Maina v Republic (Criminal Appeal E010 of 2020)
[2024] KEHC 3870 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E010 OF 2020

HM NYAGA, J

APRIL 18, 2024

BETWEEN

PATRICK MAINA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence by Hon. J.B. Kalo, Chief Magistrate in Nakuru Chief Magistrate's Court SO Case No. 279 of 2017 delivered on the 16{{^th}} November, 2020)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 19th November, 2017 at Flamingo Estate in Nakuru East District within Nakuru County he intentionally and unlawfully committed an act of inserting a male genital organ (Penis) into a female genital organ (Vagina) of N. W. N. a child aged 10 years which caused penetration.

2. 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*, the Particulars being that on 19th November, 2017 at Flamingo Estate in Nakuru East District within Nakuru county intentionally and unlawfully committed an indecent act with a child N. W. N. aged 10 years by touching her vagina.

3. The appellant was convicted on the alternative charge and sentenced to serve ten (10) years imprisonment.

4. Being dissatisfied with the said conviction and sentence, the appellant lodged an appeal based on the following grounds:-

    i. That the Learned Trial Magistrate erred in Law and fact by finding that there was evidence to support the charge of Defilement as set out in the charge sheet.

    ii. That the Learned Trial Magistrate erred in Law and fact by finding that the testimonies of prosecution witnesses were contradictory but nonetheless proceeded to rely on the same evidence to convict the Appellant.

    iii. That the Learned Trial Magistrate erred in Law and fact by not taking into consideration PW3's evidence and more especially in cross examination where he gave evidence to the fact that the P3 form did not indicate injuries and could not be linked to events of the date of the alleged incidence.

    iv. That the Learned Trial Magistrate erred in Law and fact by failing to take into consideration the evidence adduced by PW3 who admitted that there were no findings by the doctor to come to any sort of conclusion.

    v. That the Learned Trial Magistrate erred in Law and fact by ignoring the legal principle governing the circumstantial evidence and when to convict on the basis of such evidence.

    vi. The Conviction was against the weight of the evidence adduced.

5. Only the Appellant filed his submissions.

Appellants' Submissions

6. With respect to grounds one, two and three of the Memorandum of Appeal, the Appellant submitted that the evidence of PW1 and PW2 was contradictory in that PW1 stated that she was playing outside whereas PW2 stated that she decided to go to church at Philadephia to request the caretaker to let her children stay at the church, and that PW1 stated that she met PW2 at Kanu while PW2 stated that she met her on the road.

7. He submitted that the evidence of the above witnesses related to past events that occurred before the alleged incident herein.

8. He stated that the evidence of PW1, 2, 3 and 4 were uncorroborated and as such doubtful.

9. It was his submissions that the evidence of PW3 who was a professional doctor did not support the victim's case.

10. In regards to grounds 4 and 5 of the Appeal, the Appellant submitted that the evidence of PW2 revealed that his arrest was an afterthought because it took long before the same was effected.

11. He also posited that his defence was not considered and urged this court to consider it and to set him free.

Analysis and Determination

12. I have considered the appeal and submissions by the appellant. I have also read the record of the trial court and the impugned judgment.

13. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same 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. I will summarize the evidence on record.

Prosecution's Case

15. PW1 was the victim. After a brief voire dire examination, the court formed the view that the victim comprehended the meaning of an oath and could therefore tender sworn evidence.

16. She testified that on the material date her mother had asked her to look after the baby and went to work. She went to play outside behind the house. While playing outside, her mother came back and asked her where the child was and she went for the baby. Her mother then enquired why she left the baby to go and play and because she feared she would beat her, she went outside the gate and sat at the Verandah of Kamwana's shop. She said while there the accused came and asked what she was doing and gave her bananas which she ate. She stated that thereafter the accused asked her to accompany him to his house so that he could give her sweets. She agreed and when they got into the accused's house, the accused locked the door and took her to bed. She said the accused removed her clothes and he removed "his thing to susu and inserted it in her thing that I use to susu" and that she felt pain. She stated that the accused then escorted her near Kanu Street. She met her mother there. She said her mother asked why she was walking improperly and she told her that something bad had happened to her and they went home. That the next day they went to Bondeni Police station and they were referred to the hospital where she was examined. She said they were issued with a P3 form and they went back to the police station. The police asked her if she knew where the accused's house was and she said yes. At night they went to the accused house and he was arrested. She said susu is the place she uses to urinate and that the accused inserted his susu in her susu once. She stated that she knew the accused physically as he used to pass by their home but did not know his name. It was her testimony that she had seen the accused twice and identified him before court.

17. In cross examination, she said Kamwana saw her sitting outside the shop and that there were other children at the shop. She said she did not know the accused's house prior the incident herein. She said the accused's neighbour was present when the accused took her to his house. She did not know the accused Neighbour's name. She said that her father did bad manners to her once while she was sleeping. That he lifted her dress and inserted his susu in her susu and her mother came and saw him doing bad things to her. She said when her mother queried what he was doing, her father threated her with a knife and she went to sleep. She said in the morning she took a shower and they waited for her father to leave the house then they reported the incident at Central Police station and her father was arrested. She said the next day her father lied to the police that he was going to reconcile with her mother and take good care of her and he was released. She said her father bought a knife and panga and started looking for them and they hid in the neighbour's house. Thereafter she, her mother and brother went to women crisis which takes care of people with problems and stayed there for two years.

18. In re-examination, she stated that her father did bad things to her in 2016 while the accused did the same to her in 2017.

19. PW2 was Rahab Nyokabi Wachira, the Victim's mother. She testified that on 19.11.2017 at 4 pm she got home and PW1 and her brother Tom went to play outside. After 30 minutes she decided to go to the church at Philadelphia to ask the caretaker to let her children stay at the church. She said before leaving she asked Tom to call PW1 to come to the house but could not find her. She went to the church and upon returning at 7pm, PW1 had not returned. She asked her friends whether they had seen her

but they said they had not. She went to look for her at Philadephia but she did not find her. She said she met her friend Mama Lilian who also told her she had not seen PW1and they went to Central Police Station. Upon reaching there, they were referred to Bondeni Police station where they reported the incident. She said that while they were on their way home, she saw PW1 on the road. She asked her where she had been and PW1 informed her that a man found her at Kamwana's shop and they went to his house. She said she described the man as tall, had worn a leather jacket and had a head like "this". She said PW1 said she knew that man physically but not by the name. They went to Philadelphia where PW1 narrated to the caretaker and the women at the centre what she had told her. She said PW1 had told her that the man placed her on the bed, removed her clothes and put his thing into her thing. She stated that upon requesting PW1 to show her the accused's house, PW1 took her there and pointed at the house but there was no one. She said thereafter she went and reported to the police that PW1 had identified the house she had been taken to. She testified that after two weeks she and PW1 went to the said house and found the man in the house. She called the police who arrived at around 10 pm. She said the accused opened the door and PW1 identified him as the assailant, and he was arrested and taken to Bondeni police station.

20. She said PW1 was born in 2006. She said she knew the accused by appearance only and she had known him for 7 months.

21. In cross examination, she stated that there was no identification parade conducted at the Police Station.

22. PW3 was Sateph Onyango. He testified that examination conducted by DR. Wangechi on the victim showed that everything was normal except an old torn hymen. He produced P3 and PRC form as Exhibits no.1 and 2 respectively.

23. On cross examination, he stated that he could not say that the old torn hymen related to the incident herein and that there was nothing either in the P3 or the PRC form that could be linked to the incident of 19.11.2017.

24. PW4 was PC Lilian Kamau from Bondeni Police Station. She testified that the investigation was conducted by PC vera who was on transfer. She stated that she briefed her that PW1 & 2 reported that PW1 had been defiled by a person known to her. She confirmed that PW2 reported about the missing of the minor at their station vide OB 42/19/11/2017. She said the accused was arrested on 8.12. 2017.She produced PW1's Birth certificate as Exhibit no. 4. On cross examination, she stated that according to the medical history, PW1 had been defiled thrice. She said the first defilement was in 2015 by her foster father, second one was in October 2017 by a stranger while the third one was on 19.11.2017. She did not have records of any steps undertaken regarding the two previous defilements. She denied that this case was being used as a cover up by PW2 for defilement that occurred in October 2017.

Defence Case

25 DWI was Patrick Maina, the Appellant herein. He said on 19.11.2017 he went to full gospel church in company of his friend Karanja until 1 pm. Thereafter they went to Karanja's house and later to Dundori Market. He said at around 6 pm they arrived in Nakuru and he went home, watched TV and slept. That at around 10 pm the police and PW1 went to his house, and PW1 identified him as the assailant and he was arrested.

26. Having summarized the evidence, I will now determine whether the trial court erred in convicting the appellant for the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

27. This being a case for defilement, the prosecution was duty bound to prove its ingredients. In the case of George Opondo Olunga vs Republic [2016] eKLR, it was established that the ingredients of an offence of defilement are; the age of the victim, penetration and identification or recognition of the offender.

28. In this case, the age of the minor and the issue of identification have not been challenged in this appeal. The complainant's evidence was that she was 10 years old. PW4 produced her birth certificate which shows that she was born on 2nd June, 2006, thus the complainant at the time of commission of the alleged offence was 11 years old.

29. In regard to identification, the minor testified that she knew the accused physically and not by name. She stated that she had seen him twice. PW2 also knew the Appellant by appearance and she had known him for 7 months. The Appellant on his part disputed knowing both PW1 and PW2. The complainant stated that the accused gave her bananas before they went to his house where she was allegedly defiled. The appellant thereafter escorted her up to Kanu street then went back home. After the incident, the minor was able to positively identify the accused and his house prior his arrest. The trial court found that the accused and the minor spent considerable time together and the Appellant's evidence placed him at the scene of the crime. The trial magistrate did not find any reason to doubt the evidence of the Minor. I am of the same view. The minor's evidence in this regard was watertight and there is no plausible ground to doubt her.

30. The next element is proving of penetration. 'Penetration' is a term of art and is defined under section 2 of the Act to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

31. The main evidence ordinarily relied by the courts in defilement matters in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case, since the complainant was a minor, the evidence of the clinical officer is key so as to corroborate such testimonies. PW3 who produced the P3 form which was filled by DR. Wangechi testified that upon examination of the minor an old torn hymen was noted. The minor was examined a day after the incident and medical evidence herein did not indicate that her hymen was freshly broken.

32. It is my finding that although the breaking of the hymen could not be attributed to the instant offence, it did not rule out the act of penetration. I have considered circumstances of this case as shown by the court record. The evidence by the victim was that the respondent actually had sexual intercourse with her. The trial magistrate found that there was no evidence of penetration to constitute the offence of defilement but found that the evidence only proved the alternative charge of indecent act with a child.

33. "Penetration" in law, under section 2 of the *Sexual Offences Act*, would be proven even if there was only partial insertion of the appellant's genital organ into the victim's genital organ. It is not mandatory that the hymen be broken by the act complained of. I will cite two authorities to buttress this point.

34. In Mark Oiruri Mose vs R (2013) eKLR the Court of Appeal stated thus:

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"

35. Further, the same court, differently constituted, in the case of Erick Onyango Ondeng vs Republic (2014) eKLR in this respect noted: -

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

36. Clearly the trial magistrate fell into error when he found that there was no penetration to constitute the offence of defilement.

37. Having found the above I note that there was no appeal by the State against that decision so the conviction for the offence of indecent act with a child remains.

38. I will now proceed to determine the fundamental issue of whether the alternative charge herein was proved.

39. Indecent Act is defined in the --*Sexual Offences Act* as follows:

> " Indecent act' means an unlawful intentional act which causes-
>
> (a)Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b)Exposure or display of any pornographic material to any person against his or her will."

40. It should be noted that courts are not impeded by requirements of corroboration if it is satisfied that the minor is truthful. This position was reaffirmed in the case of JWA vs Republic [2014] eKLR where the Court of Appeal observed: -

> " We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

41. The trial court after conducting a voire dire was satisfied that PW1 evidence was tenable, which position I concur with.

42. The minor was categorical on what transpired on the material day. She was clear that the Appellant was the one who defiled her and she positively identified him to the police prior his arrest and further identified him at the dock. Based on the evidence tendered, the trial court rightly convicted the appellant but erred in doing so on the alternative charge. Had there been a cross appeal by the state against the said finding I would have set aside that conviction and convicted the appellant on the principal count of defilement. He must consider himself fortunate to have been convicted on that lesser count when the evidence clearly led to the principal count.

43. For the foregoing reasons, I find that the appeal on conviction lacks merit and is hereby dismissed. The conviction is upheld.

44. The Appellant also prayed that his sentence be set aside. He neither advanced any reasons for the same nor submitted on it.

45. The penalty for indecent act with a child under section 11(1) of the *Sexual Offences Act* is an imprisonment term for not less than 10 years as follows:

> " 11.
>
> (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

46. The Appellant was a first time offender. In mitigation he stated: -

> " I did not commit the offence. I pray to be released."

47. Before he was sentenced the trial court called for his presentence report. According to the Presentence Report the Appellant is 44 years old, single and a first time offender. He vehemently denied committing the offence. The victim was affected psychologically by the act committed to her and she dropped academically.

48. The trial court in sentencing the Appellant stated as follows: -

> " The court has considered the nature of the offence the accused has been convicted of and his previous records which show he is a first offender. The Applicable penalty and the contents of the presentence report. From the probation officer's observation, the victim has been adversely affected by the accused's actions and her family is apprehensive about the accused serving a non-custodial sentence. The court is of the view that a custodial sentence is necessary. The accused is sentenced to 10 years' imprisonment being the minimum sentence prescribed by the Law."

49. It is clear from the above, that the trial court considered the Appellant's mitigation but sentenced him as prescribed by the law.

50. There has been a lot of recent litigation over the so called mandatory sentences and those that provide for a minimum sentence.

51. The issue of mandatory sentences was addressed in Francis Karioko Muruatetu & others vs Republic (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

> " Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of *the Constitution*; an absolute right."

52. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

53. 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."

54. The Court of Appeal in Dismas Wafula Kilwake vs R [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

55. Odunga J(as he then was), in Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) 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."

56. In the case of Fappyton Mutuku Ngui vs Republic [2019] eKLR the court directed the trial court to rehear the Applicant's sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

57. The court in Hashon Bundi Gitonga vs Republic [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

58. In Samuel Achieng Alego vs Republic [2018] eKLR the court stated as follows;

> " It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of *the Constitution* as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances

as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

59. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the *Sexual Offences Act* takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

60. In the trial, the learned magistrate appears to have considered the issue and found no good grounds to mete out a sentence lower than the one prescribed by the law.

61. Sentencing is at the discretion of the trial court and as an appellant court, it important to restrain itself from interfering with a sentence meted by the court that conducted the trial and had the benefit of hearing the witnesses and the mitigation. This court can only do so if it is to find that the trial court proceeded on the wrong principles.

62. The Court of Appeal in Bernard Kimani Gacheru vs Republic [2002] eKLR stated that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

63. In this case I don't see any ground to hold that the court proceeded on the wrong principles. It took account of the circumstances. The appellant knew that the complainant was young child and he took advantage of her vulnerability. He enticed her to accompany him to his house by offering her bananas and promising to give her sweets which were purportedly in his house. The child was traumatised by the acts committed to her. The Appellant was not remorseful. I am thus reluctant to disturb the sentence.

64. In conclusion I find that the appeal lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF APRIL, 2024.

****

_____

H. M. NYAGA,

JUDGE

In the presence of;

Court Assistant Philip

State Counsel Ms Okok

Appellant present