Muya v Republic (Criminal Appeal 41 of 2019)
[2023] KEHC 24475 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24475 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 41 OF 2019

RN NYAKUNDI, J

OCTOBER 31, 2023

BETWEEN

PAUL IBEYI MUYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(LEAVE TO APPEAL AGAINST THE JUDGEMENT OF THE LOWER COURT BY E. KIGEN IN CRIMINAL CASE NO. SO 208 OF 2017)

JUDGMENT

Before Justice R. Nyakundi

Seneti & Oburu Associates Advocates

Mr. Mugun for the State

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 2nd November 2017 at around 1300 hrs at Wareng District within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of SJ, a child aged four (4) years old. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty and the matter proceeded to hearing. The trial magistrate conducted a voir dire on the complainant and determined that she did not understand the meaning of giving evidence under oath. The complainant gave unsworn evidence and testified that on 2nd November 2017 while she was at home playing with her brother, the accused came and told them to go help him herd cows in the forest. Upon reaching the forest he sent her brother away and then did bad manners to her after removing her clothes.

3. PW2, EK was the brother to the complainant. He gave unsworn evidence that on 2nd November 2017 they were outside playing with the complainant when the accused came and called them to go look after cows. When looking after the cows he was sent away by the accused and upon returning he found the accused doing bad manners to PW1. He then ran away crying and alerted their mother who came with people and they beat the accused person.

4. PW3, AJ, was the mother to the complainant. She testified that PW1 was born on 1st September 2011 and produced the mother and child health notebook as PEX-1. It was her testimony that she knew the accused as he was a herdsman in Jasho and she used to go wash clothes where he was herding. On 2nd November 2017, she had gone to wash clothes in the morning when PW2 later came crying and called her to come and see PW1. She found PW1 crying and the minor alleged that the accused had done bad manners to her. She took the child to the police station and then to Moi teaching and referral hospital where the P3 form issued to them was filled. She produced the same as PMFI-2a.

5. PW4, Corporal Sarah Mugo, testified that on 2nd November 2017 she was at Langas police station when at around 1600 hours members of the public brought the accused person alleging he had defiled a minor. She testified that she recorded the statements and at the time of recording, the accused admitted the offence and apologized. She then proceeded to charge him the offence.

6. PW5, Dr. Taban Lilian testified that she is a medical officer at Moi teaching and referral hospital and was conversant with the writing of Dr. Temet who prepared the P3 form. She read the contents of the form whose findings were that the complainant had been defiled as there were injuries to the genitalia and whitish discharge, consistent with defilement.

7. The accused was put on his defence and testified that he was arrested by members of the public but he did not know why and; that the police never informed him of the reason.

8. Upon considering the testimonies of the witnesses and the evidence in court, the trial magistrate convicted the accused of defilement contrary to section8(1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced him to life imprisonment.

9. Being aggrieved with the conviction and sentence the accused instituted the present appeal vide a petition of appeal filed on 5th March 2019 premised on the following grounds;

    1. That the learned trial magistrate erred in law and in fact in failing to appreciate the totality of the evidence before her and the Appellant's submissions.

    2. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant on PW1 and PW2's evidence who were coached, coerced and lured to give incriminating, unsubstantial and illegally obtained evidence.

    3. That the learned magistrate erred in law and in fact in failing to appreciate that the Appellant was never identified by both PW-1 and PW-2 when the matter was reported at the police station.

    4. That the learned trial magistrate erred in law and in fact in failing to appreciate that the identification of the accused by the witnesses was an afterthought.

    5. That the learned trial magistrate erred in law and in fact in convicting the Appellant yet the key ingredients of the charge, for instance: identification and recognition were not proved by the prosecution to the required standard.

6. That the learned trial magistrate erred in law and in fact by failing to appreciate that the evidence of the prosecution witnesses was contradictory both vide their statements and testimonies in court.

7. That the learned trial magistrate gravely erred in law and fact in convicting the appellant on contradictory, inconsistent, incredible and unreliable evidence in breach of Section 163(1) and (2) of the *Evidence Act*.

Analysis & Determination

10. It is the duty of the first Appellate court to carefully examine and analyse afresh the evidence presented from the trial court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. (See Pandya vs. Republic (1957) EA 336).

11. Upon considering the petition of appeal, the following issues arise for determination;

    1. Whether the offence of defilement was proved to the required standard

    2. Whether the sentence was harsh/excessive in the circumstances

Whether The Offence Of Defilement Was Proved To The Required Standard

12. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

13. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    i. Age of the complainant;

    ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    iii. Positive identification of the assailant.

14. This was also set out in the case of f Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 where it was stated that:

> The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

Age of the Complainant

15. The age of the complainant was determined by the testimony of PW4, her mother, who stated that she was born on 1st September 2011. She produced a mother and child health book as PEX-1 in corroboration of this evidence. The Court of Appeal in Edwin Nyambogo Onsongo

vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

It is my considered view that the ingredient of age was proved to the required standards.

Penetration

16. Section 2(1) of the *Sexual Offences Act* defines penetration as:

> The partial or complete insertion of the genital organs of a person into the genital organ of another person.

17. The evidence on penetration was given by PW5 who produced the P3 form. From the medical evidence, it was clear that the complainant had suffered injuries to her genitalia; and the doctor's finding was that the injuries were consistent with defilement. In the case of Mark Oiruri Mose v R [2013] eKLR the Court of Appeal stated that:

> Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ." (Emphasis added).

18. Upon considering the medical evidence and the testimony of PW5, I am in agreement with the finding of the trial court that there was penetration.

Identification of the assailant

19. Turnbull guidelines have been accepted as the Law in Kenya. The guidelines are contained in the following passage by Widgery LCJ " First, Whenever the case against an accused depends wholly or substantially on one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witness can all be mistaken. Provided this is done in clear terms, the judge need to use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent observation to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and

his actual appearance? Finally, he should remind the jury of any specific weakness which had appeared in the identification evidence.

20. The appellant was identified by the complainant and PW2. Further, PW3, the mother to the complainant, identified him by recognition, which visual identification corroborated the testimonies of PW1 and PW2. The reliability of that recognition evidence before the trial court as allowed and admitted taking into account all the circumstances was never challenged by the defence. The correctness of it substantially and wholly was never mistaken to render it a mistaken identification. By having a closer look of the recognition evidence of PW1 & PW2 they know each other with the appellant. All what the appellant did to PW1 as the victim of defilement was laid bare in her testimony without any reservations. The trial magistrate's analysis of the identification issue is accurate and no evidence on appeal was tendered to discredit it. This piece of in evidence leads to an inevitable inference that appellant's recognition or identification was obtained under favourable circumstances. In accepting PW1, PW2, & PW3 evidence it fostered the guidelines in Turnbull guidelines.

21. In the premises, all the ingredients for the offence of defilement were proved beyond reasonable doubt by the prosecution. I therefore find no reason to disturb the conviction of the appellant by the trial court.

Whether The Sentence Was Harsh/excessive

22. Section 8(2) of the *Sexual Offences Act* provides:

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

23. The current jurisprudence on mandatory sentences for sexual offences have been declared unconstitutional. In Maingi & 5 others v Director of Public Prosecutions & another Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) G.V Odunga J (as he then was) stated as follows;

> To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine

24. The vital question to note is that discretion to pass sentence is conferred upon the court at first instance. The power to pass sentence by an appellate court is confined only and when if the exercise of discretion at first instance has been abused, miscarried, necessarily admitted wrong facts, applied wrong principles of law or taken into account extraneous factors culminating into an illegal, irregular, punitive, excessive, or harsh sentence all together. The classic statements of the role of an appellate court when considering an appeal on sentence is contained in the cases of Ogolla s/o Owuor vs Republic (1954) EACA 270, Kipkoech Kogo –vs- R. Eldoret Criminal Appeal NO 253 OF 2003, Bernard Kimani Gacheru vs Republic (2002) eKLR paraphrased as follows: ... the judgement complained of, namely, sentence to a term of imprisonment depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate

court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, they his determination should be reviewed and the Appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the results embodied in his order, but, if upon the fact it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

25. This was also echoed in the comparative case of Barbaro v The Queen (2014) HCA 2 (27)-(28) with the following perspective: " The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less that some substantial wrong has in fact occurred' in fixing that sentence. For the reasons which follow the essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transferred into any positive statement of the upper and lower limits within which a sentence could properly have been imposed. Despite the frequency with which reference is made in reasons for judgement disposing of sentencing appeals to an available range of sentence is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that difference sentence neither permits or requires the re-sentencing court to determine the bounds of the range within which the sentence should fall.

26. The upshot of the foregoing is that; while mandatory sentences are unconstitutional, the courts are at liberty to impose the sentences prescribed in law. I have considered the offence committed and the mitigation of the appellant and I am not convinced that there is any reason to interfere with the sentence of the trial court.

27. The appeal is hereby dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2023

.....

R. NYAKUNDI

JUDGE