MHM v Republic (Criminal Appeal E036 of 2022)
[2024] KEHC 7748 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E036 OF 2022

M THANDE, J

JUNE 21, 2024

BETWEEN

MHM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. B. Kabanga RM delivered on 31.5.22 in Hola Sexual Offence Case No. E019 of 2021)

RULING

1. The Appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (SOA), and sentenced to life imprisonment. The particulars of the offence are that on diverse dates between February 2020 and 21st June 2021 in Tana River Subcounty within Tana River, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of SM, (the Complainant) a child aged 11 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of this offence are that on the same dates and in the same place, the Appellant committed an indecent act by intentionally and unlawfully touching the vagina of the Complainant with his penis.

2. Being aggrieved by both the conviction and sentence the Appellant filed this Appeal. In his amended grounds of appeal, filed on 5.12.23, the Appellant faulted the learned Magistrate for:

    i. failing to find that the Appellant was not informed in advance of the evidence against him or given reasonable access to the same, in contravention of Article 50(2)(j) of the *Constitution*.

    ii. failing to find that the voire dire examination of the Complainant was in disregard of Section 19 of the *Oaths and Statutory Declarations Act*.

iii. failing to ask the Appellant if he wished to put any questions to the Complainant thereby contravening Section 208(3) of the *Criminal Procedure Code* (CPC).

iv. failing to find that the doctor's evidence was not conclusive as no DNA was done on the sperms found in the Complainant's vagina.

v. failing to consider the Appellant's evidence and mitigation.

vi. giving a harsh and excessive sentence.

vii. failing to take into account the time the Appellant spent in custody pending trial.

3. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190).

4. The facts of the case according to the prosecution are that the Appellant had been defiling his 2 minor daughters one of whom is the Complainant. In her testimony, the Complainant stated that one day, she was left home with the Appellant and her 2 siblings. Her mother had gone to their auntie's home with her sister F. The Appellant sent his other children to fetch water at the well and called the Complainant to his bedroom. He locked the door, stripped her naked and inserted his penis into her vagina. Her siblings returned and found the door locked and the Complainant was weeping. The Complainant informed her mother what had transpired who in turn informed her uncles. The Appellant beat up his wife who reported the matter to the sub-chief but no action was taken. The Complainant further stated that her mother eventually left the home to escape the physical violence from the Appellant. Thereafter the Appellant turned the Complainant and her sister into wives and slept with them in turns. The matter came out in the open when a teacher at their school noticed that all was not well with the Complainant's sister and on inquiry, was informed of what had been going on at home. The teacher reported the matter and the Complainant and her sister were taken to Hola County Referral Hospital for examination and thereafter recorded statements at the Hola Police Station.

5. Both the Appellant and Respondent filed their submissions which I have duly considered.

6. The Appellant submitted that he was denied the right to a fair trial as the hearing proceeded with 2 witnesses without him being supplied with witness statements. He argued that the evidence adduced in court was prejudicial to him as without the witness statements, he was unable to prepare his defence.

7. Article 50(2) of the *Constitution* guarantees to every accused person the right to a fair trial which includes the right inter alia to:

(c) to have adequate time and facilities to prepare a defence.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

8. At the commencement of a trial the court is required to ensure that the accused person has been supplied in good time, with all the statements and evidence that the prosecution intends to rely on.

9. I have looked at the record. The Appellant took plea on 28.6.21 and the trial court ordered that he may be released on bond and gave the bond terms. The trial court also directed that statements be provided to the Appellant.

10. The record further shows that when the matter came up for hearing on 26.8.21, the prosecutor stated he was ready to proceed with 2 witnesses. The Appellant stated that he was ready but prayed for reduction of bond to free bond. At no point did he inform the trial court that he had not been supplied with witness statements and in fact stated he was ready. The issue he now raises ought to have been raised during trial so as to enable the trial court address its mind to the same and make a finding thereon. This was not done.

11. It is trite law that issues not raised in the trial court cannot be raised at the appellate stage. In the case of *Japheth Mwambire Mbitha v Republic* [2019] eKLR the Court of Appeal addressed its mind to an invitation to consider fresh issues and stated:

> Needless to say, the Court declined to entertain fresh issues on appeal. In line with that finding, we too are disinclined to address the allegations of a defective charge sheet as it is a new matter and there is no opinion by the two courts below on this new issue which was introduced for the first time on second appeal. Put differently, the appellant cannot fault the first appellate court for failing to make a finding on an issue that was never advanced at the hearing of the first appeal. Consequently, that ground of appeal should of necessity fail.

12. I am duly guided. The Appellant cannot complain at the appellate stage, that he was not supplied with statements, yet he did not raise the issue in the court below. Accordingly, this ground fails.

13. On the ground that voire dire was not conducted in accordance with the law, the Appellant submitted that the trial court failed to record the questions it put to the Complainant; that there is nothing to show the manner in which the Complainant was examined or the questions asked and her responses. He further submitted that the voire dire examination was casual and in flagrant disregard of Section 19 of the *Oaths and Statutory Declarations Act* and the elaborate procedure set out in the case of *Johnson Muiruri v Republic* [1983] KLR. His view therefore was that this was fatal to his conviction. For the Respondent, it was submitted that voire dire examination was conducted in accordance with the law and that upon being satisfied that the Complainant understood the duty of telling the truth and nature of oath, had her sworn. The assertion by the Appellant is therefore baseless.

14. The purpose of voir dire examination is for the court to satisfy itself that a minor witness understands the importance of telling the truth and the seriousness of an oath. In the case of *Johnson Muiruri v Republic* [1983] KLR 445 (*supra*), the Court of Appeal explained the purpose of voir dire examination of minors as follows:

> 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.

15. The record herein shows that prior to receiving the testimony of the Complainant, the trial court magistrate inquired as to whether the Complainant understood the meaning of telling the truth and the consequences of lying. This can be seen by what the Complainant stated, namely that she knows it is wrong to tell lies, that it is sin to tell lies and that one can be jailed for telling lies to the court. Having satisfied itself that the Complainant understood the importance of telling the truth, the trial court proceeded to record her evidence. I see no reason to interfere with that finding. In any event, the objection now raised by the Appellant regarding the voir dire examination or the subsequent admission of the minor's testimony was never put before the trial court. The same cannot be raised at the appellate stage.

16. I now turn to the ground that the trial court did not ask the Appellant if he had any questions to put to the Complainant at the end of her testimony. He argued that being unrepresented and given the seriousness of the charge and the severity of the punishment, the court ought to have asked him whether he wished to put any questions to the Complainant. He urged this Court to find that this omission caused an injustice and allow the appeal. The Respondent countered this by submitting that the record indicates that cross examination was nil. The Appellant chose not to cross examine the Complainant and the court cannot therefore be faulted.

17. The record shows that at the close of the Complainant's examination in chief, the court indicated "Cross examination – Nil". This simply means that the Appellant though given an opportunity to put questions to the Complainant chose not to. It is noted that there is nothing on record to show that the Appellant raised this issue before the trial court. The same cannot be raised on appeal. Accordingly, this ground also fails.

18. On the ground that the medical evidence was inconclusive, the Appellant submitted that the PW7 Mohamed Mwenje, the clinical officer who examined the Complainant stated that there was presence of male sperms in the Complainant's vagina but that he could not tell he could tell whose sperms they were. The Appellant thus argued that because of failure by PW7 to conduct DNA analysis on the sperms, the Appellant could not be connected to the alleged offence. Reliance was placed on the case of Joseph Gona Fondo v Republic Criminal Appeal No. 35 of 2021 in which the evidence did not connect the appellant therein with the offence as the DNA analysis of specimen taken from the victim did not match those of the appellant. With respect, this authority is not helpful as in the presence case, no DNA analysis was done. Indeed, this is what the Appellant complains of.

19. The critical elements forming the offence of defilement are the age of the complainant, proof of penetration and positive identification of the assailant. (See *Dominic Kibet Mwareng v Republic* [2013] eKLR).

20. There is no dispute that the Complainant was a 11 year old minor at the material time. The ingredient of age was thus proved.

21. The ingredient of penetration was also proved. Upon examining the Complainant, PW7 found that her hymen was broken though not freshly broken, had discharge and male sperms in her vagina and her outer genitalia was swollen. He concluded that there was penetration but could not tell whose sperms were in the Complainant's vagina.

22. The issue that is in contention is that of identification. The Appellant's case is that there was no evidence to connect him with the offence. It is common ground that the Appellant is the father of the Complainant. The Complainant's testimony is that her father once locked her in the house and stripped her naked and thereafter inserted his penis in her vagina. When his wife PW2 questioned him, he beat her up. At one time PW2 found him in his children's bedroom him trying to strip the Complainant and her sister PW5. When she confronted him, he again beat her up and tried to slash her with a panga which made her leave her matrimonial home. During this time, the Appellant turned the Complainant and her sister into wives and slept with them in turns. This was corroborated by PW5 who stated that the Appellant defiled them countless of times. He would go to their bed and push one of them off and defile the other. He defiled them in turns in the presence of each other. It is PW5 who disclosed to her teacher that the Appellant had been defiling her and her sister when the teacher noted that they were both looking stressed and not doing well in school.

23. In his judgment, the trial Magistrate stated that the prosecution witnesses were candid and consistent on what transpired in the case. He found no reason to disbelieve any of them. I too have considered the evidence on record. It is clear from the P3 and PRC forms and testimony of PW7 that the Complainant was defiled. The evidence of the Complainant, PW2 and PW5 leaves no doubt that the person who defiled the Complainant was the Appellant. Their testimony was clear and consistent and all point to the Appellant as the perpetrator.

24. The Appellant complains that the trial court did not consider this defence. The Appellant stated in his defence that he had differences with his wife who he alleged was in an affair with the headmaster whose name he could not recall. He further alleged that the Complainant and PW5 had boyfriends and had warned them. Additionally, that there was a conspiracy to have him jailed so that his wife and children could take his property.

25. The record shows that the trial court did consider this defence. The court found that the Appellant did not make it clear how the headmaster conspired against him or what interest he had over the matter, as PW2 was not living with the Appellant at the time of his arrest. The court further stated that the Appellant failed to explain why the Complainant and the other witnesses agreed to testify against him and yet he stated that there was no bad blood between him and the Complainant and PW5 or any police office. The trial court found that this defence was too weak to dislodge the prosecution's case. I too have considered the Appellant's defence and concur with the trial court that the same is not persuasive and did not dislodge the prosecution case. I am therefore satisfied that Appellant was convicted on overwhelming evidence and find no reason to fault the trial court on its finding in this regard.

26. Defilement of minors is a serious assault on society and its sensibilities, more so when the perpetrator is a person who should otherwise be a protector of the victims. The evidence herein shows that the Appellant preyed upon his own flesh and blood and turned them into wives, when their mother fled the matrimonial home due to the violence meted out on her for daring to question him for defiling his daughters. In spite of being father to the Complainant, the Appellant thought nothing of betraying the trust bestowed upon him by violating her. Adults of sound mind have a moral responsibility to

protect children and not to harm them as the Appellant did to the Complainant. The violation and pain he inflicted upon the Complainant is unimaginable and will live with her for a long time to come.

27. Following conviction, the Appellant was sentenced to life imprisonment. The Appellant asserts that the sentence was excessively harsh. He submitted that in recent jurisprudence, the Court of Appeal has found that life imprisonment is unconstitutional. He cited the case of *Julius Kitsau Manyeso v Republic* Criminal Appeal No. 12 of 2021 to buttress this proposition.

28. The sentence imposed upon the Appellant was in accordance with Section 8(2) of the *SOA*, which provides that a person who commits the offence of defilement with a child aged 11 years or less shall upon conviction, be sentenced to imprisonment for life. In the cited case of *Julius Kitsau Manyeso supra*, the Court of Appeal stated:

> We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic* Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies 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 in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*.

29. The mandatory nature of the life sentence provides under Section 8(2) of the *SOA* strips the trial court of the discretion to impose a sentence that is commensurate to the specific circumstances of each case. Under Section 216 of the *Criminal Procedure Code*, a trial court may receive such mitigation as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made before passing sentence or making an order against an accused person. The mandatory nature of the sentence under Section 8(2) of the *SOA* however, in effect renders any mitigation that may be made by an accused person pointless and a mere exercise in futility. Such mitigation is not taken into account. It is for this reason that the Court of Appeal in the cited case, stated that this is unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*, as the mitigation of persons convicted facing lesser sentences is taken into consideration.

30. Additionally, a life sentence is indeterminate. In this regard, the Court of Appeal went on to state:

> In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

31. Duly guided, I find that the indeterminate life sentence imposed upon the Appellant should be reviewed.

32. Given the emerging jurisprudence, it is time that Parliament relooks at the mandatory life sentence and indeed other mandatory sentences in the SOA with a view to reviewing the same.

33. In the end, after re-evaluating the evidence, my finding is that the Appellant was properly convicted and I do hereby uphold the conviction. As regards the life sentence imposed by the trial court however, I set aside the same and substitute therefor, a sentence of 40 years in prison to run from the date of his arrest.

DATED AND DELIVERED IN VIA MS TEAMS THIS 21ST DAY OF JUNE 2024

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M. THANDE

JUDGE