Mage v Republic (Criminal Appeal E070 of 2022)
[2024] KEHC 9338 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9338 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E070 OF 2022

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

EDWIN ALUDA MAGE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment delivered by Hon. P. M. Kiama, Senior Principal Magistrate on 10th November 2022 in Kangema Senior Principal Magistrate's Court S. O. Case No. E032 of 2021, Republic v Edwin Aluda Mage)

JUDGMENT

Background

1. Edwin Aluda Mage was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars are that Edwin Aluda Mage on the night of 18th September 2021 at Kanyenyeini Location of Kangema Sub-County within Murang'a County, intentionally caused his penis to penetrate the vagina of E. N. K. a child aged 14 years.
3. In the alternative count, the Appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
4. The trial magistrate considered the evidence of the 7 prosecution witnesses and the unsworn evidence of the Appellant and convicted the appellant who was sentenced to serve 20 years imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -

1. That the honorable trial magistrate erred in law and in fact in convicting and sentencing the Appellant when the evidence adduced was scanty and/or insufficient thereby arriving at a wrong and improper decision.

2. That the honorable trial magistrate erred in law and in fact in convicting and sentencing the Appellant when the evidence adduced was actually contradictory, misplaced and unjust thereby arriving at an improper, unjust and uninformed decision and judgment.

3. That the honorable trial magistrate erred in law and in fact in arriving at an improper, unlawful and illegal decision on facts and information that did not support comprehensively the evidence to necessitate a conviction upon the Appellant thus fully improper and wrongful and in decision making.

4. That the honorable trial magistrate erred in law and in fact in disregarding pertinent information of facts and evidence which were not appropriately adduced for corroboration and disregarding the Appellant's facts and statements.

5. That the honorable trial magistrate erred in law and in fact in admitting and entertaining exaggerated and extraneous unjust information and evidence which was not exhibited appropriately in support through key documents necessitating a miscarriage of justice.

6. That the honorable trial magistrate erred in fact in sentencing me to the minimum mandatory sentence without appreciating the decision of J. Odunga in Petition No 15 and 16 2015 consolidated and in J. Mativo in Constitutional and Judicial Review Division Petition No 97 of 2021.

6. The appellant prayed that the appeal be allowed and considered meritorious, conviction quashed, sentence meted set aside, and he be set at liberty in the interest of justice.

Prosecution's Case

7. The Complainant (PW1) said that on 18.9.2021 at around 1.00 pm while returning home from school, she met the Accused who was her lover and who invited her to his house for lunch. That while in the said house, the Accused was called by his boss for some work only to return at 6.00 pm. That since it was late, the Complainant chose to stay in the Accused Person's house overnight and go home the following day, and that it was during the overnight stay that the Accused defiled her.

8. J (PW3), the Complainant's father, testified that the following day after the Complainant failed to return home from school, he asked R (PW2), the Complainant's stepmother to take milk to Karuri and to also search for the Complainant. R said that she met the Complainant's friend who informed her that she saw the Complainant go into the house of the Accused and close the door. J said that he informed his brother D (PW5) and the Assistant Chief John Matheri Gikono (PW6) and they reported the matter at Kanyenyaini Police Station. That they went to the Accused's house where they found him and the Complainant. The Accused was arrested and taken to Kanyenyaini Police Station and then to Kangema Police Station where they wrote their statements.

9. The Complainant was taken to Kangema Sub-County Hospital where she was examined by the Clinical Officer Dona Maithima (PW4), who established that her labia was tender and bruised with freshly broken hymen and he formed the opinion that there was penetration. He filled, signed and stamped the P3 Form on 20.9.2021 and produced the P3 Form as ExP1 and the Treatment Notes as ExP2. PC Caroline Wanja Njeri who conducted investigations and preferred the charges herein produced the Complainant's Birth Certificate as ExP4 which showed that the Complainant was born

on 29th July 2007 and was 14 years old at the time of the offence. Prosecution witnesses positively identified the Accused in the dock.

Defence Case

10. The Appellant, Edwin Aluda, gave an unsworn statement that he was a farmer and that he woke up in the morning and went on his daily activities. He said that he took milk to Karuri Center and that when he got back, he swept the house and went to take tea but his boss called him and gave him the usual work. The Appellant informed court that he went to sleep at around 9.00 pm when the Complainant opened the gate and that he went and found her at the gate. That the Appellant sold eggs and the Complainant said she wanted eggs. That the Appellant sent her to Cucu wa Jane but found she had gone to church.

11. The Appellant said that he told the Complainant to wait for him to collect the eggs and that he then closed the chicken coop and asked the Complainant to assist him in packing the eggs. He said that he heard a person open the gate but he did not bother because he carried eggs. That the Complainant's mother asked whether he could do that and the Assistant Chief was called. That the father of the child also arrived and the Appellant was arrested. The Appellant said he worked with the Complainant's father but they did not have a good working relationship.

12. This appeal was canvassed by way of written submissions.

Appellant's Submissions

13. The Appellant submitted that proceedings indicate the complainant took herself to his house and that he did not know that she was a student as he never saw her in uniform. That the complainant was behaving like a full grown woman ripe for marriage and that during the trial process, she did not seem to have been complaining about the incident.

14. The Appellant relied on the case of *Martin Charo v Republic* (2016) eKLR where Chitembwe, J. (as he then was) held: -

> "It is true that under the *Sexual Offences Act*, a child below 18 years old cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men's houses for purposes of having sex, the court ought to treat such a child as a grownup who knows what she is doing. The appellant was 23 years old when the incident occurred as per the pre bail report. It would be unfair to have the appellant serve 20 years behind bars yet PW1 was after sex from him. The evidence does not show that the appellant knew that PW1was a student or that the appellant took advantage of PW1 being a young girl. It is clear to me that PW1 started engaging in sex way before that date."

15. The Appellant argued that for the defence under Section 8 (5) of the *Sexual Offences Act* to apply, courts should have regard to circumstances of the case including steps taken by the Accused. That the complainant visited the Appellant the previous night and that therefore the Appellant did not have time to ascertain the age of the Complainant as she arrived late in the evening. The Appellant further relied on the case of *Martin Charo v Republic* (2016) eKLR where it was held: -

> "It is important to distinguish between law and morals. It is the law that a child below the age of 18 years cannot consent to sex. Section 8 (5) qualifies the provisions of Section 8 (1) to 8 (4) which penalizes defilement. It can easily be concluded that it is immoral for one to have sex with a child under the age of 18 years. However, where the same child under 18 years who is protected by the law opts to go into men's houses for sex and then goes home, why should

> the court conclude that such a person was defiled. In my view that cannot be defilement. The complainant normally does not complain but is made to be the complainant because she is under 18 years. My view is that such a behaviour is that of an adult and not of a child. Children are not meant to enjoy sexual intercourse. Whenever they do, then that becomes the behaviour of an adult. Although the public will frown upon an adult who engages in sex with such a child, we should not forget that circumstances have changed. Young children engage in sex at very young age. This is not out of defilement. Conviction of a defiler should be based on actual circumstances and proof that the complainant was indeed defiled. This is more so when one considers the lengthy sentences imposed by the law for such an offence. It is unfair to send someone to 20 years imprisonment yet the complainant was enjoying the relationship."

16. On whether the sentence was manifestly excessive, the Appellant prayed that the court considers his mitigation if it finds that his appeal on conviction lacks merit. The Appellant submitted that in the Muruatetu case, the court appreciated that circumstances under which the initial sentence was imposed may change as one serves the sentence. The Appellant therefore prayed for a lenient sentence as was held in the case of *Joshua Gichuki Mwangi v Republic*, Nyeri Criminal Appeal No 84 of 2015.

Respondent's Submissions

17. The Respondent submitted that the offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. That the ingredients are provided for under Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No 3 of 2006 and must each be proven as was restated in *George Opondo Olunga v Republic* (2016) eKLR.

18. On the age of the victim, the Respondent contended that PW1, the victim testified that she was born on 29th July 2007 which was proved by Exhibit 4, the birth certificate and which proves that the minor was 14 years at the time of the incident.

19. On proof of penetration, the Respondent argued that PW1 described how the Appellant had used his penis to penetrate her vagina. That she explained how she did not consent to the act as she feared she would get pregnant but the Accused took off her clothes and proceeded commit the offence. That PW4, the medical officer, confirmed that he examined the child when she was presented to the hospital with the allegation of having been defiled by a person well known to her. That on examination, he confirmed that while her genital was normal, her hymen was broken due to recent penetration, the labia was tender with freshly broken hymen which was clear evidence that penetration had occurred.

20. On identification of the perpetrator, the Respondent stated that PW1 informed court that she knew him prior to the incident and referred to him as a friend. That PW2, PW3, PW5, and PW6 testified referring to the Appellant as a person who was a local and employed within their neighbourhood. That they confirmed they were present during his arrest at his place of residence where they found the victim half naked and that they apprehended the Appellant who tried to escape.

21. On the Appellant's defence under Section 8 (5) of the *Sexual Offences Act* that he believed the complainant was over the age of 18 years and had capacity to consent, the Respondent relied on the decision of the court in *Abdi Keinan v Republic* (2018) eKLR where the court held that in determining whether an accused person reasonably believed a minor to be an adult, the court has to look at the circumstances surrounding the case. The Respondent pointed out that the minor clearly stated that she was a school going child and that she knew the Appellant who was her friend. That the Appellant in his defence did not raise the issue of age of the minor and only indicated that he worked with the

father of the victim and that they had a bad working relationship. The assumption that the minor was an adult is therefore an afterthought.

22. On whether the sentence was manifestly harsh, the Respondent submitted that the aggravating circumstances outweighed mitigation which were considered by court before passing the sentence. That the sentence was therefore proportionate and appropriate to the offence and that court considered all existing circumstances.

Analysis and Determination

23. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

24. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

   i. Whether the Complainant had capacity to consent and whether the Appellant was made to believe so

   ii. Whether the sentence was harsh and excessive

Whether the Complainant had capacity to consent and whether the Appellant was made to believe so

25. On the one hand, upon perusal of the trial court records, this court establishes that in cross examination of the Complainant, she admitted that her and the Appellant were lovers and that she went to the Appellant's house as she had promised to visit him after school. Further, in her evidence, she told the Appellant that since it was at night, she would sleep over and go home the following day. Additionally, the Appellant in his submissions relied on Section 8 (5) of the *Sexual Offences Act* and the holding in the case of *Martin Charo v Republic* (2016) eKLR in arguing that the Complainant took herself to his house and that he did not have time to ascertain her age as she arrived late in the evening.

26. On the other hand, PW7, produced the Complainant's birth certificate as ExP4 which showed that she was born on 29th July 2007 and that she was aged 14 years at the time of the offence. The Appellant in his defence also indicated that he knew the Complainant, her mother and her father, and that he even worked with the said father and that their relationship was not good. This creates a picture in the mind of the court that the Appellant knew the Complainant well and that she was a school going child. Therefore, the Appellant's assumption that she was an adult and capable of consenting is an afterthought.

Whether the sentence was harsh and excessive

27. This court has noted that the Appellant was charged under Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* which provides for imprisonment for a term of 15 years for the offence. However,

the trial court sentenced the Appellant to 20 years imprisonment. The evidence on record shows that the Complainant was aged 14 years at the time of the incident. Therefore, the 20 years imprisonment imposed upon the Appellant was pursuant to Section 8 (3) of the *Sexual Offences Act* which provides: -

> A person who commits an 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.

28. However, in *Mwangi v Republic* (Criminal Appeal 84 of 2015) [2022] KECA 1106 (KLR) (7 October 2022) (Judgment), Nyeri Court of Appeal, Criminal Appeal No 84 of 2015, W. Karanja, P.O. Kiage & J. Mohammed, JJA held that: -

> "We emphasise that this court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the *SOA* due to the heinous nature of the crimes committed. And they will continue to be appropriately punished...
>
> On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts...
>
> ...We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.
>
> This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in article 160 of the *Constitution*. Further, the Judiciary has a mandate under article 159 (2) (a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the *Constitution*. This includes the provision of article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited... In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons."

29. This court finds that the sentence meted out against the Appellant was in its mandatory nature and called for the intervention of this court. Additionally, this court notes that the Appellant aged 25 years and the Complainant aged 14 years were lovers as admitted by the Complainant and there were no aggravating circumstances to warrant the imposition of the 20 years imprisonment imposed upon the Appellant. Courts have the duty to dispense justice not only to complainants but to Accused Persons as well. The sentence of 20 years imprisonment is therefore substituted with 10 years imprisonment.

30. The Appellant was first arraigned in court on 20th September 2019 and was granted cash bail which was reduced to Kshs 20,000. The Appellant was however not able to raise the security and was in remand custody throughout the trial. He was therefore in remand for a period of 1 year, 1 month and 20 days which are to be factored in his sentence pursuant to Section 333(2) of the *Criminal Procedure Code*.

31. In conclusion, this court finds that the appeal on conviction is dismissed. However, the appeal on sentence is allowed. The sentence of 20 years imprisonment is set aside and substituted thereof with sentence of 10 years imprisonment which is to run from 20th September 2019. 14 days right of appeal explained.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Peter Og'indi - Court Assistant

Muriu for Respondent

Appellant present