Waisari v Republic (Criminal Appeal 6 of 2023)
[2024] KEHC 5391 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 6 OF 2023

FN MUCHEMI, J

MAY 16, 2024

BETWEEN

HOSEA WAISARI ..... 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. 20 of 2019 on 15th April 2020)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against conviction and sentence by the Senior Resident Magistrate Gatundu where he was convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 and was sentenced to serve forty (40) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 8 grounds of appeal which are summarised 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 find that the prosecution's case was filled with material inconsistencies and contradictions;

    c. The learned trial magistrate erred in law and in fact by failing to consider the appellant's defence;

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

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant relies on Article 50 of the *Constitution* and the case of *S.C.G v Republic* [2018] eKLR and submits that his right to a fair trial was infringed as he was not offered any legal representation and neither did the prosecution supply him with the witness statements.

5. The appellant further relies on the cases of *Patrick Wamuyu Wanjiru v Republic* (no citation given); *Johnson Muiruri v Republic* (no citation given) and *Joseph Opondo v Republic* and submits that voire dire examination of the minor was not properly conducted.

6. The appellant contends that the prosecution case was filled with ambiguities which was as a result of the shoddy investigations carried out. The appellant therefore submits that his conviction was not based on sufficient evidence making his conviction unsafe. To support his contentions, the appellant relies on the case of *Erick Cheruiyot Bii v R* Criminal Appeal No. 71 of 2009. Furthermore, the appellant relies on the case of *Burunya v Uganda* Criminal Appeal No. 223 of 1968 EACA and states that the trial magistrate abused her position and stage managed the case instead of being the middle arbiter.

7. The appellant further submits that the prosecution failed to call crucial witnesses such as the complainant's siblings to testify at what point they left the complainant by herself with the appellant. The appellant calls into question the minor's credibility as a witness as she testified that the appellant had defiled her before the material day. The appellant further submits that there is a discrepancy between PW1's evidence and that of PW5 as PW1 testified that she was first taken to Kamwangi hospital before heading to Igegania level 4 hospital yet PW5 testified that PW1 was taken to the police for the first report after coming out of the hospital.

8. The appellant submits that the prosecution witnesses particularly PW3 was not credible as he testified that he found PW1 and PW2 crying in the farm yet PW1 never tendered such evidence.

9. The appellant relies on Section 124 of the *Evidence Act* and submits that the medical evidence corroborating the minor's evidence did not show any presence of spermatozoa. The appellant argues that the medical evidence did not corroborate that the minor was defiled and thus relying on her testimony alone is problematic as the trial court did not conduct a proper voire dire examination on the minor. To support his contentions, the appellant relies on the case of *John Mutua Munyoki v Republic* (no citation given).

10. The appellant submits that the prosecution failed to lead cogent and direct evidence which led the trial court drawing its own inferences and thus convicting him on insufficient evidence. The appellant further submits that he raised an alibi defence which was not rebutted. Relying on the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR, the appellant submits that the prosecution ought to have applied further evidence in accordance with Section 309 of the *Criminal Procedure Code* to rebut his defence.

11. The appellant contends that the sentence of 40 years meted against him is harsh, severe and does not meet the constitutional dictates.

The Respondent's Submissions

12. The respondent relies on the case of *Charles Wamukoya Karani v 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. The respondent submits that the complainant PW1 testified

that she was at home when the appellant pulled her hand to his house, closed the door, threw her to the bed, closed her mouth and removed her trouser pants. The witness further testified that he removed his trousers and under pants and inserted his thing for urinating inside her. The respondent states that PW1's evidence was corroborated by PW4, the clinical officer who confirmed that PW1 had injuries on her genital organs upon examining her on 5th August 2019. PW4 further testified that she found that PW1's hymen was broken and her vaginal surface was widened and reddened which was a clear indication that PW1 had been defiled.

13. On the element of age, the respondent submits that the particulars of the charge sheet indicated that the complainant was 10 years old which was corroborated by the parents of the minor, PW2 and PW3. Furthermore, the investigating officer produced a birth certificate as an exhibit which confirmed that the minor was 10 years old.

14. On the element of identification of the perpetrator, the respondent submits that the appellant was an employee at the home of the complainant and the complainant knew him very well. The appellant in his defence also confirmed that he worked for the complainant's parents as a farm hand and hence he must have interacted with the complainant. Thus, the respondent contends that identification by the complainant was that of recognition.

15. The respondent further submits that the court established that the minor understood the importance of testifying the truth as her evidence was not shaken in cross-examination by the appellant. The court further noted that the minor's evidence was remarkable and it had clarity and valour and thus the court had no reason not to believe her.

16. The respondent states that proper investigations were conducted by the police which gathered sufficient evidence to charge the appellant. The respondent states that it is not true that authorities vested with power and instruments for investigations were unprofessional for only interrogating the appellant and prosecution witnesses without carrying out credible and impartial investigations.

17. The respondent submits that the trial court considered the defence of the appellant and concluded that the defence was an afterthought as the appellant did not raise it in his cross-examination. Further, the appellant's defence was inconceivable in light of the prosecution's case.

18. The respondent contends that the while sentencing the appellant, the trial court observed the policy guidelines and sentenced the appellant to forty years imprisonment instead of a life sentence. The trial court considered that the appellant was a first offender, he was not remorseful as he did not mitigate. The respondent argues that the trial court was very lenient to the appellant as he did not even advance any mitigating factors for consideration, Thus, the respondent urges the court to enhance the sentence to life imprisonment to which they filed and served their notice of enhance sentence to the appellant.

Issues for Determination

19. The appellant has cited 8 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 was reasonable and lawful.

    c. Whether the sentence ought to be enhanced.

The Law

20. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v 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.

21. Similarly in the case of *Okeno v 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 v 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 v 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 v Sunday Post* [1958]EA 424." This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt

22. 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 the appellant's rights under Article 50(2)(h) of the *Constitution* was violated;

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

    c. Whether trial court conducted a proper voire dire examination on the complainant;

    d. Whether the prosecution case was filed with material contradictions and inconsistencies;

    e. Whether the trial court considered the appellant's defence.

Whether the appellant's rights under Article 50(2)(h) of the Constitution was violated.

23. The appellant argues that he was not conversant with the law and ought to have been offered legal representation at the expense of the state and thus his constitutional right under Article 50 (2) (h) was violated.

24. Article 50 (2) (h)of the *Constitution* stipulates:-

    Every accused person has the right to a fair trial, which includes the right-

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.

25. A closer reading of Article 50 (2)(h) of the *Constitution* denotes that the right to legal representation is not an absolute right but qualified. Legal representation at the expense of the state is thus only available where there is a likelihood of substantial injustice to occur to the detriment of an unrepresented accused person. The Court of Appeal in the case of *Macharia v Republic* stated as follows:-

> Article 50 of the *Constitution* sets out a right to a fair hearing which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where public interest requires that some form of legal aid be given to the accused because of the nature of the offence....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 the state expense.

26. In the instant appeal, the appellant was charged with the offence of defilement and sentenced to serve forty (40) years imprisonment. I have gone through the trial record and noted that nowhere does it communicate whether or not the appellant was informed of his rights under Article 50(2)(h) of the *Constitution*. However upon perusal of the court record I have noted that the appellant was supplied with witness statements at the onset of the trial and he extensively carried out cross examination on the prosecution witnesses. Furthermore, when the matter came up for defence hearing, the appellant's rights under Section 211 of the *Criminal Procedure Code* were explained to him and he stated that he understood the same and elected to give unsworn evidence. Thus it is my considered view that there was no prejudice caused to the accused during the entire trial.

27. It is noted that the appellant requested to be given legal representation by the state during the trial. It is notable that the appellant conducted his defence very well and prepared and filed his submissions. Cross-examination was done exhaustively.

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

28. Relying on the case of *Charles Wamukoya Karani v 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."

29. On the age of the victim, the court of Appeal in *Edwin Nyambogo Onsongo v 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.

30. PW2 the complainant's mother testified that the minor was born on 2nd August 2009. PW5, the investigating officer testified that the complainant was ten (10) years old and produced her birth

certificate as proof. The birth certificate shows that the complainant was born on 2nd August 2009 which means that she was 10 years at the time of the commission of the offence. Therefore it is my considered view that the prosecution proved the age of the minor.

31. 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."

32. On the element of penetration, PW1 testified that on 5/8/2019, the appellant called her together with her younger siblings to take sugar cane. PW1 further testified that the appellant was a farm hand and lived on their compound together with her parents and grandmother. The minor stated that she went to pick the sugar cane and the appellant pulled her hand to his house. The minor explained that by that time, her younger siblings had gone to her grandmother's house. PW1 then testified that when they were inside the appellant's house, he closed the door, threw her on the bed, closed her mouth and removed her trouser and pants. The minor further testified that the appellant then removed his trousers and under pants and inserted his thing for urinating into hers. The complainant testified that when the appellant was done, he dressed up and tried to give her Kshs. 50/- but she refused to take the cash. The witness further stated that it was not the first time the appellant had defiled her but she did not tell her mother because she was scared he would kill her.

33. George Kimani, a clinical officer PW4 testified that he examined the minor on 8/8/2019 and found that she had injuries on her genital organs, her hymen was broken and the vaginal surface was reddened and widened. The witness further testified that the minor's vaginal wall was painful and found no spermatozoa after doing a vaginal swab. PW4 concluded that the complainant had been defiled. The witness produced the Post Rape Care Form and P3 Form as exhibits.

34. The appellant argues that the absence of spermatozoa indicates that he did not defile the minor and furthermore the prosecution did not prove penile penetration as such, this element was not proved to the required degree. On the issue of absence of spermatozoa, the Court of Appeal in the case of *Mark Muiruri Mose v Republic* [2013] eKLR stated as follows:-

> 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.

35. Thus it is evident that the presence of spermatozoa in the vagina is not necessary so long as penetration is proved.

36. The testimony of the victim is normally corroborated by the medical evidence for penetration to be proved. In this case, the evidence of PW1 was corroborated by that of the medical officer, PW4. The witness pointed out that the minor's hymen was broken, her vaginal surface was widened and reddened. The victim complained that her vaginal wall was painful. Thus from the analysis of the evidence, it is my considered view that there is ample evidence to prove that penetration occurred.

37. On the issue of identification, PW1 testified that the appellant was a farm hand and he used to take care of their cows. The minor confirmed that the appellant lived with them on their compound. PW2 testified that the appellant was their farm hand and that he had worked for them for over one year. PW3 also testified that the appellant was their farm hand and he had hired him for over one year. The testimony of PW1, PW2 and PW3 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 person who defiled the complainant. Accordingly I find that the prosecution established the element of identification.

38. The appellant has complained that the medical evidence did not implicate him and no medical tests were carried out which he believes were necessary. As the Court of Appeal noted in *Geoffrey Kioji v Republic* Nyeri Criminal Appeal No. 270 of 2010 (UR):-

> Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

39. The court in the Geoffrey Kionji case explains the legal position that medical tests on the appellant to connect him with defilement are not a requirement. It is my considered view that PW1's testimony was well corroborated by the medical evidence and was sufficient proof of the offence.

40. The appellant further argued that the trial court did not conduct a proper voir dire examination on the complainant. On perusal of the court record, the trial magistrate noted that the minor did not understand the nature of taking an oath and directed that she give an unsworn evidence. Accordingly, the trial court stood guided by Section 124 of the *Evidence Act* and was satisfied that the minor was telling the truth as she gave a very comprehensive narration of events of the fateful day. On perusal of the court record, it is noted that the voire dire test was conducted and the court satisfied itself that the minor understood the nature of the oath before taking her sworn evidence.

41. The appellant has raised that issue that the prosecution case was filled with material inconsistencies and contradictions which went to the root of the case. Relying on the case in the Court of Appeal Tanzania of *Dickson Elia Nsamba Shapwata & Another v The Republic* Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

42. The appellant argues that the testimony of PW1, PW2, PW3 and PW5 differ on when the matter was reported, the minor was taken to hospital and when PW3 found PW2 and PW1 crying in the farm. The appellant further argues that PW1 failed to tell the court at what point she remained alone with the appellant yet she was in the company of her younger siblings. From the evidence of PW1, she testified that the appellant lured her and her young siblings with sugarcane. Further that by the time she went for the sugarcane, her siblings were at her grandmother's house. Further PW3 testified that he went to the farm and found PW2 and PW1 crying when he was told that the appellant had defiled PW1. These issues raised by the appellant are not material discrepancies because none of them relate to the offence of defilement and how it took place. PW1 gave consistent and credible evidence on how the appellant defiled her and her testimony remained unshaken by the appellant during cross examination. It is thus my considered view that there were no material inconsistencies or contradictions that went to the root of the ingredients of the offence.

43. The appellant submits that the trial court did not consider his defence. The appellant testified that on the material day he did his chores and he was in his house when PW3 tied him up and took him to the station. The appellant testified that on 15/7/2019 he had argued with PW3 about his pay, as PW3 had not paid him for three months and that is why PW3 fabricated charges against him. I have perused the court record and noted that the trial court considered the appellant's defence and found that he did not tender any plausible defence. The trial court found the said defence was a mere denial. The trial court further noted that the appellant stated that the charges had been fabricated against him by the complainant's father due to his unpaid wages for three months. The court then ruled out the defence and found that the allegation of framing up was an afterthought. It is noted that the appellant did not raise the issue in cross examination of the complainant's father who testified as PW3. The defence on appeal stated that he raised a defence of alibi. I have further perused the court record and found that the appellant did not raise such a defence. It is my considered view that the appellant's defence was plausible and did not shake the prosecution's case.

44. The appellant argues that the failure to call the material witnesses such as the minor's younger siblings was fatal to the prosecution's case. However 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 certain 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. She told the court that at the time she had gone to take the sugarcane from the appellant, her siblings were at her grandmother's house. On cross examination, the complainant's evidence was not shaken as she maintained that the appellant defiled her. The trial court found that the complainant's evidence was consistent and was not shaken on cross examination as she maintained that the appellant was the one who defiled her. The trial court thus found that the complainant's evidence was credible. Ro this extent, I agree.

45. All evidence considered, it is my view that PW1's testimony was consistent and credible. All the elements of the offence of defilement were proved. Accordingly, I find that the prosecution proved its case beyond reasonable doubt.

Whether the sentence is justified or it ought to be enhanced.

46. The Court of Appeal, on its part in *Bernard Kimani Gacheru v 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."

47. Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

> 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.

48. The Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR ruled that the mandatory minimum sentences no longer have a place in our jurisdiction because they deprive the trial court of its discretion to mete out a sentence that is commensurate with the gravity of the circumstances surrounding the commission of the offence. Subsequently after, courts applied the said principle declaring the mandatory nature of the death sentence unconstitutional in capital offences he same principle was later extended to other offences with minimum sentences such as defilement and other offences under the *Sexual Offences Act*.

49. 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 v 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*.

50. Similarly, the Court of Appeal in *Manyeso v 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.

51. The aggravating factors in this case are that, the minor was a child of tender years. She was aged ten (10) years and the impact of the offence must have been too hard for her. It is noted that the appellant did not mitigate for a lenient sentence when he was given a chance. The trauma that goes with the offence of defilement is detrimental to the child's mental and physical health and may even affect the future of the child on performance in life generally and finally define who the said child will be.

52. The respondent on the other hand urges the court to enhance the sentence to life imprisonment. It is noted that the growth of jurisprudence in sentencing for the last ten (10) years in this country does not support enhancement of sentence herein. In my view the sentence of forty (40) years was on the higher side and ought to be interfered with.

53. I have perused the record and noted that the appellant remained in custody throughout the trial. He was arrested on 5th August 2019 and sentenced on 15th April 2020. This was a period of about nine (9) months. During sentencing the trial court did not take the said period into account as provided for by Section 333 of the *Criminal Procedure Code*. This court is empowered to intervene and correct the anomaly.

54. The court hereby sets aside the sentence of forty (40) years imposed by the trial court and substitutes it with twenty (20) years imprisonment to commence from 5th August 2019 being the date of arrest.

55. The appeal is only partly successful.

56. It is hereby so ordered.

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

F. MUCHEMI

JUDGE