Matei v Republic (Criminal Appeal E013 of 2020)
[2022] KEHC 3404 (KLR) (21 April 2022) (Judgment)

Neutral citation: [2022] KEHC 3404 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E013 OF 2020

LW GITARI, J

APRIL 21, 2022

BETWEEN

ROBERT MWENDWA MATEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 (hereinafter referred to as the 'Act') It was alleged that on 7/6/2019 the appellant Robert Mwendwa Matei at Mubuura village of Kamagena Sub-Location in Tharaka North Sub-County within Tharaka Nithi County, intentionally caused his penis to penetrate the vagina of BKI a child aged six (6) years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. After a full trial, the trial court found the Appellant guilty on the main charge of defilement and convicted him accordingly. The Appellant was subsequently sentenced to serve life imprisonment.

2. Being aggrieved by the trial court's decision, the Appellant instituted the instant appeal on the grounds that the learned trial magistrate erred in both matters of laws and facts by:

    a. Convicting the Appellant on uncorroborated prosecution evidence.

    b. Failing to consider that the adduced prosecution evidence was insufficient to hold conviction. (sic)

    c. Failing to consider that the Appellant was constitutionally entitled to legal assistance hence failed to conform to a fair trial.

    d. Imposing a harsh sentence without taking into account that the Appellant being a first offender was constitutionally guaranteed for the benefit of the least severe punishment.

3. On 15th July 2021, this court gives directions that the appeal be disposed of by way of written submissions.

4. The Appellant opted to abandon the grounds of appeal and instead offered mitigation and urged this court to re-sentence him.

5. In his filed mitigation statement, the Appellant stated that he regrets his actions and prayed for leniency. It was his submission that being a first offender, the life sentence meted against him was harsh.

6. On their part, the Respondent submitted that the sentence meted out against the Appellant is as provided under section 8(2) of the *Sexual Offences Act* which is couched in mandatory terms and therefore leaves the court with no discretion once a person is convicted under that provision.

Issue for determination

7. The main issue for determination in this appeal is whether the sentence meted out against the Appellant was harsh in the circumstances.

Analysis

8. This appeal is only against the sentence. However, this being a first appeal, it is the duty of this court to re-consider and re-evaluate the evidence adduced before the trial court and come up with its own conclusion [See: *Okeno v Republic* (1972) EA 32].

A Summary of the Evidence

9. PW1 was the victim in this case. She was aged six (6) years at the material time and a nursery school pupil. She testified that she had gone to play with one Mutuma when the Appellant wrestled her down in a bush and put his penis in her private parts.

10. PW2 was PW1's mother. She testified that the Appellant was her mother's herder. On the material day, PW1 followed the Appellant to the stream to have the livestock drink water. On returning, PW1 was crying and wiping soil from her head. On interrogating her, PW1 told PW2 that the Appellant had removed her pants and had sex with her. PW2 checked PW1's genitalia and saw blood. Together with two other people who were present, PW2 arrested the Appellant and called the chief. The chief subsequently called the police who came and picked the Appellant.

11. PW3 was Robert Kiura, the brother to PW2 while PW4 was Lucy Kawira, the area manager of Mpura village in Maragua location. They corroborated PW2's statement with regard to PW1's narration of what transpired on the material day.

12. PW5 was PC Khadija Omar, the investigating officer in this case. He recalled that on the material day, she was sent to the scene of the crime together with his colleagues where they arrested the Appellant as a suspect of defilement. She took photos of the scene and produced in evidence a dirty yellow dress and a dirty white innerwear as P. Exhibits 7 and 8 respectively, both of which had blood stains.

13. PW6 was Emilio Mwenda Gaichu, a clinical officer at Marimanti Level 4 Hospital. She produced the treatment notes and P3 form of PW1, that were filled by his colleague, Andrew Kinyua. She stated that she was familiar with the handwriting and signature of his colleague. It was his testimony that upon examination of PW1, it was noted that her hymen was freshly broken and there was blood in her genitalia, evidence of penetration.

    The appellant was put on his defence based on this evidence and he stated that he was being framed. He denied the offence.

14. The main elements of the subject offence that required determination include the age of the victim, evidence of penetration, and identification of the suspect.

15. The victim's birth certificate S/No. xxxx was produced as Exhibit 1. It shows that PW1 was born on 4th February 2013. She was therefore 6 (six) years on 7th June 2019 when the subject incident took place. The Appellant was positively identified by PW1, PW2 and PW3 as he was working as a servant in the home of PW2. The evidence of the prosecution witnesses was well corroborated and pointed to the fact that the Appellant had sex with the PW1, which is sufficient proof of penetration. Considering the evidence adduced before the trial court in totality, it is my view that the same pointed to the guilt of the Appellant and the trial court was correct to find so.

16. Having found that the conviction was safe, I now turn to the issue of sentence. It is the Appellant's contention that the life sentence meted against him is harsh in the circumstances.

17. The Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR stated as follows with regards to sentencing:

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

18. Section 8 of the *Sexual Offences Act* provides for the offence of defilement of children of different ages. The younger the child, the more severe the sentence. Proof of the age of the victim is critical as it determines the sentence to be imposed upon conviction. It also determines the Section under which the perpetrator is to be charged. Section 8(2) of the Act provides as follows:

> " 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.

The word 'shall' in the Section connotes the mandatory nature of the sentence. I pause for a moment to think carefully, why this appeal in view of the nature of the submissions. The appellant heads the submissions as – "Mitigation Submissions." The appellant did make his brief mitigation before the trial court where he stated that;

"I pray for mercy. I have overstayed in the remand."

The prayer by the appellant is for this court to hear and consider his mitigation and give him a benefit thereof. He further urges the court to give him a sentence with a timeline. It is my view that what the applicant is seeking is an order for resentencing based on the Supreme Court to Kenya decision in *Francis Kariuko Muruatetu & another v Republic* Petition 15 & 16 (consolidated of 2015)

This raises the question as to whether this court has discretion to hear the mitigation and pass a sentence other than that passed by the trial magistrate. The Supreme Court of Kenya issued directions in Muruatetu's case (supra) based on what it termed as "regrettable" course by the courts below it which resulted in the pitiable state of incertitude and incoherence in the sentencing framework in the country, giving rise to an avalanche of applications for re-sentencing. The Supreme Court was

emphatic that it was not its intention to have the decision apply to cases under Section 296(2) of the *Penal Code* and others under the *Sexual Offences Act*. The Supreme Court stated-

> "We state that this implication or assumption of the applicability was never contemplated at all." We therefore reiterate that this court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

Based on the above Supreme Court's directions, I hold the view that this court has no jurisdiction to entertain an application for mitigation and sentencing. In deed even where this court has jurisdiction to entertain an appeal as provided under Section 347 (1) (a) and (2) of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) the court lacks jurisdiction to entertain appeals by way of rehearing the mitigation and resentence the appellant. The jurisdiction is to entertain an appeal on the sentence and this has tio be based on contentions that the sentence was manifestly excessive or that the court overlooked some material factors, considered irrelevant facts or that it acted on wrong principles.

The court is only empowered to hear the appeal and make a determination based on the record of the Lower Court. See Section 345 of the *Criminal Procedure Code* on the powers of the High Court. This court therefore lacks jurisdiction to entertain mitigation and to resentence the appellant. I proceed to consider the merits of this appeal.

19. In this case, the Appellant was convicted of defilement of a minor aged 6 years at the material time. In his submissions on appeal, the Appellant has admitted to committing the crime and prays for leniency from this court. I note that in his mitigation, the Appellant contends that he is remorseful and regretful of beastly act he committed causing the victim a lot of pain. In my view, this court cannot overlook the fact that the Appellant has committed a heinous crime that has occasioned trauma and suffering to a young girl. Going by the spirit of The *Sexual Offences Act* which attaches severity of the sentence to the age of the victim, I opine that the sentence meted against the Appellant was a lawful sentence and not excessive in the circumstances as the same is the mandatory sentence provided under law.

20. In the case of *Wanjema v R* [1971] E A 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence. The appellant has not based his appeal on these principles. It is my view that the trial court applied the correct law and principles in imposing the mandatory sentence of life imprisonment. I thus opine that this court has no reason to interfere with sentence meted by the trial court. The sentence was neither based on wrong principles nor on consideration of irrelevant factors or failure to consider relevant factors. It was also not manifestly excessive.

Conclusion

Based on the applicable law the appellant was properly convicted and sentenced.

21. The upshot, is that this appeal must fail for lack of merits. I therefore dismiss the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21ST DAY OF APRIL 2022.

L.W. GITARI

JUDGE

21/4/2022

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

21/4/2022