Musyoka v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 13461 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13461 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E001 OF 2023

MW MUIGAI, J

OCTOBER 25, 2024

BETWEEN

NICHOLAS MUTISYA MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon.E.H. Keago (CM) in Machakos Chief Magistrate's Court in Cr. S.O No. 10 of 2022 Delivered on 18th January, 2023)

JUDGMENT

Background

1. The Appellant herein Nicholas Mutisya Musyoka was charged with an offence of Defilement contrary to Section 8(1)(B) of the *Sexual offences Act* No.3 of 2006.

2. The particulars of the offence being that on diverse dates between the 25th December 2021 and 9th February 2022 at [Particulars Withheld] Village in Machakos Sub-County within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of V.M, a child aged 17 years.

3. In the Alternative Charge the Appellant herein 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 being that that on diverse dates between the 25th December 2021 and 9th February 2022 at [Particulars Withheld] Village in Machakos Sub-County within Machakos County intentionally and unlawfully caused his penis to touch the vagina of V.M, a child aged 17 years.

5. The Charges were read to the Appellant on 11/02/2022 and the Appellant denied the charges and the trial court entered Plea of Not Guilty entered on his behalf.

6. The Prosecution called four (4) witnesses in support of its case while the Defense opted not to tender any evidence.

Prosecution Case

The Trial Court conducted voir dire examination of the Witness.

7. PW1 V M testified that she was 17 years old and her birth certificate entry number 0218XXX67 which showed she was born on 25/8/2004. She was in Form 4 in [Particulars Withheld] Girls School – Nyeri.

8. On 12/12/2021, Jamhuri Day, they were released from school and she called her boyfriend where they met and spent the day together. She was to go back to school on 14/12/2021 but she fell ill and Nicholas; (boyfriend- Appellant) took her to hospital. Her mother went looking for her and they went home. On 21/12/2021 she went to School did exams and school closed on 23/12/2021.

9. When they closed school, she went to visit her boyfriend Nicholas Mutisya in [Particulars Withheld]. They had unprotected sex. She removed her clothes and the Accused used his penis to penetrate her vagina. She went back to school on 22/1/22. When she came for holiday she visited her boyfriend on 5/2/22 at [Particulars Withheld] village in Machakos. The Complainant was with him upto 10/2/22 when they were arrested by PC Fatuma and escorted to Katheka Kai Police Post. She stated that she had known the accused since 2019 and he was the one on the dock during Trial.

10. It was her testimony that she later wrote her statement and was taken to Machakos Level 5 Hospital for check up. There was a P3 form and PRC form issued in her name and filled upon examination.

11. PW.2 Henry Yelo testified that he was a teacher at [Particulars Withheld] Secondary and that on 14/12/2021 at 8 am he was at school and realized his student in Form 3, VM was missing. He contacted her parents, who told him that the girl was indisposed and she later on the 17/12/2021 went to school. On 17/1/22 the girl disappeared again and upon following up on the issue he learnt that the girl had been married and was staying with a young man Nicholas. He reported the matter to Katheka Kai Police Post and they went to the home of the accused where they found the girl. The girl told him that she had been married and they were having sex. He knew the girl was a minor and could not have been legally married. She was in a day school.

12. On cross – examination PW.2 told the Court that the accused was identified as the one who had married the girl. She was on and off school and he did not know where she used to disappear to

13. PW3 Dr John Mutunga testified that he worked at Machakos level 5 Hospital. He produced a P3 form in respect of VM and that the patient presented a history of sexual assault on 10/12/22. On examination she didn't have any physical injuries on her body. The genitalia was normal, hymen was broken but not fresh. No discharge was noted. On laboratory tests HIV test was negative, syphilis test was negative, pregnancy test was positive. He directed that DNA be done to determine who was responsible for the pregnancy. He produced the P3 and the PRC forms. The victim was in the company of her mother. She identified the suspect as her boyfriend and that they had been together since December 2021 and had stayed together for one week. The patient was to undergo an ultrasound to confirm gestation.

14. Upon cross examination PW3 stated that DNA had to be done upon birth and the analysis would be done at the Government Chemist.

15. There was no re-examination.

16. PW.4 No 249501 PC Fatuma Malicha stated that on 10/2/22 at 2.30pm she was at the Post Office, when Henry Yelo School Principal PW2 made a report that one student VM aged 17 years irregularly in school had been married nearby. The report was booked. They went to the suspect's area (of residence) and found VM with the Accused. She interrogated VM who told her that she had been married by the accused and had stayed with him for sometime. She arrested both of them and took the victim to the hospital where she was examined and treated. She issued her with a P3 and PRC form and it was found that she was pregnant. She was a minor as per her Birth Certificate entry No. 0261XXX67 which showed she was born on 25/8/2004. She identified the Accused at the dock as the one she found with VM. He was not known to her before.

Judgment of the Trial Court

17. The Trial Court delivered its Judgment dated 18/01/2023 and found the appellant guilty of the offence of defilement and sentenced him to serve Ten (10) years imprisonment.

Appeal:

18. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;

    1. That the Learned Magistrate erred in law and fact by convicting him on the evidence that didn't meet the minimum threshold to uphold a conviction.

    2. That the Learned Magistrate erred in law and fact by not considering his sworn defense.

19. The Appeal was canvassed by way of written submissions.

Written Submissions

Respondent's Submissions

20. The Respondent in its submissions dated 14th March 2024, Mr. Mwongera, the State Counsel submitted that that they opposed the appeal on grounds that the elements of the offence were proved appropriately. Reliance was placed in the case of FOD vs Republic (2014) to buttress the element of penetration as an element of defilement.

21. It was submitted that the testimony of PW1 clearly shows there was an existing relationship between the appellant and the victim and that they had unprotected sex with the appellant on her visit to his place. Also; that the testimony of PW3 clearly illustrates that the victim's genitalia was normal but her hymen was broken.

22. On the age of the complainant, it was submitted that it was proved by the production of the Birth Certificate No. 0261XXXX67 which indicated that the victim was born on 25th August 2004.

23. Reliance was made to the case of John Wakabiu Cini vs Republic (2016) e KLR on the choice of an appellant to remain silent.

24. On proof beyond reasonable doubt, the limb of identification the appellant was properly identified by the victim since he was her boyfriend. Reliance was placed to the case of Peter Musau Mwanzia vs Republic [2008] eKLR.

Determination

25. I have considered the Appeal, the Trial Court record and the submissions of Parties/Counsel on record. The issue whether the appeal is upheld or dismissed.

26. This is a first Appeal in the case of Okeno v Republic [1972] EA 32 the court stated:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

27. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

28. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(4) of the *Sexual Offences Act*.

29. Section 8 (1) and (4) of the Act provide as follows;

> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> .....
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

30. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

31. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

32. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

33. In this case, PW1 stated that she as 17 years old as at 30/8/2022 when she was testifying. According to her Birth Certificate Entry No. 0261XXXX67, the victim was born on 28th August 2004. According to the charge sheet, the offence was committed between 25.12.2021 – 9/2/ 2022.

A child is defined as a person under the age of 18 years old by the Children's Act. No 29 of 2002 under section 2.

34. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*"

The *Children Act* of 2022 defines "child" means an individual who has not attained the age of eighteen years;

> The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:
>
> > " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

35. In the case of DS v Republic [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

36. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

37. In this case, the victim PW1 testified that she was 17 years old and it is confirmed by the Birth Certificate Entry Number 0218XXX67 which confirmed that she was born on 25/8/2004. The facts are that

PW1 on 12/12/2021 and she called her boyfriend and they met and spent the day together. She fell ill and Nicholas the Accused took her to hospital. Her mother went looking for her and on finding her, went home. Later, when they closed school PW1 went to visit her boyfriend Nicholas, the Accused, in [Particulars Withheld]. PW1 and Nicholas, the Accused person had intercourse, unprotected coitus. PW1 went back to school on 22/2/22. When she came for holiday she visited her boyfriend, the Accused person on 5/2/22 at [Particulars Withheld] Village in Machakos and was she stayed with him upto 10/2/22 when they were arrested by PC Fatuma and escorted to Katheka Kai Police Post.

38. The issue of sexual intercourse between the Complainant and the Accused person is proved and uncontested as during cross examination of PW1 the Accused person opted to remain silent. The issue regarding age was confirmed by the Birth Certificate, the issue of penetration was admittedly proved by relationship between the Complainant and Accused person and corroborated by the medical evidence by PW3 Dr Mutunga of Machakos Level 5 Hospital and production of the Exhibits P3 Form & PRC Form. PW3 stated that on examination of the victim PW1 did not have any physical injuries on her body. The genitalia was normal, hymen was broken but not fresh.

39. More importantly the Complainant's genitalia was consistent with sexual activity, no infections were detected but pregnancy test was positive. In cross examination by the Accused person, PW3 confirmed that DNA would be done after the child was born to confirm paternity.

40. On identification of the Offender, the victim stated that the Appellant was well known to her and he was her boyfriend and, on several occasions, she had spent time with him and at his place. The Police, PW4 testified that she arrested the Appellant/ Accused and the Victim /PW1 as she had found them together at the Appellant's place.

41. Given the above facts, identification was by way of recognition and such evidence must be carefully examined to satisfy if the circumstances of identification were favorable and free from possibility of error before it can safely be made as a basis of conviction. See Wamunga Vs Republic (1989) KLR at 426.

42. This Court finds that the Trial Court considered the evidence on record and in the Trial Court's judgment, the evidence against the accused was/is overwhelming that the Appellant committed the offence of defilement.

Sentence

43. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " 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 wrong material, or acted on a wrong principle. 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 exist."

44. The Court of appeal also rendered itself as follows on sentences in sexual offences in the case of Athanus Lijodi vs. Republic [2021] eKLR;

> " On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

45. The same court in the case of Dismas Wafula Kilwake vs. Republic [2019] eKLR stated as follows;

> "Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

46. In Maingi & 5 others Vs. *Director of Public Prosecution & Another (Petition No. E117 of 2021)* (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence.

47. Justice G.V Odunga (as he then was) found that –

> " to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentence fall foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be mandatory minimum prescribed sentences."

48. The provision of Section 8(1) as read together with provisions of section 8(2) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *the Constitution* of Kenya 2010 (Article 262 & Rule 7 of 6th Schedule of the Transitional & Consequential Provisions of *the Constitution* 2010) must be considered with adaptation, qualification and exception in line with *the Constitution*.

49. This Court takes cognizance of the fact the *Sexual Offences Act* 2006, preceded *the Constitution* which provides for;

> Article 27 (1) Every person is equal before the law and has the right to equal protection.

The Appellant is also entitled to fair hearing vide Article 50 of *the Constitution*; to remain silent not to incriminate himself and to challenge evidence which rights he exercised during trial.See *Christopher Ochieng vs Republic Kisumu CA Criminal Appeal No 202 of 2011* and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 0f 2104.

50. At the heart of these proceedings, was/is a situation, although an offence was committed and evidence indicted the Appellant, the prevailing circumstances inform sentencing.

51. The Trial Court record confirms, PW1 the Complainant, was candid that the Appellant was her boyfriend and they were in a relationship and they had intimacy through intercourse. Secondly, the Complainant in her testimony informed the Trial Court that she voluntarily, left school and met the Appellant, ran away from school to meet the Appellant, called the Appellant and went to the Appellant. In fact, they were found together and were taken to the Police Post. There was no evidence of coercion, undue influence, duress, violence or force instead it was mutual engagement by parties.

52. The medical evidence did not reveal tears, injuries, bleeding consistent with recent force but broken hymen.

53. This Court considered that the Appellant proceeded unrepresented during the trial, he did not cross examine the Complainant and opted not to give any defense or mitigate during pre-sentence. Against this backdrop, the evidence of PW1 Complainant /Victim was consistent in her testimony that she willingly entered and maintained a relationship with the Appellant.

54. The legal hurdle is that the Complainant's consent was not legal consent as she was under 18 years old and hence intercourse amounted to defilement and hence the conviction.

55. However, the surrounding circumstances mitigate the sentence as the Complainant and Appellant were in a mutual agreed relationship. Although, the prosecution proved the offence of defilement beyond reasonable doubt, the circumstances depict at the same time a relationship.

56. Sentencing is a discretion of the Court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

57. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(1) & 8 (4) of the *Sexual Offences Act* No 3 of 2006 fettered the courts

discretion in sentencing, this Court finds that the sentence ought to take into account the surrounding circumstances and mitigate the sentence.

58. In Republic vs Scott (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

Disposition

1. The evidence is credible and it is safe to uphold the conviction of the Appellant.
2. This appeal is partly upheld on conviction and partly dismissed on sentence which is reduced from 10 years to 5 years imprisonment.

JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 25/10/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Koech for the ODPP/Respondent - Present Online

Appellant – Absent

Patrick – Court Assistant