Mwangi v Republic (Criminal Appeal E022 of 2022)
[2024] KEHC 7890 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E022 OF 2022

PN GICHOHI, J

JULY 2, 2024

BETWEEN

SHADRACK WAMBUGU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. Y.I. Khatambi (Principal Magistrate) in Nakuru Chief Magistrate's Court Criminal Case No. 158 of 2019 delivered on 3rd February, 2022)

JUDGMENT

1. Shadrack Wambugu Mwangi (hereafter referred to as the Appellant), appeared before the trial magistrate in Nakuru on 22nd August, 2019 where he was charged with the offence of defilement contrary to Section (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 22nd day of September, 2019 at Nakuru East Sub - County within Nakuru County, he intentionally and unlawfully caused his male genital organ namely penis to penetrate the vagina of FKM a child aged 12 years.

3. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the offence were that on the 22nd day of September, 2019 Nakuru East Sub -County within Nakuru County, he intentionally and unlawfully committed an indecent act to a child namely FKM a child aged 12 years by touching her vagina using his penis.

5. He pleaded not guilty and the case proceeded for trial. The Appellant was found guilty on the main charge and convicted. He was sentenced to serve ten (10) years imprisonment.

6. He was aggrieved by both conviction and sentence and therefore preferred this appeal on the following grounds:-

    1. That the learned trial magistrate erred in law and fact by convicting the Appellant on insufficient evidence.
    2. That the learned trial magistrate erred in law and fact when he failed to note that age of the complainant was not established.
    3. That the learned trial magistrate erred in law and fact by concluding that the Appellant was properly identified.
    4. That the learned trial magistrate erred in law and fact by pronouncing a harsh sentence.
    5. That the learned trial magistrate erred in law and fact when he failed to give consideration to the Appellant's defence and mitigation.
    6. That the learned trial magistrate erred in law and fact by failing to accord the Appellant a fair trial.

7. The Appellant therefore urged this Court to allow the appeal, quash the conviction, set aside the sentence imposed on him and he be set at liberty.

8. This appeal was heard on the basis of written submissions. On his part, the Appellant filed his submissions on 18th April, 2023 and seems to have abandoned his appeal on conviction. He submitted that he was seeking leave to substitute his appeal and instead make mitigatory submissions.

9. Restating the charge that he was facing before the trial court and that he was found guilty and sentenced to 10 years imprisonment, the Appellant went on to state :-

> " I pleaded not guilty due to the judge due to my untruthfulness. It's with total sincerity that I apologise for my dishonesty. I remorsefully admit and humble myself before God and this honourable court and the Republic and beg for leniency and forgiveness for my acts/deeds. I am sincerely sorry and apologetic to the complaint and her family at large and even extended my honesty to them and reaching for my forgiveness which has yielded positively...Since the date of my conviction, I have called myself to a meeting and found why I went contrary to the law. It has been facilitated mostly by theological education and training I am going through here in prison.
>
> I have found that change is the only way for redefying my bad character to a new and self-understanding person who can relate well with the rest... Just as annexed, I have acquired theological certification and others still ongoing in the process of reformation. Also, I have and still going on with tailoring course which I have already booked my first grade in the course...All this is voluntary not pushed as I want to proof that I have changed greatly."

10. He therefore urged the court to consider his honesty and the programs he has undertaken and grant him a him a lesser and lenient sentence preferably a non- custodial sentence. He pledged to be law abiding.

11. In his submissions dated 12th April 2022 and filed on 18th January, 2024, the Respondent went ahead to summarised the evidence before the trial court. He submitted that the evidence on record left no

doubt that the ingredients of the offence had been proved and that there was no injustice caused on the Appellant.

12. He further submitted that the Appellant's defence was duly considered and did not challenge the prosecution case. He therefore urged the court to no find no merit in the appeal and proceed to uphold the conviction.

13. While urging the Court to uphold the sentence, the Respondent submitted that the Appellant's mitigation was noted and that based on the facts of the case, the Appellant does not deserve any leniency.

Analysis and Determination

14. This being the first appeal, it is the duty of this Court to evaluate afresh the evidence adduced before the trial court and arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify – See *Okeno v Republic* (1973) E.A 353.

15. However, the Appellant has abandoned the appeal on conviction and therefore, evaluation on facts is not necessary and the submissions by the Respondent on conviction are overtaken by events. and of no consequence.

16. The only ground left for determination in this appeal is on sentence. The section under which the Appellant was charged, that is, Section (1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006 provides:-

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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.
>
> (3) 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." [Emphasis added]

17. A perusal of the judgment shows that the trial court ascertained that there was no birth certificate but the P3 Form and the PRC Form indicated the child's age as twelve (12) years. The Court of Appeal has since settled the issue of age of victim in defilement cases. In *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR held as follows: -

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R* Cr. Appeal No.19 of 2014 and *Omar Uche v R*,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of

the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

18. While relying on the Court of Appeal holding in *Francis Omuroni versus Uganda* Criminal Appeal No. 2 of 2000 on determining age of the victim in defilement cases, the trial court went on to say:-

> "I am of the considered view that the said information was filled upon interrogation on both the complainant and her guardian. I also had a chance to see complainant when she appeared before my court during trial. Based on the above-mentioned fact, physical appearance of the complainant and the response given in voire dire, I have no reason to doubt that the complainant was below 18 years. I make this consideration taking into consideration the above-mentioned case gives the authority to deduce the complainant's age through observation and common sense."

19. It is clear that the trial court did not categorically state that it was adopting the age of 12 years given by the P3 Form or PRC Form . The use of the words "below 18 years" above was vague. Sentences as framed under the *Sexual Offences Act* are categorised by age of the victim even though mandatory minimum sentences have been declared unconstitutional.

20. While sentencing, the court stated:-

> " Mitigation by accused duly considered . I have further weighed the mitigating factors against the aggravating factors which included the injuries sustained by the complainant . I note the prosecution never presented a birth certificate on age assessment. As a consequence, age stated in the P3 Form and PRC Forms are estimated.

21. From the case law, the P3 Form and the PRC Form are documents that are credible to give the age of the victim herein as 12 years.

22. The prosecution had no previous records for the Appellant. In mitigation, the Appellant stated:-

> "I pray time in custody be considered. I am sole breadwinner. My parents are old. I seek leniency. I am looking for money to go to school."

23. While sentencing, the trial court stated:-

> " Mitigation by accused duly considered . I have further weighed the mitigating factors against the aggravating factors which included the injuries sustained by the complainant .
>
> I note the prosecution never presented a birth certificate on age assessment. As a consequence, age stated in the P3 Form and PRC Forms are estimated. Accused is sentenced to imprisonment for 10 years. Sentence to run from 26/9/2019 when accused took plea."

24. Before passing the sentence, the trial court had called for a pre-sentence report which captured the Appellant's age as 22 years. The pre-sentence report shows that the Appellant was aged 22 years. In her recommendation, the Probation Officer stated:-

> " Before court is a 22-year-old single male who is a school dropout . At the time of his arrest, he was engaging in causal work for to save for his school fees as he intended to return to school, . He maintains he is not guilty although he gave contradicting information from his father's .

The victim and her family could not be traced. In vie of the above factors and the gravity of the offence, I leave it that natter to court for its suitable conclusion and determination."

25. From the foregoing, there is no doubt that mitigation was considered. No doubt, the trial exercised its discretion while arriving at that sentence and considering the age of the victim and the circumstances under which the offence was committed, the sentence passed on the Appellant was very lenient. There is no justification to interfere with that sentence despite the Appellant's remorse. Further, it is clear that the trial court also complied with Section 333 (2) of the *Criminal Procedure Code* while sentencing.

26. In conclusion therefore:-

    1.. The appeal is dismissed for lack of merit.

    2. The conviction is upheld and the sentence affirmed.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2024.

PATRICIA GICHOHI

JUDGE

Inthe presence of:

Shadrack Wambugu Mwangi - Appellant

Mr. Kihara for Respondent

Ruto- Court Assistant