Somoire v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 27294 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E037 OF 2022

SN MUTUKU, J

DECEMBER 19, 2023

BETWEEN

SAMUEL NDOTOI SOMOIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence of the Hon. Nthuku J.N (Principal Magistrate) delivered on 1/12/2022 in S.O Case E025 of 2022 in the Chief Magistrate Court at Loitoktok)

JUDGMENT

1. Samuel Ndotoi Somoire, the Appellant, was charged with Defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge are that on 8th July, 2022 at Loitoktok subcounty in Kajiado County he intentionally and unlawfully caused his penis to penetrate the vagina of MNK a child aged 9 years.

2. The Appellant faced an alternative charge of Indecent Act with a child contrary to section 11(1) as read with section 11(4) of the *Sexual Offences Act*, that on 8th July, 2022 at Enduet village in Rombo location Loitoktok subcounty in Kajiado County he intentionally and unlawfully caused his penis to penetrate the vagina of MNK a child aged 9 years

3. He pleaded not guilty. He was tried and found guilty for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He was convicted and sentenced to serve life imprisonment.

4. He is aggrieved by the conviction and the sentence and has filed the instant appeal through his Petition of Appeal dated 6th December 2022. He has raised the following grounds:

a. That the Honourable Magistrate erred in law and fact in finding that the Appellant was guilty of the offence of defilement.

b. That the Honourable Magistrate erred in law and fact in convicting and sentencing the Appellants to serve life imprisonment when there was no sufficient evidence presented to sustain the charge.

c. That the Honourable Magistrate erred in law and fact in failing to appreciate that the offence was not proved beyond reasonable doubt.

d. That the Honourable Magistrate erred in law and fact in finding that there was sufficient evidence to proof that the Complainant PW1, identified the appellant as his assailant at the time of the defilement, when there were clear contradictions in the evidence of PW2, PW3, PW4 and PW5.

e. That the Honourable Magistrate erred in law in placing more weight on PW1's case and totally failed to evaluate the evidence by PW2, PW3, PW4 and PW5 was not creditable evidence.

f. That the Honourable Magistrate erred in law and in fact in failing to find that the prosecution did not prove their case beyond reasonable doubt.

g. That the Honourable Magistrate erred in law and fact in disregarding the appellant defense.

h. That the Honourable Magistrate erred in law by sentencing the Appellant harshly to life imprisonment while having the full knowledge that the alleged offence was reported after a month and very hard to prove that the appellant is the assailant.

i. That the Honourable Magistrate erred in law and fact by sentencing the Appellant harshly to life imprisonment and ignoring the mitigation tendered by the Appellant.

5. The Appeal was canvassed through written submissions. The appellant filed his submissions dated 14th July 2023. He has submitted that the trial court erred in law by placing the convict at the scene of crime when it was clear that from the testimony of all the defence witnesses the appellant was not at the place at the time of the alleged offense. He submitted that all the prosecution witnesses' testimony was hearsay, yet it was admitted in convicting the appellant. He further submitted that PW6, a Clinical Officer, testified that upon examination of the victim he did not see any sperm cells but yellowish substance, a sign of UTI, without having the appellant tested on the same.

6. He submitted that the subordinate court erred in law and fact in failing to consider the evidence of DW1 that he was at Rombo shaving customers where he was employed as a casual worker and the offence was committed elsewhere and by disregarding the evidence of DW2.

7. The Respondent filed submissions on 19th July 2023 and submitted that for an offence of defilement one needs to prove the age of the victim, penetration, and identification of the perpetrator.

8. On proof of age the Respondent relied on *Hadson Ali Mwachongo v Republic* [2016] eKLR where the court stated that:

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim."

9. It was submitted that the child was aged 9 years at the time of the offence and that the child's birth certificate was produced as an exhibit.

10. On the ingredient of penetration, it was submitted the minor testified that the appellant defiled her on the material date at his shop; that the child's testimony was not shaken during cross-examination; that her statement was corroborated by that of PW5, the Clinical Officer, who examined her and filled a P3 Form; that the child had pelvic tenderness and that urinalysis showed pus cells and yeast cells and that on cross examination he stated that the pain in the pelvic region and difficulty in walking are common symptoms in defilement cases.

11. It was further submitted that under section 124 of the *Evidence Act* the trial court can convict the accused person on the evidence of the victim alone in sexual offence cases. The Respondent relied on various cases as shown in the submission including *Mwarome Munga Janji v Republic* [2021] eKLR where the court reiterated its statement in the case of *Erick Onyango Ondeng v Republic* (2014) eKLR that:

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "

12. The Respondent cited *Okeno v Republic* (1972) EA 32 where the court stated that:

> " It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* (1958) EA. 424."

13. It was submitted that there was positive identification of the appellant as the minor was able to identify him as the person who defined her; that she knew the appellant as Ndotoi and that he operated a shop that she had gone to several times; that there was a bed inside the shop and that is where she was defiled; that there were no inconsistencies by the prosecution witnesses and that PW1's evidence that the appellant owned a shop was corroborated by PW2 and DW2 and that the testimonies of the prosecution witnesses remained consistent during cross- examination.

14. The Respondent argued that the trial court considered the evidence of the defence as shown on page 16 – 20 of the judgement; that the trial court keenly analyzed the facts and evidence on record and found the appellant guilty of the offence.

15. On the issue of harshness of the sentence metered against the appellant, it was submitted that the sentence was according to the law under section 8(1) of the *Sexual Offences Act*; that there are principles to be considered before sentencing including the seriousness of the offence as shown in Court of Appeal decision in *Bernard Kimani Gacheru v Republic* (2002) eKLR where it was stated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

16. It was submitted that the sentence imposed by the trial court was not manifestly excessive, or based on wrong principles and that as such the appellate court should not interfere with it.

Analysis and Determination

17. The duty of this Honourable Court, while sitting on first appeal, is to re-analyze, re- evaluate, and re-consider all the evidence adduced at the trial court with a view to arriving at its own independent conclusion.

18. The offence of defilement has 3 key ingredients that must be proved beyond reasonable doubt; namely: penetration, age of the victim and identity of the accused. It is upon this court to establish whether the prosecution proved these three elements beyond reasonable doubt.

19. The grounds of appeal revolve around contradictions of the evidence of prosecution witnesses, insufficient evidence to proof the case beyond reasonable doubt, failure to consider the defence of the appellant and mitigation and harsh sentence.

20. I have considered the entire evidence. The trial court conducted a voire dire examination on the minor aged 10 years and concluded that though intelligent, the minor did not understand the meaning of an oath. The court directed that the minor testifies without taking an oath.

21. The evidence of the minor is that she was sent to buy sugar at the appellant's shop on 8th July 2022. She knew him as Ndotoi. She described what the appellant did to her after telling her to go inside the shop and she followed him inside thinking that he was going to give her the sugar. She described the appellant's private parts as "Kidongoi" and hers as "embalish" and demonstrated her private parts by touching the area. She explained that the appellant did the 'act' on her in his bed and while she was lying on her tummy after he parted her legs wide using his hands. She explained how the appellant told her to take a bathe and wash her bloody clothes and threatened her that if she told her mother he would poison her.

22. I have noted that the complainant reported back to school on 21st July 2022 about two weeks after and that her matron, PW3 found her crying in the toilet on 14th August 2022. This was over a month after the alleged defilement. Indeed, when she was examined by Emmanuel Korir (PW5) on 15th August 2022 and Saitoti Lolisoi (PW6) on the same date, both witnesses confirmed that her hymen had been torn. PW5 said that the child has bruises or lacerations. She was found infected with a UTI and yeast infection (candidiasis) PW5 said that the injuries the minor might have sustained must have healed by the time he examined her because it was two weeks after the incident.

23. The appellant's evidence is an alibi, that on the day of the incident he was in Rombo at a Kinyonzi where he was employed and that on 8th July 2022, he did not open the shop. He said that it was his wife who operates the shop. He claimed that the minor was mentally challenged and that she lied that he was at the shop on that day.

24. DW2 JM testified that he is a pastor in Rombo and an uncle to the minor. He stated that on the incident day he was at home and that the appellant was in Rombo at the Kinyozi about 1.5km away. That the appellant's wife opened the shop. On cross-examination he stated that he went to the kinyozi at 5pm; that he doesn't know what happened during the day and that he is the landlord at the said shop.

25. I have carefully considered the evidence adduced in this case. I find no contradictions in the evidence of the prosecution witnesses. I find the evidence of the minor corroborated by medical evidence of PW5

and PW6. I find she remained unshaken even during cross examination. She seems intelligent enough from the way she described what happened to her. At her age, she is likely to have taken the threats by the appellant seriously because had it not been for her infection with UTI and yeast infection which caused her pain and discomfort in passing urine, this incident could have gone unnoticed. By this time, the bruises and lacerations in her genitalia had healed. However, her hymen could not be replaced and it was found missing, confirmation that she had been defiled.

26. From the testimony of the two clinical officers who examined her it was demonstrated beyond reasonable doubt that defilement had occurred as there was no hymen present. I find that penetration as defined under section 2 of the *Sexual Offences Act* has been proved beyond reasonable doubt. I also find that her age has been proved beyond reasonable doubt through the birth certificate produced in court as Ex. 2 which gives her age at the time of the offence to have been 9 years.

27. The minor was also able to identify the appellant as the person who defiled as she even explained the room where the incident happened. The appellant was known to her before. She frequented his shop. PW2 also testified that she knew the shop and that it was near the minor's place. I find all the ingredients of the offence proved beyond reasonable doubt.

28. On the issue of harsh sentence, I have noted the sentence under section 8(2) of the *Sexual Offences Act*, which states that: 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.

29. This issue of sentence has been discussed by courts in various authorities. In *Christopher Ochieng v Republic* [2018] eKLR, the Court of Appeal was of the view that, basing the reasoning of the Supreme Court when it held that the mandatory death sentence prescribed for the offence of murder under section 204 of the *Penal code* was unconstitutional:

> "…..In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis…Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* (supra), we would set aside the sentence for life imposed and substitute it therefor with a sentence of 30 years imprisonment from the date of sentence by the trial court."

30. Further, in *Jared Koita Injiri v Republic* [2019] eKLR the Court expressed itself as hereunder:

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the SupremeCourt decision in *Francis Karioko Muruatetu & Another vs Republic* (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

31. Justice G.V Odunga, as he then was, while addressing this issue in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows:

> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the *prima facie* mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the *Muruatetu 1* Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed. I gather support from the opinion held by the Court of Appeal in *Dismas Wafula Kilwake v Republic* [2019] eKLR that:
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> > "In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

32. Having considered the views of the courts in the above cases in respect to sentencing, it is my finding that a sentence of 30 years will be sufficient for the Appellant to learn from the errors of his ways. I therefore reduce the life imprisonment meted out to the Appellant to a jail term of 30 years, to run from the date when he was sentenced from the trial court.

33. Consequently, the Appeal herein fails and is hereby dismissed in all other respects except for the sentence. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH DAY OF DECEMBER 2023.

S. N. MUTUKU

JUDGE