Tomokia v Republic (Criminal Appeal E043 of 2023)
[2024] KEHC 6642 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E043 OF 2023

RN NYAKUNDI, J

JUNE 7, 2024

BETWEEN

RONALD MUKULO TOMOKIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. P.N. Areri in Eldoret cr. SO. N0. 127 of 2019)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 5th day of May, 2019 in Kapseret Sub-County within Uasin Gishu County in the Republic of Kenya, the accused willfully and unlawfully caused his genital organ to penetrate the genital organ of AJ a child aged 14 years.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were more less the same.
3. The appellant was convicted on the main charge and sentenced to 20 years imprisonment.
4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:
    i. That the learned trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.
    ii. That the learned trial magistrate erred in law and in fact in failing to independently analyze and/or evaluate the evidence on record hence an erroneous determination.

iii. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without taking into account the weight of the evidence adduced.

iv. That the learned trial magistrate erred in failing to appreciate and find that the charge preferred against the appellant had not been established and proved as required by law.

v. That the learned trial magistrate erred in shifting the burden of proof onto the appellant and in convicting the appellant based on speculative circumstantial evidence.

vi. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant when there was no proof of defilement.

vii. That the learned trial magistrate erred in law and in fact in taking into account and/or consideration extraneous matter which were not in the charge sheet and di not form part of evidence to sentence the appellant.

viii. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without sufficient evidence and in rejecting the appellant's defence.

ix. That the learned trial magistrate erred in law and in fact in imposing a very harsh sentence without considering the appellant's mitigation and the circumstance of the case.

x. That the learned trial magistrate erred in law and in fact in failing to hold that the prosecution had not/or did not link the appellant to the alleged crime.

xi. That the learned trial magistrate erred in law and in fact in not acquitting the appellant of the charge against him for want of proof beyond reasonable doubt.

The parties filed their submissions in support of their arguments.

Appellant's Submissions

5. The appellant submitted on two issued for determination. Whether the offence of defilement was proved beyond reasonable doubt and whether the sentence was harsh and excessive.

6. It was submitted for the appellant that the elements of defilement; Identity of the person committing the offence and age of the victim were not proved by the prosecution. On the element of identity, the appellant submitted that he was not properly identified by the complainant who was the single identifying witness.

7. It was submitted for the appellant that the trial court did not warn itself of the special need for caution before relying on the evidence of identification by the complainant who was the single identifying witness. Counsel therefore submitted that failure by the trial court to undertake an inquiry of careful testing of the testimony of the complainant is an error and the conviction therefrom against the appellant cannot be said to be safe.

8. The appellant argued that during cross examination, the complainant stated that she had seen the appellant on one occasion before. On further cross examination she confirmed that she did not know the appellant. Further, that he led police officers to the house where they found someone sleeping. She also stated that she could not recall what the appellant was wearing at the time of the incident.

9. Learned counsel for the appellant maintained that on the part of PW2, she testified upon cross examination that the complainant admitted to the act after being beaten by the teachers in the presence of her mother. Further that PW4 Dr. Jagdish Kanji gave the general history of the complainant as narrated by her during examination to the effect that when she was on her way home, she was

intercepted by a motor-cycle rider who took her to his place and defiled her. On cross examination the medical doctor told the court that the complainant stated during medical examination that she did not know the perpetrator by name.

10. The appellant submitted that from the foregoing testimonies he was not properly identified by the complainant who was a single identifying witness. He stated that this might be a case of mistaken identity. The complainant further stated that she could not recall if there was electricity in the house in question, that she could not see properly at the particular time, that she did not know the appellant and that she could not recall what the appellant was wearing during the incident. On this counsel cited the case of Adam Daktari Konoye vs Republic. He urged the court to find that the appellant was not properly identified.

11. On the element of penetration, it was submitted for the appellant that the prosecution failed to prove that there was partial or complete insertion of the appellant's genital organ into that of the complainant. That according to the medical doctor, genital examination on the complainant revealed that she had fresh hymenal tears at 3, 5 and 7 O'clock and erythema and abrasions at the posterior fourchette. It was his further findings that there was no vaginal discharge noted and that no spermatozoa was seen.

12. The appellant stated that upon cross examination, the medical doctor confirmed that not all hymenal tears are caused by defilement and that the same can be caused by the patient herself introducing an object into her genitalia. For these reasons the appellant argued that the element of penetration was not established and there is doubt as to whether the complainant was defiled.

13. On the issue of age, the appellant was not opposed to the finding that the complainant was a minor aged 12 years old.

14. The appellant made submissions on sentencing. He argued that the sentence was harsh and excessive considering the circumstances of the case. He cited the Judiciary sentencing policy guidelines and argued that the age of the appellant was not considered being 24 years old. That the appellant is a first offender without a previous criminal record and that he was remorseful. He urged the court to find that the sentence was harsh and excessive. He relied on the case of Philip Mueke Maingi & others versus Director of Public Prosecutions & another, Machakos High Court Constitutional Petition No. E017 of 2021.

Respondent's Submissions

15. Ms. Emma Okok, Senior Prosecution Counsel in opposing the appeal submitted on the elements of defilement and she maintained that the prosecution's case was proved beyond reasonable doubt.

16. Regarding the element of penetration, the respondent posited that the complainant testified that on that material date, she was on her way to her friend' house when she met the appellant. The appellant told her that his name was Godfrey. He grabbed her hand and took her to the mud house that had two rooms. The appellant had sexual intercourse with the complainant. That he warned the complainant not to tell anyone about the incident and if she did so, he would kill her. The complainant eventually told her parents and teachers what had transpired. She was taken to hospital where she was treated and discharged. During cross examination, she was categorical that the appellant was someone she knew by physical appearance as she had seen him before. It was also her evidence that the incident occurred at around 2:00PM and she was unable to see the appellant.

17. Additionally, counsel submitted for the Respondent that the complainant's evidence was corroborated by evidence of PW4 Dr. Jagdish Kanji who examined the complainant. His evidence was that the

complainant presented with a history of defilement. She had fresh hymenal tears at 3, 5 and 7 O'clock. There was erythema and abrasions at the posterior fourchette. He concluded that the complainant had been defiled and produced the P3 from as prosecution exhibit 2. That the evidence on penetration was therefore solid.

18. The respondent submitted on the element of age and stated that the minor was 12 years old as she was born on 23rd March, 2007.

19. Finally on identity, according to the respondent the complainant testified that she knew the appellant as he used to sit at the shop near their school. She did not know his name but she could identify him by his physical appearance. On the material date, the appellant introduced himself as Godfrey. The incident occurred at around 2:00PM. It was during the day. The complainant testified that she stayed with the appellant at the mud house for about an hour. During cross examination, she was categorical that she was able to properly identify the appellant. She stated thus; "I saw the accused during the offence with my eyes." The Respondent submitted that the complainant had sufficient time to properly identify the appellant and there was no possibility of mistaken identity. That the evidence of identification was therefore solid.

20. It was further submitted for the respondent that the defence of alibi pleaded by the appellant was an afterthought as the same came at the tail end of the trial. She therefore concluded that the all the ingredients of the offence of defilement were established to the required standard.

21. On the legality of sentence, counsel submitted that the sentenced imposed was appropriate considering the offence and urged the court to uphold it.

Analysis And Determination

22. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32.

23. The issues that arise for determination in this appeal are;

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

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

Elements of offence of defilement

24. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement

    8(2) "A person who commits am offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

25. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant. See Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013

What does the evidence portend?

Age of the complainant

26. In a charge of defilement, the age of the victim is important for two reasons: i) defilement is a sexual offence against a child; and ii) age of the child has also been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence. On this element, the parties appeared to agree that the complainant herein was 12 years old.

Penetration

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. According to the appellant, based on the findings of the medical doctor that there was no vaginal discharge noted, that there was no spermatozoa seen, there might be a likelihood that penetration into the complainant's genital organ might have not been caused by defilement attributable to the appellant.

29. Having considered and analyzed the evidence adduced, I come to the conclusion that there is ample evidence that penetration did occur. The medical evidence produced supports penetration of the minor.

Was the appellant the perpetrator?

30. The minor stated that the she has seen the appellant before and that she used to see him at the shop where he used to just sit. She equally stated that she saw him the day he touched. The trial court in finding that the appellant was the assailant stated that the complainant led the police to the place where she was defiled and therefore the identification was proper.

31. In the cases of R vs Turbull and Others (1976) 3 ALL ER 549. Lord Widgery C.J had this to say: -

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" was the observation impended in any way, as for example by passing traffic or press of people. Had the witness ever seen the accused before" How often" if only occasionally, had he any special reason for remembering the accused" How long elapsed between original observation and the reason for remembering the accused" How long elapsed between original observation and the subsequent identification to the police" was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance."

32. The law requires the trial court to carefully scrutinize evidence of a single identifying witness and only convict if satisfied that it was free from possibility of error or mistake. In Wamunga versus Republic [1989] KLR 424 the Court of Appeal stated thus:

> It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.

33. In Roria v Republic [1967] EA 583, the court warned on the dangers of convicting on the evidence of a single identifying witness, stating:

> A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.

34. I have gone through the complainant's testimony over and over again. This is a young girl who was expected to be at school on this material day but he did not report. Her cousin had looked for her in school but she was not in school. It then followed that she had to explain to the teachers and parents where she was and she narrated the events leading to the present offence. She even led the police to the place where she was defiled. They found another man and she could tell that it was not the assailant until she was taken to Mosonics offices where she was able to identify the appellant. This is a man she stated to have seen before at Ole Tebes and the ordeal happened during the day. I am satisfied that this is not a case of mistaken identity.

35. In my view, the evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant. Accordingly, I find that the elements of defilement namely, penetration and minority age of the victim were proved beyond doubt. The conviction was therefore proper.

36. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court did not error in convicting the appellant for defilement. The appeal on conviction therefore lacks merit and is hereby dismissed.

On sentence

37. The appellant prayed that the sentence meted be set aside. Section 8 (3) of the *Sexual Offences Act* to convict provides as follows:

    8

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

38. The trial court in sentencing the appellant considered the mitigation advanced and sentenced the appellant to 20 years imprisonment. Such a minimum sentence gives a judicial officer the discretion to impose a severe sentence or a lenient one depending on the circumstances of the case. I must say that the trial court was right in appreciating the seriousness of the sentence and imposing an appropriate sentence.

39. However, I am of the considered opinion that if the mitigating factors were considered, they should have given credit and the sentence should have been a lesser one.

40. In the "Muruatetu Case", the Supreme Court various guidelines to be considered in sentencing:

> "(a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

41. In my considered view, the objectives of sentencing should be considered in totality. In this regard. Additionally, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

1) Retribution: to punish the offender for his/her criminal conduct in a just manner.

2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

5) Community protection: to protect the community by incapacitating the offender.

6) Denunciation: to communicate the community's condemnation of the criminal conduct.

7) Reconciliation: To mend the relationship between the offender, the victim and the community.

8) Reintegration: To facilitate the re-entry of the offender into the society.

42. In the end, I understand the mandatory minimum sentences to be placing a limitation on the trial court's power to set a lower sentence than the one prescribed by the statute.

43. I have come to learn over time as a judge at various levels of our courts that no task confronting a criminal court Judge is more of an enigma that that of sentencing the convicted offender. Trying a case may be as easy as falling off a log. The difficult comes in knowing what to do with a man or woman for that matter once she has been found guilty. If anything the problem of sentencing has grown all the more vexing since the creation of common law as a legal system within the commonwealth nations. One of the hallmarks of classical penology is the structural changes that account for the rise of discretion in sentencing. To start with, there is always the question to grapple with as to the appropriate punishment of the offence as the same is already calculated by the legislature rather than by individual Judges.

44. My reading and interpretation of the various penal statutes gives one the impression that the legislature task in enacting the various provisions on patterns of sentences is for courts to dispense punishment with uniformity without regard for the offender's Social economic class, his or her mental state, or the circumstances surrounding his or her unlawful deed. Above all the letter and spirit of the law, punishment is to be meted out according to the terms of the statute violated and not according to the trial Judges interpretation of how the law should be applied.

45. Unfortunately, that is not the case now in our administration of criminal justice system for the philosophy of individualization of sentences as gained wider acceptancy and currency. In essence the promoters of individualization typology have tailored the principles in sentencing to make punishment consonant with the needs of the offender.

46. That was the epitome of the Supreme Court decision in Francis K Muruatetu V R 2017 eKLR in aggregate it cannot be denied that indeed this new trajectory on discretionary sentencing procedures have created manifold problems in imposing sentences, for various individuals with the same circumstances of facts on the commission of the offence. Basically, these problems are derived from the fact that the shift from consistency, uniformity, equality, predictability, to individualize sentencing vested in the discretion of a trial Judge occasioned un appreciable measure of sentences which are either extremely lenient or on the upper scale of being punitive and excessive.

47. I am convinced that the sentencing function with the tenet of tyranny of discretion exercised by Judges has sometimes gone overboard for reason that same courts and handling similar types of offences and offenders have ended up with erratic sentences which from the lens of the public have no appropriate answers. I am of the considered view that even on individualized dichotomy on sentencing, the Judges task is that of interpreting the law in the court room and seeing to it that rules of procedure are scrupulously adhered to with minimum departure from the prescribed sentence.

48. In the event of departure from the legislative provisions on sentencing the trial Judge ought to endeavor to give clear reasons with a mess of certainty as to why the sentence had to be individualized from the one intended by the legislature. In the case of House v The King (1986) 161 CLR 513 518-119 the court went about to state as follows:

> " Discretion signifies a number of different legal concepts. Here the order is discretionary because it depends on the application of a very general standard-what is just and equitable- which calls for an overall assessment in the light of the factors mentioned in the statutory provision, each of which in turn calls for an assessment of circumstances. Because this assessment call for value judgement in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the fact which its operation depends with a close eye on the characteristics of a discretionary order in the sense which we have outlined, if the questions involved lead themselves to differences of opinion which within a given range are legitimate and reasonable answers to the questions, it would be wrong to allow a court of Appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conforming with the dictates of principled decision making, it would be wrong to determine the parties rights by reference to a mere preference for a different result over that favored by the judge at the first instance. In the absence of error on his part. According to our

consumption of the appellant process, the existence of an error whether of law or fact, on the part of the court at first instance is an in disposable condition of a successful appeal"

49. What has come to be the hallmark of the discretionary nature of sentencing in Kenya is the necessity of the trial courts at the end of it all to exercise their discretion to meet both the circumstances of the crime and the circumstances of the criminal. Simply put, that the canon of individualization of sentences as interpreted by Kenyan courts. It is also a key component of the principle of proportionality in Kenyan sentencing law. The meaning in context is that the sentences should be proportionate. Firstly, it should be proportionate to the crime, that is a grave offence is reflected by a severe sentence. Notwithstanding that sentences must also be proportionate to the personal circumstances of the offender or convict. Essentially the discretionally nature of sentencing is that the personal situation of the offender or convict must be taken into consideration by the sentencing court. Secondly, the breadth of discretion conferred on trial judges under Kenyan sentencing law means that different Judges can legitimately adopt different sentencing approaches when sentencing an offender in different situations but with similar facts.

50. Those decisions can never be said to discriminatory under Article 27 of *the constitution*. Thirdly, inconsistency in sentencing is likely to happen in Kenya's criminal Justice System because of Judicial variability. Thus individual Judges have different approaches to sentencing that occur naturally by virtue of their own knowledge, experience, perspectives, and legal philosophies.

51. The analogy to be drawn from the above analysis leads me In the end, to interfere with the 20 years imprisonment sentence and have it substituted with a lesser sentence of 15 years imprisonment. In arriving at this decision, I have taken into account a mixed grill of factors bone out of the entire circumstances of this appeal and the guiding objectives and principles in sentencing regime in Kenya.

52. In the upshot, the appeal partially succeeds on sentence whereas the judgement on conviction is affirmed. 14 days Right of Appeal explained.

DATED SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JUNE, 2024

In the Presence of

Mr. Mugun for the State

Appellant

.....

R. NYAKUNDI

JUDGE