Njoroge v Republic (Criminal Appeal 86 of 2023)
[2024] KEHC 5389 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5389 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 86 OF 2023

FN MUCHEMI, J

MAY 16, 2024

BETWEEN

WILSON MUSEMI NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Resident Magistrate Court in Gatundu by Honourable C. N. Mugo (SRM), in Criminal Sexual Offence Case No. 29 of 2019 on 15th April 2020)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the judgment of the Senior Resident Magistrate Gatundu where he was convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve fifty (50) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing five (5) grounds which are condensed as follows:-

    a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case by discharging the required burden of proof;

    b. The learned trial magistrate erred in law and in fact in failing to avail the eye witness to the alleged offence who was the whistle blower;

    c. The learned trial magistrate erred in law by failing to follow the laid out procedures in Section 36 of the Sexual Offences Act to ascertain the DNA of the samples noted on the minor's genitalia;

d. The sentence meted out against the appellant is harsh and excessive.

3. Parties disposed of the appeal by way of submissions.

The Appellant's Submissions

4. The appellant submits that the prosecution did not prove the elements of defilement. The appellant states that the prosecution did not prove the age of the minor as the P3 Form indicates that the minor was 12 years old, the Assessment Summary Report indicates that the minor was 7 years old, the outpatient record from Gatundu level 5 hospital recorded the minor's age at 6 years old whereas the PRC Form shows the minor's date of birth as 24th October 2007.

5. The appellant further submits that he was framed by the owner of the house where the minor was found, one Moses who witnessed the incident. The said witness caught the appellant in the act of defiling the minor, locked his house from outside and raised an alarm and people came to the house and found the appellant and PW1 naked. The mob rescued PW1 and beat up the appellant. The appellant submits that the eye witness duped the mob by stating that he was the one who had defiled the minor taking advantage of the fact that the minor knew the said eye witness. The appellant submits that Moses coached the minor who was mentally disabled on what to say and bribed her with money he took from the appellant.

6. The appellant submits that the prosecution did not call any of the witnesses who rushed to the scene to testify that Moses had locked him in the house. The appellant further submits that no explanation was given on how and why the clothes of the minor were recovered by the police officers from the house of the said Moses given that the appellant would have had time to dress up the child if he had been locked inside the house by Moses before raising alarm.

7. The appellant submits that he was set up by Moses who incited the crowd to beat him up and steal his money. Thereafter a police man arrived and asked him for a bribe so that he could take him to hospital. Unfortunately, the appellant submits that since he had no money left, the police officer took him to Kamwangi police station.

8. The appellant relies on Section 36 of the Sexual Offences Act and submits that the authorities ought to have taken him for DNA testing and taken the samples to test if they were a match with the DNA samples of the minor to ascertain whether he had defiled her. To support his contentions, he relies on the case of Chila & Another vs Republic [1962] EA 722.

9. The appellant argues that the PRC For was filled in and signed by Dr. Koskei yet she was not called as a prosecution witness which contravenes Section 77 of the Evidence Act.

10. The appellant submits that the trial was heard by three magistrates who never gave him a chance to recall any witnesses pursuant to Section 200 of the Criminal Procedure Code and thus denying him justice for the case had no eloquent flow. The appellant submits that he had little understanding of the law and during plea taking he asked for forgiveness as part of his mitigation which the trial court took as a plea of guilty and therefore he was convicted wrongly on the charges of defilement.

11. The appellant relies on the cases of Edwin Wachira & 9 Others vs Republic Petition No. 97 of 2021 consolidated with Petition No. 88 of 2021 Adan Maka Thulu vs DPP; Petition No. 90 of 2021 Robert Mwangi vs DPP and Petition No. 57 of 2021 Kazungu Kalama Jojwa vs DPP and submits that the sentence of fifty years is harsh and excessive. The appellant further relies on Section 7 of the Criminal Procedure Code and the case of Julius Amollo Oremo vs Republic Court of Appeal No. 176 of 2010 and submits that he ought to have been sentenced to seven years imprisonment as opposed to the 50 years meted against him.

The Respondent's Submissions

12. The respondent relies on the case of Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013 and submits that the prosecution proved its case beyond reasonable doubt by proving all the elements of the offence of defilement. On the element of age, the respondent relies on the case of Mwalango Chichoro Mwanjembe vs Republic (2016) eKLR and submits that PW2, the complainant's mother testified and stated that the complainant was born on 24th February 2007 and PW5, the investigating officer produced the minor's birth certificate which indicated the minor's date of birth as 24th February 2007. Thus, the respondent contends that at the time of the incident, the complainant was 12 years old. The respondent further submits that the appellant has not brought any new material facts to dispute the fact of age.

13. The respondent further relies on Section 2 of the Sexual Offences Act and the case of Mark Oiruri Mose vs Republic (2013) eKLR and submits that PW1 testified that on 20/1/2020, the appellant removed her trouser, biker and pant. The appellant then held her by strangling her on the neck and pumped her at her vagina and that she felt a lot of pain. The respondent further submits that PW1's testimony was corroborated by PW4 who confirmed on examination that the complainant's hymen was broken and that there was a whitish discharge. The witness produced the P3 Form and PRC Form as exhibits in support of his testimony. As such, the respondent submits that the evidence produced during the trial clearly proved the element of penetration.

14. On the identity of the perpetrator, the respondent submits that the appellant was well known to the complainant. The respondent further submits that although the appellant had used the house of one Moses to commit the offence, the complainant was categorical that Moses was not the defiler but that the appellant was. The respondent contends that Moses was very well known to the complainant since he was her grandmother's neighbour and she played there regularly so there was no way the complainant confused the appellant with Moses. Furthermore, the appellant was found defiling the minor as the door had been locked from outside and an alarm raised and the respondent submits that when members of the public went, they found the appellant with the complainant inside the house since the complainant was naked, the mob were angered and attacked the appellant beating him thoroughly.

15. The respondent contends that from the evidence that was adduced at trial the appellant defiled the victim and there was no possibility of mistaken identity as the incident took place during the day. Furthermore, the complainant also clearly identified the appellant on the dock as the perpetrator, in court.

16. The respondent submits that the trial court considered the defence of the appellant that he was a victim of mob justice from being set up by the owner of the house where the minor was found naked, and the trial court found that the appellant's defence consisted of mere denials. The respondent submits that the appellant did not demonstrate what grudge the complainant or her family could have with him in order to collude with the police to fabricate charges against him. The respondent further submits that the appellant was found at the scene of the crime together with the complainant who was naked at the time. Alarm was raised and the appellant was found in a compromising position with the victim angering members of the public who beat him thoroughly. Furthermore, the respondent submits that the evidence of the complainant together with the medical evidence tendered proved that the appellant committed the offence and that he was not set up by anyone.

17. The respondent submits that failure to produce the eye witness was not fatal to the prosecution case. The respondent further relies on Section 124 of the Evidence Act and submits that in sexual offences, corroboration of evidence by the victim is not a mandatory requirement as long as the court believes

the victim is being truthful and records the reasons for believing the victim as the trial court did in the instant case.

18. The respondent states that there was no need to ascertain DNA of the samples noted on the minor's genitalia as the prosecution proved penetration and therefore DNA analysis was not necessary. Furthermore, the respondent contends that the appellant did not bring up the issue of DNA analysis during his trial but he has raised the issue on appeal.

19. The respondent submits that the sentence meted was legal as Section 8(3) of the Sexual Offences Act provides for a sentence of not less than twenty (20) years imprisonment. The respondent relies on the case of Abdalla vs Republic KECA 1054 (KLR) and submits that the court does not have discretion to give a finding outside what is stipulated as the law. The respondent submits that Section 7 of the Criminal Procedure Code empowered the trial court to pass any sentence authorized by law for any offence triable by that court which includes an offence under the Sexual Offences Act 2006. Thus, the trial court acted according to the law and hence the sentence imposed on the appellant was legal and proper.

Issues for determination

20. The appellant has cited 5 grounds of appeal which can be compressed into two main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence is harsh and excessive

The Law

21. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

22. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court 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 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]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

23. In order to establish whether the prosecution proved its case beyond a reasonable doubt I shall address the following issues as raised by the appellant:

    a. Whether there was conclusive evidence of all the ingredients of defilement;

    b. Whether the trial court considered the appellant's defence;

    c. Whether the failure to call the eye witness was fatal to the prosecution's case.

    Whether there was conclusive evidence of all the ingredients of defilement.

24. Relying on the case of Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 where 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."

25. On the age of the victim, the court of Appeal in Edwin Nyambogo Onsongo vs Republic (2016) eKLR, the court stated as follows in respect of proving the age of the victim in cases of defilement:

> "....the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.

26. PW2 the complainant's mother testified that the minor was born on 24th February 2007. PW5, the investigating officer testified that the complainant was twelve (12) years old and produced her birth certificate as proof. I have perused the birth certificate and noted that the complainant was born on 24th February 2007 which date PW2 gave to the court. As such, the minor was 12 years and approximately 8 months at the time of the commission of the offence. The prosecution in my view, proved the age of the minor.

27. 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."

28. On the element of penetration, PW1, a child with a mental disability testified that the appellant did something to her and pointed at her vagina. PW1 further testified that the appellant was pumping her at the vagina and she demonstrated the said actions before the court. The minor further testified that the appellant removed her trouser, bikers and the pant. PW1 further states that the appellant was strangling her on the neck and that she felt a lot of pain.

29. Dr. Mary Gachagua, PW4 testified that Dr. Kuria examined the minor on 16th October 2019 and filled the P3 Form. PW4 testified that she is a medical officer at Gatundu Level 5 hospital where she worked with Dr. Kuria for four years and knew her handwriting. She testified that upon examination of the complainant, Dr. Kuria found that her hymen was broken and there was a whitish PV discharge. PW4 testified that based on the findings, Dr. Kuria confirmed that there was sexual assault. PW4 produced the Post Rape Care Form and P3 Form as exhibits.

30. On proof of penetration the courts will have regard to the complainant's testimony as corroborated by the medical evidence. Thus the evidence of PW1 is corroborated by the medical evidence produced by PW4 who pointed out that the minor's hymen was broken and that there was a whitish discharge. Thus from the analysis of the evidence, it is my considered view that there is ample evidence to prove that penetration did occur.

31. On the issue of identification, PW1 testified that the appellant is the only one who had ever sexually assaulted her and that she was sure that he was the one who did the bad thing to her. PW2 testified that on 6/10/2019 she got a call from PW3 who told her to rush to Aunt Magda's place. Upon arrival, PW2 found PW1 with no clothes on and the appellant was being beaten outside by a mob. The witness further testified that she was informed by Moses that he went back home and found PW1 and the appellant in his house and he raised an alarm since he found the appellant on top of the minor. PW2 further testified that PW1 told her that the appellant called her to Moses's house, gave her sugar cane and then he removed her clothes and slept on her. PW5, the investigating officer testified that PW1 was accompanied by PW2 at the police station where they reported that the appellant had defiled PW1. PW2 told PW5 that the incident occurred at the house of Moses, who is a neighbour of PW1's grandmother. She further stated that PW1 told her that she

    knew Moses and was categorical that it was not Moses who had defiled her but another man she referred to as Muthuri. PW5 went to the scene where she found a mob beating the appellant. She was informed that the appellant had defiled PW1 in the house of Moses and thereafter PW5 went to the house of Moses and recovered PW1's clothes.

32. I have perused the trial record and noted that the appellant was arrested at the scene where a mob was beating him for defiling PW1. Furthermore, PW1 was consistent that although the offence was committed at the house of Moses, it was not Moses who defiled her but the appellant. Moses was a neighbour to PW1's grandmother and was well known to the minor. The minor regularly played at that neighbourhood and therefore she was in good position to identify Moses and the appellant and not to confuse the two. Moreover, PW1 was defiled during the day and thus she was able to clearly see the perpetrator as he defiled her. Evidently, the testimony of PW1, PW2 and PW5 positively identifies the appellant as the perpetrator. The appellant was well known to the complainant and the identification was by way of recognition. It is thus my considered view that the appellant was positively identified as the perpetrator. As such, I accordingly find that the prosecution did prove the element of identification.

33. The appellant submits that the trial court did not consider his defence. The appellant testified that on the material day he met a police officer he had met the previous day and the said police officer told him to give him Kshs. 1,000/- which the appellant refused and the police officer threatened to fabricate charges against him. The appellant testified that he was later attacked, stabbed and lost consciousness although he does not know why he was beaten by the mob. The trial court considered the defence of the appellant and found that he had not tendered any plausible defence as it consisted of mere denials. I have perused the court record and noted that the trial court considered the defence by the appellant but found that it did not displace the evidence of the prosecution witnesses. The appellant admitted to been at the scene of the crime, although he feigned ignorance as to why the mob beat him up. The appellant further failed to demonstrate how the charges against him were fabricated because he refused to give the unnamed police officer Kshs. 1,000/-. Furthermore, the appellant did not show what grudge the complainant or her family would have against him in order to collude with the said police officer to fabricate charges against him. Moreover, PW1 gave a consistent testimony on the events that occurred on the material day and her evidence was cogent and thus she did not have any reason to frame the

appellant. As such, it is my considered view that the defence was considered but was not sufficient to displace the prosecution evidence.

34. The appellant argues that the failure to call an eye witness was fatal to the prosecution's case. The appellant further argues that the prosecution ought to have called one Moses to testify as the house where the incident occurred was his and that he was in cohorts with PW1 to frame him. It is clear in the evidence that Moses was not present in his house when the incident occurred and as such, it would not be helpful to the prosecution to call him as a witness.

35. It is trite law that in sexual offences cases, pursuant to Section 124 of the Evidence Act, corroboration of evidence by the victim is not a mandatory requirement as long as the court believes the victim is telling the truth and records the reasons for believing the victim. Accordingly the prosecution need not call all witnesses who may have information of a fact. Failure to call a witness will only be fatal if the evidence presented by the prosecution is insufficient to sustain a conviction and contains gaps which could have been filled by a witness who was not available. In the instant case, PW1 gave a consistent account of how the appellant defiled her despite her mental disability. On cross examination, the complainant's evidence was not shaken as she maintained that the appellant defiled her. The trial court cautioned itself due to the complainant's disability but found that the complainant's evidence was consistent and credible. PW1 was very firm that the appellant had defiled her. The trial court thus found that the complainant was being truthful. Accordingly, it is my considered view that PW1's testimony was cogent, consistent and not shaken during cross examination.

36. The appellant contends that a miscarriage of justice occurred to his detriment as his case was heard by three magistrates who did not adhere to Section 200 of the Criminal Procedure Code. I have perused the court record and noted that the case proceeded before Honourable C. N. Mugo for hearing. The matter was before Honourable Ng'ang'a twice on 8th November 2019 and 7th February 2020 for mentions. Thus, Section 200 of the CPC was not applicable in the instance because the 2nd magistrate did not take evidence. However, the typed proceedings indicate that the matter was partially heard before another magistrate which was incorrect. Upon perusal of the hand-written proceedings of the court, it is clear that the matter proceeded for hearing to its conclusion before Honourable C. N. Mugo.

37. The appellant argues that the PRC Form was filled and signed by Dr. Koskei yet the said doctor was not availed by the prosecution for questioning which is contrary to Section 77 of the Evidence Act.

38. Section 77(3) of the Evidence Act provides:-

> When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner or geologist as the case may be, and examine him as to the subject matter thereof.

39. Dr. Mary Gachagua testified in place of Dr. Kuria who had filled the P3 Form on 16th October 2019 after examining the complainant. Dr. Gachagua stated that she had worked with Dr. Kuria at Gatundu level 5 hospital for a period of four years and that she was familiar with Dr. Kuria's handwriting and signature Dr. Kuria was said to be unavailable to attend court on the material day. The witness produced the P3 Form and the PRC Form in court and was cross- examined by the appellant who did not question her on the findings in the PRC Form or object to its production as an exhibit. The appellant cannot therefore introduce this new issue on appeal.

40. I find that the prosecution proved their case beyond any reasonable doubt and that the conviction was based on cogent evidence and is hereby upheld.

Whether the sentence is harsh and excessive

41. The Court of Appeal, on its part in Bernard Kimani Gacheru vs Republic [2002] eKLR restated 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 stated is shown to exist."

42. Section 8(3) of the Sexual Offences Act No. 3 of 2006 provides that:-

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years.

43. The Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR ruled that the mandatory death sentence deprives the trial court of its discretion to mete out sentence that is commensurate with the gravity of the circumstances of the offence. Subsequently courts applied the said principle as envisaged in capital offences of murder and robbery with violence and extended the said import to other offences including those under the Sexual Offences Act.

44. Recently the High Court dealt with the constitutionality of the mandatory minimum sentences under the Sexual Offences Act in the case of Maingi & 5 Others vs Director of Public Prosecutions & Another [2022] eKLR. The petitioners in the case were convicts serving sentences for offences under the Sexual Offences Act and they argued that the mandatory minimum sentences imposed in the Act fettered with the discretion of the courts in imposing alternative sentences. The court held that the strict application of the mandatory minimum sentences under the Sexual Offences Act with no discretion at the trial court to determine the appropriate sentence to impose, such sentences were contrary to Article 28 of the Constitution.

45. Similarly, the Court of Appeal in Manyeso vs Republic (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR), whereby the accused was convicted of the charge of defiling a girl aged 4 ½ years and sentenced to life imprisonment, held that the constitutionality of the mandatory and indeterminate sentence of life imprisonment was discriminatory, in humane and a violation of the right to human dignity. The Court of Appeal further held that notwithstanding the direction issued in Francis Karioko [2021] eKLR which applied to only murder cases, the reasoning in Francis Karioko [2017] eKLR equally applied 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 on mitigation when facing lesser sentences are allowed to be heard on mitigation.

46. It is important to note that the minor was a child aged 12 years and was mentally challenged. Additionally, the impact of the offence must have negatively impacted on her. The appellant was a first time offender, a father of two children and was remorseful as per the mitigation he presented before this court. It is not in dispute that the trauma was detrimental to the child's mental and physical health and could affect the future of the child on performance in life generally.

47. I have considered all the factors discussed herein in sentencing and it is my view that the sentence of fifty (50) years was excessive considering the development of jurisprudence by superior courts in Kenya.

The applicant herein ought to be given the benefit of a reasonable sentence that is commensurate to the offence. Based on those factors, this court is entitled to interfere with the sentence.

48. I have perused the appeal record and noticed that the appellant was not released on bail during trial. He stayed in custody from 7th October 2019 when he was arrested to 15th April 2020 when he was convicted and sentenced. This period of five (5) months was not taken into account during sentencing as provided for under Section 333 of the Criminal Procedure Code. As such, this court requires to address this issue although the appellant did not include it in his grounds of appeal.

49. The sentence of fifty (50) years imprisonment is hereby set aside and it is hereby substituted with twenty (20) years imprisonment to commence from 7th October 2019 being the date of arrest.

50. This appeal is only partly successful.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 16TH DAY OF MAY 2024 AT THIKA

F. MUCHEMI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR