Kimani v Republic (Criminal Appeal E034 of 2022)
[2024] KEHC 2329 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2329 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E034 OF 2022

HM NYAGA, J

MARCH 5, 2024

BETWEEN

WILSON MWANGI KIMANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Conviction and Sentence in Criminal Case No. Molo Chief Magistrate's Court Criminal SO No. 54 of 2020 (Republic vs Wilson Mwangi Kimani) which was delivered on the 18th May, 2022 by Hon. E. Soita – RM)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrate's Court at Molo and was charged as follows;

   Principal Count

   Defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

   The particulars were that on 10th May, 2020 at Mlima Mitatu, Elburgon, in Molo Sub-County within Nakuru County he intentionally caused his penis to penetrate the vagina of A. W., a child aged seven (7) years.

   Alternative Count

   Committing an Indecent Act with a child Contrary to Section 11(1) of the *Sexual Offences Act*.

   The particulars of this count were that on 10th May 2020 at Mlima Mitatu, Elburgon in Molo Sub-County, within Nakuru Sub-County he intentionally touched the vagina of A. W. a child aged 7 years, using his penis.

2. The Appellant denied the charges and after full trial, the accused was found guilty, convicted and sentenced to life imprisonment.

3. Aggrieved by both the conviction and sentence, the Appellant preferred this Appeal through his Grounds of Appeal dated 29th September, 2023. He set out the following grounds;

    1. That the Learned Magistrate erred both in law and fact by finding that the offence of defilement was committed yet the evidences relied on is self-defeating.

    2. That the Learned Magistrate erred both in law and fact in failing to consider that the prosecution witness evidence was riddled with contradictions and thus totally insufficient to support a conviction.

    3. That the Learned Magistrate erred in placing on the accused the duty or burden of establishing his own innocence.

    4. That the Learned Magistrate erred both in law and fact in failing to consider that key witnesses mention were never produced nor called to testify during the trial.

    5. That the Learned Magistrate finally faulted both in points of law and fact when he rejected the appellant's defence of alibi without cogent reasons as provided by Section 169(1) of the Criminal Procedure Code yet the same was remarkably comprehensive in casting considerable doubt to the strength of case.

    6. That the prosecution failed to prove its case to the required standard of beyond reasonable doubt.

    7. That the sentence imposed was excessive in the circumstance.

4. When the Appeal came up for directions, the court directed the parties to file Written Submissions.

5. The Appellant submitted that in a charge of defilement the following ingredients must be established;-

    a. That there was penetration of the genital organ of a person into the genital organ of another person.

    b. That the person who caused the penetration is properly identified.

    c. The age of the child is proved to establish the offence and also ascertain the punishment applicable.

6. To buttress these Submissions counsel for the Appellant cited the case of George Opondo Olunga vs Republic, (2016) eKLR.

7. Counsel for the Appellant submitted that the identification of the Appellant was questionable. That according to PW2, he saw the Appellant being chased away by Mama Brayo at 7:00 p.m. and it was dark.

8. On identification, it was further submitted that DW3, the village elder testified that when she was called by Mama Brayo, the victim stated that it was Joseph or Baba Maina and not the Appellant who had defiled her and gave her Kshs. 10/=.

9. It was also submitted that the evidence of DW2 was that he was with the Appellant at the time the alleged offence took place. On this question of identification, the Appellant cited the decision in Wamunga vs Republic (1989) KLR 426 where it was held;-

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely male it the basis of conviction."

10. Also cited were the cases of;

    a. Nzaro vs Republic (1991) KLR 212

    b. Kiarie vs Republic (1984) KLR 739

    c. Republic vs Turnbull (1973) 3ALL ER 549 where the court held thus;

> " .....The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friend are sometimes made."

11. To the Appellant, the alleged offence was committed at night, at 7:00 p.m. That the only source of light was moonlight if any. That the intensity of the light was not brought to the attention of the court and therefore the evidence of identification was not enough to warrant a conviction.

12. The Appellant further submitted that the element of penetration was not proven. That the only way to prove penetration is through medical examination. It was submitted that the evidence of the doctor (PW4) did not mention the hymen was broken. The Appellant referred the court to the decision in Mohammed Omar Mohammed vs Republic (Garissa High Court Criminal Appeal No. 2 of 2020), where the court is said to have held that under normal circumstances where defilement occurs they hymen is broken, one would expect the vagina to be freshly torn, flow of blood and difficulty in walking. That such evidence was not led in this case. Also cited was the case of Titus Karani vs Republic (2021) eKLR.

13. The Appellant further submitted that although Mama Brayo, who was mentioned by witnesses as the one who saw the Appellant in the Act, she was never called as a witness.

14. It was also submitted that although PW5 mentioned Kshs. 50/= having been given to PW1 by the Appellant, PW1 did not mention any form of enticement.

15. The Appellant also did question why PW4 went to lodge the complaint with the police, yet she was absent when the incident happened. That there was clearly a grudge as stated by PW2.

16. The Appellant further submitted that the Learned Magistrate rejected his defence without giving any cogent reason as required under Section 169 of the Criminal Procedure Code.

17. That there is no burden of proof for an accused to prove his alibi and that if there is a reasonable possibility that the accused's alibi could be true, then the prosecution has the onus to discharge the burden of proof and that an accused must be given the benefit of doubt. To buttress this point, counsel cited the case of Kiarie vs Republic (1984) KLR where it was held 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 sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable..."

18. Also cited, to support this argument was Victor Mwendwa Mulinge vs Republic (2014) eKLR and Erick Otieno Meda vs Republic [2019] eKLR.

19. The Appellant thus prayed that the Appeal be allowed as prayed.

20. The Respondent filed its Written Submissions dated 16th November, 2023.

21. The Respondent restated the duty of the Appellate Court as set out in Gitobu Imanyara & 2 Others vs AG [2016] eKLR.

22. The Respondent also concurred with the Appellant on the ingredients to be proven in an offence of defilement, as set out in George Opondo Olunga vs Republic (supra)

23. On the question of identification, the Respondent submitted that this was sufficiently proven as the victim knew the Appellant very well as he was a neighbour. She knew him by name, the reason why she had no difficulty responding to the Appellant when he called her, after finding her at their gate.

24. The Respondent further argued that PW3's evidence was that she found the Appellant lying flat on the ground with his trouser lowered with the victim nearby with her clothes off. That further PW2, the mother to the victim, testified that when she went to look for her daughter, she saw the Appellant running away, and went to his house, where he locked himself inside.

25. It is also submitted that the incident took place between 6 and 7 p.m. and it was not dark. All this according to the Respondent show that the Appellant was positively identified.

26. The Respondent further submitted that, even without corroboration, the court could still rely on Section 124 of the *Evidence Act* in convicting the Appellant. Cited was the case of Mohammed vs Republic [2006] 2 KLR 138.

27. On penetration, the Respondent submitted that this was proven by the evidence of the victim, who described what the Appellant did to her on the material day. That this evidence was corroborated by the medical report produced by PW6. That although there was no reference to the hymen, there was clear evidence of penetration. That even partial penetration suffices to prove the ingredient.

28. To support these submissions, reference was made to the decision in Erick Onyango Ondeng vs Republic [2014] eKLR where it was held that;

> " In sexual offences, the slightest penetration of a female sex organ is sufficient to constitute the offence. It is not necessary that hymen must be raptured."

29. On the age of the victim, the Respondent submitted that the same was duly proven as required by the law with the production of an Age Assessment Report and the evidence of the victim's mother. Counsel cited the following cases that dealt with the issue of age of victim;

    a. Francis Omuroni vs Uganda Criminal Appeal No. 2 of 2000 (UR)

    b. Edwin Nyambogo Onsongo vs Republic (2016) eKLR

30. The Respondent further submitted that contrary to the Appellant's submissions, the evidence of the prosecution was credible, reliable and sufficient. That there were no contradictions as alleged. That PW2 and PW3 testified and pointed to the Appellant as the perpetrator of the offence.

31. On appellant's alibi, the Respondent submitted that although it was given without notice, the same could not see the light of day as the Appellant stated he was alone that day, but then called DW2 who claimed that they were together that day. That in any case, the alibi by the Appellant was displaced by the evidence of PW1 and PW2 and PW3 who placed him at the scene.

32. The Respondent also submitted that the Judgment by the Learned Magistrate complied with Section 169 of the Criminal Procedure Code and duly considered the defence raised by the Appellant.

33. The Respondent urged the court to dismiss the Appeal.

Analysis and Determination

34. As a first Appellate Court, the duty imposed upon it is as was set out in Okeno vs Republic(1972) EA 32 as follows;

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

35. In analyzing the evidence. I will briefly look at the evidence adduced in the lower court, and the defence raised.

36. PW 1 was the complainant. She stated that on the material day her mother had sent her to the shop to buy sugar and doughnuts. On the way back she met the appellant who was at their gate. The appellant took the items she had told her that he would give her Ksh. 50/-. He then led her to the shamba belonging to Mama Brayo which had maize. The appellant then removed her inner pants, then his, and then slept on top of her and placed his thing into her thing.

37. PW2 was the complainat's mother. She told the court that the girl was 7 years, having been born in May, 2012. She stated that she had sent the complainant to the shop at around 5.00 p.m. and the girl did not return on time so she went out to look for her. She met Mama Brayo who told her that something terrible had occurred to her child. Mama Brayo narrated to her what she had seen, in her maize farm. Upon going to the farm, she spotted the appellant fleeing and he ran to his house and locked himself

inside. On examining her child she noted that she was walking with difficulty. She was advised not to bath the child and she took her to the police station then to the hospital.

38. PW3 was Vininck Nyanchama. She stated that on the material day at around 6.00 pm, she was seeing off her friend. On the way back, she spotted the complainant on her farm. When she approached her she saw the appellant, who was lying on the ground next to the girl. Both stood up and the appellant dressed up and fled from the scene, towards his house. She pursued the appellant and in the process met the complainant's mother to whom she narrated what had transpired.

39. PW 4 was Nancy Mugomo, the complainant's grandmother. She narrated how the news were relayed to her. She went and assisted in taking the victim to the hospital.

40. Dr. George Biketi was PW5 (erroneously noted as PW4). He confirmed that the complainant was seen at Elburgon Sub-County Hospital on allegations of defilement. He produced the medical notes for the complainant.

41. In his defence, the accused stated that on the material day he was at work the whole day. When he went home at 7.00 pm, he was with one Karimu. He met a lady who mentioned some children and he was told to wait until morning. On the next day he learnt that there was child who had been defiled. He went to work but was arrested on 14th May 2020. He stated that he had been in a relationship for 3 weeks with the complainant's mother (PW2) but she had accused him of wasting her time. He accused her of having many men, so he left her. He averred that as a result, there was hatred between him and PW 2 conceded that he had known the complainant for a long time.

42. Amos Njoroge Kimani was DW2. He is a brother to the Appellant. He stated that on the material day he was with appellant and they went to work at Elburgon until around 17:00 hours. They then went home, where they reached at 20:00 hours. He learnt of the allegations from his sister.

43. DW 3 was Alice Chepkonga. She testified that on the material day, at around 18:00 hours, she was called by Mama Brian so that they could go and see a child who had been defiled. That the child said that she was defiled by Joseph and not the appellant.

Issues for Determination

44. Having summarized the evidence, then it is the duty of the court to deal with it and determine if it was sufficient to warrant a conviction.

45. On identification, the Appellant's submission is that the offence occurred at 7:00 p.m. and it was dark. The Respondent sated that the offence took place at around 6:00 to 7:00 p.m. and it was not dark as alleged.

46. PW2 stated that she sent her daughter to the shop at around 5:00 p.m by 6:30 p.m. she had not returned so she went out to look for her. She met Mama Brayo who told her something bad had happened to her daughter.

47. PW3 stated that she was seeing off her friend at around 6:00 p.m. On the way back she saw the victim in her shamba upon approaching the shamba she spotted the Appellant who ran towards his house.

48. PW4 said that she received a call around 6:00 p.m. and learnt of the incident.

49. From this evidence, it is clear that the incident took place well before 7:00 p.m. It was around 6:00 p.m. For PW3 to have spotted the victim in the middle of her farm, then it was definitely during daylight. I thus find that the conditions were ideal for identification.

50. Further the three (3) witnesses knew the Appellant who was a neighbour. There is no possibility that there was mistaken identity.

51. The Appellant submitted that the victim had mentioned someone else not him. Looking at the evidence of the victim, there is no doubt that she was referring to the Appellant, who she identified as Mwangi.

52. Having looked at the evidence, there is no doubt that the accused was positively identified.

53. On the question of penetration, I concur with the Respondent that penetration in law is not synonymous with the rapture of the hymen. Section 2 of the Act describes penetration as;-

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

54. Therefore even the slightest penetration, even without causing any visible injury suffices as penetration. On this, I fully concur with the finding of the court in Erick Onyango Odeng vs Republic (supra).

55. The Medical Report produced by Dr. Biketi (PW6) clearly shows that there were injuries that were consistent with penetration.

Therefore the Appellant's arguments on this point cannot hold at all.

56. On the age of the victim, this was well established by the Age Assessment Report. The victim's mother also gave the age of her child.

57. Proof of age, while being a key ingredient in proving the offence of Defilement, can be proven by various ways. The authority of Edwin Nyambogo Osango (supra) and Francis Omwari vs Uganda (supra) clearly support this view.

58. It is my finding that the age of the victim was duly proved.

59. The Appellant pointed to alleged contradictions and gaps in the prosecution case. He submits that Mama Brayo, who was mentioned by PW2, never came to testify.

60. The evidence on record is that it was PW3 who saw the Appellant in the shamba, with the victim. It is clear that PW3 and Mama Brayo are one and the same person, who owned the shamba where the Appellant was spotted. Thus, I don't see any gaps in the evidence as alleged..

61. The Appellant claims that his alibi was not considered by the court.

62. A look at paragraph 17 of the Judgment sheds light on the issue. The court stated:-

> " The accused during his defence stated that he was at work when the incident occurred, this issue was never raised during the prosecution case hence an afterthought. DW2 for the defence did state that he was with the accused person at work, with the accused person not even mentioning the same issue if he was with someone who is in fact, his brother at work."

63. Clearly, the trial magistrate duly considered the defence of the accused and his alibi. He discounted it an as afterthought and gave his reasons. That limb of his appeal fails.

64. The Appellant further stated that PW5 mentioned Kshs. 50/= which was not mentioned by the victim.

65. A look at the testimony of the victim at page 5 of the proceedings clearly shows that the victim testified that Mwangi had told her he would give her Kshs. 50/=. Thus, the evidence of PW5 is consistent with that of the victim.

66. After considering the evidence, the Grounds of Appeal, the submissions for the Appellant and the State, I am of the view, just that trial magistrate, that the case against the Appellant was proven to the requisite standard in law.

67. Consequently, I find no merit in the Appeal and I dismiss it.

68. On sentence, the Appellant states that the same was excessive. No submissions were made on this point. However I will still address the same.

69. Following the recent developments in the law as a consequence of the decision in Francis Muruatetu and Others vs Republic [2017] eKLR mandatory sentences, even under Sexual Offences were found to be unconstitutional.

70. For instance, in Jared Koita Injiri vs Republic [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that

> " if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> " The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

71. In Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) it was held as follows;

> " Taking cue from the decision in Francis Karioko Muruatetu directed that 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."

72. Sentencing is a key ingredient of a trial process. It is the stage where an accused knows his fate, hence the need to have a proper consideration of all the material factors, both aggravating and mitigating.

73. The trial court proceeded to impose a life sentence on the appellant, after considering the age of the victim.

74. The most recent jurisprudence points to the meting out of determinate sentences by the courts rather than an indeterminate life sentence. A case in point is Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) where the Court of Appeal held that;

> "We note that the decisions of this court relied on by the appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. 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."

75. This does not mean that the court ought to take sexual offences lightly. Indeed, perpetrators of such acts against innocent children do not deserve an iota of mercy. The court was entitled to mete out a sentence it felt was justified.

76. The appellant is a grown man, who decided to have sex with a girl aged seven. He should not have expected a lenient sentence by the trial court.

77. After considering the circumstances of the offence, I set aside the life imprisonment and substitute it with a term of thirty (30) years imprisonment.

78. The appellant was out on bond during the trial so his sentence will commence from the date of his conviction by the trial court.

79. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF MARCH, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A Maureen

State counsel Okok

Appellant- present from Naivasha Maximum Prison.