Murangiri v Republic (Criminal Appeal E057 of 2022) [2025] KEHC 1491 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E057 OF 2022

LW GITARI, J

FEBRUARY 7, 2025

BETWEEN

VINCENT MURANGIRI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This appeal arises from the proceedings in Meru Chief Magistrate's Court Criminal Case No.E013/2020 where the appellant was charged with the offence of defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act* No.3/2006. The particulars of the charge are that on 1/11/2020 at Imenti North Sub-County in Meru County he intentionally caused his penis to penetrate the vagina of S.N a child aged six years. In the alternative the appellant was charged with committing an indecent Act with a child contrary to Section (11) (1) of the *Sexual Offences Act* in that on 1/11/2020 in Imenti North Sub-County in Meru County intentionally touched the vigina of S.N a child aged six years with his hands and penis.
2. The appellant denied both charges but after a full trial he was found guilty on the charge of defilement, convicted and sentenced to serve life imprisonment.
3. The appellant was dissatisfied with that turn of events and filed this petition of appeal which initially raised eight ground of appeal which were reduced to four in his amended grounds of appeal. The grounds are as follows:
    1. That, the learned magistrate convicted the appellant notwithstanding that fact that he was a child at the time he committed the offence, thus the conviction and sentence were in contravention of Article 53 of *the Constitution* and other provisions of the law.
    2. That, the learned trial magistrate erred in law by failing to consider that the legal provision for mandatory life sentence under Section 8 (2) of the *Sexual Offences Act* denies the judicial

officers their legitimate jurisdiction to exercise of discretion in sentence not go impose an appropriate sentence in an appropriate case to case basis which is unconstitutional and unfair in breach of Article 27(1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the Appellant is unlawful.

3. That, the learned trial magistrate erred in matters of law and fact by failing to consider the appellant defense and his mitigation.

4. That, the learned trial magistrate erred in matters of law and fact by failing to consider the appellant defense and his mitigation.

He prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

4. The Respondent opposed the appeal and prays that the appeal be dismissed.

The Prosecution's Case:

5. PW3 Janet Katumbein her evidence before court state that she is a volunteer children officer. The complainant's mother came to her and told her the complainant had been defiled. She examined the child and saw her vagina appeared stretched. She escorted he mother and her child to hospital. She asked the complainant what had happened and she said she was defiled by Vincent Murangiri and it was not the first time he had defiled her. The witness confirmed that she did not know the accused person.

PW4 Inspector Binti Hamisi Swalehin her evidence before court stated that she is the investigating officer in this case. She charged the accused with offence herein upon concluding her investigations. She produced a birth certificate that showed the complainant was six years as at the time of the defilement. She further stated that the accused person had ran away but was later arrested.

PW5 Huey Atemiin his evidence before court stated hat he is a clinical officer at Nairobi Women's Hospital. He produced the medical reports for the complaint's hymen was perforated. The P3 form produced showed that the complainant had been defiled.

The accused was put on his defence. He gave sworn statement and called 2 witnesses.

Analysis and Determination:

I have considered the grounds of appeal and the proceedings before the learned trial magistrate.

I have also considered the submission. The issue which arise for determination are:

1. Whether the learned magistrate erred by convicting the appellant not withstanding that he was a child at the time he committed.

2. Whether the sentence under Section 8(2) of the *Sexual Offences Act* is un-constitutional, unfair and in breach of Article 27(1) (2) 4 of *the Constitution*.

3. Whether the learned magistrate erred by failing to note that both the complainant and the appellant were all children.

4. Whether his mitigation was considered.

Whether the learned magistrate failed to consider that the appellant was a child when he committed he offence

6. The appellant contends that it is not in dispute that he was sixteen years at the time he committed the offence. He contends that his birth certificate was produced in court. He further contends that

the court found that he was minor and the Meru Probation Committee was ordered to assign him an advocate.

I have considered this ground of Appeal. The record shows that on 10/5/2021 a birth certificate No.0240308366 was produced in court showing that the date of birth of appellant was 30/10/2003. The learned magistrate held that the appellant was still a minor and order that a pro-bono counsel be appointed for him.

Later on 7/3/2022 he learned magistrate ordered that the appellant be escorted to hospital for age assessment. I have however perused the record but I did not come across an age assessment report for the appellant. The birth certificate is the reliable and credible evidence to proof the age of the appellant. The birth certificate shows that the appellant was born on 30/10/2003. The offence was committed on 1/11/2020 which is the applicable date in determining the age of the appellant. The date of the offence is the one taken to determine whether the offender was an adult or a child when he committed he offence. That date is 1/11/2020. So at the time he committed the offence he was seventeen years old. The appellant was charged under Section (8)1(2) of the *Sexual offences Act*.

Section 8(1) (7) provides as follows:-

> "where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused herein in accordance with provisions of the *Borstal Institutions Act* (Cap 92) and the children's Act Cap 141)"

The learned trial magistrate stated as follows when considering the sentence to be imposed-

> " The accused person is now an adult and the question this court is to consider at this point in time is whether to sentence the accused person as an adult. I note the offence herein is serious in nature as the person defiled was a child of tender years aged 6 years old. I note the court of Appeal was faced with a similar situation in JKK –v- Republic 2013 eKLR where the Court of Appeal held as follows:-
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>> "The purpose of sentences under the *Children Act* are meant to correct and reliability a young offender i.e that in any person below the age of eighteen years while taking into account the overriding objective is the preservation of life of the child and his best interest. A death sentence of life imprisonment are not provided for but when dealing with an offender who has attained the age of sixteen years the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear all the weight and responsibility of hi omission or lack of judgment by serving a custody sentence. We are of the view that appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistake which can only happen after serving a custodial sentence."

This court according being guided by the above court of Appeal decision notes that the offence herein is of serious nature in line with the law..... I am of the view that the accused should serve a custodial sentence."

I note that the learned magistrate was well guided by the binding decision of the Court of Appeal. The *Children Act* under Section 190 provided for custodial punishment for child offenders as the Rehabilitation Schools and Borstal Institution depending on the age of the child. There was no provision under the Act which allowed any form of imprisonment of a child offender. The courts

were faced with difficulties when dealing with offenders who committed serious crimes when they were children and at the time of passing the sentence they had become adults. Although the *Sexual Offences Act* was amended to make provision of sentencing offenders who committed offences when they were children and are adults at time of sentencing under the Borstal Institution Act and the Children's Act the section is not couched in mandatory terms. It provides that – "may upon conviction ". This is in my view leaves room for the exercise of discretion when sentencing. The Court of Appeal in the above decision which was cited and relied on by the learned magistrate address the issue appropriately by stating that under the *Children Act* are meant to correct and rehabilitate young offender who are below eighteen years and sentences like life imprisonment and death sentence are not provided under the *Children Act*. The Court of Appeal decision was binding on the learned trial and is also binding on this court. The mandate of the Judiciary is to do justice to all irrespective of status.

Article 159 (1) (2) (a) provides that;

> "Judicial Authority is derived from the people and vest in and shall be exercised by, courts and Tribunals established under this Constitution. In exercising Judicial Authority, the courts and Tribunals shall be guided by the lowing principles- Justice shall be done to all irrespective of status."

Thus the courts have a duty to ensure justice for minor children who are violated by the very persons who are supposed to treat them with care and guidance as well as protection from harm and kind. When such offenders appear in court and are found culpable at the time that they are adult nothing preventing the court from dealing with them t that particular time especially when the face serious crimes like the one herein. See the persuasive decision in Matheka J in Amos Kipchirchir Cheruiyot -v- Republic (Criminal Appeal No.133/2019 (2020) KEHC 487 (KLR) (30 December 2020) Judgment). Where he Judge while considering the question of punishment of children who committed serious crimes and face sentencing when they are adults. "That is not to say that children who committed horrendous crimes should be treated with kid gloves."

I find that the case of JWM –v- Republic (2014) eKLR which the appellant relied on is persuasive and is not binding on this court. In S.C.N –v- Republic (2018) eKLR, Justice Mwongo relied on Court of Appeal Decision in Republic –v- Dennis Kirui where he Court of Appeal reduced he sentence of life imprisonment to ten years and J.K.K.-v- Republic (supra) and applied the principles therein to sentence the appellant who was seventeen years at the time of committing the offence but had attained the age of eighteen ears at the time of sentencing. I am guided by the above authorities and find that the learned magistrate did not err when he sentenced the appellant as an adult. I find that grounds 1&3 are addressed and are without merits. The appellant has challenged he mandatory nature of the sentence under Section 8(1) (2) of the *Sexual Offences Act*. The Section provides as follows:-

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

The Supreme Court in a recent decision has given courts below it the guidance on sentence under Section 8 of the *Sexual Offences Act*.

In Petition No.E018/2023 Republic –v- Joshua Gichuki Mwangi & Others. The Supreme Court in an appeal by the Director of Public Prosecutions challenging the Court of Appeal decision in which the court had held inter alia that the imposition of mandatory minimum sentences under the *Sexual Offences Act*, Cap 63A Laws of Kenya is unconstitutional, the Supreme Court determined the issues,;

i. Whether the a mandatory minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional , and

ii. Whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the *Sexual Offences Act*.

The Supreme held as follows: "the sentence under Section 8 of the *Sexual Offences Act* remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid."

The decision of the Supreme Court binds all the court below it by dint of Article 163(7) of *the Constitution* which provides as follows:

All courts other than the Supreme Court are bound by the decisions of the Supreme Court."

Since the Supreme Court affirmed the sentences under Section 8 of *Sexual Offences Act*, this court cannot interfere with the sentence imposed by the leaned magistrate. The sentence imposed was lawful.

On ground No. 4 the appellant submits that his defence was not considered. I have considered this ground and find that the appellant had raised a defense of alibi. In the case of Kiarie –v- Republic (1984) KLR. It was stated that .... " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of court a doubt that it is not unreasonable."

It is well settled that an accused who raises a defence of alibi does not assume any burden of proving that answer, the burden is on the prosecution to disapprove and discredit that defence and discharge its burden to prove the guilt of the accused. The burden of proving his guilt remains throughout on the prosecution is well as proving the falsity of his defence. The Court of Appeal in the Case of Victor Mwendwa Mulinge –v- Republic (2014) eKLR while addressing alibi defence stated as follows:

It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution, see Karanja –v- Republic (1983) KLR 501--- this court held that in a proper case, a trial court may, in testing defence of alibi and in weighting it with the other evidence to see if the accused's guilt is established beyond all reasonable doubt take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigations and hereby prevent any suggestion that the defence was an afterthought."

The learned trial magistrate in her considered judgment at page 69 of the record considered the defence of appellant and stated as follows:

As for the evidence by the accused I find that the same has been greatly overwhelmed by that of the prosecution.

The accused tried to raise an alibi as his defence that he had gone to church on the material date and then allegedly later to a neighbor's palace for other activities."

She quoted the case of Moses Njagi Rukemi –v- Republic (2021) eKLR when it was held that "the 'alibi defence was raised belatedly. She then held as follows: by the above authority the accused alibi was raised belatedly and later in the day as the accused did not raise the defence during cross-examination. In any event I am of the view that the alibi by the accused person and his witnesses was greatly dislodged by that of the prosecution witnesses.....

In my view the alibi raised by the accused is an afterthought and has not in any way shaken the credibility of the prosecution's evidence."

I have perused the record of the trial magistrate and noted that it is indeed true that the defence was only raised after the prosecution case. It was not put the witnesses when they testified. I find that the learned magistrate carefully considered the defence and was right to reject it as an afterthought. I have considered the circumstances of this case. It is a case where this offence divided the family in the

middle with the child's mother standing firm for the justice of the minor and the other side isolating her and her child for taking that stand. The complainant knows the appellant as he was a close relative. Medical evidence corroborate the evidence of the complaint. The investigating officer testified that the appellant disappeared for three weeks after committing the offence. This is not denied. Section 124 of the *Evidence Act* provides as follows:

124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

The learned Magistrate conducted 'Voire dire' examination and found that the complainant was intelligent and also concluded that she had no reason at all to doubt her. I find the charge against the appellant was proved with overwhelming evidence which remains intact as the defence was a mere denial and an afterthought.

The decision by the learned magistrate was sound.

Conclusion:

7. The appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE