Waithera v Republic (Criminal Appeal 269 of 2019)
[2022] KEHC 16754 (KLR) (19 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16754 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 269 OF 2019

CW GITHUA, J

DECEMBER 19, 2022

BETWEEN

ANTONY NJAU WAITHERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon M. Nyaga, CM dated 16th October 2019 in the Chief Magistrate's Court at Makadara Criminal Case No. 163 of 2013)

JUDGMENT

1. The appellant, Antony Njau Waithera, was tried and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA).

   The particulars of the offence were that on January 7, 2013 at [Particulars Withheld] Estate in Nairobi County, the appellant intentionally caused his penis to penetrate the vagina of PELL (Name Withheld) a child aged 15 years.

2. After a full trial, he was convicted of the offence and was sentenced to 20 years imprisonment.

   He was aggrieved by his conviction and sentence hence this appeal.

   In his petition of appeal filed on December 27, 2019 by his then advocates Ms. Kang'ahis and Associates, the appellant advanced six grounds of appeal in which he principally complained that the learned trial magistrate erred in law and fact by: convicting him on the basis of evidence which did not prove his guilt as charged beyond any reasonable doubt; failing to appreciate the contradictions in dates of alleged commission of the offence, date of report to the police and date of the medical reports; failing to consider the appellants plea in mitigation and meting out a manifestly excessive and inconsiderate sentence.

3. At the hearing, the appellant informed the court that he had withdrawn instructions from his advocates and that he was going to prosecute the appeal in person. He chose to prosecute the appeal by way of written submission which he duly filed on February 14, 2022.

   The Respondent contested the appeal through written submissions filed on its behalf by learned prosecuting counsel Ms. Z. Chege.

4. Briefly, in his submissions, the appellant contended that he was wrongly convicted as the prosecution failed to adduce credible and sufficient evidence to prove all the essential elements of the offence of defilement. He emphasized that the medical evidence relied on by the prosecution did not prove penetration and that the victim's evidence was contradictory and unreliable and that it created a doubt in the prosecution's case which ought to have been resolved in his favor. He urged the court to find merit in his appeal and allow it.

5. On her part, learned prosecuting counsel submitted that the prosecution through its six witnesses proved all the ingredients of the offence of defilement against the appellant beyond any reasonable doubt; that although corroboration of the victim's evidence was not a legal requirement in view of the provisions of Section 124 of The *Evidence Act*, the victim's evidence in this case on penetration was corroborated by the medical evidence adduced in support of the prosecution's case. She concluded that the appellant was properly convicted and that the sentence handed down by the trial court was lawful as it was in accordance with the law.

   She invited the court to dismiss the appeal in its entirety for lack of merit.

6. This is a first appeal to the High Court. The duty of a first appellate court was succinctly enumerated in the celebrated case of *Okeno v Republic* [1972] E.A. 32 in which the court stated as follows;

   > " The first appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantilala M. Ruwala v. Republic* [1957] E.A 570). 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 conclusions. 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 –vs- Sunday Post* (1958) E.A 424."

7. Guided by the above principle, I will proceed to analyse the evidence presented before the trial court.

   The court record shows that the prosecution called six witnesses in support of its case. The first witness (PW1) who was the victim testified that she lived with her mother at [Particulars withheld] and that on January 7, 2013 at around 10:30am, she was alone in the house when she heard a knock on the door. On peeping through the key hole, she recognized the person at the door as Njau who she knew previously. He had been contracted to work for her mother three years ago. She allowed him into the house. She identified Njau as the appellant in this case.

8. PW1 recalled that after inviting the appellant into the house, he engaged her in some conversation and after about 15 minutes, he offered her Kshs. 2,000 and requested her to go to bed with him. She refused and as she stood to walk away, he pushed her back to the couch, removed her underwear and pants. He then removed his trousers and proceeded to defile her. After he was done, he put back her underwear and pants. She continued lying on the coach as she was in a lot of pain.

9. PW1 stated that at around 12 noon, her mother arrived but she was unable to tell her what had happened as she could not get the words to do so. The appellant had by that time ran to the balcony.

10. Her mother (PW2) recalled that when she returned to the house in the afternoon, PW1 appeared shaken and frightened and on enquiring what was happening, she just stammered and did not tell her anything. She took lunch and rested on the couch till around 6pm when she went to adjust the curtains. This is when she noted that there was someone hiding in the balcony. She shouted for the person to come out and when he did and walked into the sitting room, she recognized him as Njau who she had previously employed to paint her [Particulars Withheld] at Githurai 45. After interrogating him, she called PW3, the security guard manning the building who went to her house and found the appellant. Together with the caretaker, he arrested the appellant and took him to Kasarani police station.

11. PW1 and PW2 also went to the police station and reported the matter to PW6 IP Esther Gatheru. PW6 referred PW1 to the MSF Clinic along Juja Road where she was examined the same evening by a clinical officer Ms. Purity Kajuju who completed a medical report and a PRC Form which were produced on her behalf by her colleague who testified as PW4. On the following day, PW1 was examined by PW6, Dr. Joseph Maundu. He filled the P3 form which he produced as P. Exhibit 5.

12. When placed on his defence, the appellant elected to give a sworn statement and did not call witnesses. In his statement, he denied having committed the offence as alleged but admitted that he knew PW1 before the material date as he had seen her twice when she accompanied her mother to supervise work he was doing for her (PW2) at her school in Githurai. He claimed that he was an artist and had gone to PW2's home on January 7, 2013 at the invitation of PW1 who wanted him to do some illustrations in her book but when her mother found him, she created a scene calling him a thief. She then called a security guard and he was arrested, taken to Kasarani police station where he was subsequently charged with an offence he had not committed.

13. Having given due consideration to the grounds of appeal, the evidence on record and the rival written submissions made by both parties and all the authorities cited by the appellant, I find that only two key issues emerge in this appeal for my determination, namely;

    i. Whether the prosecution proved the appellant's guilt as charged beyond any reasonable doubt.

    ii. Whether the sentence imposed on the appellant was harsh and manifestly excessive in the circumstances of the case.

14. It is trite that in defilement cases, for the prosecution to secure a safe conviction, it must prove beyond any reasonable doubt the three essential ingredients of the offence, which are, the age of the victim; penetration and positive identification of the accused person as the assailant.

15. In this case, it is clear from the evidence on record and the appellant's submissions that the age of the victim which was stated in the charge sheet to be 15 years was not disputed. Nevertheless, the prosecution proceeded to prove the age of the victim through the birth certificate produced as P. Exhibit 1 by PW5. The birth certificate confirmed that PW 1 had exceeded her 15th birthday by a few days when the offence was allegedly committed.

16. Regarding penetration, contrary to the appellant's submissions, it is clear from PW 1's evidence which was materially corroborated by the medical evidence presented by PW 4 and PW 6 that PW1 was defiled on January 7, 2013. PW 4 produced as P.Exbt 2 a medical report which confirmed that PW 1 was examined at the MSF Clinic Juja Road on the same day she claims to have been defiled.

17. On examination, the clinical officer noted that though PW1's external genitalia was normal in structure, it was stained with fresh blood at the vaginal entry which had fresh lacerations at the posterior fourchette which was bleeding. Her hymen had large fresh tears at 6 o'clock, a minor tear at 9 o'clock which was bleeding and a blood clot at 6 o'clock. PW 6 recalled having examined PW 1 a day after the

incident and noted that her vagina had blood stains and her hymen was torn. Given the foregoing, I am satisfied that the evidence on record proved beyond doubt that PW 1 was in fact defiled on January 7, 2013 as alleged.

18. Regarding the appellant's identification as the culprit, PW 1 was clear and consistent in her evidence that she knew the appellant previously as her mother's employee and that on the material date, she had engaged in a conversation with him for about 15 minutes before he forced her to have coitus with him.

19. Although the appellant in his defence denied having committed the offence as alleged, he admitted having worked for PW 2 in her school in the year 2009 during which time she met PW 1. He also admitted having gone to PW2's home on the material date during the day and having spent time alone with PW1 before her mother arrived. PW 2 recalled that on her arrival, she noted that PW 1 looked frightened and was walking with difficulty but she did not suspect that anything was wrong until around 6 pm when she spotted a person hiding in her balcony who turned out to be the appellant.

20. Given the above evidence, I find that PW1's identification, indeed recognition of the appellant as her assailant was positive, credible and reliable and there was no possibility of mistaken identity.

21. After my own independent reappraisal of the evidence on record, I find that the learned trial magistrate properly and thoroughly interrogated the evidence adduced by both the prosecution and the defence and arrived at the correct conclusion that the prosecution had proved the charge preferred against the appellant beyond any reasonable doubt. It is therefore my finding that the appellant was properly convicted.

22. In respect to the appeal against sentence, Section 8(3) of the *Sexual Offences Act* prescribes a minimum mandatory sentence of 20 years imprisonment for persons convicted of the offence of defilement involving minors aged between twelve and fifteen years.

    When sentencing the appellant, the learned trial magistrate made a finding that the victim was 15 years and he proceeded to sentence the appellant to the minimum mandatory sentence prescribed under Section 8(3) of SOA as was required by the law then prevailing.

23. However, recent jurisprudence emerging from both the High Court and the Court of Appeal has changed the above legal position. The High Court in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another*(Odunga J) and Edwin Wachira & 9 others vs Republic consolidated with petition No.88 and 90 of 2021(MativoJ)following the reasoning of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*[2017] eKLR (Muruatetu) and guided by Article 25, 27, 28 and Article 50 of *the Constitution* has held that although the sentences prescribed under the *Sexual Offences Act* are not perse unconstitutional and courts are at liberty to impose them in appropriate cases, the imposition of the same as a mandatory minimum sentence was unconstitutional as it deprived the trial court its discretion to impose lesser sentences if the court was satisfied that it was the appropriate sentence given the facts and circumstances of the case.

24. The position taken by Odunga and Mativo JJ (as they then were) was recently upheld by the Court of Appeal in *Joshua Gichuki Mwangi vs Republic* Criminal Appeal No.84 of 2015 where in reducing the 20 year minimum mandatory sentence imposed on the appellant under Section 8(3) of the SOA to 15 years' imprisonment, the court stated as follows with regard to sentencing;

    '' This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2)(a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall

be done to all and to protect the purpose and principles of *the Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited."

25. Given the foregoing and having weighed the aggravating against the mitigating factors in this case and having considered the circumstances surrounding commission of the offence, I allow the appeal against sentence and set aside the 20 year sentence imposed by the trial court. I substitute it with a sentence of ten years imprisonment. The record shows that the appellant was arrested on January 8, 2013 and remained in lawful custody till September 8, 2015 when he was released on bond.

    In compliance with Section 333 2) of the *Criminal Procedure Code*, I hereby direct that the period the appellant spent in lawful custody shall be taken into account when computing the substituted sentence.

    It so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DECEMBER 2022 .

C.W. GITHUA

JUDGE

In the Presence of :

The Appellant

Ms. Adhiambo for the State

Ms. Maureen Court Assistant