Mokaya v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 4607 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4607 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E020 OF 2023

WA OKWANY, J

APRIL 11, 2024

BETWEEN

JEFTA MOKAYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Original Judgment in Nyamira CMCR (SO) Case No. 88 of 2020 in the Chief Magistrate's Court at Nyamira by Hon. W.C. Waswa, Resident Magistrate delivered on 23rd February 2022)

JUDGMENT

1. The Appellant herein 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. The particulars of the offence were that on the 6th day of November 2020 in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of ANA, (particulars withheld) a child aged 6 years.

2. He also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 6th day of November 2020 in Nyamira North Sub-County within Nyamira County, intentionally and unlawfully caused his penis to come into contact with the vagina of ANA, (particulars withheld) a child aged 6 years.

3. The Appellant pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of 6 witnesses in support of its case.

4. A summary of the prosecution's case was that the victim ANA (particulars withheld), was at home alone when the Appellant came to to buy scrap from her. The Appellant asked her to show him where the toilet was. She escorted him to the toilet where he undressed her, removed his trousers and defiled

her. The complainant's cousin, one Joel (PW5), found the Appellant in the act when he also went to use the toilet. Upon finding the Appellant in the act, PW5 screamed and called out for help from the complainant's grandmother MKO. (particulars withheld) (PW2) who was plucking tea in a nearby farm.

5. PW2 rushed to the scene where he met the Appellant at the gate. She found PW1 outside the house, having already left the toilet. PW1 informed her that the Appellant had defiled her. She later recorded her statement at Ekerenyo Police Station.

6. PW3, Philip Kigari, a village elder was called to the scene where he found an irate mob on the verge of beating the Appellant. He escorted the Appellant to the police station and positively identified him before court.

7. PW4, Faith Kwamboka, the Clinical Officer, examined the victim on 6th November 2020 and noted that her that her hymen was broken and that there was some blood discharging from her vagina. Puss cells were also seen. She concluded that there was penile sexual penetration which she found to be consistent with attempted defilement because the penetration was not complete. She produced the P3 Form (P.Exh1) and the Clinic Attendance Card (P.Exh2).

8. PW6, No. 75171 Sgt. Mengich from Ekerenyo Police Station testified on behalf of PC Mwende who was the investigating officer. She recorded witness statements and established that the victim had been defiled by the Appellant. PW6 produced the victim's birth notification form (P.Exh3) which indicated that she was born on 16th July 2014.

9. At the close of the Prosecution's case, the trial court found that the prosecution had established a prima facie case against the Appellant and found that he had a case to answer. When placed on his defence, the Appellant elected to give a sworn statement and did not call any witnesses.

The Defence Case

10. The Appellant (DW1) testified that he did not know the complainant. He explained that he was arrested on 11th November 2020 and taken to court where he was charged with the offence of defilement. He stated that the charges were false.

11. At the end of the case, the court found that the prosecution had proved its case against the Appellant who was consequently convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2). The Appellant was sentenced to serve life imprisonment.

12. The conviction and sentence precipitated the filing of the present appeal in which the Appellant listed the following grounds of appeal:

    1. That the learned Trial Magistrate erred in law and in fact by failing to observe that the right to a fair trial of the Appellant was grossly violated, denied and taken away without just cause in gross violation of the provisions of Article 50 (2) (g), (h) of *the Constitution* and Articles 25 (c) and 27.

    2. That the learned Trial Magistrate faulted both in law and in fact when he maliciously failed to note that the ingredients of the offence of defilement were not proved beyond reasonable doubt as required by the law of proof.

    3. That the sentence was of mandatory nature and the life imprisonment imposed on him took away and denied him his fundamental rights for fair trial and also denied the judicial officer the legitimate jurisdiction to exercise his/her discretion in sentencing which was unconstitutional,

unfair and in breach of Articles 27 (1) (2), 25 (c) of *the Constitution* and Sections 216, 329 of the Criminal Procedure Code, Cap 75.

4. That the learned trial magistrate erred both in law and fact when he overlooked and objected Appellant's defence without cogent reason yet the same was remarkably comprehensive in casting considerable doubts to the strength of the Prosecution case.

13. The Appeal was canvassed by written submissions which I have considered.

Analysis and Determination

14. I have considered the Record of Appeal and the parties' respective submissions. I find that the main issues for my determination are as follows: -

i. Whether the Appellant's right to legal representation was infringed.

ii. Whether the offence was proven to the required standard.

iii. Whether the sentence was harsh and excessive.

15. The duty of the first appellate court is to reconsider and reanalyse the evidence presented before the trial court with a view to arriving at its own independent conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See Okeno v R {1972} EA 32).

The Right to Legal Representation

16. The Appellant submitted that his right to legal representation was infringed as he was neither informed of the said right nor accorded legal representation by the state. The Respondent, on the other hand, argued that the failure to inform the Appellant of his right to representation was not fatal to the Appellant's case.

17. Article 50 of *the Constitution* provides for the right of an accused person as follows: -

50. Fair hearing

(2) Every accused person has the right to a 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;

18. My understanding of the above provision is that the right of an accused person to be assigned an advocate is not absolute and is only a requirement where substantial injustice may occur in the absence of such representation. In David Macharia Njoroge vs R (2011) eKLR the court held thus: -

> " State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."

19. In Karisa Chengo & 2 Others vs. R, Cr. Nos. 44, 45 & 76 of 2014, the court also stated: -

> "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." (Emphasis added)

20. In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation.

i. Proof to the required standards.

21. Section 8 of the *Sexual Offences Act* stipulates as follows: -

> 8. Defilement
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

22. The ingredients of the offence of defilement were outlined in the case of Dominic Kibet vs. R [2013] eKLR as follows: -

> "To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

23. Age is a critical factor in defilement cases because it informs the nature of punishment to be passed on a convicted person. (See Hadson Ali Mwachongo vs. Republic [2016] eKLR). The age of a victim may be proved through medical evidence or other cogent evidence. In Francis Omuroni -Versus- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held thus: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."

24. In the present case, the Prosecution presented the evidence of PW6, Sgt. Mengich, who produced the victim's Birth Notification (P.Exh3) which indicates that PW1 was born on 16th July 2014. The offence was committed on 6th November 2020. This means that the victim was 6 years old at the time in question. I therefore find that the ingredient of minority age of the victim was proved to the required standard.

25. On penetration, the Appellant argued that the same was not proved while the Respondent maintained that penetration was proved through both the oral and documentary evidence presented at the trial.

26. Section 2 of the *Sexual Offences Act* defines penetration as: -

'penetration' means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

27. The above definition clarifies that penetration does not have be complete for the defilement charge to stand as even partial insertion of the genitalia organs of a person into the genitals organs of another still amounts to penetration. In the present case, I note that PW4 alluded to the fact that penetration was not complete. My finding is that even partial insertion of the Appellant's genitalia into the victim's genitalia was sufficient to prove penetration. I am guided by the decision by the Court of Appeal in Erick Onyango Ondeng vs. Republic (2014) eKLR held thus: -

> " 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."

28. Penetration can be proved by the victim's sole testimony in accordance with Section 124 of the *Evidence Act* or the victim's testimony corroborated by the medical evidence. In this case, the Prosecution tendered the evidence of PW1, PW4 and PW5. PW1 testified as follows on the circumstances under which she was defiled: -

> " ..I showed him the toilet. I escorted him to the toilet. Upon arrival at the toilet, the accused removed his trouser. He also removed my innerwear. He carried me and 'akanifanyia tabia mbaya'….."

29. PW5, Joel testified as follows: -

> " ….The toilet was open. I found Abigael and a man. The man chased me away. I told my grandmother who screamed and people came. I found Abigael and the man standing close to each other. The man was removing Abigael's panty. I first saw Abigael. The accused and Abigael were facing each other. Abigael was to the wall and the accused next to the door. Abigael was shorter than the accused so I saw her well…"

30. The evidence of PW1 was corroborated by the medical evidence of PW4, the Clinical Officer, who examined the complainant and found that blood was discharging from the vagina, her hymen was broken and puss cells were also seen. I note that the findings of the clinical officer were also recorded in the P3 Form (P.Exh1).

31. I find that even though the victim's assailant may not have fully completed the heinous act of defilement, having been interrupted by PW5 who found him in the act, there was overwhelming evidence of partial penetration. This finding is fortified by the fact that the victim's hymen was broken and she was also bleeding from her vagina. I note that the victim explained, in very clear terms, how the Appellant removed his trouser and her panty before defiling her. From the totality of the evidence presented by the prosecution witnesses, it is clear that the ingredient of penetration was proved to the required standard.

32. Turning to the identification of the perpetrator of the offence, I note that PW5 literally caught the Appellant in the act of defiling the complainant. The incident occurred in broad daylight. The victim testified that the Appellant came to her house to buy scrap metal and that he lured her to the toilet where he defiled her. PW5 explained that he saw the Appellant in the toilet with the victim. He stated that he found the Appellant removing the victim's panty. I find that the testimonies of the victim and PW5 were consistent and remained unshaken during the cross-examination.

33. PW2, the victim's grandmother, testified that she rushed home upon hearing the alarm raised by PW5 and that she met with the Appellant at her gate. The Appellant was quick to tell her that he had not done anything to the complainant. There is no doubt in my mind that the Appellant was positively identified by the victim and PW5 who found him in the act of defiling the minor. I find that the evidence of PW1, PW2 and PW5, on the identification of the Appellant, was watertight and free from any error or mistake. To this Court, the appellant and no one else defiled the victim (PW1).

34. I have considered the Appellant's testimony in his defence and I note that it consisted of mere of denial of the offence that did not impeach the watertight evidence presented by the prosecution witnesses.

35. It is therefore my conclusion that the offence of defilement was proved beyond reasonable doubt. Consequently, I uphold the Appellant's conviction by the trial court.

Sentence

36. The offence of defilement under Section 8(2) attracts a mandatory sentence of life imprisonment. It is trite that sentencing is matter that lies at the discretion of the trial court. In this regard, an appellate court cannot interfere with the trial court's discretion, on sentencing, unless it is satisfied that the sentence was based on wrong principles or that it was excessive.

37. In Ogalo s/o Owoura (1954) 21 E A C A 270 the Court of Appeal for Eastern Africa stated that an appellate Court will only alter a sentence imposed by the trial Court if it is evident that it has acted on wrong principles or overlooked some material factor or if the sentence is manifestly excessive in view of the circumstances of the case.

38. In Bernard Kimani Gacheru vs Republic [2002] eKLR, the Court of Appeal held thus: -

> " 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 stated is shown to exist."

39. Taking a cue from the above cited cases, I find that it will not be in the place of this court to interfere with the life sentence that the trial court passed on the Appellant unless it is shown that the 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.

40. The issue which arises is whether the life sentence meted out on the Appellant herein was appropriate. I have considered the law and the mitigation presented by the Appellant during the trial. I am also alive to the fact that life sentence was declared unconstitutional in the recent decision by the Court of Appeal in Julius Kitsao Manyeso vs. R, Criminal Appeal No. 12 of 2021, where the Court of Appeal considered the decision by the European Court of Human Rights in Vinter and Others vs The United Kingdom (Application Nos. 66069/09, 130/10 and 3896/10 (2016) III ECHR 317 (9 July 2013) and held as follows: -

> "…..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 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……an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment…."

41. The Court, in the above cited case, reasoned that the imposition of a mandatory indefinite life sentence, denies a convict facing life imprisonment the opportunity to be heard in mitigation while convicts facing lesser sentences are granted the right to mitigate. This denial is unjustifiable discrimination, unfair and repugnant to the principle of equality as enshrined under Article 27 of *the Constitution*. The court further opined that an indeterminate life sentence is inhumane treatment that violates the right to dignity under Article 28 of *the Constitution*. 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.

42. The decision in Julius Kitsao Manyeso case (supra) followed the decision by the High Court in JMR v Republic [2022] eKLR where Ali Aroni J. (as she then was) determined that it is unconstitutional for juveniles to be held and sentenced to serve "at the pleasure of the President". The Court determined that such a sentence amounted to an indefinite imprisonment and ordered the immediate release of the Appellant.

43. The decisions in the above cited cases show that the prevailing legal position, on sentencing within our jurisdiction, is that mandatory indefinite sentences for juveniles and adults alike is unconstitutional.

44. Guided by the law and the decision in the above cited case, I find that the sentence passed by the trial court, even though legal, was not appropriate. This Court also appreciates the fact that sentences must not only be determinate but must also be commensurate to the gravity of the offence in question.

45. In the present case, the victim was not only a minor, but was a child of a tender age of 6 years. I also note that the Appellant did not express any remorse for his actions, during mitigation when he merely proposed that he be given a non-custodial sentence. My view is that the Appellant did not fully

appreciate the gravity of his actions. In R vs. Scott (2005) NS WCCA 152, Howie J. Grove and Barn JJ stated:

> " There is a fundamental and immutable principle of sentencing that the sentence imposed must ultimately reflect the seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..... one of the purposes of punishment is to ensure that an offender is adequately punished.... a further purpose of punishment is to denounce the conduct of the offender."

46. Having regard to the findings that I have made in this judgment, I find that the instant appeal is merited, albeit partly, only in respect to the indeterminate nature of the life sentence imposed on the Appellant. I however dismiss the appeal against the conviction.

47. Consequently, I hereby set aside the life sentence imposed on the Appellant and substitute it with 25 years' imprisonment. The sentence period shall begin to run from the date he was sentenced by the trial court and shall also factor in and deduct the period, if any, that the Appellant spent in custody while awaiting his trial.

48. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 11TH DAY OF APRIL 2024.

W. A. OKWANY

JUDGE