Ireri v Republic (Criminal Appeal E018 of 2019)
[2023] KEHC 19136 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19136 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E018 OF 2019

LM NJUGUNA, J

JUNE 14, 2023

BETWEEN

PATRICK MUGO IRERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeal against the judgment of Omwange (SRM) in MCSO Case No. 26(A) of 2017 and delivered on 18.06.2019)

JUDGMENT

1. This appeal arises from the judgment of the learned trial magistrate aforementioned. The appeal filed by the appellant on June 26, 2019 challenges the said determination on the grounds as set out on the face of his petition of appeal.

2. 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*, 2006.The particulars of the main charge being that, on the June 11, 2017 at around 1300hrs in Mbeere North Sub County within Embu County intentionally and unlawfully caused his penis to penetrate the vagina of AN a girl aged 10 years. He also faced 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 with particulars being that on June 11, 2017 at around 1300hrs in Mbeere North Sub County within Embu County intentionally touched the vagina of AN a girl aged 10 years.

3. At the conclusion of the trial, the trial magistrate convicted the appellant in the main charge of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*, 2006 and sentenced him to life imprisonment, as provided under the Act.

4. It is the said conviction and sentence that forms the basis of the instant appeal.

5. The court directed that the appeal be canvassed by way of written submissions which directions the parties complied with.

6. The appellant submitted that he felt discriminated upon by the sentence meted out by the trial court in that he stood condemned for the rest of his life. It was his case that the indeterminate sentence meted out by the trial court clearly denies him future prospects since the sentence does not give him a chance to be rehabilitated and thereafter reintegrated back to the society. The appellant in support of his appeal placed reliance inter alia on the cases of *Jared Koita Njiri v Republic [2019] eKLR* and *Francis Karioko Muruatetu & another [2017] eKLR*. On sentence, it was his submission that the court sentenced him to serve life imprisonment without taking into account that he was a first offender and additionally, that he is remorseful for having committed the offence. He therefore urged this court to reduce the sentence by the trial court.

7. On the other hand, the respondent submitted that upon the evaluation of the evidence of four witnesses, the trial court convicted the appellant herein of the main charge of defilement and sentenced him to serve life imprisonment, a determination it fully supported. It was submitted that there was penetrative sexual intercourse as PW3 vividly gave details on how the appellant defiled her when she took food to him. That PW1 produced P3 and PRC Forms as exhibits 1and 2 respectively which captured hymenal laceration at 4 o'clock and 7 o'clock. In regards to the age, it was submitted that the complainant stated that she was 10 years old and, a birth certificate produced as Pex 3 confirmed her age as 10 years and 9 months. On sentence, it was argued that section 8(2) of the *Sexual Offences Act*, stipulates a minimum and mandatory sentence of life imprisonment, and therefore, the trial court did not err in any way. Reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic* eKLR. In the end, this court was urged to find the appeal herein to be unmerited.

8. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic [2010] eKLR* where the Court of Appeal stated:-

> ' The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.'

9. The elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are:

   i. Age of the complainant;

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

   iii. Positive identification of the assailant.

10. On these elements; 'The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.' See (*Charles Wamukoya Karani v Republic, Criminal Appeal No 72 of 2013*).

11. On the age of the complainant, the *Sexual Offences Act* defines 'Child' within the meaning of the Children's Act No 8 of 2001 which defines a 'Child' as 'any human being under the age of eighteen years.'

12. In the case of *Martin Okello Alogo v Republic [2018] eKLR* the court stated that:-

> ' On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello v Republic Cr Appeal No. 203 of 2009 (KSM) where the Court of Appeal stated:-
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> 'In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1).'

13. PW3 in her testimony stated that she didn't know her age while PW4, the police officer representing the initial investigating officer testified that PW3 was born on August 12, 2006 and further produced the complainant's birth certificate. The court has independently perused the same and has noted that the complainant was born on August 12, 2006 while the offence herein was allegedly committed on June 11, 2017. As such, the complainant was aged roughly 11 years at the time when she was allegedly defiled. I am therefore convinced that the age of the complainant was determined appropriately.

14. On penetration, the *Sexual Offences Act* defines 'penetration' as

> 'The partial or complete insertion of the genital organs of a person into the genital organs of another person'

15. Further, the Court of Appeal, in the case of *Sahali Omar v Republic [2017] eKLR*, noted that:

> ' Penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the *Sexual Offences Act*.'

16. In the case herein, the complainant testified how the appellant defiled her twice. It was her evidence that on the first occasion, she had taken food to the appellant who asked her to remove her clothes and upon refusing, the appellant forcefully removed her pant, forced her on the ground and thereafter inserted his male genital organ into her female genital organ. That the appellant only stopped when he realized that the cattle were going towards other people's shamba. In the same breadth, PW1 on behalf of Dr Were who examined the complainant testified that on the genitalia, there was hymen laceration, at 4 o'clock and 7 o'clock at the vagina which were not bleeding; additionally, that there were signs of previous vaginal penetration. It is therefore clear that the evidence adduced clearly showed that the prosecution did prove penetration.

17. On identification, the complainant stated that the appellant herein was an employee at their home and was living with them and therefore, a person well known to her. The same is not controverted by any of the witnesses herein and in that regard, the way to approach the evidence of visual identification was

succinctly stated by Lord Widgery, CJ in the well-known case of *Republic v Turnbull [1976] 3 ALL ER 549* at page 552 where he said:-

> ' Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.'

18. It is my finding that the appellant in the instant case was properly and positively identified by recognition based on the testimony of the prosecution witnesses including the complainant in that, he was a hand man within the home where the complainant lived. In the circumstances, therefore, the appellant was someone well known to AN and in any case, the appellant is alleged to have committed the offence on two different occasions and in broad day light.

19. On the ground that the appellant's defence was not considered, the court noted that the weight of evidence adduced by the prosecution weighed against that adduced by the appellant; and it is outright that the appellant was responsible for the sexual abuse on the complainant. His defence was a mere denial. The trial court thus was satisfied, on the evidence given before it that the appellant was responsible for the sexual abuse and injuries the complainant suffered.

20. On the ground that there existed a grudge between the complainant and the appellant, the appellant simply denied committing the offence herein. In my humble view after having considered the evidence adduced before the trial court, I find that indeed, the prosecution proved its case beyond any reasonable doubt. I do not find evidence which shows that there was a grudge between the complainant and the appellant; in my view, the defence is a mere afterthought.

21. On sentence, I note that the appellant herein was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment.

22. The appellant urged this court in his submissions to reduce the imposed life sentence. This court considered the same in light of Phillip Mueke Maingi & 5 Others Vs Director of Public Prosecutions & the Attorney General, Odunga J (as he then was) and wherein it was stated that:

> 88 A study of the offences under the said Act reveals that the Act prescribes minimum mandatory sentences in several sections.
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> 89. In determining the relevance and constitutionality or otherwise of such sentences, and statutes in general, it is my view that the current constitutional dispensation particularly article 27 of the *Constitution* ought to be taken into account.
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> 90. It is clear that minimum mandatory sentences prima facie do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances.
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> My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines it is appreciated that:
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> Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for offenders.

23. He proceeded that:

> 'It may be argued that these decisions of the Court of Appeal ought not to be followed on the ground that they are per incuriam in light of the clarification in Muruatetu 2. However, it is my view that the Supreme Court in Muruatetu 2 did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that Muruatetu 1 only dealt with murder. I agree with that clarification. However, the Supreme Court left it open to the High court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination one way or another. The Supreme Court did not hold that the High Court ought not to apply the reasoning in Muruatetu 1.'

24. In light of the above, this court underscores the need that indeed the mandatory sentences are not unconstitutional in the sense that they may still be imposed but in deciding what sentences to impose, the courts must ensure that whatever sentence is imposed upholds the spirit of the *Constitution* and further, regard to the surrounding circumstances. The Court of Appeal in the case of *Dismas Wafula v Republic [2019] eKLR* stated:

> 'In appropriate case 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 demands. On the other hand, the court cannot be restrained 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.'
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> [Also See Court of Appeal in *Eliud Waweru Wambui v Republic [2019] eKLR*].

25. It is trite that the rights of an accused person to a fair trial as provided for under article 50(2) of the *Constitution*, is absolute and cannot be limited under Article 25 (c) of the *Constitution*.

26. That notwithstanding, this court is aware that the Supreme Court in Muruatetu two clarified that the Muruatetu one was limited to the death penalty in murder cases. However, I entirely agree with the reasoning of Odunga J that the principles flowing from the Muruatetu 1 are binding to all courts in Kenya as dictated by Article 163 (7) of the *Constitution*.

27. It is trite that a decision arrived at by a court of law should be justified and further perceived justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand. After all, a mandatory minimum sentence carries the same characteristics and effect regardless of the offence created by the provision.

28. Therefore, having regard to the above and a further guidance by the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic, Criminal Appeal No 84 of 2015* at Nyeri, where the appellant was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(3) of the *Sexual Offences Act* and, the Court substituted the 20 year sentence with a 15 year sentence to run from the time the trial court imposed its sentence.

29. In the case herein, 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* 2006 which provides that upon conviction the offender shall be sentenced to life imprisonment.

30. In the given circumstances therefore, I hereby set aside the life imprisonment and substitute the same with 30 years imprisonment to run from the date the trial court imposed its sentence.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 14TH DAY OF JUNE, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent