MKR v Republic (Criminal Appeal E015 of 2022)
[2025] KEHC 5809 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E015 OF 2022

CM KARIUKI, J

MAY 8, 2025

BETWEEN

MKR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. M.I.G. Moranga (S.P.M) in Kilgoris MCSO No. 69 of 2020 delivered on 11/10/2022)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 15 years' imprisonment for the defilement of a 16-year-old girl.

2. Being dissatisfied with the said conviction and sentence, he preferred an appeal *vide* a memorandum of appeal dated 17/10/2022. The appellant filed grounds of appeal as follows:

    i. That the learned magistrate erred in law and in fact by convicting and sentencing the appellant and failing to appreciate that the doctor's evidence did not link his findings with the appellant's alleged crime. The doctor's consideration was not proved and hence arrived at the wrong determination.

    ii. That the learned trial magistrate erred in law by failing to comply with the provisions of Order 21, Rule 2(1) and (2), 3(1) and (2) of the *Civil Procedure Act*.

    iii. That the learned trial magistrate erred in law by convicting and sentencing the appellant without a fair trial as envisaged under Article 50 of the *Constitution*. The evidence of the prosecution witnesses was not an eyewitness, and no one observed the incident, and thus the case against him was not adequately proved.

iv. That the learned trial magistrate erred in law by convicting and sentencing the appellant without finding that he was never served with the evidence of the case to enable him to prepare for his defence.

v. That the trial magistrate erred in law and fact in concluding that the offense of defilement was proved without considering the evidence of the clinical officer and that the age and penetration were not proven to the required standard.

vi. That the learned trial magistrate erred in law and in fact in convicting the appellant based on basically hearsay testimonies.

vii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the clinical officer's evidence was based on an examination which was done 7 days after the alleged defilement, yet he claims to have found sperms whose owner cannot be ascertained from the entire prosecution.

Brief facts

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. No. 3 of 2006.

4. The particulars were that on diverse dates between 26th September 2020 and 12th October 2020 at Taktech village in Trans Mara East sub-county within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of D.C. a child aged 16 years.

5. The appellant was tried and convicted. The appellant was sentenced to 15 years' imprisonment.

Directions of the court.

6. The appeal was canvassed by way of written and oral submissions.

The Appellant's submissions.

7. The appellant submitted that the offence of defilement was not proved beyond reasonable doubt to warrant a conviction. The complainant's hymen was not freshly broken and there was no laceration of the external vagina putting doubt on whether penetration occurred on the stated dated. The complainant was pregnant, but another person could have done penetration. The appellant contends that this court should activate its legislative limb to have DNA as proof of defilement.

The respondent's submissions.

8. The respondent submitted that the age of the complainant was not challenged. Thus, it was safe for the trial court to hold that the complainant's age had been proved to be 16 beyond reasonable doubt.

9. The respondent submitted that the appellant was well known to the complainant and identification was by recognition.

10. The respondent submitted that penetration was proved through the evidence of the victim and corroborated by medical evidence.

11. The respondent submitted that the appellant was granted a fair trial as he was served with witness statements and informed of his right to recall the complainant. Therefore, no prejudice was occasioned to the appellant.

12. The respondent urged this court to uphold the sentence of the trial court, as no contention has been raised on the sentence imposed.

Analysis and Determination.

The court's duty

13. The first appellate court is obligated to re-evaluate the evidence and make its own conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32

14. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are.

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

15. The appellant was charged with the offence of defilement in contrast to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, which provides:

> " 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(4) "A person who commits an offence of defilement with a child aged sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years."

16. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act*, which the prosecution must prove beyond reasonable doubt, are:

    1) Age of the complainant.

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see *Mark Oiruri Mose v R* [2013] eKLR; and

    3) The accused was the assailant.

17. See the case of *Charles Wamukoya Karani Vs: Republic*, Criminal Appeal No. 72 of 2013.

18. PW1 testified that she was 16 years old. Her mother, PW2, testified that the complainant was 16 years old. She produced PW1's immunization card as P Exh 3.

19. Based on the evidence adduced, the age of the victim was 16 years at the time of the defilement.

20. PW1 stated that the appellant went to her home and asked her to go with him. They went to the riverside where the appellant defiled her.

21. PW2 testified that her child was not feeling well and was taken to the hospital. Upon examination, she was found to be pregnant.

22. PW3 testified that she found PW1 vomiting and not eating well. She later informed her mother that she was pregnant.

23. PW4, a clinical officer, examined PW1 on 05/10/2020. On examinations, both labia were normal. Hymen was penetrated with a whitish discharge. She was found to be 16 weeks pregnant. She produced P3 form, PRC form and treatments notes as P Exh 1(a, b and c) respectively.

24. The analysis of the evidence yields the inescapable conclusion that the prosecution proved to the required standard that penetration did occur of D.C.

25. Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom?

26. PW1 testified that the appellant was her uncle. She stated that the appellant had previously defiled her and was responsible for the pregnancy.

27. The appellant, in his defense, gave an unsworn statement. He merely denied the charges.

28. The girl knew the appellant well and gave such a succinct account of the times and manner they had unprotected sex. This is a person she knew and trusted. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex. Thus, who defiled her?

29. Based on the evidence adduced, the appellant caused the penetration of D.C.

30. The court, therefore, finds that the appellant was properly convicted on the charge of defilement based on evidence that proved the case against him beyond reasonable doubt.

31. In the upshot, the appeal on conviction is dismissed.

On sentence.

32. The relevant penalty clause under which the appellant was sentenced is Section 8 (4) of the *Sexual Offences Act*, which section provides that:

    8(4) "A person who commits an offence of defilement with a child aged sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years".

33. The trial court considered the fact that the appellant was not remorseful and the circumstances surrounding the offence, including the fact that the offence is becoming rampant in the region.

34. The law is clear on such offences where minors do not have the capacity to consent to any sexual relationships and even marriage. Thus, a deterrent sentence is necessary.

35. The victim was a child- she was 16 years old. The manner the offence was committed was by taking advantage of a child. The child is likely to also suffer post-traumatic effects, from agonizing memories of the incident. In addition, the fact that the prevalence of the offence justifies 15 years imprisonment in this case. Therefore, a deterrent sentence is necessary.

36. There is new jurisprudence; Minimum sentences set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See the Supreme Court in *Republic Vs Joshua Gichuki Meangi And Initiative For Strategic Litigation in Africa (ISLA) And 3 Others* Supreme Court Petition No. E018 of 2023.

37. Furthermore, the Supreme Court decision in *Republic vs. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), emphasized the court's obligation not to interfere with mandatory minimum sentences prescribed under the *Sexual Offences Ac*t. In that case,

the Supreme Court categorically held that the minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

38. The apex court held:

> " 56. Mandatory sentences leave the trial court with absolutely no discretion, such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different sets of meanings and circumstances.
>
> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

39. In the circumstances, the 15-year imprisonment sentence is upheld.

Conclusion and orders

i. The appeal on conviction and sentence is dismissed.

ii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025.

.....

CHARLES KARIUKI

JUDGE

In the presence of:

Court Assistant: Mr.Nyangaresi