Muriithi v Republic (Criminal Appeal E004 of 2021)
[2024] KEHC 635 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEHC 635 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E004 OF 2021

AK NDUNG'U, J

FEBRUARY 1, 2024

BETWEEN

JOHN GATHOGO MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki
CM Sexual Offences Case No 36 of 2020– L. Mutai, CM)

JUDGMENT

1. The Appellant in this appeal, John Gathogo Muriithi was convicted after trial of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 14/07/2020 at Laikipia County, willfully and unlawfully caused his penis to penetrate the vagina of BMW a child aged 10 years. On 29/11/2020, the Appellant was sentenced to life imprisonment.

2. Being dissatisfied with the conviction and the sentence, the Appellant appealed to this court challenging the conviction and the sentence. He initially filed grounds of appeal followed by amended petition of appeal filed by M/s Micere Advocates which petition is followed by the filing of amended grounds of appeal and submissions filed by the Appellant in person on 05/06/2023 upon being granted leave by this court. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by failing to consider the Appellant's evidence and thereby made a wrong decision.

    ii. The learned magistrate erred by failing to consider that the Appellant had not participated in the offence and therefore awarded a sentence that was excessive and erroneous in the circumstances.

iii. The learned magistrate misdirected herself in considering the Appellant's submissions and therefore made a wrong decision.

iv. The learned magistrate failed to consider the Appellant's mitigation arriving at a wrong decision and meted out an excessive sentence.

v. The learned magistrate erred by imposing a very severe sentence which was unlawful despite the mitigating factors presented by the Appellant.

Further grounds as filed by the Appellant in person;

i. The learned magistrate erred by not appreciating that the plea of guilty entered initially against him was not unequivocal.

ii. The learned magistrate erred convicting him without noting that his right to fair trial as provided under Article 50(2) (g) (h) and (k) was contravened.

iii. The learned magistrate erred convicting him without appreciating that penile penetration was not proved beyond reasonable doubt.

iv. The learned magistrate erred convicting him to life imprisonment without appreciating that mandatory minimum sentences are unconstitutional and illegal.

v. The learned magistrate failed to note that there was a brewing grudge between the complainant's family and the Appellant on matter of land that they wanted to take away from him.

vi. That the learned magistrate convicted him without considering his defence statement.

vii. That the learned magistrate judgement did not comply with section 169(2) of the Criminal Procedure Code.

viii. That the sentence meted was manifestly harsh and excessive.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that he had initially pleaded guilty and the court failed to warn him of the consequences of pleading guilty to such grave charges. He was unrepresented and he did not understand the charges and he informed the court of the same. Therefore, with the notion that the Appellant was guilty as charged, the trial court continued with the trial without informing him of his Constitutional right under Article 50(2)(g) and (h) to have an advocate or be provide with one at the court's expense. That failure to inform his of such rights prejudiced him and therefore it cannot be said that he was accorded a fair trial. Reliance was placed on the case of Elijah Njihia Wakianda vs Republic Nakuru criminal Appeal 437 of 2010(2016) eKLR. That even though he later pleaded not guilty, that did not take away the implication of his initial plea of guilty which was not unequivocal.

4. He submitted that what the complainant described as forced sexual attack was as a result of being coached by adults. That the charges were trumped up by the complainant's mother and sisters following a long standing land dispute. That the complainant did not describe the scene of crime, she was not led to explain the sexual assault including pain, fear, a struggle, etc, she did not scream and she did not testify whether she experienced pain. That the prosecution failed to conclusively prove partial penetration since the complainant's hymen was not broken and since the lacerations observed could have been caused by fingers or any other object. It is urged that the prosecution failed to examine her as to why the ordeal was devoid of trauma which shows that it was a made up case. The trial court

also failed to invoke section 124 of the *Evidence Act* by not recording the reasons why she believed the minor. The court also failed to note the minor's demeanour and credibility.

5. On medical evidence, he submitted that the clinical officer failed to explain why the minor's hymen was not perforated yet the minor had described the ordeal as unprotected, unhurried sexual attack. She also failed to explain why there were no epithelial cells, no discharge , no seminal fluid and did not explain how the minor was forcefully defiled but could be able to run. Reliance was placed on D vs East Berkshire (Community Health NHS Trust (2005) 1 AC 373 (CA) to emphasise that medical evidence is not always infallible since there are medical misdiagnosis and courts should not take every medical diagnosis as gospel truth. He further submitted that the medical opinion must be accompanied by other factors. The fact that there were no independent witnesses shows that the matter was planned by the family members. Further, laceration of the genitalia is not conclusive proof of penetration as the court held in Michael Mumo Nzioka vs Republic (2019)eKLR.

6. He submitted that his defence was quashed without good reasons and the court failed to look into the issue of a land dispute. The trial court failed to comply with section 169(2) of the Criminal Procedure Code by failing to record the offence or the section under which he was convicted which rendered the judgment null and void and vitiated the entire proceedings. That the section he was charged with is still in dispute since his committal documents states that he was convicted of incest. Further, PW3 testified that he was an uncle to the complainant and therefore the charge of incest was the appropriate charge and of which would have had an implication to the resultant sentence since defilement and incest attracts different sentences. As for the sentence, he urged the court to reconsider the same in light of the developing jurisprudence.

7. The Respondent's counsel in the written submissions argued that the prosecution proved its case against the Appellant beyond reasonable doubt. Penetration was proved through the complainant's evidence which was corroborated by medical evidence, evidence of PW2 and PW3. Further, the trial court correctly relied on complainant's evidence by invoking the provisions of section 124 of the *Evidence Act*. As to identity, it was submitted that the complainant knew the Appellant as her uncle which was corroborated by evidence of PW3. Further, there was no doubt that was raised as to the correctness of the identity of the perpetrator. As to the age, the same was proved by her birth certificate that was produced by PW2, her mother. As for the sentence, counsel submitted that the same was lawful and mandatory and urged the court not to interfere.

8. In the supplementary submissions, it was further submitted that the sentence imposed was correct and justified taking into consideration numerous mitigating circumstances. That courts have discretion in sentencing and the minimum nature does not make a sentence illegal as was held in Muruatetu case and that the decision in Muruatetu did not invalidate the mandatory minimum sentences in the *Sexual Offences Act*. The sentence was proper as aggravating factors outweighed the Appellants mitigation. Further, the sentence reflected the severity of the offence considering the tender age of the victim and the loss of dignity occasioned.

9. That the fact that the complainant did not detail whether or not she felt pain or fear during the ordeal or that she did not scream did not negate the fact that the offence actually took place. Counsel urged the court to disregard the argument as the evidence on record established the ingredient of the offence. As to non-compliance with section 169(2) of the Criminal Procedure Code, it is submitted that the court at page 1 of the judgment noted the offence the Appellant was facing and on page 40, the court convicted the Appellant on the main count and as such, Appellant's allegation should be disregard. As to his defence, counsel submitted that the same was a mere denial unlike the prosecution's case that was consistent and corroborated by several witnesses. Therefore, the conviction was proper and safe.

10. It is my duty as a first appellate court; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

11. I have had occasion to read, consider and re-evaluate the evidence as recorded by the trial court. In so doing, , I have taken cognizance that I never saw nor heard the witnesses testify and have given due allowance for that fact. I have put into account the submissions made and the case law relied upon.

12. In summary, the evidence before the trial court was as follows. PW1, the complainant, in her unsworn testimony testified that on the material day, she was at home washing utensils while her mother was washing clothes and her auntie was in the farm. She was asked to go and check on her siblings and her cousins who were at her auntie's place who was their neighbour. She met her uncle, the Appellant, near her auntie's gate. His home neighbour's her auntie's home. He held her by the neck and warned her against saying anything or he would cut her. He held a jerican and a panga. He led her to his one roomed house, locked the door, asked her to sit on his bed and to remove her clothes but she declined. He held her and removed her dress, skin tight and pants. He pulled out his thing for urinating and forced it into hers after forcing her to lie on his bed. After he pushed, she dressed up, walked out and locked him inside from outside while he was calling out for her.

13. She ran and informed her auntie BN who had just gotten home from the farm and they reported to her mother. When they got to Appellant's house, he had managed to get out. The matter was reported to police and she was taken to hospital. She testified that she did not scream because the Appellant was pressing her neck. She testified on cross examination that the Appellant lives in one roomed house and he threatened to cut her into pieces with a panga he had.

14. PW2, the complainant's mother testified that she was at home with the complainant who was washing utensils and after she finished, she asked her to get her siblings from a neighbour, N. After a short while, the complainant was back but running and she ran to the house where BN was. Shortly, they informed her that the Appellant had defiled the complainant. They got to the Appellant's house but he had managed to leave the house. They reported the matter and took the complainant to hospital. She testified on cross examination that she did not witness the ordeal. She produced the complainant's birth certificate as Pexhibit1

15. PW3, BN stated that she had just entered the kitchen from the farm when the complainant entered the kitchen while crying. She enquired what was the matter and she reported that the Appellant had defiled her. She took her to her mother and they proceeded to the Appellant's home but they did not find him there. Complainant was taken to the police station and to the hospital.

16. PW4, was the clinical officer who examined the complainant. He testified that her inner wear was blood stained and was wet, she had laceration on labia majora, the hymen was not broken and she had no vaginal discharge. There were no pus cells, HIV was negative but there was gram positive noted which is foreign organic secondary to defilement and something else. (sic). The source of blood in the inner wear was due to lacerations on her vaginal area and his conclusion was that she was defiled. He produced the P3 and PRC form as Pexhibit 2 and 3 respectively.

17. PW5, the investigating officer testified that he received a report of defilement. That the Appellant was traced within Nyeri County and he was arrested on 16/07/2020. He produced the complainant's skin tight she wore at the time and the skirt as Pexhibit 4(a) and (b).

18. In his unsworn defence, the Appellant denied committing the offence. He stated that the complainant lives on their farm which the complainant's father had always wanted to take away from them.

19. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

20. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

21. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

22. In the present appeal, the complainant's age was not disputed. PW2, the complainant's mother produced the complainant's birth certificate as Pexhibit1 which shows that the complainant was born on 12/11/2009. The offence was committed on 14/07/2020 and therefore the complainant was 10 years at the material time.

23. As regards to proof of penetration, the Appellant submitted that the complainant failed to describe whether she felt pain, she did not scream, she failed to describe the scene of crime, the hymen was not broken and the lacerations observed could have been caused by fingers or any other object. On medical evidence, he submitted that the clinical officer failed to explain why the hymen was not perforated yet the minor had described the ordeal as unprotected, unhurried sexual attack. He also failed to explain why there were no epithelial cells, no discharge , no seminal fluid and did not explain how the minor was forcefully defiled but could be able to run. Further, laceration of the genitalia is not conclusive proof of penetration as the court held in Michael Mumo Nzioka vs Republic (2019) eKLR.

24. The complainant in her testimony told the court that the Appellant's house was a one-roomed house. She described how the Appellant ordered her to sit on his bed. Further, she stated that the Appellant's home is after her auntie's home. It therefore follows that she described the scene of crime. As to why the complainant did not scream, she testified that she did not scream because the Appellant was pressing her neck.

25. As to the medical evidence, PW4 was clear and he stated that his finding was that there was proof of penetration. He testified that the complainant's inner wear was blood stained and was wet, she had laceration on labia majora, the hymen was not broken and she had no vaginal discharge. There were no pus cells, HIV was negative but there was gram positive noted which is foreign organic secondary to defilement. The source of blood in the inner wear was due to lacerations on her vaginal area. His findings were well captured in the P3 and PRC forms.

26. The Appellant in his submissions relied on the case of Michael Mumo Nzioka vs Republic (2019) eKLR by stating that laceration though a proof of penetration, is not on its own conclusive. The Appellant misquoted the learned Judge in that case as follows;

> Therefore, lacerations of genetalia can be proof of penetration even though where hymen is not broken....though again that is not conclusive proof.

27. This is contrary to what the Judge held in that case. What the Judge stated was that presence of spermatozoa was not conclusive proof of penetration. The Judge sated as below;

> " The hymen was torn/broken and there were also lacerations i.e. bruises around her genitalia. In George Owiti Raya vs. Republic [2013] eKLR it was noted that:-
>
> "There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul-smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration."
>
> "Therefore, lacerations of the genitalia can be proof of penetration even where the hymen is not broken. In fact, the mere fact that no spermatozoa is found does not necessarily mean that there was no penetration though its presence may well prove that there was penetration, though again that is not conclusive proof. In Mwangi vs. Republic [1984] KLR 595 at 603, the Court rendered itself thus: (emphasis added)
>
> "The presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has sexual intercourse nor is absence of spermatozoa in her vagina proof of the contrary. What is required to prove that sexual intercourse has taken place is proof of penetration, an essential fact of the offence of rape."

28. From the above, I find that penetration was proved to the required standard following the complainant's testimony which was corroborated by the medical evidence. It therefore follows that there was no need for the trial court to rely on section 124 of the *Evidence Act* since the medical evidence corroborated the complainant's evidence.

29. Having established that the complainant was defiled, the question that begs is whether the complainant was defiled by the Appellant.

30. The Appellant was not a stranger to the complainant. The complainant referred to him as uncle. He was a neighbour to her aunty N. PW2 and PW3 also confirmed that the Appellant was their neighbour. The complainant's mother testified that the Appellant's sister N was married to her late cousin M. The complainant did not name anyone else as her defiler apart from the Appellant. The Appellant denied committing the offence. He claimed that the charges were trumped up due to a land dispute since the complainant's father wanted to take away their land.

31. On the material before court, it is safe to infer that the issue of land dispute brought up by the Appellant in his defence is unfounded, diversionary and a mere attempt by the Appellant to avoid the consequences of his act. There was no mention of the complainant's father during the trial. The Appellant did not put across this issue during cross examination of the prosecution witnesses. It was raised too late in the day and was not put to the witnesses when they testified. Such a defence ought to be put to the witnesses so that they can have an opportunity to give their side. Failure to raise it when cross-examining the witnesses leads to the inevitable conclusion that it is an afterthought which cannot possibly be true. The appellant and complainant were neighbours. The complainant knew him very well. I find that the prosecution proved that the appellant was the perpetrator.

32. He further claimed that since he was complainant's uncle, the charge of incest which was withdrawn should have been maintained. It is however noteworthy that the Appellant was not an immediate uncle to the complainant ad he was not related to the complainant by blood as PW2 and PW3 testified that

the Appellant's sister was married to their late cousin and that is why the complainant referred to him as uncle.

33. In his submissions, he stated that section 169(2) of the Criminal Procedure Code was not complied with since the trial magistrate failed to record the offence or the section under which the Appellant was convicted which rendered the judgment null and void and vitiated the entire proceedings.

34. The said section states that;

> (2) In the case of a conviction, the judgment shall specify the offence of which and the section of the penal code or other law under which, the accused person is convicted, and the punishment to which he is punished.

35. While convicting the Appellant, the trial magistrate stated;

> " ...I therefore proceed to declare the accused person guilty as charged on the main count and I convict him under section 215 CPC."

36. It is noteworthy, however, that the trial court, as confirmed in the Respondent's counsel's submissions, stated the offence the Appellant was charged with at the beginning of the court's judgment and therefore there was no ambiguity whatsoever regarding the offence for which the Appellant was convicted. Furthermore, non-compliance with the requirements of section 169 does not automatically result in the trial process being vitiated. This was held by the court of appeal in Samuel Mwambuki & another v Republic[2019] eKLR while relying on the case of Hawaga Joseph Ansanga Ondiasa V R Criminal Appeal No. 84 Of 2001 where the court held that;

> " It is true that the trial magistrate may be criticized for the perfunctory way in which he expressed himself in his judgment. However, even if we were to hold that he did not prepare his judgment strictly in accordance with section 169 of the Criminal Procedure Code, this would not, of itself mean that the conviction of the appellant was wrong or is to be invalidated."

37. In any event, such defect if existent is curable under section 382 of the Criminal Procedure Code, which provides as follows:

> "
>
> " 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

38. The Appellant further argued that the trial court continued with the trial without informing him of his constitutional right under Article 50(2)(g) and (h) of *the Constitution* to have an advocate or be

provided with one at the court's expense. That failure to inform him of such rights prejudiced him and therefore it cannot be said that he was accorded a fair trial.

39. Article 50 (2) (g) and (h) provides that every accused has a right to fair trial which includes the right;

> "(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

40. In regards to Article 50 (2) (h) it is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. Our courts in interpretation of this have severally stated that substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. See for example Supreme Court Petition No. 11 of 2017, Charles Maina Gitonga -vs- Republic (2018) eKLR where it was observed that: -

> "...legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provision of the Repealed constitution and that under section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

41. In discussing what is substantial injustice, the Learned Judges in Karisa Chengo & 2 Others v. R, Criminal Appeal Nos. 44, 45 & 76 Of 2014 observed as follows: -

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the State obligation to provide legal representation arise."

42. Considering the above authorities on interpretation of substantial injustice, I am not persuaded that the Appellant herein has satisfied any of the tests stated above to demonstrate that substantial injustice was occasioned to him due to fact that he was unrepresented.

43. On the sentence, the Appellant was sentenced to life imprisonment as provided for in law. He urged this court to interfere with the sentence on account of developing jurisprudence.

44. In recent jurisprudence, our superior courts have on several occasions termed life imprisonment as unconstitutional. Recently, the Court of Appeal in Malindi in Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) held that;

> "...This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

45. The court proceeded to set aside sentence of life imprisonment and substituted thereof a sentence of 40 years imprisonment.

46. A more recent case is the Kisumu Court of Appeal decision in Evans Nyamari Ayoko vs Republic Criminal Appeal 22 of 2018 delivered on 08/12/2023 whereby the court held that life imprisonment in Kenya does not mean the natural life of a convict but life imprisonment translates to thirty (30) years imprisonment.

47. By parity of those decisions, and in the circumstances of this case, the Appellant to that extent succeeds in his challenge to the sentence.

48. With the result that the Appeal herein largely fails save for the success in respect to the sentence as alluded to hereinabove. The Appeal against conviction fails and is dismissed. The sentence of life imprisonment imposed is set aside and substituted thereof with a sentence of imprisonment for 40 years.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 1ST DAY OF FEBRUARY 2024

A.K. NDUNGU

JUDGE

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