Ochieng v Republic (Criminal Appeal E018 of 2016)
[2024] KEHC 8328 (KLR) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8328 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E018 OF 2016

RN NYAKUNDI, J

JULY 8, 2024

BETWEEN

FREDRICK OCHIENG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. H. Barasa in Eldoret Law courts Cr. S.O No. E170 of 2013) Coram: Before Justice R. Nyakundi Mr. Mark Mugun for the State)

JUDGMENT

Representation:

Mr. Mark Mugun for the State

1. Fredrick Ochieng was charged with the offence of Defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 1st day of January 2013 in [Particulars Withheld] district within Western province, the accused intentionally and unlawfully caused his genital organ (penis) to penetrate into the genital organ (vagina) of VNN, a girl aged 3 years.

2. Alternatively, he was charged with an offence of committing an Indecent Act with a child contrary to section 11(1) of the *sexual offences Act*. The particulars of the offences were more less the same.

3. The Appellant was found guilty as charged, convicted and sentenced to serve life imprisonment. He was aggrieved with both conviction and sentencing and as such filed the present appeal, relying on the following grounds:

    i. That the appellant pleaded not guilty.

ii. That the learned trial magistrate erred in law and fact in not finding that fundamental rights had been violated in the police custody.

iii. That the learned trial court erred in both law and fact that he did not observe that the P3 form filled by the clinical revealed disconnections with the witness' testimonies.

iv. That the learned magistrate erred in law and facts by not considering the defence witness adduced by the accused.

4. The role of this Court as the first appellate Court is well settled. It was held in the case of *Okeno v. Republic* (1972) EA 32 and in *Mark Oiruri Mose v. R* (2013) eKLR that a first appellate Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. The grounds of appeal as crafted by the appellant speak of the anomalies in the P3 form vis a vis the testimonies and the fact that his defence was not considered by the trial court.

6. The prosecution in establishing its case marshalled five witnesses who gave testimonies in support of the prosecution's case.

7. PW1 MNS testified that the minor herein was a nursery school pupil at [Partiiculars Withheld] primary school turbo and that she was barely four years old. She stated that the minor herein used to sleep in the same room with two other minors, namely M who was aged seven years and B who was five years. She told the court that on 1st December, 2013 at around 12:15 am she was in her house when she heard the aid children cry. She woke up and went to see what was happening.

8. She told the court that she found a stick at the door and on checking further she noticed that the padlock that had been used to lock the door was missing. She went round the house and met the minor herein coming from the other side of the house. She was crying as she uttered the words, baba (father) she passed her and proceeded to her bed. She stated that she lit the lamp and saw that the other two children were sleeping. She said that she closely observed the minor and found that she was bleeding profusely from her private parts. She called her neighbours who came to the scene and saw what had happened to the minor. They then proceeded to the accused's house and before they talked to him, he denied having done anything. That the victim kept saying that the accused laid on her. She told the court that they took the minor to Turbo dispensary but found no doctor to attend to them. They then proceeded to cottage hospital where they were told that the case was beyond the hospital. They went back to Webuye district hospital where the minor was attended to. She stated that when she went back home, she found a crowd and on inquiring what the matter was, she was told that blood had been found in the accused's person house. She told the court that the matter was reported at the Turbo Police Station and the accused was arrested in connection to the offence. She stated that the minor had to undergo an operation following the incident.

9. PW2 Dickson Kabutkorir took the stand and stated that he examined the minor herein and filled a P3 form which he produced before the trial court. He explained that the minor had vaginal tears on the vagina walls and blood was oozing from her genitalia.

10. PW3 told the court that he was the village elder of Kambi Mawe village and that on 1st December, 2013 at around 8:30 am PW1 called him and informed him that her granddaughter had been defiled. He then proceeded to PW1's home in the company of one JK and PW1 dully narrated to him what had happened. He stated that he checked the scene and noticed blood nearby a banana stem. He said that

PW1 suspected her neighbours. He told the court that they later entered the accused persons house and questioned him as to his whereabouts. The previous night he stated that as they were questioning him, he had some blood stains on his trouser and this made him become suspicious. Upon his advice, PW1 reported the matter at Turbo Police Station. The accused was then arrested after three days and upon interrogation, he led police officers to his house where a blood stained trouser was recovered. The same was dully retained as an exhibit.

11. PW4 was a government analyst based in Nairobi and he told the court that on 8th April, 2013 he received a grey pair of track suit trouser and the blood sample of the minor herein. On 2nd April, 2014 the blood sample of the accused person was also received at their laboratory. He stated that they were required to examine the blood stains on the said pair of trousers and the blood samples and state whether there was any relationship between them. He carried out a DNA analysis and concluded that the DNA profile generated by the blood stains on the trouser matched those of the minor herein. He prepared a report dated 29th April, 2014 which he produced as an exhibit.

12. PW5 a police corporal testified that she was one of the officers who investigated the case. She stated that she recovered a grey blood stained trouser from the accused person. She said that she recovered a grey blood stained trouser from the accused person. The same had been washed but the blood stains were still visible. She said that she obtained blood samples from the minor and the accused person herein for comparison with the blood stains on the said trouser. She forwarded the blood samples and the grey trouser to the government analyst who prepared a report. She told the court that the accused was arrested with the help of PW3.

13. From the above prosecution evidence, the trial court concluded that the prosecution established a prima facie case and proceeded to put the Appellant on his defence.

14. In his defence, the accused person told the court that on 1st January, 2013 at 4:00 AM some people knocked at his door and when he opened the same, he found three people one of whom was a woman. The two men then requested him to escort the woman to hospital which he did. He said that they went to a hospital called medical but they did not find any doctor. They then went to a private hospital called cottage but again they found no doctor. The woman then told him to go back to his house and requested him to help look after her house since it was late. After two weeks the village elder and one of his guards came to his house and asked him to accompany him to the police station. When they got there, he was put in the cell and thereafter, he was arraigned in court and charged with the present offence.

Determination

15. In determining this appeal this court shall satisfy itself that the ingredients of the offence of defilement were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court. The issues for determination in this appeal are:

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

    ii. Whether or not the sentence was excessive.

Elements of offence of defilement

16. 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 an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

17. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

a. Age of the complainant;

b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

c. Positive identification of the assailant.

18. In the case of Charles Wamukoya Karani v. Republic, Criminal Appeal No. 72 of 2013 it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

19. What does the evidence portend?

Age of the complainant

20. The age of the complainant forms one of the essential ingredients of the offence of defilement which must be proved by the prosecution beyond reasonable doubt. Under section 8(1) of the *Sexual Offences Act* a person is deemed to have committed defilement if he or she does an act which causes penetration with a child. Under Section 2 (1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than eighteen (18) years. The onus of proving age resides with the prosecution.

21. The significance of proving the ingredient of age in defilement cases was clearly spelt out by Mwilu J (as she then was) in the case of Hillary Nyongesa v Republic (Eldoret Criminal Appeal No.123 of 2000) stated that:

> " Age is such a critical aspect in Sexual Offences that it has to be conclusively proved.... And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

22. Therefore, 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) the 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.

23. A child is defined as a person under the age of eighteen years. Is the victim herein a child?

24. PW1 being the grandmother and guardian of the child survivor herein informed the court that the child was almost four years. The position was also confirmed by PW3 who examined the victim and produced a P3 form indicating that the victim was 3/1/2 years old. I take note that the trial court had the benefit of equally observing the demeanour of the witnesses. The trial court concluded that the minor was clearly a child of tender years. The fact that the victim is a minor was not disputed by the

appellant. I find no reason to differ with the findings of the trial court and therefore this court finds that the minor was 3/1/2 years old at the time of the incident.

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."

25. The victim's grandmother gave a narration of the ordeal. She told the court that when she went around the house, she found the padlock that had been used to lock the door was missing. She went round the house and met the minor herein coming from the other side of the house. That the minor was crying as she uttered the words, baba (father) she passed her and proceeded to her bed. She testified that she closely observed the minor and found that she was bleeding profusely from her private part.

26. The findings of the medical officer whose report was produced by PW2 support the complaint's testimony that she was defiled. On examination, the minor had tears extending to the vaginal wall and blood was oozing. This in itself is prima facie evidence of penetration hence there can be no doubt that penetration was occasioned on the complainant.

Was the appellant the perpetrator?

27. The Appellant was suspected from the start of it. PW1 and PW3 testified to this effect. PW3 stated that he saw the appellant wearing a blood stained trouser. A search was conducted in the appellant's house and the blood stained trouser was found. The trouser was forwarded to the government analyst along with blood samples obtained from the appellant and the victim. As rightly noted by the trial court, the accused might have not identified the assailant due to her tender age but the finding as contained in the government analyst report and the fact that the said blood stained trouser was recovered from the accused person proves beyond any reasonable doubt that the appellant was the perpetrator of the heinous act.

28. It is therefore the finding of this court that the appellant was rightly identified as the perpetrator.

29. 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.

30. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error.

31. 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

32. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principles or if the court exercised its discretion capriciously. In Shadrack Kipchoge Kogo v Republic. The court of Appeal stated: "Sentence is essentially an exercise

of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

The court of Appeal on its part, in *Bernard Kimani Gacheru v. Republic* (2002) eKLR restated that: " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wring material, or acted on a wrong principles. Even if, the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exit"

33. Life sentence or imprisonment stipulated as a minimum mandatory sentence under the Sex Offences Act in my view was meant for public protection for serious offences defined under this Act involving Sex Acts against minors below age of 18 years. In my reflection, parliament in its wisdom saw it fit that without mandatory minimum sentences such offenders convicted of defilement or incest will get away with lenient sentences which will pause a risk the members of the Republic occasioned by the commission of the offence or any other such specified offences under the *Act*.

34. The legislature must have considered that the seriousness of the offence of defilement on defilement or one or more offences associated with it is such as to justify the imposition of a sentence of imprisonment for life. The pattern of sentences under Section 8(1) & (2) of the *Sexual Offences Act*, applied in respect to an offender found guilty of the elements of the offence beyond reasonable doubt. In this section life sentence means a sentence imposed against an offender which he serves for life. Therefore, under this section the court is required to pass a sentence on imprisonment for life as a mandatory minimum sentence. There was no alternative sentence in which the court could exercise discretion. However, in the recent times mandatory life imprisonment has faced serious debate about its suitability with regards to human rights issues prescribed in our chapter 4 of the *constitution* commonly referred to as the Bill of Rights.

35. The Kenya Court of Appeal alluded to these constitutional imperatives in *Julius Kitsao Manyeso v Republic* (2023) Eklr in which they determined as follows:"..... the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017]eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *constitution*." Further, that "....an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28,.....an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved. The Court reasoned that the imposition of a mandatory indefinite life sentence, denies a convict facing life imprisonment the opportunity to be heard in mitigation while convicts facing lesser sentences are granted the right to mitigate. This denial is unjustifiable discrimination, unfair and repugnant to the principle of equality as enshrined under Article 27 of the *constitution*. Further, an indeterminate

> life sentence is inhumane treatment and violates the right to dignity under Article 28. It is now a principle in international law that all prisoners, including those serving life sentences,

be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved"

36. The criteria for imposition of a life sentence consisted broadly on the provisions of the statute without room of the trial court exercising discretionary parameters for guidance. In most of those cases there was no express departure from the criteria laid down in the *Sexual Offences Act*. It is not clear whether parliament when referring to Sections 888(1) & (2) and Section 20 of the *Sexual Offences Act* had taken into account the interrelationships of the sentencing principles and objectives as a policy in this area of law and the interrelationships to such factors like mitigation. The Sexual Offences as defined in the above provisions justified imprisonment or detention for life of a convict.

37. That was the law then until the progressive jurisprudence from the superior courts to look at the sentencing regime from the lens of the *constitution*. It is interesting now in a larger framework to precisely pin down the circumstances in which life sentence is possible or desirable or appropriate as earlier intended by parliament. To the extent that life imprisonment without parole has been declared unconstitutional by one of our apex courts, the threshold for imposition of it if necessary is in the realm of discretionary sentence. It is notable that with the death penalty as a mandatory sentence having been rendered unconstitutional by the Supreme Court in *Francis Muruatetu* (2017) eKLR life imprisonment in *Sexual Offences Act* has a minimum mandatory sentence remain to be one of the harshest penal sanctions in the Kenyan Criminal Laws.

38. Life imprisonment was literally interpreted to mean serving the sentence until your last breathe. The way I see it the country was responding to Sexual Offences against minors under the age of 18 years who were being sexually assaulted in defiance of Social norms and culture. The courts therefore in this respect are toning down from the hardline objectives of deterrence as a purpose of punishment towards rehabilitation of an offender. The courts also pursuant to Article 2(5) & (6) of the *constitution* are obliged to incorporate international law which is part of our sources of law in the decision making process such as to justify the imposition of a sentence on imprisonment for life. The ICCPR in Article 10 (3) provides the rhythm that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and the penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their reformation and Social rehabilitation.

39. The United Nations High Commission for Human Rights Committee for Civil Political Rights, General comment No. 21 in respect of Article 10(3) of the *ICCPR* amplifies the Article by clearly stating that no penitentiary system should only be retributory, it should essentially seek the reformation and social rehabilitation of the prison. In terms of Section 8(1) & (2) and Section 20 of the *Sexual Offences Act* the minimum mandatory life sentence is therefore only retributory as proscribed by Article 10 (3) of the *ICCPR*. In Article 7 of the *ICCPR* and Article 5 of the *Universal Declaration of Human Right, a torturers punishment* is prohibited. That is also what Article 25 (a) of the *constitution* provides for as follows: (a) That every person has a fundamental right and freedom from torture and cruel, inhuman or degrading treatment or punishment. *The African Charter on Human and People's Rights* in Article 2, 3, 4 & 5 provides as follows:

> Art 2:
>
> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guarantee in the present charter without distinction of any kind such as race, ethic group, colour, sex language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
>
> Art 3

Every individual shall be equal before the law

Every individual shall be entitled to equal protection of the law.

Art4.

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Art5.

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

40. In addition, there is no constitution doubt that Article 27 incorporates the above provisions as follows: (i) Every person is equal before the law and has the right to equal protection and equal benefit of the law (ii) Equal includes the full and equal enjoyment of all right and fundamental freedoms. (iii) The state shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

41. In relation to this ground of Appeal, having said the above, life imprisonment without the prospect of release must be looked from the view point of the individual subject of this penalty and on the other hand, from the violations and infringement of the fundamental rights and freedoms guaranteed in our constitution. My normal routine visit of our correctional sentence exercising supervisory jurisdiction has exposed me to practical experiences shared by the prisoners serving this kind of penalty. In one instance I recall a prisoner on life sentence being emphatic that the penalty once imposed by the court denies him any hope of ever getting re-united with his family and society as a whole. A key point from that conversation was that the sentence is an outright rejection by society for there is no prospect of his release until his last breathe.

42. In the same line, human dignity in Article 28 of the *constitution* has acquired weight to vividly demonstrate that mandatory life sentence gives rise to situations which are against the dictates of the *constitution* and the possibility of rehabilitation. It is this sound reflection which I would endeavor to re-affirm the Appellants right to the respect of the human dignity inherent to him as a human being which equally applies that the all forms of degradation of man, including torture and inhuman or degrading punishment is completely outside any of our constitutional architecture. If this is the case, then the sentence going by the dicta in the Benard Kimani case is a sentence that is manifestly excessive, punitive, and harsh. These are material factors to be considered by this court on Appeal.

43. What is the appropriate sentence? Section 8 (2) of the *Sexual Offences Act* to Convict provides as follows:

> " 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."

44. In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to 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."

45. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

46. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

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

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

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

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

v. Community protection: to protect the community by incapacitating the offender.

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

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

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

47. The trial court while sentencing the appellant considered the appellant's mitigation but still issued a minimum mandatory sentence. I have to state at this juncture that mandatory sentences have now been faced out and judicial discretion and the circumstances of the case have taken precedence. Therefore, in considering the objectives of sentencing in their totality and the circumstances of the case, I am inclined to interfere with the life sentence and substitute it with 40 years' imprisonment. The sentence shall take into account the provisions of Section 333(2) of the *Criminal Procedure Code* by having its commencement date of the 11.1.2013.

48. Further the court in arriving at this decision, has taken into account the circumstances surrounding the incident, aggravating factors, mitigation and the objectives of sentencing.

49. In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT ELDORET THIS 8TH DAY OF JULY , 2024

In the Presence of

Mr. Mugun for the State

Appellant

.....

R. NYAKUNDI

JUDGE