Musyoki v Republic (Criminal Appeal 72 of 2019)
[2023] KEHC 18562 (KLR) (Crim) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18562 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 72 OF 2019

DR KAVEDZA, J

JUNE 16, 2023

BETWEEN

JOSEPH MUENDO MUSYOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. J.Kibosia, SRM on 11th September 2018 in Makadara Chief Magistrate's Court Sexual Offences case no. 41 of 2016 Republic vs Joseph Muendo Musyoki)

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*, No 3 of 2006. He was sentenced to serve life imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.

2. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He also challenged the sentence arguing that it was excessive.

3. As this is the Appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v R* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its 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.

4. The prosecution called five witnesses in support of their case. FN (Pw 1) the complainant herein was declared a vulnerable witness after voir dire examination. His mother, therefore, gave evidence on his behalf.

5. NK (Pw 2) the mother of the complainant told the court that the complainant is four years old. She testified that the minor informed her that Rasta had done 'tabia mbaya' to him. On further inquiry, he narrated how Rasta removed his trouser and underwear and defiled him. He then helped him dress up. The minor had also told her that an individual by the name of Mugoya had found the minor in the company of Rasta as they tried to locate his home. They found Chairman and Ogendi and the latter was able to identify the minor and bring him home.

6. At around 1 pm, she told the court that the minor was in pain and upon inquiry, his anus was 'interfered' with. She further testified that she took him to the hospital where she was treated and the matter was reported to the police. It was her evidence that the minor had identified the appellant as his assailant. She told the court that at the time, the appellant had rasta/dreadlocks.

7. Geoffrey Mogoi (Pw 3) testified that on April 1, 2016, he found the appellant in the company of a small boy. He asked him if he knew the child but he denied. He accompanied them to the area Chairman for further assistance. Before they could get the chairman, they met one Ogendi who identified the child. He escorted them to the child's home. The next day, he was informed that the child had been molested. He assisted the police in identifying the appellant.

8. Dr Maundu Joseph (Pw 4) examined the complainant on 07/04/16. He presented a case of alleged defilement by someone known to him. On examination, he found: no injuries on the genitalia; pain in the anal region; tears on the anal opening; anal grip was reduced; no discharge was noted. He produced the P3 form. The conclusion was that there was anal penetration.

9. No 641XX PC Ramadhan Yusuf (Pw 5) the investigating officer told the court that he took the case from his colleague who was on maternity leave. He conducted investigations, recorded statements, and proceeded to charge the appellant. He produced the PRC form on behalf of Dr Mungai who had since left the Government Chemist.

10. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave unsworn evidence and did not call any witnesses. He denied committing the offence charged. He told the court that on the material day, he was walking home when the complainant who appeared lost approached him and told him to take him home. He then met Pw 3 with whom they accompanied the child to the Chairman's place. There, they met one Ongendi who identified the child and they took him to his home. He told the court that he was later arrested and charged.

Analysis and determination.

11. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He submitted that the conviction was obtained by means of perjured testimonies. He specifically pointed an accusing finger at the complainant's mother (Pw 2) whom he accused of framing him. He also submitted that there was no medical evidence linking him to the crime. He argued that a DNA test was never conducted on his semen to prove that he was the perpetrator of the offence. He relied on the case of *Mutonyi v Republic* [1982] KLR 203 on the importance of corroboration in support of his case. He urged the court to quash his conviction.

12. I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. Regarding proof of

age, I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.

13. The complainant's mother (Pw 2) indicated that the complainant was 4 years old. No birth certificate was produced to ascertain his age. The PRC report produced indicates that he was born on April 5, 2012. Therefore, although the production of a birth certificate is important to help the court determine the correct sentence to impose, failure to produce one is not an automatic ground to acquit an accused person if age is established through other means including parents giving the age of their child. Where in doubt, a court can order for medical examination in the course of the hearing to avoid a possible dilemma when sentencing in case of a conviction.

14. In the case of *PMM v Republic* [2018] e KLR the court had this to say when a birth certificate is not produced in court;

> "What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant."

15. In the circumstances, the mother's evidence, coupled with the evidence from the medical report and the observations of the court on the age of the minor, the prosecution adduced credible evidence on the age of the complainant. The complainant was therefore a child under the age of 11 years at the time the alleged offence was committed.

16. The next question is whether the prosecution adduced sufficient evidence to prove that the appellant defiled the child victim as alleged. The complainant was declared a vulnerable victim and could therefore not give evidence. Pw 2 who gave evidence on his behalf recounted she found out that the complainant had been defiled. it was her evidence that, while in the company of the appellant, the complainant was sexually assaulted in the anus.

17. The medical evidence presented confirmed that the complainant's anal region had tears and reduced grip. The victim was also in pain. This was indicative of anal penetration. The conclusion by Pw 4 was that the complainant was likely to have been sexually assaulted. There is no other possible explanation of what could have happened to the minor's anus besides evidence that he was defiled.

18. Regarding the identity of the perpetrator, the complainant identified the appellant after the incident. He identified him as Rasta and he was recognised by Pw 2. PW 3 also gave evidence in support of the recognition that the appellant was the person who was identified as Rasta. In his defence, he did not deny knowing the complainant's mother. As a result, he was arrested. From the evidence, the complainant was very clear on the events that took place and the identity of the perpetrator.

19. From the totality of the evidence, I am satisfied that the prosecution proved all the elements of the offence of defilement. I, therefore, uphold the conviction.

20. On sentence, the appellant was sentenced to life imprisonment. He submitted that the sentence imposed by the trial court was excessive thereby contravening Articles 28 and 29 of the *Constitution* of Kenya. During the sentencing proceedings, the court noted that the sentence imposed was mandatory.

21. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate cases. . (See *Dismas Wafula Kilawake v Republic* [2019] eKLR and *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015). Further pursuant to the provisions of sections 216 and 329 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, mitigation is part of the process

under section 329 which provides that the court may before passing a sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed.

22. Thus, in my view, section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find life imprisonment for a first offender to be somewhat too stiff and shatters all the hopes of the appellant for rehabilitation or having another chance to start afresh. Further, there has been no definition of what life imprisonment means. It would be an injustice to keep certain offenders for an indefinite period when the circumstances of their cases suggest that they should at some point be given a chance to start afresh.

23. Therefore, the appeal on the sentence succeeds. The minimum mandatory sentence of life imprisonment is hereby vacated. I hereby resentence the appellant to 30 years imprisonment from the date of his conviction being September 11, 2018.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 16TH DAY OF JUNE 2023.

.....

D. KAVEDZA

JUDGE

In the presence of:

Ms Ntabo for the State.

Habiba C/A.

Appellant present (VTC)