Mutai v Republic (Criminal Appeal E003 of 2023)
[2024] KEHC 3447 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E003 OF 2023

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

ALEX KIPKURUI MUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Kigen in Eldoret Law courts Cr. S.O No. 190 of 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. The particulars of the offence were that on 11th August, 2020, at around 1900hrs within Kakamega county, the appellant intentionally cause his genital organ (penis) to penetrate the genital organ (vagina) of one YI a child aged 9 years old.

2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were more less the same.

3. The Appellant was found guilty as charged, convicted and sentenced to serve life imprisonment. He was aggrieved with both conviction and sentencing after which he mounted the present appeal. The appeal is based on the amended grounds as follows:

    i. That the learned trial magistrate erred in both law and facts in failing to analyze the evidence on record thus arriving to a wrong conclusion and unjustified sentence.

    ii. That the learned trial magistrate erred in both law and facts by basing her judgment on medical report that was not conclusive and did not satisfy the provisions of law.

    iii. That the learned trial magistrate erred in both law and facts in failing to invoke the findings of petition No. E017 of 2021 at high court in Machakos by justice Odunga on maximum-

minimum mandatory sexual offences sentences and court's discretion on determining cases on individual mitigation circumstances.

iv. That the learned trial magistrate failed both in law and facts when she failed to grant the appellant herein a fair trial hence unsafe conviction.

v. That the learned trial magistrate erred in both law and facts when she failed to find that the prosecution was not proven to the required standards of the law.

4. This being the first appellate court, I am mandated to re-evaluate and analyse the evidence adduced in the trial court afresh for me to come up with an independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified. See Okeno vs. Republic [1972] E.A 32.

5. At the trial court, the prosecution marshalled 5 witnesses in support of their case. The complainant was unable to understand the meaning of giving evidence and as such she gave unsworn evidence. She testified that on the material day, her aunt had sent her to the shop, when the accused who is her relative called her to pick some sweets and as such she followed him to his house and while inside the house, he removed her trouser and T-shirt and proceeded to defile her after covering her mouth. It was her testimony that she felt a lot of pain when the accused inserted his penis into her vagina. The following day she reported to her aunt what had transpired and she was escorted to hospital.

6. PW2 was RM. She testified that she noticed the minor herein was walking with difficulty, she then inquired from her what had happened but she kept quiet and later at night she started crying that she was in pain and narrated what happened and the following day they took her to hospital.

7. PW3 HK testified and stated that the minor herein was his niece and that on 12.08.2020 PW2 who is her wife called him and informed him that the child was in pain and the following day they escorted her to hospital Seregeya where they were referred to MTRH, he thereafter made a report at the police station.

8. PW4 testified on behalf of Dr. Jesara who had since left the facility and on further studies, this is after satisfying to the court that she had previously worked with her and was conversant with her handwriting and signature. It was her evidence that the minor was seen on 14.08.2020 where she narrated the events leading to the incident. On examination, the neck and limbs were normal. She had hymeneal remnants, Erythema of the Labia Minora bilaterally, had abrasions of the posterior fourchettes and further that high vaginal swab revealed numerous epithelial cells. The doctor concluded that the minor had been defiled.

9. PW5 testified and stated that he taken up the matter from the I.O Pc Anguko who had since been transferred, he stated that the minor was 9 years old and produced a dedication card P-Exh No. 2 which showed that the minor was born on 04.08.2011.

10. From the above prosecution evidence, the trial court concluded that the prosecution established a prima facie case and proceeded to put the Appellant on his defence.

11. The accused person gave unsworn testimony and denied committing the said offence and stated that on 10th, prior to the incident, he was working at Lydia's home and lived in the house of Oloo who is the ex-husband of one of his aunts. It was his evidence that the said aunty was not happy that he was working for the said Oloo and that the said aunt had threatened her.

12. The appellant filed his written submissions, which I have perused through and considered the same in coming up with a determination.

Findings And Determination.

13. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court. The issues for determination in this appeal are:

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether or not the sentence was excessive.

Elements of offence of defilement

14. 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* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement

    8 (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."

15. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant.

16. In the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 it was stated that:

    > " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

17. What does the evidence portend?

Age of the complainant

18. The age of the complainant is one of the critical ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

19. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of Hillary Nyongesa Vs Republic (Eldoret Criminal Appeal No.123 of 2000) stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

20. Therefore, in a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child, and ii) the age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

21. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

22. PW5 testified that the minor was a minor as she was aged 9 years old as at the time and in this respect. He then produced PW1's minor's dedication card, indicating that the minor was 9 years old. The trial court rightly found that the complainant was 9 years old at the time the charges were being leveled against the accused person.

23. I find the age of the victim was 9 years old.

Penetration

Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

24. In dealing with this issue, I shall revert to the record. The complainant in her testimony took the court through the events leading to the incident. She stated that on the material day, her aunt had sent her to the shop, when the accused who is her relative called her to pick some sweets and as such she followed him to his house and while inside the house, he removed her trouser and T-shirt and proceeded to defile her after covering her mouth. It was her testimony that she felt a lot of pain when the accused inserted his penis into her vagina. The following day she reported to her aunt what had transpired and she was escorted to hospital.

25. The findings of the medical officer whose report was produced by PW4 support the complaint's testimony that she was defiled. On examination, She had hymeneal remnants, Erythema of the Labia Minora bilaterally, had abrasions of the posterior fourchettes and further that high vaginal swab revealed numerous epithelial cells. This is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

Was the appellant the perpetrator?

26. The Appellant was a person known to the complainant. She testified that the accused was her relative. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia.

27. It is therefore the finding of this court that the appellant was rightly identified as the perpetrator.

28. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

29. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

30. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

31. What is the appropriate sentence? Section 8 (2) of the *Sexual Offences Act* to Convict provides as follows:

> " 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."

32. In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

> " (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

33. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

34. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

v. Community protection: to protect the community by incapacitating the offender.

vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society.

35. In order to determine whether a mandatory life imprisonment as per the Kenyan Constitution is unconstitutional one has delve into Art. 19, 20, 22, 24, 25 26, 27, 28, 29, & 50 of *the Constitution*. The analysis of these relevant provisions when critically analyzed as pertaining mandatory life imprisonment such a statutory provisions prima-facie are inconsistent with *the constitution*. The sentence of life imprisonment is thus a discretionary sentence pursuant to the Principles Julius Kitsao Manyeso and Philip Mueke Maingi (Supra) available for trial courts to impose should such a court belief that particular circumstances of a particular case warrant the imposition of such a sentence. One of the key predominant constitutional imperative which renders mandatory life imprisonment unconstitutional is traceable to Art. 25 (a) of *the constitution*. In that it is cruel, inhuman and degrading punishment. It removes from the convict all hope, expectation, optimistic of his or her release from prison for reason of it being served until the last natural breathe. Essentially, such a sentence takes away all the rights of a human being to sustain and maintain any desire to ever look forward to the enjoyment of the right to life in Art. 26 of *the constitution*. The court in the case of Tliynne, Wilson and Gunnell v Tlie United Kingdom 13 E.H.R.R 666 at 669 where it is stated. "that life sentence are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, contingence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk or repletion.....But, however, relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilized community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sense which locks the gate of the prison irreversibly for the offender without any prospect whatever or any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear tht his or her release after a few years might. Overtime I have come to appreciate that no criminal justice system for our country is perfect, leave alone the sentencing system at the end of a trial in which an offender is found guilty and convicted of the appropriate offender's charge. The courts are free to exercise discretion within the limits of the provisions in the statute and guidelines from jurisprudential decisions. Although that is the case, one must admit that on the face of it the facts of the case might appear similar or identical but the truth of the matter is there are clear characteristics or features which distinguish one homicide from another. It follows in greater detail the court to analyze different approaches based on the factual matrix of the case aimed at ensuring consistency and fairness in sentencing. In the instant case, the submissions placed before this court and the reasons in support at this sentencing stage on appeal it seems from the constitutional standpoint and the ratio decidendi in the authority cited the state of mandatory life imprisonment in Kenya is no longer good law. The court is therefore clothed with jurisdiction on appeal pursuant to the guidelines in the Benard Kimani Gacheru and Ogolla s/o Owuor (Supra) to review the sentence on record.

36. The trial court while sentencing the appellant considered the appellant's mitigation but still issued a minimum mandatory sentence. Mandatory sentences have now been outlawed. Judicial officers now have the discretion to sentence an accused person based on the circumstances of a case. Therefore, in considering the objectives of sentencing in their totality and the circumstances of the case, I am inclined to interfere with the life sentence and substitute it with 301 years' imprisonment. The sentence shall run from the date of i.e. 19th August, 2020.

37. The court in arriving at this decision, has taken into account the circumstances surrounding the incident, aggravating factors, mitigation and the objectives of sentencing.

38. In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024

In the presence of:

Mr. Mugun for the State

Appellant

.....

R. NYAKUNDI

JUDGE