Mwiti v Republic (Criminal Appeal E079 of 2023)
[2024] KEHC 11554 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11554 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E079 OF 2023

LW GITARI, J

SEPTEMBER 24, 2024

BETWEEN

ANTONY MWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. The appellant was charged at the Principal Magistrate's Court at Nkubu with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3/2006. The particulars of the offence were that on 26/8/2022 in Meru County, unlawfully and intentionally caused his penis to penetrate the vigina of BK a child aged seven (7) years. He also faced an alternative change of committing an indecent act with a child contrary to Section 11(1) of the Act.

2. The appellant denied the charge. However after a full trial he was found guilty, convicted and sentenced to serve life imprisonment. The appellant was dissatisfied with the conviction and sentence and filed this appeal which initially raised eight grounds and later amended in the supplementary grounds of appeal as follows:-

    1. That the learned trial magistrate erred in law and fact by failing to note that the evidence of broken hymen is not prove of defilement.

    2. That the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8(4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27

(1) (2) (4) of the *Constitution* of Kenya. Hence the sentence imposed on the Appellant is harsh and excessive.

3. That the learned trial magistrate failed to take into consideration he defense of the appellant.

3. He prays that the conviction and sentence be set aside and be substituted thereof with an acquittal of the accused.

1. The respondent opposed the appeal and prays that the appeal should fail.

The Prosecution Case:

4. The prosecution called five (5) witnesses in support of their case; PW1 BK is the complainant. She gave unsworn statement after the learned magistrate did voire dire examination and held that the minor was intelligent enough to testify. She told the court that sometimes in the month of August 2022 the appellant who is her neighbour led her to his house where he removed her pant and inserted his penis in her vigina. She told the court that the appellant defiled her on his bed. She further told the court that she had known the appellant since she was a small baby. The complainant told the court that she informed M (PW3) who in turn went and called her mother. The appellant was arrested and the two were taken to the Police Station. She was then taken to hospital.

5. PW2 SK is the complainant's mother who testified that on 26/8/2022 she was picking tea when one EK went and informed her that the complainant had been defiled by the appellant. She went to the plot of the appellant where he found him on the bed but the complainant was not there. The appellant was arrested by some people. The complainant was hiding in a toilet. She called the area manager and the appellant was arrested. She took the complainant to hospital and a P3 form was filled. She was also treated and was given some drugs. PW2 testified that the complainant was born on 20/2/2014. She produced her birth certificate in court as exhibit 3. She told the court that the complainant was his neighbor who lived 200 metres from her home. In cross-examination PW2 told the court that she had not framed the appellant.

6. PW3 D M testified that on 26/8/2022 she was in her kitchen when she saw the appellant with a child inside his house. She then heard a child crying from inside the house of the appellant. She went upto the door of the appellant's house. She then called one Mama M and some young men who went and opened the door. She entered the house and saw the appellant and the complainant on the appellant's bed with her pants off. She took the complainant outside and she interrogated her. The complainant informed her that the appellant had done "tabia mbaya" to her. She sent EK to go and call the complainant's mother. The area manager was called and he arrested the appellant. The two were escorted to the Police Station.

   In cross-examination she told the court that she had known the appellant for two years.

7. PW3 No.227857 Cpl Kezia is a police woman attached to Murungurune Police Station and was the investigations officer in the case. She testified that on 26/8/2022 she received a report of defilement from one Senior Sergeant Ngere. She went to the Police Station and met the appellant and the complainant. She escorted the two to Kanyakine Sub-County Hospital where they were both examined. She recorded witness statements and charged the appellant. She produced the birth certificate as exhibit 3.

8. PW5 Timothy Mberia was a clinical officer attached at Kanyakine Sub-County Hospital. He produced the P3 form for the complainant which had been filled by his workmate S. Kimathe who he had worked with for two years. On examination, the complainant had reddiness and mild tenderness pain on her vigina (Labia Minora). The hymen was broken. The clinical officer concluded that, the fact

that the labia minora was reddish and tender and the hymen was broken, there was penetrative sexual intercourse. He produced the P3 form as exhibit 1 and treatment card as exhibit 2

9. In cross-examination he told the court that Redness is a sign of friction and the tenderness showed that the incident was fresh. That it was established on examination that the hymen was broken.

Defence Case:

10. The appellant denied the charge and told the court that on the material day he was sick and she took medicine then slept. As he slept the complainant's mother went looking for her in his house but she was not there. She alleged that he had cohabited with the complainant's mother for two years and they disagreed when he refused to open a kiosk for her. That the complainant's mother demanded money which he declined.

Analysis and determination:

11. The appeal was canvassed by way of written submissions.

Appellant's submissions:

12. He submits that the case was not proved to the required standard since the evidence of broken hymen is not prove of defilement. He relies on the case of P.K.W v Republic. The appellant further submits that the learned trial magistrate failed to note that the sentence under Section 8(2) of the *Sexual Offences Act* is unconstitutional to the extent that it denies judicial officers their legitimate jurisdiction to exercise discretion in sentencing, so as to impose appropriate sentence in an appropriate case based on the scope of the evidence adduced and records based on case to case basis which is unconstitutional and unfair in breach of Article 27(1)(2)(4). He relies on the Court of Appeal decision in *Julius Kitsao Manyeso v Republic* Criminal Appeal No.12/2021 (2023) eKLR *Evans Wanjala Wanyonyi v Republic* (2019) eKLR and J*ared Koito Ingiri v Republic* Criminal Case No. 93 of 2014 where it was held that mandatory sentences are unconstitutional. He submits that the charge was not proved beyond any reasonable doubts.

Respondent's Submissions:

13. He submits that the charge was proved beyond any reasonable doubts as all the ingredients namely age, penetration and identity of the perpetrator were proved. He relies on *Charles Wamukoya Karani-v-Republic* Criminal Appeal No. 72/2013 *Joseph Kieti Seet-v- Republic* (2014) eKLR.

14. On sentence, the respondent submits that the mandatory life imprisonment sentence is not unconstitutional and relied on *Muruatetu & Another v Republic, Katiba Institute and 4 Others (Amicus Curia*l Petition 15, & 16 of 2015 (2021) KESC 31 (KLR) (6th July 2021) Directions.

15. The respondent has also cited the case of *Moatsh-v- The State* (2003) B.W.C.A 20 (Botswana), *The State- Vasco Kanguu Libangani 23* (SA 68 of 2013) 2015 NASC (Supreme Court of Namibia.)

Analysis and Determination:

16. I have considered the proceedings before the trial court, all the submissions and the grounds of Appeal. The issue for determination is:

    1. Whether the charge against the appellant was proved beyond any reasonable doubts.

17. This is a first appellate court. The duties of this 1st appellate court are well laid down in the decisions of this court and those of the Court of Appeal

18. In *Okeno v Republic* (1972) E.A 32. It was held that the duty of the first appellate court is to subject the evidence to a fresh evaluation, analyse it and come up with its own independent finding while bearing in mind that it did not have a chance to see the witnesses when they testified and leave room for that. The court stated, "The first appellate court must itself weigh conflicting evidence and draw its own conclusions *Shantilal M. Tuwala v Republic* (1975) E.A 57. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own finding and draws its own conclusions; only then can it decide whether the magistrate's findings would 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. The appellant was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* which provides as follows:-

> "(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."

19. Under this provision, the ingredients which the respondent is supposed to prove in order to secure a conviction are:-

    1. Age of the victim
    2. Penetration
    3. Identification or recognition of the perpetrator

Proof of Age:

20. The age of the victim of a sexual offence is determined by medical evidence or any other credible evidence it may also be proved by the evidence of the parent, birth certificate or Immunization Card.

21. In the case of *Omoroni-v- Uganda,* Court of Appeal No. 2/2000. It is was held that-

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from the medical evidence, age may also be proved birth certificate, the victims parents or guardian and by observation and common sense."

22. In this case the prosecution discharged the burden to prove the age of the complainant by producing her birth certificate showing that she was born on 20/2/2014. The birth certificate was produced as exhibit 3 and proves that the victim was aged eight years at the time the offence was committed. The appellant has not disputed the age of the complainant.

23. Penetration is proved by the evidence of the complainant corroborated by medical evidence. The twin evidence on penetration was adduced by the complainant and the clinical officer's evidence. The complainant testified that on the material day the appellant went and picked her from home after she came from school. The appellant then led her to his house, removed her clothes including the pant and then inserted his penis in her vigina. She told the appellant that she would report to her mother. She informed M who in turn called her mother. The appellant was arrested by people who roughed him up.

    She went and reported the matter at Murungurune Police Station. She was then taken to hospital and was treated.

24. PW5 the Clinical Officer testified that he examined the complainant on 16/8/2022 testified that the complainant had redness and mild tenderness at her vagina (Labia Minora.) She had lost her hymen. He concluded that the redness on the labia and the broken hymen were suggestive of penetrative sexual intercourse. He produced the P3 form and the treatment notes in court as exhibits.

25. The appellant has disputed the testimony of the complainant and that of the clinical officer. He contends that the broken hymen is not prove of defilement. He relies on the case of P.K.W. v Republic. I find that in view of the definition of penetration, that is partial or complete insertion of the genital organ it may be proved y showing that it was partial, on the surface or insertion.

26. In this case there was redness and also a raptured hymen. The complainant was examined soon after the offence was freshly broken. The prosecution in this case has proved that the broken hymen was as a result of the defilement of the appellant. The testimony that the complainant and the appellant were together was corroborated by the testimony of PW3 who heard the complainant crying while inside the house of appellant. Upon entering she found the appellant on the bed with complainant whose pant had been removed. The complainant informed PW3 that the appellant had defiled her and the two were taken to the police station. The complainant was escorted to hospital immediately. The authority cited by the appellant PWK v Republic is not relevant. The doctor confirmed that the hymen was there and was freshly broken. It is trite that each case must be considered on its facts and circumstances. In this case the prosecution discharged the burden to prove that the broken hymen was as a result of defilement.

Identification of the Perpetrator:

27. The prosecution's case is that the appellant was known to the complainant as they were neighbours. It is trite law that recognition of an offender is more reliable than identification. The appellant has not denied that he was well known to the complainant. The appellant was arrested at the scene as per the testimony of the PW3. The identification of the perpetrator was proved to the required standard. The appellant in his defence admitted that he was arrested at the scene. He was placed at the scene of crime by witnesses and it was in broad day light. I find that the prosecution proved all the ingredients of defilement against the appellant beyond any reasonable doubts.

28. The record shows that the learned trial magistrate considered the defence of the appellant at length and gave reasons for rejecting it. The ground is sham. The appellant has challenged the sentence imposed on him contending that.

29. The appellant has challenged the sentence of life imprisonment which was imposed on him by the trial magistrate. He has challenged the sentence on the basis that the mandatory nature of the sentence is unconstitutional. Section 8(1)(2) of the *Sexual Offences Act* provides for a maximum mandatory sentence of life imprisonment. The sentence imposed was therefore lawful. The Supreme Court has in a recent decision declared that the sentence under Section 8 of the *Sexual Offences Act* is lawful as it is provided for under the Act and the Section is still valid. In the case of Republic v Joshua Gichuki Mwangi Supreme Court of Kenya Petition No. E018/2023 affirmed the mandatory sentences under the *Sexual Offences Act* and they do not deprive the Judicial Officers of the power to exercise judicial discretion. The Supreme Court held that the Sentence of life imprisonment imposed by the learned trial magistrate was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. This decision binds this court by dint of the doctrine of 'stare decisis' which is to the effect that courts must decide cases according to the law and are bound by stare decisis which hold that the precedents set by Court of Appeal and the Supreme Court bind this court.

30. In *Kindero & 5 Others v Waititu & Others* Supreme Court Petition No 18/2014 (consolidated with Petition No. 20/2014- it was stated:-

> The principle of Stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system."

31. The Supreme Court has settled the Law on the sentences under Section 8 of the *Sexual Offences Act* and this court cannot depart from it. The appeal on the sentence has no merits. The complainant in this case was a minor aged eight (8) years when she was defiled the sentence was not only deserved but was also lawful.

Conclusion:

32. For the reasons stated in this Judgment, I find that the appeal has no merits and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2024.

L.W. GITARI

JUDGE

24/9/2024

Appellant – present, virtual from Meru G.K. Prison.

Judgment has been read out in open court.