Jedidah v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 7113 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E029 OF 2023

HM NYAGA, J

JUNE 13, 2024

BETWEEN

DAVID NJUGUNA JEDIDAH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the conviction and sentence of Hon. M.Kyalo (S.R.M) in Nakuru CMCR No. MCCHSO E0115 of 2021 on 11th August, 2023 and 16th August, 2023)

JUDGMENT

1. The Appellant was charged with Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars were that on diverse dates between 3rd July, 2021 and 5th July, 2021 in Nakuru West Sub-County within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of SO a child aged 15 years.

2. In the alternative, he was charged with Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on diverse dates between 3rd July, 2021 and 5th July, 2021 in Nakuru West Sub-County within Nakuru County, he intentionally and unlawfully committed an indecent act with a child namely SO aged 15 years old.

3. He pleaded not guilty and the trial ensued with prosecution availing a total of four (4) witnesses in support of its case.

4. PW1 was CE, the Complainant's mother. She testified that the Complainant was born on 2nd August, 2005 and produced her birth certificate as P Exhibit 1.

5. She stated that on 3rd July, 2021 and 5th July, 2021 the complainant went missing and on Tuesday the teacher at Crater View called and advised her to look for her lest she be arrested. She reported the incident to the Chief and she was referred to the elders who advised her to report the matter at Rhonda

police post. She complied. She said had surveyed and found out where the complainant was. She said she went to the Accused's house in company of an elder, another lady and 6 police officers. On reaching there, they knocked at the accused person's door but he did not open and the Police officer broke the door and they entered the house. She said therein the accused was queried about the whereabouts of the victim and he denied knowing the same twice but the third time, the accused admitted the complainant was in his house. She said the complainant was found under the bed with her clothes on and the accused was arrested. She took the complainant to Nairobi Women Hospital where she was treated. She stated that the child said she had stayed with the accused for 3 days .She identified the accused before court.

6. PW2 was PC Fatma attached to Rhonda Police Station. It was her testimony that on 5th July, 2021 at about 7 pm, as she was preparing to leave work PW1 went and reported that the complainant had disappeared on 3rd July, 2021 and had not been found. She booked an OB. She said PW1 told her that the victim had been seen somewhere and she organized the patrol team to visit but by the time the said team was ready, PW1 was not there. She stood the said team down and went home. She said the following day she found the accused who had been arrested at the station. She said she also found PW1 and the complainant. She interrogated them and recorded their statement. She stated that upon interrogating the complainant, she told her that on 3rd July, 2021 one Natalia gave her keys to the accused person's house saying that "Daddy" who is the accused had said that she should go there. She said she went to the house, opened and stayed there until 8 pm when the accused came. She said they slept together and had sexual intercourse and the following day on 4th at around 11 am they had sex again. She said on 5th July at 9 pm when they were preparing to sleep, she heard her sister knocking at the door. She said the accused woke up and opened the door and found out that it was her mother accompanied by the police officers and he was arrested and escorted to Rhonda Police Station. She stated that she also interrogated the accused who told her that on 5th July, 2021 he found the complainant on the road and when he asked her where she was going at night, she did not answer but requested for drinking water. He said they proceeded to his house and he left the complaint outside and went inside the house to fetch water and that was when the police and PW1 went and arrested him.

7. PW3 was the complainant. She said she was 15 years old at the time of the incident. She said they used to stay with the accused in the same plot and he knew him as "Daddy". It was her testimony that on 3rd and 5th of July 2021 at about 2pm while at home, a girl who used to stay with the accused called her outside and gave her the key to the accused person's house and told her that the accused wanted her to go to his house. She said it was not her first time to go there. She said at 7.30 pm she left her home for the accused house and found he was not there. That at 2pm the accused came from job and they prepared food and went to sleep. She said the accused removed her clothes and inserted his penis in her vagina. She said the following day at night they had sex again. She said on Monday at 9pm her sister and mother went to the accused house, knocked the door and the accused opened the door and he was arrested while she was taken to the hospital.

8. PW4 was Doctor Njoroge. He said upon examining the complainant her hand, neck, abdomen and lower limbs were normal. He said Genital examination revealed the complainant had an old broken hymen. He concluded that there was a blunt trauma penetration to the Vagina. He produced P3 and PRC form as P. Exhibit No.2 and 3 respectively.

9. In cross examination, he said the complainant was sexually active and the time she had sex is not specified in the P3. He said he did not examine the accused and he was not sure which blunt object caused penetration.

10. After the testimony of PW4 the prosecution's case was closed. In a ruling dated 24th March, 2023 the court found the accused had a case to answer and he was put on his defence. He opted to give sworn evidence and called one witness.

11. DW1 was the appellant. He testified that on the material dates he was taking care of his sick mother at her place. He said he needed to get something from his house and while at the gate he met the complainant with other girls and she asked for drinking water. He told her to get it from her friends and he went to his house, changed and on coming out he met 10 policemen who arrested him. He said his door was not broken into as alleged and the child was not found sitting on his bed. He said the allegation that the complainant's mother came with the chief and elder was untrue. He said he was not examined.

12. In cross examination, he said on 3rd and 5th July 2021 he was at his sick mother's home at Kaptembwa West but he did not have any proof of her sickness. He confirmed he had known the child for a long time and no grudge existed between him and her or her mother.

13. DW2 was Jedidah Muthoni, mother of the Accused person. She testified that the accused was at her house on 3rd and 4th and he left on 5th. She said she was shocked when he was arrested. She confirmed she did not have any documents to show that she was sick.

14. On 11th August, 2023, the trial court found the prosecution had proved all elements of the charge beyond reasonable doubt and convicted him.

15. On 16th August, 2023, the trial court sentenced the Appellant to 20 years imprisonment.

16. The Appellant was aggrieved by the lower court's conviction and sentence and filed the instant appeal raising the following grounds:-

    a. That the Learned trial Magistrate erred in law and in fact in finding that the prosecution had proved its case against the Appellant beyond reasonable doubt.

    b. That the Learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.

    c. That the Learned trial magistrate erred in failing to consider the Doctor's evidence did not establish guilt ever or at all.

    d. That the Learned trial magistrate erred in law and fact in delivering an excessively harsh sentence against the appellant vis a vis the evidence on record.

    e. That the Learned trial magistrate erred in law and in fact in generally disregarding evidence adduced by the Appellant.

    f. That the Learned trial magistrate erred in law and fact by misdirecting her mind and considering extraneous matters.

    g. That the Learned trial magistrate erred in law and fact by finding that the evidence adduced by prosecution witnesses was sufficient to warrant a conviction and sentence against the appellant.

17. The Appellant therefore prayed that the conviction be quashed and sentence set aside.

18. The Appeal was argued through written submissions.

Appellant's Submissions

19. The Appellant submitted that the age of the complainant was sufficiently proved.

20. On penetration, the appellant discredited the prosecution's case for reasons that the Doctor could not tell the object used in causing penetration, did not indicate the age of injuries in the P3 and that PRC produced shows no semen or sperms was collected from him and as such no nexus between him and defilement of the minor was established.

21. Regarding whether he was the perpetrator, the Appellant submitted that the prosecution did not prove the same beyond reasonable doubt for grounds that PW1 and PW3 never called any neighbors to confirm the minor slept in his house on the material dates and that he was popularly known as "Daddy"; that the evidence of PW1 and PW3 was contradictory in that PW1 stated that the police broke into his house while PW3 testified that he was the one who opened the door when it was knocked, and that while PW1 stated that PW3 had hid under the bed PW3 disputed the same.

22. On sentence imposed by the trial court, the Appellant submitted that the trial court has a discretion to impose a lesser sentence where the circumstances so dictate. He faulted the trial magistrate for not giving reasons for imposing the maximum sentence. To this end, he placed reliance on the case of *Daniel Kyalo Muema v Republic* [2009] eKLR where the Court of Appeal stated that the words "shall be liable to" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

23. Citing the case of *Brian Nyachio v Republic* [2022] eKLR, the Appellant opined that in the absence of extraneous circumstances, he ought to have benefitted from a lower sentence.

24. The Appellant urged this court to consider the time he spent in remand custody pursuant to Section 333(2) of the Criminal Procedure Code.

Respondent's Case

25. The Respondent submitted that it proved its case against the Appellant beyond reasonable doubt.

26. On penetration, the Respondent argued that PW3's evidence that she had sexual intercourse with the Appellant was corroborated by PW4 who confirmed that PW3 had an old broken hymen and blunt trauma penetration of the vagina.

27. With respect to the age of the Complainant, the respondent submitted that PW1's evidence that the victim was born on 2nd August 2005 was supported by the birth certificate produced as an exhibit which showed the victim was 15 years old at the time of the incident.

28. On the identity of the accused, the respondent submitted that the evidence of PW1, PW3 and the appellant confirmed that the appellant was a person well known by the victim and as such the evidence on identification was solid.

29. With regard to the Appellant's defence, the respondent argued that the appellant's defence of alibi was raised at the tail end and therefore it was an afterthought and not strong enough to rebut the prosecution's case, and the trial court was right in disregarding the same.

30. In regards to the Appellants submissions that crucial witnesses were not called to testify, the respondent submitted that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case. The respondent referred this court to the provisions of Sections 142 and 124 of

the *Evidence Act* and urged the court to find that the prosecution discharged its burden of proof and the appellant was properly convicted of the offence of defilement.

31. On sentence, the respondent submitted that from the circumstances of the instant case, it was apparent the appellant abused the trust bestowed upon him by failing to protect the minor but instead took advantage of her. The respondent thus submitted that the sentence imposed was severe and deterrent and asked this court to confirm the same.

32. The respondent concurred with the appellant that this court should invoke Section 333(2) of the *Criminal Procedure Code* and order the Appellant's sentence to run from 8th July, 2021 when he was first arraigned in court.

33. Ultimately, the respondent urged this court to dismiss the appeal in its entirety.

Analysis and Determination

34. 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 v Republic* [1972] E.A 32.

35. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the following issues arise for determination.

    a. Whether the prosecution proved their case beyond reasonable doubt; and

    b. Whether the sentence was manifestly harsh and excessive.

36. This being a case for defilement, the prosecution was duty bound to prove its ingredients. In the case of George Opondo Olunga v Republic [2016] eKLR, it was established that the ingredients of an offence of defilement are; the age of the victim, penetration and identification or recognition of the offender.

37. In this case, the age of the minor and the issue of identification have not been challenged in this appeal. The complainant's evidence was that she was 15 years old at the time of the incident. PW1 produced her birth certificate which shows that she was born on 2nd August, 2005, thus the complainant at the time of commission of the alleged offence was 15 years old.

38. In regard to identification, both the minor and the Appellant confirmed they knew each other. Therefore, the identification of the Appellant was proved to the required standard.

39. The next element is proving of penetration. 'Penetration' is a term of art and is defined under section 2 of the *Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

40. The main evidence ordinarily relied by the courts in defilement matters in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case, since the complainant was a minor, the evidence of the clinical officer is crucial so as to corroborate such testimonies. PW4 who produced the P3 form and Post Rape Care (PRC) report testified that upon examination of the minor an old broken hymen was noted. According to the minor, she had engaged in sexual intercourse with the Appellant two days prior her examination. The exact date of the injury was not indicated by the doctor but in my view that did not rule out the act of penetration. It is my considered view therefore that Penetration was proved beyond reasonable doubt.

41. Was the Appellant the perpetrator? I have considered circumstances of this case as shown by the court record. The evidence by the PW1 was that the victim went missing for three days. She reported the incident at the police station. She stated that she had done her investigation and knew the victim was at the complainant's house. She accompanied the police officer to the appellant's house and indeed the victim was found there. The complainant on her part corroborated PW1's testimony that she had stayed at the Appellant's house for three days prior his arrest. She confirmed the appellant was arrested in his house. The appellant's defence in my view was not one of alibi. If anything, his defence placed him at the scene of crime. He testified that on the date of his arrest, he had gone to his house and he met with the victim and other girls at the gate. He stated that the victim requested for drinking water and he told her to get from her friends, and he entered his house, changed clothes and when he came out he found 10 police officers who arrested him. His evidence was not corroborated by his witness. The evidence of both PW1 and PW3 placed him at the scene of the crime and their evidence was watertight and considering the Appellant confirmed that no grudge existed between them, I do not have any reasons to doubt PW1 & PW3's evidence. It bears repeating that the Appellant was a person known to the complainant and therefore I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia.

42. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

43. I have considered the Appellant's submissions. The contradictions he pinpointed in my view were minor and did not go to the root or shake the strong prosecution case as presented. The court in the case of *Joseph Maina Mwangi v Republic*, CA NO. 73 of 1992 stated,

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of section 382 of the *Criminal Procedure Code,* viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence ..."

44. I therefore find that the contradiction alluded to were inconsequential to the conviction.

45. The Appellant also faulted the Prosecution for not availing all witnesses to wit, the elder, chief and the girl who allegedly gave his house key to the complaint. I hold the view that failure to call these witnesses was not fatal to the prosecution's case. The witnesses availed were sufficient and they were able to prove beyond reasonable doubt the offence in issue. Additionally, the prosecution is not obliged to call a superfluity of witnesses but only such witnesses that are sufficient to establish the charge beyond reasonable doubt(See the case of *Keter v Republic* [2017] EA 135.

46. The Appellant's further line of attack was that the trial erred in failing to consider the Doctor's evidence did not establish his guilt. According to the Appellant he was not examined and as such there was no evidence that could link him to the offence herein. Medical examination of perpetrator is not a mandatory requirement to prove defilement. In defilement matter, examination of the perpetrator is not mandatory. I'm guided by the case of *Mark Oiruri Mose v R* (2013) eKLR the Court of Appeal stated thus:

> " 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. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"

47. In *Muhendu v Republic* (Criminal Appeal 60 of 2018) [2024] KECA 322 (KLR) (22 March 2024) (Judgment) the Court of Appeal held that:-

> "Medical examination of a perpetrator is not a requirement to prove defilement, and is only necessary depending on the circumstances of a particular case, say, when for instance, upon the medical examination of the victim it is established that she was infected with a sexually transmitted disease. Such medical examination of the perpetrator may either prove or disprove whether the perpetrator infected the victim with the disease...."

48. In sum, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW3, a child aged 15years. Therefore, the Appeal on conviction lacks merit and is hereby dismissed. The conviction is upheld.

49. On the issue of sentence, it is imperative to note that sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic* [2021] eKLR).

50. The appellant was sentenced to 20 years imprisonment as provided under the Section 8(3) of the *Sexual Offences Act*. This section provides:-

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

51. The Appellant was a first time offender. In mitigation his counsel stated: -

> "The accused is a young person and sole breadwinner. The mother is diabetic and has high blood pressure. He is a first time offender. We pray for a non-custodial sentence"

52. The trial court in sentencing the Appellant stated as follows: -

> "I have considered the mitigation by the accused person and that he is a young man. I also consider the circumstances of the offence committed. The offence committed attracts a mandatory minimum sentence of 20 years. I have not seen any reason to make me deviate from the given sentence. Further the nature of the offence ties my hands and I am unable to be lenient. I therefore sentence accused to 20 years imprisonment. The time he has been in remand to be considered."

53. It is clear from the above that the trial court considered the Appellant's mitigation but sentenced him as prescribed by the law.

54. There has been a lot of recent litigation over the so called mandatory sentences and those that provide for a minimum sentence.

55. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others v Republic* (2017) eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence

prescribed for the offence of Murder by section 204 of the Penal Code was unconstitutional. The Court took the view that:

> " Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the *Constitution*; an absolute right."

56. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

57. For instance, in *Jared Koita Injiri v Republic* [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that;

> " if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> " The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* (*supra*), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

58. The Court of Appeal in *Dismas Wafula Kilwake v R* [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

59. Odunga J (as he then was), in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;

> " Taking cue from the decision in Francis Karioko Muruatetu directed that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

60. In the case of *Fappyton Mutuku Ngui v Republic* [2019] eKLR the court directed the trial court to rehear the Applicant's sentence on grounds that following the decision in the Muruatetu case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

61. The court in *Hashon Bundi Gitonga v Republic* [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

62. In Samuel *Achieng Alego v Republic* [2018] eKLR the court stated as follows;

> "It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the *Constitution* as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

63. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the *Sexual Offences Act* takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

64. In the trial, the learned magistrate appears to have considered the issue and found no good grounds to mete out a sentence lower than the one prescribed by the law.

65. The appellant herein knew that the complainant was young child and he took advantage of her vulnerability. He knew the victim was a school going child and did not the need to allow her to go to school and report her whereabouts to her parent. He defiled her for two days and had he not been arrested, he was intent on continuing with the same act. He ought to have known that his acts were wrong.

66. I have looked at the circumstances of the case and the comparative sentences meted by the superior courts for similar cases. While the trend has been to reserve the minimum sentences for the most aggravating cases, it does not mean that the court ought to treat defilement cases lightly. The court retains a duty to punish an offender for his actions.

67. I have considered the circumstances of the case and I am inclined to interfere with the sentence meted by the lower court.

68. Therefore, the sentence of 20 years imprisonment is hereby set aside and the Appellant is hereby sentenced to 15 years imprisonment.

69. Under Section 333(2) of the *Criminal Procedure Code*, the court is enjoined to take account of the time an accused has been in custody prior to his conviction. From the court record the appellant was in custody throughout the trial. Therefore, his sentence will commence on 8th July 2021, when he was first remanded in custody.

70. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF JUNE, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Nancy for the state

Mr. Kairu for Appellant