Mwangi v Republic (Criminal Appeal 40 of 2015)
[2024] KEHC 10603 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10603 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 40 OF 2015

CJ KENDAGOR, J

JULY 18, 2024

BETWEEN

FRANCIS MUIRURI MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was tried and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* and sentenced to life imprisonment. The particulars of the offence were that; on 26th august 2011 at [Particulars Withheld], Murang'a County, caused his genital organ namely penis to penetrate the anus of PNK, a child aged 9 years.
2. Dissatisfied with the conviction and sentence, he filed a petition of appeal on 6th May 2015 wherein he listed seven (7) grounds of appeal. Subsequently, he filed amended grounds of appeal together with his written submissions.
3. The appeal was disposed of by way of written submissions.
4. The appellant relied wholly on the written submissions mentioned above.
5. The respondent contests the appeal through written submissions dated 27th May 2024.
6. As a first appellate court, I must reconsider and evaluate the evidence in the court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In *Kiilu & Another v Republic*, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate court as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the

evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

7. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial court, and the written submissions filed on behalf of the parties. I have also read the judgment of the trial court. Having done so, I find that the issue for my determination is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt and whether the conviction was safe.

8. The complainant was a child of tender years who gave sworn evidence. The appellant submitted that the voire dire examination was improperly conducted. The record shows that the trial court conducted a voire dire examination and recorded it in terms. The learned trial magistrate was satisfied that the child understood the nature of the oath and the duty of telling the truth. I am content that the trial court employed the correct procedure in ascertaining the child's competence to give evidence. See *Johnson Muiruri v Republic* [1983] KLR 445.

9. Turning to whether Section 200 (3) of the *Criminal Procedure Code* (CPC) was complied with and, if not, the consequences of such non-compliance, if any;

Section 200(3) of the CPC provides: -

> "Where a presiding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right"

10. In *Joseph Kamara Maro v Republic* [2014] eKLR the Court of Appeal held that:

> "Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code."

11. Additionally, in *Joseph Kamau Gichuki v Republic* [2013] eKLR the Court stated that:

> "This Court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of

witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

12. From the above decisions, it is clear that a succeeding magistrate or judge is not obliged by Section 200(3) of the *Criminal Procedure Code* to start a trial de novo. The record shows that the prosecution had challenges securing the attendance of the witnesses due to interference and that the complainant's mother was treated as a refractory witness. The interference can be inferred from the appellant referring the investigating officer to deliberations before the chief to settle the matter. Additionally, the trial court observed the time-lapse and its impact on the minor in the comprehensive ruling delivered on 24th February 2014 on this issue. The provisions of Section 200 of the *Criminal Procedure Code* were duly complied with, and I find no fault with that holding.

13. The ingredients that need to be proved in offence of defilement are;

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

14. According to the birth certificate produced, the complainant was born on 11th March 2002. At the time of the incident complained of, he was 9 years and 5 months. I am satisfied that the child's age was established.

15. The next issue is whether the prosecution proved penetration.

    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."

    Therefore, penetration, as an essential ingredient of the offence, must be proven beyond reasonable doubt.

16. The complainant, in his evidence in chief, stated that he experienced pain in the anus and stomach and that his stool had blood. PW5, a medical doctor, testified that there was distension in the abdomen, loose anus, and inconsistency of stool. The examination was three days after the date under reference. The evidence on record shows that the complainant was well-oriented and gave a good history during the medical examination. The evidence of the child is corroborated by the medical evidence produced, and penetration into the anus was proven.

17. The next key question is the identity of the perpetrator. The complainant said that he had gone to see his grandmother and that he ended up at the appellant's house when he did not find her. PW2 and PW3 reiterated that the appellant was the complainant's uncle. From the evidence of the complainant, the appellant was in contact with him, they shared a bed for two nights. The complainant's evidence was that of recognition. It is a well settled principle in criminal law that recognition is a better form of identification than identification of a total stranger.

18. In the case of *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, Court had this to say on circumstantial evidence:

    " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way

back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

19. The trial magistrate made a finding that the inculpatory facts show that the penetration occurred when the complainant was with the appellant and that the supposition is that the appellant sexually assaulted the complainant. There was no doubt that the complainant properly identified the Appellant as the perpetrator of the sexual assault.

20. The totality of the evidence of PW1, PW5, and the medical reports establish the required standard of proof that it was the appellant who sexually assaulted the complainant.

21. In the end, I concur fully with the learned trial magistrate that all the ingredients of the offense were proved beyond a reasonable doubt. The appellant was afforded a fair trial, and the conviction was safe. The appeal against conviction is accordingly dismissed.

22. I will now turn to the sentence. Under section 8 (2) of the *Sexual Offences Act*, 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.

23. The learned trial magistrate exercised discretion on sentencing and, in doing so, meted a lawful sentence.

24. Jurisprudence has evolved that life imprisonment is not left indeterminate.

In *Ayako v Republic (Criminal Appeal 22 of 2018)* [2023] KECA 1563 (KLR) (Okwengu, Omondi & J. Ngugi, JJA) (8 December 2023) (Judgment) translated life imprisonment to 30 years. They stated as follows:-

> "26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.
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> 27. In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years' imprisonment. The record shows that the appellant was in custody since he was arraigned in court on July 18, 2011. By dint of section 333(2) of the Criminal Procedure Code, the imprisonment term of 30 years shall be computed to begin running from that date."

25. Considering this case's evidence and severity, I translate the life imprisonment to 40 years. In compliance with Section 333 (2) of the *Criminal Procedure Code*, the period the appellant spent in custody before his sentence shall be taken into account, from 16th September 2013 to 28 April 2015.

26. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted with the sentence outlined in paragraph 25 of this judgment.

27. It is so ordered.

DELIVERED, DATED, AND SIGNED AT NAIROBI ON THIS 18TH DAY OF JULY 2024.

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C. KENDAGOR

JUDGE

Judgment delivered through the Microsoft Online Platform.

In the presence of:

Court Assistant: Hellen

ODPP: Ms. Oduor

Appellant: Francis Muiruri Mwangi