Kiiri v Republic (Criminal Appeal E055 of 2017)
[2023] KEHC 19747 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19747 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E055 OF 2017

JRA WANANDA, J

JULY 7, 2023

BETWEEN

JOHN KIIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged in Eldoret Chief Magistrate's Court Criminal Case No E063 of 2020 with the offence of defilement of a girl contrary to the *Sexual Offences Act* No 3 of 2006. The Charge Sheet referred to Section 8(1)(3) of the *Act* as the provision of law under which the Appellant was charged. The particulars of the charge were that on diverse dates between the month of March 2020 and November 12, 2020 in Kapseret sub-County within Uasin Gishu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of AC, a child aged 12 years and 8 months.

2. The Appellant was also charged with the 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 that on the same date and same place as above, he intentionally caused his penis to come into contact with the vagina of the same AC, a child.

Prosecution evidence

3. PW1 was the child complainant. She stated that she is a student in Class 6, she is 13 years old, she was born on March 27, 2007, in March, July and November 2020 the accused, who was her friend and a neighbour, invited her to his house, she went in the evening at about 7 pm, they had sexual intercourse and she went home at 8 pm, the minor is her child (holding baby in Court), in July 2020 she met the Appellant who invited her to his house, she went and they had sex, she left at about 9 pm and went back home, her mother asked her where she had gone, she told the mother that she had gone to her aunt's place, the mother called the aunt who denied seeing the complainant, in November she again

met the Appellant on the road, he invited her to his place at 6 pm, she conceived in July, the child is called [name withheld] her mother knew she was pregnant, a test was done, she told the mother that it was the Appellant's pregnancy, the mother reported to the police, she was taken to Moi Teaching & Referral Hospital. In cross-examination, she accused the Appellant of having tricked her to go to his house, she conceded that the Appellant did not force her, she could not remember the number of times she went to the Appellant's house, she used to pass through the shamba, the Appellant was renting a house, it is fenced, she used to pass through the fence, she got pregnant in the month of July 2020, she gave birth in June 2021, she did not tell anyone that she had befriended the Appellant, she did not leave anything in the Appellant's house.

4. PW2 was the child's mother. She stated that PW1 is her daughter, aged 14 years old and is in class 5, on January 25, 2020 PW1 informed her that she had been impregnated, upon observing PW1 she took her to a pregnancy test which turned out positive, PW1 told her that the Appellant had impregnated her, she had seen the Appellant, he comes from around doing casual jobs, they reported to the Chief who called the Appellant, the Appellant admitted, they went to the Moi Teaching & Referral Hospital together with the Appellant and thereafter to Simat Police Station, they were issued with a P3 Form, it was filled in, PW1 has a birth certificate. In cross-examination, she stated that PW1 told her that it is the Appellant who had impregnated her, the Appellant's home and hers are not far apart.

5. PW3 stated that PW1's was her niece. She stated that on November 25, 2020 she was at home at about 10 am when she learnt that PW1 had been impregnated, she called PW1 and they went to the chemist where a test turned out positive, PW1 stated that it was the Appellant who had impregnated her, she told PW1's mother what had happened, PW3 met the accused whom she took to her house and upon asking him, he admitted that he had impregnated PW1, they went to Moi Teaching & Referral Hospital for further tests, PW1 is 14 years old and in class 6, the Appellant was later arrested. In cross-examination, she reiterated that the Appellant admitted to the offence, she had never seen PW1 in the Appellant's house, it is PW1 who directed her to the Appellant's house, when they took PW1 to hospital she was found to be 14 weeks pregnant, PW1's child is 3 months old.

6. PW4 was one Dr. Simiyu. She stated that she is attached to Moi Teaching & Referral Hospital, she worked with one Dr. Taban for 2 years, she was familiar with Dr. Taban's handwriting and signature, PW1 was seen at the hospital on November 25, 2020, she narrated that the Appellant was her lover since March 2020, that they had engaged in sex on several occasions, that the last being on November 16, 2020, that she then got pregnant. PW4 stated further that a scan revealed 8 weeks 6 days pregnancy, her private parts had purplish colour with healed wounds, the doctor certified that PW1 had been defiled and impregnated, the P3 Form was filled by Dr. Taban, signed and dated. He then produced the P3 Form and Patient's attendance card. In cross-examination, he reiterated that PW1 stated that it was the Appellant who impregnated her.

7. PW5 was one PC Felix Cherotich. He stated that he is attached to Simat Police Station, he was the Investigating Officer in the case, on November 25, 2020 PW1 reported a case at the station, he recorded statements, PW1 was escorted to the hospital, he found that PW1 had a relationship with the Appellant, she was aged 12 years. He then produced the clinic card. In cross-examination, he conceded that it is DNA which can confirm paternity.

8. At the close of the prosecution case, the Court made a finding that there was a case to answer and placed the accused to his defence.

Defence evidence

9. In his defence, the Appellant gave sworn testimony. He stated that he is not married, the offence is not true, he was visited at 10 pm by people known to him where he was selling alcohol, they took him to Simat Police Station, PW1 used to come to his house since 2020, there was a curfew from 7 pm, PW1 alleged that she conceived in July 2020 and delivered in 2021 whereas he was arrested in 2020, he denied committing the offence, DNA should have been done, the same was not done. In cross-examination, he alleged that he was forced to sign a statement, he however conceded that he did not inform the Court about it, he also never raised the issue with the police officers in Court, he does not know the witnesses.

Judgment of the trial Court

10. After analyzing the evidence, on 4/03/2022 the trial Court found the Appellant guilty and convicted him for the offence of defilement. The Appellant then presented his mitigation.

11. After the mitigation, the complainant (PW1) and her mother requested to be allowed to address the Court. When she was given the opportunity, the complainant stated that she wanted the Appellant to be acquitted, she had forgiven him, she wanted him to come and help her in raising the child, the child is 8 months old, the complainant lives with her mother who is not employed, her father is also not employed.

12. On her part, the mother (PW2) also stated that she wanted the Appellant to be acquitted so that he could go and take care of his child and its mother.

13. On 7/03/2022, the trial Court sentenced the Appellant to serve 20 years imprisonment. It was the trial Court's finding that the said sentence was the mandatory one provided by the law

Filing of Appeal

14. Being dissatisfied with the decision, the Appellant lodged this Appeal on March 22, 2022. The Petition of Appeal contained Grounds of Appeal premised as follows:

    i. That the learned trial Magistrate erred both in law and fact by failing to note the discrepancies in the prosecution case.

    ii. That the learned trial Magistrate erred both in law and fact when he relied on a medical report whose presentation was an afterthought.

    iii. That the learned trial Magistrate erred both in law and fact when he failed to re-evaluate the evidence adduced by the prosecution for a just decision to be reached.

    iv. That other grounds will be raised during the hearing.

15. Parties then filed written submissions in support of their arguments. The Appellant's Submissions was filed on 13/01/2023. On its part, the Respondent filed its Submissions on 16/05/2023 through Learned Prosecution Counsel Ursula Kimaru.

Appellant's Submissions

16. Although he has not clearly or expressly mentioned it, I understood the Appellant to be submitting that the sentence of 20 years imprisonment being the minimum mandatory sentence imposed under statute was unlawful and that being a mandatory sentence, it did not also take into account his mitigation. He also submitted that he was arrested on November 26, 2020, was arraigned on November 27, 2020 and the trial was then concluded on 7/03/2022, therefore by the time of sentencing he had

already served a total of 1 year and 3 months in custody, the Court did not consider this period. He submitted further that he is a first offender, it is regrettable that he "was overtempted and could not control his emotions and ended up committing the offence". Finally, he submitted that he is remorseful, rehabilitated, repentant and reformed. In conclusion, he submitted that it was his mitigation and prayer that the Court reviews his sentence to a lighter sentence.

Respondent's Submissions

17. On her part, Counsel for the Respondent submits that all the elements of the charge of defilement were proved, namely, age of the victim, identification, and penetration. Counsel then submitted that a reading of the Appellant's Submissions infers that he is satisfied with the conviction and is only requesting the Court to consider his mitigation. She added that the Act provides that the penalty for an offender whose victim is between 12 and 15 years is the term of imprisonment of not less than 20 years, Judiciary sentencing guidelines directs that where the law provides mandatory minimum sentence then the Court is bound by those provisions and must not impose a sentence lower than what is prescribed, the sentence is therefore legal, and not harsh nor excessive. In conclusion, Counsel submitted that since the Appellant was in custody throughout the trial the Court can consider the period spent, that therefore, although the prosecution case was water-tight, the Appellant can be considered for remission under Section 333(2) of the *Criminal Procedure Code*.

Analysis and determination

18. I have considered the appeal and submissions by both parties. I have also read the record of the trial Court and the impugned Judgment.

19. 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).

20. I note that although in his Petition of Appeal, the Appellant challenged both the conviction and the sentence, in his Submissions, he has said nothing regarding his challenge on conviction. He has dwelt solely on the sentence which he has prayed that it be reduced. It therefore appears that he has abandoned the challenge on conviction. However, since the Appellant has not expressly stated that he has abandoned the same, I will still therefore analyze and determine whether the conviction was safe.

Issues for determination

21. In view of the foregoing, my view is that the issues that arise for determination in this appeal are the following;

    i. Whether the prosecution proved its case beyond reasonable doubt.

    ii. Whether the imposition of 20 years imprisonment as the mandatory minimum sentence was lawful.

    iii. Whether the period that the Appellant had spent in custody prior to the sentence should be taken into account.

22. I now proceed to analyse and answer the said issues.

    i. Whether the prosecution proved its case beyond reasonable doubt

Elements of the offence of defilement

23. The Appellant was charged with the offence of defilement. As aforesaid, the Charge Sheet referred to "Section 8(1)(3)" of the *Sexual Offences Act*. The Act however does not however have such a Section and the practice, where the victim is between the ages of between 12 and 15 years, is for the Charge Sheet to refer to "Section 8(1) as read with Section 8(3)". Since no objection has been raised on this issue, I will presume that the above is what was intended to be stated in the Charge Sheet and that the same was simply an inadvertent mistake or mix-up which did not prejudice the Appellant.

24. The two Sections provide as follows:

> " 8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

25. The specific elements of the offence of defilement arising from Section 8(1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are the following:

a. Age of the complainant.

b. Proof of penetration.

c. Identification of the perpetrator.

26. The above was reiterated in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No 72 of 2013 where it was stated as follows:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

a. Age of the complainant

27. 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 is also used as an aggravating factor for purposes of determining the sentence to be imposed, the younger the child the more severe the sentence.

28. In this case, the complainant (PW1) testified that she was born on March 27, 2007 and that she was 13 years old at the time of the incidents. On her part, her mother (PW2) testified that the complainant was 14 years old. Additionally, the Investigating Officer (PW3) produced a clinic card showing that the complainant was born on March 28, 2007.

29. From the foregoing, I am satisfied that the child's age of about 13 years was proved and that her age therefore fell within the category of "between the age of twelve and fifteen years" as stated at Section 8(3) aforesaid.

b. Penetration

30. 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."

31. In this case, the complainant described in quite some detail how she used to go to the Appellant's house and that they would have sex. She vividly described the location of the Appellant's house and how she would get there, sometimes through the fence. I also note that the Appellant indeed admitted that the complainant used to come to her house. The evidence that the two were lovers was largely not controverted. I get the feeling that in his defence, the Appellant did not seriously challenge this evidence. I also note that the complainant was consistent in her account noting that she gave the same story to her mother, her aunt, the medical staff and also to the police. There was no contradiction in her account.

32. It has also not been challenged that when the complainant was examined, she was found to be 8 weeks 6 days pregnant, no doubt a result of sexual activity. In fact, at the time of giving her evidence, she had already given birth and was with the baby in Court.

33. In view of all the above, I agree with the State Counsel that penetration was proved.

c. Identification of the Appellant

34. According to the complainant, she was in a romantic relationship with the Appellant and that the Appellant lived in the neighbourhood. On his part, the Appellant admitted that indeed he knew the complainant. The two were therefore not strangers to each other. In this case, the complainant described in quite some detail how she used to go to the Appellant's house and that they would have sex. I have also already stated that the complainant convincingly described the location of the Appellant's house and how she would get there (through the shamba and through the fence). I find that the evidence that the two were lovers was largely not controverted.

35. On the Appellant's assertion that a DNA test should have been conducted to prove paternity, I am aware that whether the victim of a sexual offence is impregnated or not is irrelevant to the ingredient of the offence of defilement. This was asserted in *AML v Republic* [2012] eKLR (Mombasa), where Hon Lady Justice M Odero Court upheld the view that:

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

36. This was further affirmed in the case of *Kassim Ali v Republic* Cr App No 84 of 2005 (Mombasa) where the Court stated:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

37. Since I have already stated that I found the complainant's evidence to be consistent, candid and credible, I find that the Appellant was positively identified as the perpetrator herein; there was no mistaken identity or error. In his Submissions before this Court, the Appellant also appeared to finally admit that indeed he had sex with the complainant.

38. In view of the foregoing, I find that the prosecution evidence left no doubt that the Appellant was the defiler.

Finding

39. Accordingly, I find that the elements of defilement, namely, minority of the victim's age, penetration and identity of the perpetrator were all proved. I find that the prosecution proved its case beyond reasonable doubt and that the trial court did not err in convicting the Appellant. The conviction was therefore proper. The appeal on conviction therefore lacks merit and is hereby dismissed.

ii. Whether the imposition of 20 years imprisonment as the mandatory minimum sentence was lawful

40. As already stated, Section 8(3) of the *Sexual Offences Act* provides as follows:

> " 8(3) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

41. While imposing the sentence, after the Appellant had given his mitigation and after the complainant and her mother had addressed the Court and pleaded with it to release the Appellant to enable him go and take care of the complainant and the baby, the trial Magistrate stated as follows:

> " I have heard the statements of the complainant as well as the complainant's mother. The same has been identified and noting the nature of the offence, and the sentence provided by the law which is a mandatory sentence, the accused is hereby sentenced to serve 20 years imprisonment

42. In the case of *Shadrack Kipkoech Kogo v R*, Eldoret Criminal Appeal No 253 of 2003, the Court of Appeal stated as follows:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

43. One cannot discuss the issue of mandatory sentences in Kenya without mentioning the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (commonly referred to as Muruatetu 1). It had been interpreted by many that the decision was authority to the effect that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial courts had no discretion but to impose the said mandatory sentences are now at liberty to petition the High Court for orders of resentencing in appropriate cases.

44. However, in *Francis Kariuki Muruatetu & Another v Republic: Katiba Institute & 5 Others (Amicus Curiae)* (2021) Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola SSJJ) (otherwise referred to as Muruatetu 2), the Supreme Court has now clarified that its directions given in Muruatetu (1) regarding the unconstitutionality of mandatory sentences was limited only to cases of murder and do not necessarily extend to sexual offences (see also *Juma Abdalla v Republic*, Court of Appeal Criminal Appeal No 44 of 2018 (2022) KECA 1054 (KLR) (7 October 2022).

45. It is however also true that emerging jurisprudence is to the effect that in spite of mandatory sentences having been stipulated by some statutes, including the *Sexual Offences Act*, nevertheless the Courts are free to exercise judicial discretion while imposing sentences. The emerging view, which I wholeheartedly embrace, is that the Courts cannot be constrained by to impose the provided sentences if the circumstances do not demand it.

46. For the above proposition, I refer to the recent Court of Appeal decision in *Joshua Gichuki Mwangi Mwangi v R*, Criminal Appeal No 84 of 2015, Nyeri in which the Court quoted its earlier decision in Dismas Wafula Kilwake v Republic [2019] eKLR where the following was stated:

> "..... 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 .....)"

47. In light of the above, I feel justified to interfere with the sentence of 20 years imprisonment imposed by the trial Court.

48. In this case, I take into account the circumstances of the offence and also the sentencing guiding principles and the authorities on this issue. I wholly agree and reiterate that it is inexcusable for an adult grown up man to initiate and engage in sexual activities with a minor. However, I also appreciate that there was no use of force or violence on the minor and the plea to the trial Court by the complainant and her mother that the Appellant be released to go and help them take care of the baby. I also believe that having already served a period of more than 1 year in custody, the Appellant has now learnt his lesson. In the circumstances, I am persuaded to alter the sentence downwards. I therefore hereby reduce the 20 years imprisonment sentence to 14 years imprisonment.

iii. Whether the time spent in custody should be factored in sentence

49. Section 333(2) of the *Criminal Procedure Code* provides as follows:

> "Subject to the provisions of section 38 of the Penal code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

50. In *Ahamad Abolfathi Mohammed & Another v Republic*, [2018] eKLR, the Court of Appeal stated as follows:

> "By dint of section 333 (2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and

> still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. .... We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

51. It has not been challenged that the Appellant remained in custody throughout the trial. Since Section 333(2) of the Criminal Procedure Code is couched in mandatory terms and since this Court has now set aside the 20 years imprisonment and substituted it with a sentence of 14 years imprisonment, the period spent in custody must be factored in the sentence.

52. From the Charge Sheet, I note that the Appellant was arrested on November 26, 2020 and arraigned on the next day, November 27, 2020. Although he was granted bail, it seems that he remained in custody throughout the trial as it appears that he was unable to raise the bail. He was then convicted and the sentence was delivered on 7/3/2022. The period between arrest and sentence is therefore about 15 months. This period ought to be therefore factored and reduced from the 14 years prison sentence that this Court has now imposed.

Final Orders

53. In the end, I issue the following orders:

    i. The conviction is upheld.

    ii. On sentence, I hereby set aside the sentence of 20 years imprisonment imposed by the trial Court and substitute it with a sentence of 14 years imprisonment.

    iii. The 14 years prison sentence shall be computed as from the date of the Appellant's arrest as appears in the Charge Sheet, namely, November 26, 2020.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

.....

WANANDA J. R. ANURO

JUDGE