Shiande v Republic (Criminal Appeal E014 of 2020) [2024] KEHC 3457 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3457 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E014 OF 2020

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

FREDRICK SHIANDE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

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 charge were that on 24th September, 2018 at Eldoret West Sub-County within Uasin Gishu County, he intentionally and unlawfully inserted his genital organ (penis) into the genital organ (Vagina) of I.R a girl aged 7 years old.
2. The appellant faced an alternative being 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 offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to life imprisonment.
4. Being aggrieved with the said judgment the appellant lodged the present appeal based on the following grounds:
    - i. That the identification parade was not conducted as it is required by law, the chapter 46 police force standing orders.
    - ii. That, the accused herein was not taken to the hospital for the medical proof of evidence for forensic examination which is c/s 36(1) of the Sexual Offence act No. 3 of 2006.
    - iii. That, section 8(2) of the sexual act No. 3 of 2006 provides only one sentence which is life and hence it is mandatory sentence which is inhumane and violates

the appellant's rights to fair trial under article 50(2) and article 25 of *the Constitution* of Kenya.

iv. That the prosecution failed to prove the age assessment of the complainant which was just approximated to (7) and eleven (11) years.

5. Parties filed written submissions in support of their arguments.

Appellant's Submissions

6. The appellant expressed his deep regrets and feelings to the victim and her family. The appellant sought for forgiveness. According to the appellant, the continued incarceration of a prisoner no longer serves any of the objectives set out in the sentencing guidelines. Instead, it has turned our corrective facilities into detention camps.

7. The appellant also made submissions to the effect that the mandatory nature of sentences is discriminatory and it violates the accused's right to dignity. He submitted that life imprisonment is now unlawful and cited the decision in Julius Kitsao Munyeso Vs Rep. cr. App. No. 12 of 2021.

8. Whereas the appellant appealed on both the sentence and conviction. The submissions appear to only address the question of sentence and nothing therein addresses conviction. In essence the appellant argued that the sentence imposed was inhumane, cruel and harsh and does not support his reform and rehabilitation.

Respondent's Submissions

9. The Respondent in opposing the appeal submitted along the lines of the elements of defilement. On age, the respondent submitted that the complainant was subjected to an age assessment through radiology tests. The tests confirmed that she was between 8-11 years old. The respondent further stated that the appellant did not mount any challenge on the age of the complainant. That they were neighbors and must have known if the child was older or younger than the age she says she was.

10. On penetration, the respondent submitted that Dr. Taban Tokosan testified that she was requested to examine the complainant for purposes of establishing whether there had been penetration of her genitalia. The doctor noted that the complainant's private parts were painful and there was reddening of the Labia minora and the posterior fourchette.

11. The appellant also made submissions on the question around identification. It was submitted that the complainant who testified as PW2 is captured confirming that she knew the appellant by his name Shiande. That this was a case of recognition rather than identification of a stranger.

12. On sentence, the respondent submitted that the sentence prescribed by section 8(2) of the *Sexual Offences Act* is life imprisonment. The respondent argued that the life imprisonment sentence is lawful. The Appellant cited some decisions, which I have read through.

Analysis and Determination

13. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. 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. The issues that arise for determination in this appeal are;

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

ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

15. 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."

16. 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:

    i. Age of the complainant;

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

    iii. Positive identification of the assailant.

17. 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."

What does the evidence portend?

Age of the complainant

18. 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) 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.

19. In the present case, PW6 adduced an age assessment report, in which it is indicated that the minor is between 8 and 11 years. The issue of age was not so much contested. Besides the range is within the provisions of section 8(2) of the CPC.

Penetration

20. 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."

21. The trial court in coming up with its finding relied on the testimony of the Complainant who stated that the accused asked her to bend and he did bad manners to her and from the evidence adduced by PW6, it is clear that the child was defiled based on the state of her genitalia when taken to hospital, the

doctor examined the child and found that the complainant had indication that she had been defiled therefore that there was indication that penetration occurred.

22. The Learned Trial Magistrate after considering the evidence in its totality concluded that there was sufficient and credible evidence against the appellant thereby rendering him guilty of the offence of defilement.

23. From the foregoing, having thoroughly read through the record, the court is persuaded that the appellant was properly convicted.

24. The inevitable conclusion from the analysis of the evidence is that there was ample evidence to prove that penetration did occur.

Was the appellant the perpetrator?

25. The complainant stated that the accused was known to her and PW1 and 3 stated that the accused was living opposite the plot where the complainant, her parents and PW3 live and the accused in his testimony admitted he had lived in the area for 14 years and was known to PW1 and had been in a relationship with her although he denied that he knew the complainant. The trial court found the appellant to have been positively identified. In considering all the material on record, I couldn't agree more.

26. 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.

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

28. 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

29. Section 8 (2) of the *Sexual Offences Act* to convict provides as follows:

> 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."

30. 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."

31. 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.

32. 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.

33. The point of significance in this Appeal is whether the trial court was right in imposing a life sentence against the Appellant having appraised the offence, and the circumstances under which it was committed. The key criteria under which this court can interfere with sentence is now well settled as demonstrated by the pre-dominant principles in Nilsson v Republic (1970) KLR 552 in the following manner: " Before an appeal against the sentence can succeed, this court must be satisfied that there exist to a sufficient extent circumstances entitling it to vary the order of the court below. These are stated in Ogalo s/o Owuora v R (1954) 21 E.A.C.A 270 a decision upon which I understood both counsels to rely, in the following words: The principle as upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and will not ordinarily interfere with the discretion exercised by the trial judge unless as was said in James v R (1950) 18 E.A.C.A. 147 it is evident that the judge has acted upon some wrong principles or overlooked some material factors. To this we would add a third criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case " Similarly the court of Appeal in this case of Bernard Kimani Gacheru v Republic (2002) eKLR propounded those principles in the following manner: " It is now settled law, following several authorities by the 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 appellant court will not easily interfere with the sentence unless

i. That sentence is manifestly excessive in the circumstances of the case or

ii. That the trial court overlooked some material factor, or

iii. Took into account, some wrong materials or

iv. Acted on a wrong principle.

Even if, the Appellate Court feels that the sentence is heavy and that the Appellant 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 matter already stated is shown to exist.

I think going by this case law and the legislature prescription on the appropriate sentence for defilement one would find difficulty in trying to review the minimum mandatory sentence as appreciated by the trial court. In this space, it has become a nation conversation within the justice sector more so our Superior court to question as to when a life sentence should be imposed. From the jurisprudence, it is neither possible nor desirable to set out all those circumstances in which a life sentence might be appropriate given its risk of infringing Art. 25 (a) as a sentence which is not free from torture and cruel. Inhuman or degrading treatment or punishment, (b) Free from slavery or servitude, (c) The right to a fair trial and (d) the right to an order of habeas corpus.

The persuasive case in Ex P Bradley v R 1991 1 WLR 134 made the following observations: " the sentence court recognizes tht passing a life sentence may will cause the accused to serve longer, and sometimes substantially longer, than his just deserts. It must thus not expose him to that peril unless there is compelling justification for such a course. That compelling justification is the perception of grave future risk amounting to an actual likelihood of dangerousness. But of course the court's perception of that future risk is inevitably imprecise. It is having to project its assessment many years forward and without the benefit of a constant process of monitoring and reporting such as will be enjoyed by the Parole Board.

34. The distinguishing aspect of this case is simply the position taken by the superior court in the cases of: Julius Kitsao Manyeso vs Republic COA Criminal Appeal of 2021 and Philip Mueke Maingi & 5 Others vs Director of Public Prosecution & A.G HC Petition NO. E017 of 2021. Where the court has pronounced itself in brief as follows: "The mandatory minimum sentences under the *Sexual Offences Act* are Unconstitutional. Right to Human Dignity, where penal provisions prescribed mandatory minimum sentences without granting the trial court the discretion to determine the appropriate sentence. What were the guiding principles in determining what part of the judgement was the ratio decidendi What were the guiding principles in determining what part of the judgement was the Obiter Dictum. It will seem logically also to follow by extension on the appellant's case that serving a life sentence until one's last breathe is unconstitutional and that the life sentence in the first place as a mandatory punishment is not justifiable. The breadth and flexibility of the discretion to grant the relief against mandatory life sentence is in the present appeal exercisable within the confines of the above principles.

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 a determinable period of 30 years' imprisonment. The sentence shall run from the date of conviction i.e. 19th December, 2019.

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

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R. NYAKUNDI

JUDGE