Muchesia v Republic (Criminal Appeal E027 of 2021)
[2025] KEHC 1363 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1363 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E027 OF 2021

AC BETT, J

FEBRUARY 11, 2025

BETWEEN

SAMUEL MUCHESIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon. Eric Malesi (PM) in Kakamega CM'S Court SO Case No. 63 of 2020)

JUDGMENT

Background

1. The Appellant Samuel Muchesia was jointly convicted with the others of the offence of gang defilement contrary to Section 8(1) as read with Section 10 of the *Sexual Offences Act*. The particulars were that on the 20th day of May 2020 at (particulars withheld), within Kakamega County in association with Derrick Kanga and John Mukali, the Appellant caused their penises to penetrate the vagina of LM a child aged 14 years.

2. As a consequence of the conviction, the Appellant and his co-accused were each sentenced to serve imprisonment of fifteen (15) years.

3. The Appellant's co-accused filed separate appeals. The said appeals were consolidated, heard and determined before the present appeal and the conviction and sentence of the trial court was upheld.

4. In the instant case, the Appellant was also dissatisfied with the decision of the trial court and lodged a petition of appeal which he later amended and set out the following grounds of appeal:-

    i. That the imposed sentence is excessively harsh and unjust considering that, the appellant was first offender and comes before court seeking a more lenient sentence.

ii. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph *4*:1.

iii. That the appellant is remorseful and regrets his actions. He is repentant.

iv. That the appellant before his conviction and sentence was, a father of three school going children and a husband to one wife.

v. That the appellant worked tirelessly to support his family and self and his elderly parents and has potential if given another chance.

vi. That the court considers my mitigation grounds and award a lesser sentence or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the Community Service Order.

vii. That the court considers the provisions of Section 333 (2) of the *Criminal Procedure Code*.

The effect of the amendment was to limit the appeal to an appeal against the sentence only.

The Evidence

5. The Prosecution called a total of four witnesses in a bid to prove its case. The victim PW1 was subjected to voire dire examination and once the court was satisfied that she was possessed of sufficient intelligence and knew the importance of telling the truth, she gave an unsworn statement.

6. PW1, the victim, testified that she was a class six pupil at [Particulars withheld] Primary School and that on 20th May 2020 at about 6:30 pm she was at the posho mill when she decided to go buy potato chips. She had Kshs. 70/- with her and she wanted chips worth Kshs. 30/-. After she bought the chips from the 3rd accused, who is the Appellant in this appeal, he asked her to follow him for her balance. She followed him to the 2nd Accused's house where she found the 1st Accused. She was hesitant to get into the house and the Appellant dragged her in and locked the door. She narrated how the Appellant made her lie down, the 1st Accused then took off her trousers and the Appellant grabbed her on the neck and mouth and inserted his penis in her vagina. After he was done, the Appellant removed his clothes and inserted his penis in her vagina. She bled from her vagina, was in pain and when she tried to scream they grabbed her and covered her mouth and she lost consciousness. The gang then took her and threw her at the fence of one Deno's home who then took her to her home. She informed her grandmother of the incident and she was taken to Shamakubu Health Centre and later to Kakamega County General Hospital by an ambulance where she was treated though she is yet to heal since she feels pain when urinating. She explained that it was the 2nd Accused who locked the door before she was defiled by the 1st Accused and the Appellant herein. Her birth certificate was produced as PEXH 1, the black trouser she had worn as PEXH 2 and a white and pink panty which she had work and had blood stains was produced as PEXH 3.

7. On cross examination by the 1st Accused she said that she did not scream because she was held by the neck and her mouth covered with his hands.

8. On cross examination by the 2nd Accused she stated that she knew him very well as he was a son to his grandfather and refuted claims that she had been coerced to say what she had said.

9. On cross examination by the Appellant she stated that she had found him and the 2nd Accused at the place where he sells chips.

10. PW2, a clinical officer from Matungu Sub-County Hospital testified that she attended to the complainant in 20th May 2020 at the Kakamega County General Hospital and that they were forced to take her to theatre to repair her private parts since her vaginal wall and cervix had raptured. The complainant was admitted for two weeks and thereafter they continued to see her as an outpatient. She indicated that the complainant was yet to fully heal.

11. On cross examination by the 2nd Accused she indicated that it was not possible to establish how many perpetrators were involved.

12. PW3, grandmother to the victim gave evidence that she knew the assailants and the Appellant and that on 20th May 2020 she returned home from 'chama' at about 6:30 p.m. but did not find the complainant at home. She was told that she had gone to buy chips. After sometime she went to where the chips were sold and asked the 2nd Accused, who sells the chips if he had seen the complainant and he denied prompting her to inform the complainant's father. The complainant then returned home, bleeding through her trousers and was crying. She narrated what had happened to her. They went to the 2nd Accused's house where they found his bedsheet had blood. The blood stained sheet was produced as PMExh 7. The witness then took the complainant to hospital.

13. On cross examination by the 1st Accused she stated that she knew him as he assisted in the 2nd Accused's posho mill.

14. On cross examination by the 2nd Accused she indicated that he was a son to his in law and that on the day of the incident he came out with a panga to stop them from entering his house.

15. It was the testimony of PW4, No. 106368, attached at the Shinyalu police station and the investigating officer, that she was informed by the OCS of the arrest of the 2nd Accused and the Appellant. She then proceeded to the scene of crime where the 2nd Accused's father led her to his house where she noticed blood stains on the floor. She lifted the mattress and found a pink sheet with blood stains. She then visited the complainant in hospital on 23rd May 2021 who narrated to her the events that had taken place.

16. Her evidence marked the close of the prosecution case and the court ruled that a prima facie case had been established and the accused persons was put on Defence.

17. In resisting the charges, each of the three accused persons gave own evidence. While the 1st Accused, Derrick Kanga gave unsworn statement, 2nd Accused and the Appellant offered sworn statements.

18. In his unsworn statement, Derrick Kanga, the 1st Accused stated that he was a form 2 student at Shamiloli Secondary School and that on 20th May 2020 he had visited his step mother who stays in Ikungu to help with household chores. He denied being at the scene with the complainant.

19. In the sworn statement of John Mukali, the 2nd Accused stated that on 20th May 2020 he spent his day at the posho mill where technicians were repairing it. At 6PM he accompanied the technicians and on returning he encountered PW2 asking about the whereabouts of PW1 to which he responded he did not know. He claimed that he spent the night in his house and was later arrested by the police alongside the Appellant.

20. On cross examination he stated that he lived at his father's household and that the 1st Accused assisted him to bring stock to his shop while the Appellant kept potatoes in his house.

21. DW3, was the Appellant who testified that he sells mandazis in the morning and chips in the evening and that on 20th May 2020 in the evening the mother to his child came to his place of business to collect

money for their child's shoes and she then saw her off at about 7PM. The 2nd Accused then called him and he headed back to his shop where he found him with a man and a few minutes later a crowd armed with crude weapons demanded for the person who sells chips on allegations that he had defiled PW1. He ran away to a plantation and later in the evening he joined the 2nd Accused at his house where they were subsequently arrested.

22. On cross examination he refuted claims that he took PW1 to the 2nd Accused's house and covered her mouth.

23. The court directed that the appeal be canvassed by way of submissions. The Respondent did not file submissions.

Appellant's Submissions

24. The Appellant submits that this court ought to award the least severe punishment as stipulated by Article 50 (2) (p) of *the Constitution* and according to the discretion of the court and the recent jurisprudential developments in our country. He relies on the case of Thomas Mwambu Wenyi v. Republic [2017] eKLR.

25. The Appellant further submits that the circumstances of the offences for which he was convicted were not so grievous as to warrant a sentence of 15 years imprisonment. He cites the Judiciary Sentencing Guidelines page 15 paragraph *4*:1 where the objectives of sentencing are among others; the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the assailant to inflict harm. According to him, the circumstances of the case, which was based on circumstantial evidence, called for a lesser sentence.

26. As an auxiliary, the Appellant submits that he is remorseful, regrets the deeds and promises never to repeat the offence again. He submits that before his conviction and sentence at 24 years, he was a young man with a wife, and children. He asserts that at 28 years old, he is not a danger in society as he has met Christ while in prison and is now fully rehabilitated and ready to be productive in building the nation.

27. The Appellant relies on the case of Douglas Muthaura Ntoribi v. Republic [2018] eKLR where the court held that:-

> " ... A good and working prison system should be able to reform convicts. There is no legal research which leads to the conclusion that capital offenders cannot be reformed..."
>
> He further relies on the case of Francis Opondo v. Republic [2017] eKLR and Daniel Gichimu & Another v. Republic [2018] eKLR where the court held that:-
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> > "In the instant appeal, we find that both appellants stated in their mitigation before the trial court that they were first offenders, a fact not disputed by the prosecution. We also take note of the fact that the infliction of violence on PW1 was minimal and the item robbed from her was also recovered. In our view, a sentence of fifteen years imprisonment would suffice in the circumstances. We therefore find it prudent to interfere with the sentence affirmed by the first appellate court, set it aside and substitute it with one of fifteen years' imprisonment to run from the date of the arrest of the appellants. To that extent only does the appeal succeeds."

28. The Appellant further urges the court to reduce the sentence arguing that a sentence should not condemn a person beyond rehabilitation and re-integration. He relies on Evans Wanjala Wanyonyi v. Republic [2019] eKLR where the Court of Appeal, being guided by the cases of Christopher Ochieng

v. Republic [2018] eKLR and Jared Koita Injiri v. Republic [2019] eKLR in relation to sentencing held as follows:-

> " ...we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years..."

29. The Appellant further cited the cases of Paul Ngei v. Republic [2019] eKLR in which the Court of Appeal at Kisumu substituted the mandatory sentence of 20 years imposed upon the Appellant with 12 years.

30. In respect to Section 333 (2) of the Criminal Procedure Act, the Appellant, relying on Ahmad Abolfathi Mohammed & Another v. Republic [2018] eKLR submits that the trial court did not consider the time that he spent in custody since the day of his arrest.

31. As a precaution, the Appellant submits that in absence of a cross-appeal on the part of the Respondent, the court ought not to enhance the sentence imposed upon him by the trial court.

Analysis and Determination

32. Pursuant to Section 10 of the *Sexual Offences Act*, a person convicted of gang rape is liable to a minimum sentence of 15 years imprisonment. It stipulates:-

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

33. The underlying principle in Section 10 of the *Sexual Offences Act* is that the sentencing court has no discretion to sentence the convict to a sentence that is less than the minimum prescribed sentence. The court's discretion can only be exercised to impose a higher sentence which, depending on the circumstances of the case, can be extended to life imprisonment.

34. It is trite law that an appellate court can only interfere with a trial court's sentence where it finds that the trial court acted wrongly as stated in the case of Shadrack Kipkoech Kogo v. Republic Criminal Appeal No. 253 of 2003 [2021] eKLR where the court held:-

> " ...Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore as an error of principle must be interfered with." (In the said case, the court considered the fact that the victim was a child of tender years).

35. The question before this court is whether the sentence of 15 years imposed upon the Appellant was proper. In the case of Republic v. Joshua Gichuki Mwangi [2015] KEHC 1424 (KLR), the Supreme Court allowed a petition of appeal to the extent of setting aside the Judgement of the Court of Appeal in Nyeri where it declared the mandatory minimum sentences for sexual offences unconstitutional in that they limit the discretion of the court. In its judgement, the Supreme Court reiterated that its

decision in the Francis Karioko Muruatetu case did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, *Sexual Offences Act* and other statutes.

36. The rationale behind the Supreme Court's decision in the case of Joshua Gichuki Mwangi (supra) is that women and children, whose rights have long been violated with great impunity, need to be protected from sexual predators through deterrent sentences which aim at punishing the perpetrator and keeping them away from the society while offering the victims a sense of retribution and justice.

37. Based on the aforesaid case, I find that the court's hands are tied. The Appellant does not qualify for a lesser sentence than the minimum nor for a Community Service Order in the circumstances.

38. The *Sexual Offences Act* sets the minimum sentence for the offence of gang rape at 15 years. A review of the evidence indicates that the victim was subjected to defilement by three persons. There is no doubt in my mind that the victim was defiled by more than one person. Her evidence is a testimony of the agony she underwent. She was threatened with death and defiled in turns therefore causing her to bleed and to suffer injuries which she was yet to recover from at the time of the case.

39. The P3 form and the discharge summary that was produced by PW2 is evidence of the trauma that the victim was subjected to. Her vaginal wall and cervix were raptured. She had to be taken to theatre for purposes of repairing of her private parts, therefore causing her to suffer more pain. She was admitted for treatment for two (2) weeks.

40. I have carefully considered the Appellant's submissions, the mitigating factors and the relevant law. The circumstances of the offence were quite aggravating. The victim was a 16 year old child facing three adults who defiled her in turns, resulting in loss of consciousness and leaving her with deep psychological scars. The offence called for a deep sense of retribution as well as a sentence that would be deterrent on the face of it. I am of the considered view that the offence called for a heavier sentence. The trial court was therefore quite lenient in imposing the minimum sentence on the Appellant notwithstanding his mitigation.

41. In anticipation that the court may find the sentence lenient and decide to enhance it, the Appellant has urged the court to find that in absence of a cross-appeal or a warning notice from the court, the option of enhancement is not available to the court. In the case of Amboke & Another v. Republic [2019] eKLR, the court held thus:-

> " A ground urged in this appeal relates to enhancement of sentence without warning, notice or a cross-appeal. This Court in Samwel Mbugua Kihwanga – v - Republic, Cr. App. No. 239 of 2011, explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal..."

42. I am in agreement with the Appellant that there was no cross-appeal against the sentence filed by the Respondent. The court did not also warn the Appellant of the likelihood of an enhancement of the sentence. In the circumstances, despite finding that the circumstances of the instant case called for a longer custodial sentence. I will not enhance the same.

43. The Appellant's last ground of appeal is that the court considers the provisions of Section 333 (2) of the *Criminal Procedure Code*. The Appellant was arrested on 21st March 2020. According to the record, he was released on bond on 27th May 2020. He was therefore in custody for two (2) months. However, for reasons that the court has held that the sentence imposed upon the Appellant was quite lenient, I

am of the considered opinion that the two months ought not to be credited to the Appellant. The trial court had considered all the circumstances before imposing the sentence and the sentence is proper.

44. The upshot is that the appeal lacks merit. It is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 11TH DAY OF FEBRUARY 2025.

A. C. BETT

JUDGE

In the presence of:

The Appellant virtually

Ms. Chala for Respondent/State

Court Assistant: Polycap