Tuva v Republic (Criminal Appeal E031 of 2022)
[2024] KEHC 1070 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1070 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E031 OF 2022

A. ONG'INJO, J

FEBRUARY 8, 2024

BETWEEN

MWIDADI RAMADHAN TUVA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered by Hon. R. M. Amwayi, Senior Resident Magistrate on 18th November 2021 in Mombasa Chief Magistrate's Court S. O. No. E061 of 2021, Republic v Mwidadi Ramadhan Tuva)

JUDGMENT

Background

1. Mwidadi Ramadhan Tuva was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars are that Mwidadi Ramadhan Tuva on the 27th day of April 2021, in Likoni Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of HJN. a child aged 16 years.

3. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The trial magistrate considered the evidence of the 5 prosecution witnesses and the unsworn evidence of the appellant and convicted the appellant who was sentenced to serve 20 - years imprisonment.

5. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -

1. That the learned trial court magistrate erred in law and fact by omitting to conduct voire dire examination on the complainant.

2. That the learned trial court magistrate erred in law and fact by giving a harsh and excessive sentence.

3. That the learned trial court magistrate erred in law and fact by failing to consider the appellant's age during sentencing.

4. That the learned trial court magistrate erred in law and fact by failing to consider the factor of being a first offender.

5. That the learned trial court magistrate erred in law and fact by failing to consider the time spent in remand custody as per Section 333(2) of the *CPC* in a meaningful manner.

6. The appellant prayed that the appeal be allowed, conviction quashed and sentence meted on him set aside.

Prosecution's Case

7. PW1, MJH. gave sworn evidence and said that she was 16 years old and that she knew the appellant as he was their neighbour. She said that on 27.4.2021 at 5.00 pm, her mother sent her to buy ginger and that when she went to the shop she met the appellant who was seated alone outside an unfinished building. The complainant said that the appellant called her, removed her panty, defiled her, and warned her not to tell anyone about what had happened. That the complainant then dressed up and went home and when her mother asked where she had been she lied. That when the complainant was beaten, she told them the truth of having been defiled by the appellant. That the complainant took her parents and brother to the appellant's house, and her brother reported the matter to the police and she was taken to a hospital in Likoni for treatment.

8. PW2, N.B.C. the mother of the complainant informed court that the complainant was born on 17.4.2005 and she produced her birth certificate as ExP1. She said that the appellant was known to her as they were neighbours. He said that on 27.4.2021 at about 5.00 pm, she instructed the complainant to go to the shop to buy ginger but she overstayed and went back at about 6.30 pm without the ginger. That they went to the kiosk and PW2 was told the complainant had not been there. PW2 testified that her sister interrogated the complainant who told her that she had been defiled by the appellant. That they then went to Manyatta Hospital where the complainant was examined and treated. PW2 said that when her son overheard the complainant say that she had been defiled by the appellant, he arrested the appellant and took him to Inuka Police Station where they recorded statements.

9. PW3, Stephen Kalai, a Clinical Officer at Likoni Sub-County Hospital informed court that on 29.4.2021 at about 10.00 am, the complainant was taken to hospital on allegations of having been defiled on 27.4.2021 and that she had been defiled severally by the appellant. That when PW3 examined her, there was a whitish discharge from her genitalia, the hymen was torn with healing scar. PW3 said that he recommended laboratory tests for urinalysis and HIV, and filled the PRC Form which he produced at ExP4. He produced the treatment notes and laboratory results as ExP2. PW3 also filled the P3 Form in respect of the complainant and he concluded that the probable weapon was a blunt object. PW3 produced the P3 Form as ExP3.

10. PW4, SJN, said that the complainant was his sister while the appellant was their neighbour. PW4 testified that on 27.4.2021 at 5.00 pm, he had returned home from school when he heard noise from the house. He said that his mother was beating the complainant while asking where she had been. That the

complainant said that while on her way to the kiosk, she met the appellant who pushed her to a house and defiled her. That PW4 went to look for the suspect and took him home where the complainant positively identified him and they went to Inuka Police Station and reported. That the appellant was arrested, they recorded their statements and the following day the complainant was taken to hospital.

11. PW5, No. 101633 PC Hasiba Huka, attached at Inuka Police Station and the investigating officer herein said that on 28.4.2021 at about 8.00 am, he went through the OB when he noted a defilement case minuted to her for investigation. She said that she called the complainant's mother who went to the station with the complainant and she interrogated them. That the complainant told her that she was sent by her mother at around 5.00 pm to buy ginger when she met the appellant who took her to an unfinished house and forcefully had sexual intercourse with her. That PW5 then escorted the complainant to Likoni Sub-County Hospital where she was examined and a PRC and P3 forms were filled. She said that they then went back to the station and recorded their statement. PW5 positively identified the appellant in court.

Defence Case

12. The appellant, Ramadhan Mwidadi Tuva gave an unsworn evidence that Issa asked for shoes and trousers to attend a wedding and that they were to be returned after 2 days but Issa did not comply with what they had agreed on. That on the 4th day, the appellant went to ask for the shoes and trouser and Issa told him that he did not have any attire. That his mother got outside and asked the appellant why he was having an altercation with his child and that they threatened the appellant with consequences. The appellant said that after 3 days when he was in his house after work, he heard a knock on the door and when he went to open, he met Issa, Nyamvula and police officers. That when he asked what he had done, he was told that he would know later and that he was taken to the police station. That on 27.4.2021, fingerprints were taken and he was brought to court on 29.4.2021 and charged.

13. This appeal was canvassed by way of written submissions.

Appellant's Submissions

14. The appellant submitted that the evidence of the complainant that was taken is non-compliant with Section 19 of the *Oaths and Statutory Declarations Act* because the trial court did not conduct voire dire examination on the minor victim before proceeding to receive her evidence. The appellant stated that the trial court was duty bound under Section 19 of the Act to establish whether the complainant, being a child of tender age had the capacity to testify on oath. The appellant relied on the Court of Appeal case of *John Muiruri v Republic* (1983) KLR 445.

15. The appellant argues that he was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) and the prescribed penalty is imprisonment for not less than fifteen (15) years. However, the trial court did not state in its judgment the reason for enhancing the sentence from the stipulated 15 years to 20 years. The appellant submitted that where a penal law is worded with the prefix 'is liable to', the stated penalty is not to be construes to be a mandatory one, and that even in such cases the courts have the discretion to impose a lesser sentence than the one stated. The appellant cited the cases of *Kichajele s/o Ndamungu v Rep* (1949) EACA 64, *Opoya v Uganda* (1967) EA 752 and *Salim Kaingu v Rep.* HCCR App No. 36 of 2019.

16. The appellant stated that the sentence of 20 years imprisonment was harsh and excessive in the circumstances considering his youthful age whereby he was only 19 years old as at the time of the alleged offence, the penalty stipulated under Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006 and the fact that he was a first offender. The appellant submitted that he urged the court to consider the

time spent in remand custody but the same was not considered. The appellant relied on the case of *Abolfathi Mohamed*, Criminal Appeal No. 135 of 2016.

Analysis and Determination

17. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

18. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

i. Whether failure to conduct voire dire examination was fatal to the prosecution's case

ii. Whether the factor that the appellant was the first offender was considered and whether the appellant's age was considered during sentencing

iii. Whether the sentence was harsh and excessive in the circumstances and whether the time spent in remand custody as per Section 333(2) of the *CPC* was considered

Whether failure to conduct voire dire examination was fatal to the prosecution case.

19. Section 125 (1) of the *Evidence Act* states: -

> " All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause)".

20. Section 19 (1) of the *Oaths and Statutory Declarations Act* provides: -

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

21. In the case of *Samuel Warui Karimi v Republic* [2016] eKLR it was held: -

> " ...voire dire is an examination that serves two purposes; one, it is a test of the competency of the witness to give evidence and two, a means of testing whether the witness understands the solemnity of taking an oath. Thus under the *Evidence Act*, the test is one of competency

as the court is supposed to consider whether the child witness is developmentally competent to comprehend the questions put to him or her and to offer reliable testimony in criminal proceedings. It, therefore, follows if the child is not competent to comprehend the evidence, they cannot also give sworn evidence.

.....

This explains why the Courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the *Children's Act* has remained a guide in regard to criminal responsibility."

22. From the charge sheet, the complainant was aged 16 years at the time she was defiled having been born on 17.4.2005 as per ExP1 certificate of birth produced by PW2. By all standards, she was not a child of tender years and was therefore competent to testify without voire dire examination. There was nothing to prevent her from understanding the questions put to her or from giving rational answers to those questions. This ground cannot be sustained.

Whether the time spent in remand custody as per Section 333(2) of the CPC was considered

23. The appellant was arraigned in court on 30.4.2021 and granted bond of Kshs. 300,000 with a surety. But it appears he did not manage to get security and therefore his trial proceeded while he was in remand custody up to 18.11.2021 when he was convicted and sentenced to serve 20 years imprisonment. The appellant was therefore entitled under Section 333(2) of the Criminal Procedure Code for a discount of 6 months and 18 days being the period he was in custody from his sentence. The trial magistrate did not comply with this mandatory provision.

Whether the appellant's mitigation as a young adult and a first offender was considered and whether the sentence was harsh and excessive in the circumstances

24. In the case of *Philip Mueke Maingi & 5 Others v Republic*, Petition No. E017 of 2021 where Odunga, J. (as he then was) quoted with approval the holding in the case *R v Scott* (2005) NSWCCA 152 where Howie J Grove and Barr JJ stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..."

25. It was further held in *Philip Mueke Maingi & 5 Others v Republic* (*supra*)

> " 118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:
>
> 1) To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

25. In this case, the appellant was charged with the offence under Section 8(1) as read with Section 8(4) under the *Sexual Offences Act* which provides: -

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

26. The trial magistrate did not explain why she found it fit to go beyond the minimum sentence provided for in consideration of the emerging jurisprudence as to unconstitutionality of the minimum and maximum sentences. Considering that the appellant was a first offender and a young adult of an apparent age of 21 years as shown in the charge sheet and who was likely to be in a Romeo and Juliet relationship with the complainant, the trial magistrate ought to have considered the circumstances of the case and meted out an appropriate and commensurate punishment. 20 years instead of the minimum 15 years for the appellant who is a first offender as a young adult was harsh and excessive in the circumstances.

27. The complainant who was 16 years at the time when this offence is alleged to have occurred had been sent to the shop by the mother, PW2 and when she overstayed at the shop on return she was asked where she had been, she said that she had been at the kiosk but she did not have what she had been sent to buy. PW2 accompanied the complainant to the shop and she confirmed that the complainant had not been there. It is when PW2 learnt that the complainant was lying that she went with her to her sister's place and it is upon being beaten that she revealed that she had had sex with the appellant. She allegedly found the appellant seated outside an unfinished building and when he called her she went to the said unfinished building where she allegedly had her tights and panty removed and he had intercourse with her.

28. There is no evidence that any force was used on her apart from the finding that she had been defiled. Had the complainant not been beaten, she was not going to reveal that she had had sexual intercourse with the appellant. According to PW3, the Clinical Officer at Likoni Sub-County Hospital, the complainant said it was not the first time he had had sexual intercourse with her. He had defiled her before and warned her not to tell anyone.

29. In consideration of the circumstances of this case and the fact that the appellant has so far been in custody for 2 years and 9 months, his sentence is hereby set aside and substituted with 3 years on probation during which time he will be required to attend the Assistant Chief's Barazas at least once in a month and sensitize members of the public about the negative effects of the vice of gender and sexual based violence in the community. At the end of the supervision period, a report shall be filed in court confirming compliance and impact.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 8TH DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE