Ludunde v Republic (Criminal Appeal E057 of 2021) [2024] KEHC 9570 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E057 OF 2021

AC MRIMA, J

JULY 25, 2024

BETWEEN

GEORGE WAFULA LUDUNDE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.N. Osoro (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 217 of 2019 delivered on 14th May 2020)

JUDGMENT

Background:

1. George Wafula Ludunde, the Appellant herein, was charged with the offence of Defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the offence are that; on the 17th September 2019 at 13.00hrs in [particulars withheld] within Trans-Nzoia County intentionally caused your penis to penetrate the vagina of M.J a child aged 7 years old.
3. The Appellant faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of *Sexual Offences Act* No 3 of 2006.
4. Upon considering the entire evidence, the trial Court found the Appellant guilty of the main offence of defilement and he was accordingly convicted under Section 215 of the *Criminal Procedure Code*. He was sentenced to life imprisonment.
5. The trial Court, properly so, made no finding on the alternative charge.

The Appeal:

6. The Appellant was dissatisfied with the conviction and sentence. Through Amended Grounds of Appeal, the Appellant urged the Court to quash his conviction and to set aside his sentence on the following grounds: -

   1. That the learned trial magistrate erred in law and fact by failing to note that the charge sheet was defective.

   2. That the learned trial magistrate erred in law and fact by failing to consider the provision of the sentencing policy guidelines during sentencing.

   3. That the learned trial court failed to observe that the clinical officer did not introduce himself as per laws of Kenya.

   4. That the learned trial court failed to exercise discretional powers during sentencing.

   5. That the learned trial court failed to consider the appellants mitigation and pre-sentence report.

7. The Appellant filed submissions in further support of his case. He submitted that the omission of the word 'unlawfully' in the charge sheet rendered it defective. He relied on various cases among them *David Odhiambo v Republic*, Criminal Appeal No 5 of 2005 where the Appellant was acquitted for that reason.

8. As regards the second ground of Appeal, the Appellant submitted that the failure by the Clinical officer to introduce himself was contrary to Section 2 of the *Clinical Officer's (Training Registration and Licensing) Regulations* and as such the Court could not tell whether he was a competent witness.

9. The Appellant urged this Court to allow the appeal, quash the conviction and set-aside the sentence so that he be set at liberty.

The Respondent's case:

10. The State opposed the appeal through written submissions dated 23rd May 2023. It was its case that the prosecution established all the ingredients for the offence of defilement beyond reasonable doubt.

11. It urged that the appeal be dismissed and the conviction and sentence affirmed.

Analysis:

12. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions (See *Okono v Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as so held in *Ajode v Republic* [2004] KLR 81.

13. The Supreme Court of India in *K. Anbazhagan v State of Karnataka and others* Criminal Appeal No 637 of 2015 observed as follows: -

    ...The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete

reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record.

14. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

15. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

16. This Court will deal with grounds of appeal alongside the consideration of the ingredients of the offence of defilement.

Whether the charge sheet was defective:

17. The Appellant's case derives from the contention that the omission of the word 'unlawful' in the particulars of the offence occasioned him prejudice.

18. The requirement that a Charge Sheet is properly drafted is codified in law. Section 134 of the *Criminal Procedure Code* provides for the manner in which a Charge Sheet should be drafted. It provides as follows;

> 134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

19. In *Peter Ngure Mwangi v Republic* [2014] eKLR the Court of Appeal stated that where the evidence adduced is at variance with the charge, the said charge is defective. It was observed thus: -

> 39. ...A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, (1983) eKLR that:
>
> ...In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
>
> (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
>
> (ii) When for such reason it does not accord with the evidence given at the trial.
>
> 40. In the South African case of *S v Hugo* 1976 (4) SA 536 (A), the Court held that "the charge should inform the accused of the case the State wants to advance against him." The Court quashed the conviction on the basis that the accused was prejudiced because evidence had been admitted regarding allegations which did not appear on the charge.

20. When the Appellant was arraigned in Court for plea taking, the substance of the charge was read to him to which he responded 'Not guilty'.

21. The foregoing is an indication that the Appellant understood the charge he faced.

22. More importantly, the evidence of the prosecution witnesses was in tandem with the offence of defilement. The complainant testified as PW1, her evidence was that the Appellant did 'tabia mbaya', he put me on his bed and gagged my mouth.

23. The other witnesses' evidence, including Nyongesa Geoffrey, a Clinical Officer at Matunda as PW3, corroborated the charge of defilement.

24. Section 382 of *Criminal Procedure Code* is further illuminating on this issue. It provides as follows: -

> 382. Finding or sentence when reversible by reason of error or omission in charge or other proceedings:
>
> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

25. From the foregoing, it can be discerned that substantial miscarriage of justice did not occur at the trial Court. The uncontested fact that the complainant had not attained the age of the majority put the Appellant on sufficient notice of the kind of offence he was facing. It mattered not that the word 'unlawfully' was not in the particulars.

26. The above is bolstered by the Court of Appeal in *Benard Ombuna v Republic* [2019] eKLR where it was observed as follows: -

> .... In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence." (emphasis added)

27. In the premise, this Court finds that no prejudice was suffered by the Appellant herein. The ground of appeal is hereby dismissed.

Age of the complainant:

28. The Age Assessment Report which was produced as PExh-2 indicated that the Complainant was 7 years of age at the time of the incident.

29. There was no challenge as to the age of the Complainant both the trial Court and in this appeal. Therefore, this Court finds that the complainant was aged 7 years old when she as allegedly defiled.

Penetration:

30. In her evidence, the complainant testified that 'Guka', sent her to the posho mill and on return, he asked her to get into his house where he undressed her, removed his 'susu' put it her 'susu' and did 'tabia mbaya' to her.

31. This Court has also keenly studied the Medical Examination Report produced by the Clinical Officer. On physically examining the complainant's genitalia, that there was mild reddening of vulva, broken hymen and no discharge.

32. The term ‘penetration’ is defined by Section 2 of the said Act in the following way;

> “ penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

33. This position was fortified in *Mark Oiruri Mose v R* (2013) eKLR when 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…. (emphasis added).

34. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v Republic* (2014) eKLR held as such on the aspect of penetration: -

> …. In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

35. Even if there was absence medical evidence, the complainant’s evidence alone was able to sustain the aspect of penetration. I say taking cue from the Court of Appeal decision in Criminal Appeal No 312 of 2018, *Evans Wanjala Wanyonyi v Republic* [2019] eKLR where the decision in Criminal Appeal No 84 of 2005 (Mombasa) *Kassim Ali v Republic* was cited wit approval as follows: -

    ….. [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.

36. On the basis of the law and evidence, this Court finds that the issue of penetration was properly proved.

37. Further, the ground of appeal to the effect that the Clinical officer did not introduce himself does not tilt the finding of penetration in any way.

Identification of the perpetrator:

38. The identity of the Appellant was not in contest.

39. However, for abundance of caution, it was only the complainant who rendered the evidence on identification. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

40. Evidence by a single witness must be treated carefully and cautiously. In *R v Turnbull & others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

> …. 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way…? 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 the 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 his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made….

41. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences where a Court may convict on uncorroborated evidence as long as the Court believes that the witness is truthful.

42. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in *Peter Musau Mwanzia v Republic* (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

43. Since there is no doubt that the Appellant was well known to the complainant and in view of the fact that the issue of identification was not contested in this appeal, this Court affirms the finding of the trial Court that, indeed, it was the Appellant who defiled the complainant.

44. As such, the appeal on conviction is hereby rejected.

Sentence:

45. Having found so, the Court now turns to the question whether trial court erred in sentencing the Appellant.

46. From the record, it is apparent that upon convicting the Appellant, the Trial Court considered the nature of the offence, the Pre-Bail Report and the Appellant's mitigation. According to Section 8(2) of the *Sexual Offences Act*, there was only one mandatory sentence which was life imprisonment. The trial Court rendered that sentence.

47. There has, however, been pronouncements by the Court of Appeal on the constitutionality of the indefinite nature of life imprisonment. In *Manyeso v Republic* [2023] KECA 827 (KLR), the Court held that the life imprisonment provided under Section 8(2) of the *Sexual Offences Act* is unconstitutional due to its indeterminate nature. However, in Criminal Appeal No 104 of 2021 in Nairobi *Onesmus Musyoki Muema v Republic*, the Court of Appeal held that the sentence of life imprisonment under Section 8(2) of the *Sexual Offences Act* is constitutional. Therefore, the position is unsettled.

48. Recently, the Supreme Court of Kenya in Petition No E018 of 2023 *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) delivered on 12th July 2024, considered the issue as to whether mandatory and minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and whether Courts have discretion to impose sentences

below the minimum sentences and, in the case of the mandatory sentences, whether Courts can render any other sentences apart from the mandatorily prescribed ones in the *Sexual Offences Act*.

49. The Learned Judges of the Apex Court first differentiated between 'mandatory sentences' and 'minimum sentences' by making the following remarks: -

(56) Mandatory sentences leave the trial Court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

(57) In the *Muruatetu case*, this Court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

(62) Before Kenyan Courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all Courts below.

50. On the question whether the Court of Appeal was proper in making the finding on unconstitutionality of minimum sentences under the *Sexual Offences Act*, the Learned Supreme Court Judges stated as follows;

(63) Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

(64) The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then

juxtapose the impugned provision against the *Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case.

(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

(67) We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

51. The foregoing elaborate findings of the Supreme Court are self-explanatory as regards minimum sentences and the new position under Section 8 of the *Sexual Offences Act*. For clarity, unless and until Section 8 of the *Sexual Offences Act* is specifically declared unconstitutional, upon a proper consideration arising from a matter filed in an appropriate forum, it remains good law.

52. In this case, the Appellant was charged under Section 8(1) as read with (2) of the *Sexual Offences Act*. Sub-section (2) provides as follows: -

> 8(2) 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.

53. Flowing from the foregoing, since Section 8 of the *Sexual Offences Act* remains valid law, then the trial Court, as well as this Court, has no discretion to grant an otherwise sentence.

54. As the Appellant was properly sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, the appeal on sentence hereby fails.

Disposition:

55. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have still been handling matters from the Constitutional & Human

Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

56. In the premises, the following final orders do hereby issue: -

a. The appeal is wholly dismissed.

b. The trial Court's conviction and sentence of life imprisonment are hereby upheld.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

George Wafula Ludunde, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.