Omusele v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 10064 (KLR) (9 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10064 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E004 OF 2023

RN NYAKUNDI, J

AUGUST 9, 2024

BETWEEN

LUKA OWINO OMUSELE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. Kigen in Eldoret cr. SO. N0. 151 of 2021)

JUDGMENT

Representation:

Mr. Mark Mugun for ODPP

1. 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* No. 3 of 2006. The particulars of the offence were that on diverse dates between May 2021 and 04/06/2021, the appellant intentionally and unlawfully caused his penis to penetrate the vagina and anus of PA, a girl aged 8 years old.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were more less the same.

3. The appellant was convicted on the main charge and sentenced to life imprisonment.

4. Being dissatisfied with the said judgment the appellant lodged the present appeal relying on the following grounds:

    i. That the learned trial magistrate erred in law and in facts in failing to find that the prosecution was marred with irreconcilable contradictions and inconsistencies.

ii. That the learned trial magistrate erred in both law and facts in failing to observe that penetration and weapon of penetration was not proven as an ingredient of defilement.

iii. That the learned magistrate erred in both law and fact by disregarding my defense without any cogent reason.

iv. That the learned trial magistrate erred in both law and facts in failing to invoke the findings of petition No. E017 of 2021 at High court Machakos by Justice Odunga and maximum-minimum mandatory sexual offences sentences and courts discretion on determining cases on individual mitigation circumstances.

v. That more grounds to be adduced during the hearing of the appeal.

Parties filed written submissions in support of their arguments.

Appellant's Submissions

5. The appellant submitted that his constitutional rights under article 49 were violated when the officer arresting him never informed him of the reason for arrest. That he never testified in court but he raised his defence. He further submitted that his rights under article 50(2)(i) were violated when he was denied the prosecution intended to rely on. He stated that he was never supplied with any statement or document. He concluded that he was not accorded a fair trial.

6. It was his case that the present case was planned against him. That there was no investigation officer and he was not allowed to cross examine the witnesses. He alleged that he later came to realize that the child birth card had no official stamp. The prosecution failed to take the minor for age assessment and as such he stated that his conviction was wrong.

Respondent's Submissions

7. Mr. Edward Kakoi, prosecution counsel in opposing the appeal submitted on the sufficiency of the evidence. On the question of age, it was counsel's submission that the prosecution produced the Complainant's child dedication card which indicated her date of birth as 27/04/2013. He stated that this was sufficient proof to show that as at May, 2021, the Complainant was 8 years old. That the appellant being a person who was quite conversant with the complainant's family, could have challenged this if he knew she was not of that age and he did not. He cited the Court of Appeal's decision in *MW v Republic* (2020) eKLR.

8. On the issue of identification, it was submitted for the respondent that according to the complainant's testimony, she had seen the appellant and that he was someone he had seen numerous times before the incident. The evidence was corroborated by PW3 who testified that in one of those instances when the appellant defiled the complainant in his house, she stood waiting outside. The appellant was someone they were very familiar with. Learned counsel submitted that recognition is more reliable and more believable than identification of a stranger and he cited the Court of Appeal decision in Reuben Anjononi v Republic.

9. The question of penetration was equally addressed. It was submitted for the respondent that PW1, Dr Michael Kibowen Kapiyen, testified and produced the P3 form on behalf of Dr. Tabaan who he had known and worked with for 2 years before Dr. Tabaan went for further studies. He confirmed that the signature on the Complainant's P3 form was Dr. Tabaan's. He argued that it was clear that the court permitted the production of the P3 form in order to avoid undue delay and expense in securing the attendance of Dr. Tabaan.

10. Concerning the complaints that the P3 form lacked the facility's official stamp, the respondent submitted that nothing could be further from the truth. Learned counsel stated that on page 17 of the record of appeal, it is clear that the P3 form bears the stamp of Moi Teaching & Referral Hospital together with that of Huruma Police Station. That the trial court was by virtue of section 88 of the *Evidence Act* permitted to presume that the stamp, seal and signature on the document is genuine.

11. Finally, counsel for the Respondent put it that the appellant's defence was considered. That when he was given a chance to defend himself, he chose to focus on the deficiencies of the prosecution case and the fact that he was framed

12. On the legality of sentence, the respondent admitted that recent case law is not yet settled on whether courts have discretion in mandatory minimum sentences. He concluded that the sentence was the most befitting given the circumstances of the case.

Analysis and Determination

13. I have considered the appeal and submissions by both parties. I have also read the record of the trial court and the judgment. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v. Republic* [1972] E.A 32.

14. The issues that arise for determination in this appeal are;

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

    ii. Whether the sentence meted upon the appellant was lawful.

Elements of offence of defilement

15. 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."

16. 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:

    1) Age of the complainant;

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

    3) Positive identification of the assailant.

17. 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."

What does the evidence portend?

Age of the complainant

18. 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) 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.

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

20. The appellant herein submitted that the child birth card did not bear an official stamp. The prosecution on the other hand produced the complainant's child dedication card which indicated her date of birth as 27/04/2013. That this was sufficient proof to show that as at May 2021, the complainant was 8 years old. I have perused through the said document and I am persuaded that the victim was a minor. The trial court rightly found that the complainant was eight years old at the time.

21. I find the age of the victim was 8 years old.

Penetration

22. 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."

23. The appellant did not submit much on this besides the fact that the P3 form lacked an official stamp, which allegation was rebutted by the respondent. The respondent on the other hand confirmed that indeed the P3 form was filled by Dr. Tabaan. Dr. Michael testified on behalf of Dr. Tabaan, having satisfied the court that he had previously worked with her for two years. He testified that the complainant was examined in their facility and it was established that the minor had tears at position 3 O'clock and 9 O'clock, She had fresh abrasions and erythema on the Posterior fourchettes, she had erythema of the urethra, had a healed scar at 12:00 O'clock in the anus, HIV negative, VDRL negative and urinalysis showed presence of Leucocytes.

24. Having considered and analyzed the evidence adduced, I come to the conclusion that there is ample evidence that penetration did occur. The medical evidence produced supports penetration of the minor.

Was the appellant the perpetrator?

25. The minor stated that the appellant who is their neighbor had defiled her and her sister Pauline (Pw-2) in his bed and thereafter gave them food. Appellant was a person known to the complainant. The Respondent's counsel submitted that submitted that recognition is more reliable and more believable than identification of a stranger. There was no element of mistaken identity of the Appellant as the person who penetrated her genitalia. The appellant is a neighbor to the victim. In the cases of *R v Turbull and Others* (1976) 3 ALL ER 549. Lord Widgery C.J had this to say: -

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some

> reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. Secondly 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 the accused under observation" At what distance" In what light" was the observation impended in any way, as for example by passing traffic or press of people. 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 original observation and the reason for remembering the accused" How long elapsed between 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 the actual appearance."

26. 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.

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

28. The appellant prayed that the sentence meted be set aside. Section 8 (2) of the *Sexual Offences Act* to convict 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."

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

30. In my considered view, the accused mitigation ought to count in sentencing. 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.

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

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

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

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

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

5) Community protection: to protect the community by incapacitating the offender.

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

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

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

32. Therefore, mandatory minimum sentences place a bar on the trial court's ability to set a sentence lower than the one prescribed by the statute. It kind of stripes the Judge or magistrate's power to exercise judicial discretion on a case-to-case specifics. Sometimes I consider it as an intrusion by the legislature with regards to the sentencing discretion of Judges and Magistrates. The courts merely become rubber stamps.

33. The trial court while sentencing the accused persons noted that the appellant is a first offender. The prosecution on the other hand indicated that the appellant is having two other similar cases. The trial court considered the age of the minor and the gravity of the offence and sentenced the appellant for life.

34. It is my considered view that in our legal system we are gradually moving away from mandatory sentences and judicial officers have discretion to sentence an accused person depending on the aggravating factors and the circumstances of the case. Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent. Therefore, whether mandatory sentencing is for serious offences like murder, sexual offences aggravated robbery offences, trafficking of drugs offences within the ambit of the various penal statutes may also be in contravention of the doctrine of proportionality, which is at the heart of the sentencing scheme in the criminal justice system. The question which then trial courts must ponder at all material times is whether mandatory sentencing is a necessary and effective way to deal with such offences given its likely effect of violating the fundamental rights and freedoms guaranteed by the ***constitution***. Sometimes just a mention of an offence of aggravated robbery, defilement or murder seems to send signals to the court that such an offender if convicted in overall should be sentenced to along period of incarceration. The questions of the sentence not being more severe than is necessary to meet the purpose of sentencing is more often than not ignored. This is an area where one sees the tyranny of a judge's discretion in practice in a manner which ignores the objectives and principles of sentencing. In the case of *R V Engert* (1995) 84 A Crim R 67. Gleeson CJ discussed the discretionary nature of sentencing in the following extract:

> "A moment's consideration will show that the interplay of the considerations relevant to sentencing will be complex and on occasion even intricate. It is therefore erroneous in principle to approach the law of sentencing as though automatic consequences follow from the presence of absence of particular factual circumstances. In every case what is called for

is the making of a discretionary decision in the light of the circumstances of an individual case and in the light of the purpose to be served by the sentencing exercise."

35. The whole of the circumstances of the particular case must be considered. The mitigating circumstances must be considered against a background of matters such as the gravity of the offence and the need for deterrence in determining whether the convict deserves a long custodial sentence within the prescription of life imprisonment by the legislature. It seems to me that the approach taken by the legislature in providing for mandatory minimum sentence was to deal with the mischief of inconsistency and disparity of sentences on the same set of facts of the case and culpability of the offender. In this case, the appellant had been sentenced to life imprisonment which means that he shall be in custody for life. However, from the record we are not told that the offence itself was so grave enough to require a life sentence which could not be achieved by a determinable period of punishment. It is my considered view that not only should the court look at the nature of the offence but undertake an inquiry on the offender convict history to establish whether he is a person of unstable character likely to reoffend or commit such offences in the future and hence the necessity of protecting the public for life. In Kenya now, the sentence of life imprisonment is now the most severe sentence that the court can impose and it is not in my judgment one should ever be imposed unless the circumstances are such as to call for a severe sentence based on the offence which the offender has committed. In the present case, the criteria for life imprisonment finds no sufficient and exceptional circumstances to have it imposed as the only sentence preferable against the appellant. The primary issue here is whether it is legitimate to impose a life sentence which for all intents and purposes is against the provisions of Art 25(a) of the *constitution* which provides as follows:

> "Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited:
>
> a. Freedom from torture and cruel, inhuman or degrading treatment or punishment;

36. For this reason, I take the position the mitigation factors ought to count and the objectives of sentencing ought to be considered in totality. Therefore, I believe a determinable period in this case would meet all the objectives of sentencing.

37. In the upshot, the life imprisonment sentence be and is hereby interfered with a lesser sentence of thirty (30) years' imprisonment. The court in arriving at this decision, has taken into account the aggravating factors, mitigation, that the appellant is a 1st offender and the objectives of sentencing.

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

DATED AND SIGNED AT ELDORET THIS 9TH DAY OF AUGUST, 2024.

.....

R. NYAKUNDI

JUDGE