



**Karuri v Republic (Criminal Appeal 83A of 2021)
[2023] KEHC 23327 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23327 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL 83A OF 2021
A. ONG'INJO, J
SEPTEMBER 21, 2023**

BETWEEN

MURIITHI KARURI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Hon. R. Amwayi (SRM) delivered on 19th August 2021 in Mombasa S. O. Case No. 15 of 2020, Republic v Muriithi Karuri)

JUDGMENT

Background

1. The Appellant, Muriithi Karuri was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars were that Muriithi Karuri on diverse dates between September 2019 and 27th January 2020 in Jomvu sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of S.A. a girl aged 10 years old.

Prosecution case

3. PW1, ENO, testified that the complainant was her daughter and that she was born on 20.12.2010. PW1 produced the birth certificate as Pexh-1. She said that the accused was known to her as he was their neighbour and positively identified him as the one in court. That on 27.01.2020 at 2.00 pm while at work, PW1's husband received a phone call that there was a child locked in a house. That PW1 and her husband worked in the same company so the supervisor told PW1 to rush home. That when she got to the plot, she found a crowd of people outside the accused's door. That the landlady by the name Philomena then told her that her daughter had been locked in the accused's house. That when the police and the village elder got there, they forced the accused to open the door.



4. PW1 said that they then went to hospital at Port Reitz where the child was examined and various tests done in the laboratory. That the doctor told them there was foul smell from the child and that tests confirmed that the child had been given some narcotic drugs. That the doctor examined her private parts but the child did not have her panty and she said her panty and biker were at the accused's place. That upon examining the genitalia, the doctor said there was proof of penetration. That they were issued with treatment notes and PRC Form and later the police gave her a P3 Form which they took to Port Reitz Hospital where it was filled. PW1 testified that the biker was found in the accused's house and that when she interrogated the child, she said that the accused called her into his house and blocked her nose. That she then could not recall anything. That the incident took place on a school day after she went back home for lunch at 1.00 pm and that the child said it was the accused who defiled her.
5. PW2, PMK testified that the complainant was her tenant and the accused whom he positively identified in court was known to her and was her tenant. PW2 said that in January 2020, the accused had moved from her house. That on 27.01.2020 at about 1.00 pm, the complainant had gone home for lunch and that a neighbour by the name Irene went and told her that the child had gone into the accused's house. That PW2 went to his house and knocked on the door and that she was with Irene and the child's uncle but the accused did not open. That they stayed there for a few minutes and knocked again and the accused opened the door. That they got into the house and found the accused in a bedsheet and when he was asked the whereabouts of the child, he denied knowing where she was. That PW2 then pushed the door and found the child standing in the bedroom. That she had a uniform and that PW2 took her to the sitting room where the accused was and when he was asked why he was denying, he kept quiet.
6. PW2 said that the village elder and the child's parents were called and that the neighbours also went to the scene. That the village elder called the police who went and arrested the accused and the child was taken to hospital while the rest recorded their statement. PW2 said that it was not the first time the child was going to the house. That PW2 noticed the behavior of the child going to the accused's house when the accused moved from PW2's house and went where she could see him from her shop.
7. PW3, S.N. underwent *voire dire* examination and gave sworn evidence that she was 11 years old. She said that the accused was known to her and positively identified him as the one in court as he was their neighbour and Babake Mercy. That on 27.01.2020 at about 1.00 pm when she was going back home for lunch, the accused called her into his house. That he then locked the door, started to undress her and removed her biker and panty. That he also undressed by removing his trouser and took her to his bed. That house had two rooms and that they were just the two of them. That he locked the door from the inside, made her lie on the bed and did bad manners to her. That he penetrated her vagina using his penis. That the neighbours went and knocked on the door and that it was Nyanya who went and that she is called Philomena. That she knocked and the accused opened the door and that Philomena went and found her standing in the bedroom. That she called the police who went and took them to the police station and PW3 was taken to hospital where she was examined and treated.
8. PW4, No. 113009 PC Pauline Njoki Nyage testified that on 27.01.2020, she was in the office when she was called by the in charge and informed that they proceed to Kwamatolo area to effect arrest. That they proceeded to the scene and found the accused before court locked inside the house with a minor and there was a crowd of people outside. That they rescued the accused and took the child in the company of her mother to hospital for examination and the doctor confirmed she had been defiled. That the accused called her and did not know what he did to her. That she fell asleep and on waking up, she found herself naked and that the child was aged 10 years old. PW4 said they recorded statements of witnesses and that the person charged was the accused in court.



9. PW5, Dr. Rehan Khan from Port Reitz Hospital testified that he had a P3 Form, treatment notes and PRC Form. That the P3 Form dated 27.01.2020 and signed by Dr. Said whom he had worked with for four years but was transferred to Tudor. He testified that he was conversant with his handwriting and signature. That the patient was aged 10 years old and was taken in by her mother on allegations of having been defiled by a person known to her. That the patient had changed clothing and on examination, she was in general good condition and the examination of the body was normal. That examination of genitalia revealed that hymen was intact. No discharge was noted and that she was put on treatment which were antibiotics and PEP. PW5 produced the P3 Form as Pexh-4.
10. PW5 testified that he also had the PRC Form in respect of the same patient filled on 27.01.2020 on allegations of having been defiled by a person well known to her. That on examination, the vagina was normal with absent hymen and slight inflammation on vaginal wall with mucal discharge. PW5 produced the PRC Form as Pexh-3. He said that he also had treatment notes in respect of the same patient and examination was the same. He produced the treatment notes as Pexh-2.

Defence Case

11. The accused, Muriithi Karuri gave sworn evidence that the complainant's mother was being vengeful. That the children and their parents used to go to his house. That on the alleged date, the complainant went to the accused's house and knocked. That he opened the door and she asked for food which he gave her. That before she ate, the mother went in the company of another and started to threaten him. That he was taken to the police station but he did not do anything with the child.
12. Based on the evidence by the prosecution and the appellant's sworn statement, the trial magistrate found the appellant guilty and he was convicted and sentenced to serve life imprisonment.
13. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -
 1. That the learned trial court magistrate erred in law and fact by convicting me the appellant to life imprisonment without considering that identification being an essential element of defilement was not proved beyond reasonable doubt.
 2. That the learned trial court magistrate erred in law and fact by convicting me the appellant to life imprisonment without considering that I the appellant was denied a right to fair trial pursuant to Article 50(2)(p) of the Constitution.
 3. That the learned trial court magistrate erred in law and fact by convicting me the appellant to life imprisonment without considering that the sentence meted on me was harsh and excessive.
 4. That the learned trial court magistrate erred in law and fact by convicting me the appellant to life imprisonment without considering my reasonable defence.
14. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

15. The appellant argued that the trial leading to his incarceration was conducted in breach of his right to be furnished with copies of witness statements despite the fact that the trial magistrate issued several orders for the same to be done. That the prosecution were duty bound to provide all the relevant documentary evidence in their possession pursuant to Article 50(2)(j) of the Constitution. The appellant relied on the case of Joseph Amos Owino v Republic, CA. CR. APP. NO. 450 of 2007 to that effect.



16. The appellant contended that the complainant's testimony was inconsistent, an issue which was overlooked by the trial court. That the complainant adduced evidence in court that was different from what she had earlier told the police contrary to Section 124 of the *Evidence Act*. That the court is therefore required to take action in accordance with Section 163 (1)(c) of the *Evidence Act* of impeaching the credit of witnesses on inconsistent evidence. The appellant cited Faud Dumila Mohammed, Cr. App. No. 210 of 2003 where magistrates in every case of alleged sexual offences are required to look at particular cases keenly. Also, in the case of *Ndung'u Kimani v Rep.* 1979 KLR 282, the court held that a witness whose evidence is to be relied on should not create an impression that he/she is not a straight forward person.
17. The appellant submitted that medical evidence was incompatible with the offence. That the P3 Form indicated that the complainant was taken to hospital on 4.2.2020 and the incident took place on 27.1.2020, a fact which implies that at the time of examination, 7 days had lapsed. That the same P3 Form indicated that the injuries found on the complainant were 10 days old at the time of examination. The appellant argued that medical evidence is tendered with the aim of corroborating the evidence of the victim in defilement cases and the moment it occurs to the trial court that it is questionable, then it cannot serve the purpose that it was intended. That the appellant has been HIV positive for the last over 20 years and that if he truly had engaged in sexual intercourse with the complainant, then she definitely would be infected with the same.
18. On sentencing, the appellant stated that the trial magistrate purportedly took into consideration the mitigation presented but unfortunately did nothing in the sentence to demonstrate that the mitigation had been considered. That the sentence of life imprisonment was worded in mandatory terms and the court is disallowed to exercise any discretion to impose any other sentence apart from the one stated by the law. The appellant cited the case of *Philip Mueke Maingi & 5 Others v Rep.* Const. Pet. No. E017 of 2021 where the learned judge observed that any law that disallows the court to exercise its legitimate discretion in sentencing an offender because of its mandatory nature is unconstitutional to the extent of that deprivation.
19. The appellant also relied on *Yussuf Dahar Arog v Rep.* HCCR App. No. 110 of 2016 where Ojwang' J. (as he then was) observed *inter alia* on the principles of sentencing that a court should exercise judicial principles such as taking into account the ordinary span of life of a human being, the general circumstances surrounding the commission of the offence, the possibility that the culprit may reform and become law abiding, the goals of peace and mutual tolerance and accommodation among people. The appellant therefore urged the court to exercise its discretion and adjust the sentence considering the mitigating factors prevailing in the case, particularly his current age of 57 years and his health status.

Respondent's Grounds of Opposition

20. The respondent opposed the appeal herein on the following grounds: -
 1. Identification of the appellant was established
 2. The age of the minor was proved at the trial court
 3. The fact of penetration was proved
 4. The trial court guaranteed the appellant's right to fair trial
 5. The appellant's defence was considered by the trial court and a finding made on the same
 6. The prosecution proved its case beyond reasonable doubt



7. The period spent by the appellant in custody was considered during sentencing
8. The sentence meted by the trial magistrate was lawful

Analysis and Determination

21. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze 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.”

22. After considering the grounds of appeal, records of the trial court, submissions and grounds of opposition, the issues for determination are as follows: -
 - i. Whether identification of the assailant was proved beyond reasonable doubt
 - ii. Whether the appellant was accorded a right to fair trial pursuant to Article 50(2)(p) of the *Constitution*
 - iii. Whether the appellant’s defence was considered
 - iv. Whether the sentence meted was harsh and excessive

Whether identification of the assailant was proved beyond reasonable doubt

23. The appellant alleged that identification was not proved beyond reasonable doubt. However, PW3, the complainant, in her testimony stated that the appellant was their neighbour and Babake Mercy, that it was not her first time to go to his house and that he used to send her to the shop. PW1 and PW2 also confirmed that the appellant was a neighbour and well known to the complainant. The offence was committed in broad daylight by the appellant who was well known.

24. In the case of the case of *Peter Musau Mwanza v Republic* (2008) eKLR, it was held as follows: -

“We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.”

25. This court finds that the appellant was a person well known to the complainant as he was a neighbour and the complainant had been to his house severally. There was no possibility of mistaken identity. Therefore, the element of identification was proved by the prosecution to the required standard.



Whether the appellant was accorded a right to fair trial

26. The appellant submitted that the prosecution did not provide all the relevant documentary evidence in the form of witness statements and any other piece of evidence that the prosecution may have possessed pursuant to Article 50(2)(j) of the *Constitution*.
27. Article 50(2)(j) of the *Constitution of Kenya*, 2010 provides: -
to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
28. Upon perusal of the proceedings, this court established that on 17.8.2020, the trial court ordered that the appellant be supplied with witness statements and documentary exhibits that the prosecution intended to rely on. Thereafter, the matter came up for hearing on several occasions where the appellant cross examined the witnesses extensively and even gave his defence testimony and at no point did he raise any objection of not having been supplied with witness statements and documentary exhibits. Therefore, the ground herein has no basis and is disallowed.
29. The appellant also submitted that the complainant's evidence was inconsistent and untruthful. That the complainant adduced in court a story that was totally different from what she had earlier told the police with regard to what ensued.
30. The Court of Appeal in *Richard Munene v Republic* [2018] eKLR held the following with regard to contradiction or inconsistency in the evidence of the prosecution witness: -
It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.
31. This court finds that the inconsistencies and contradictions that the appellant makes reference to did not go to the substance of the charge so as to occasion injustice to the appellant. It is therefore disregarded.

Whether the appellant's defence was considered

32. The trial court judgment on pages 4, 7 and 8 shows that the appellant's defence was considered. This court therefore finds that conclusions drawn by the court were correct and cannot be faulted.

Whether the sentence meted was harsh and excessive

33. The appellant submitted that the sentence of life imprisonment was worded in mandatory terms and the court is disallowed to exercise any discretion to impose any other sentence apart from the one stated by the law.
34. Section 8(1) and (2) of the *Sexual Offences Act* provides: -
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.



35. In *Julius Kitsao Manyeso v Republic*, Criminal Appeal No. 12 of 2021 in the Court of Appeal at Malindi, Nyamweya, Lesiit and Odunga, JJA. have now held that: -

“... we are of the view that the reasoning in *Francis Karioko Muruatetu & Others v Republic* (2017) eKLR equally applies to the imposition of a mandatory indeterminate life sentence namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28...”

36. In *Philip Maingi Mueke & 5 others v Director of Public Prosecutions & Another*, Machakos High Court Petition No. E017 of 2021 [2022] KEHC 13118 (KLR) Odunga, J. (as he then was) held: -

“107. In my view, even without the application of the ratio in *Muruatetu 1*, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly Article 28 of the Constitution.”

...

118

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

37. Up to 7th July 2023, the provisions under Section 8 (2) of the *Sexual Offences Act* were legal but in *Julius Kisau Manyeso v Republic*, the Court of Appeal in Malindi Criminal Appeal No. 12 of 2021 declared that the reasoning in *Francis Karioko Muruatetu & Others v Republic* equally applies to the imposition of a mandatory life sentence namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution* and it is also inhuman treatment and violates the right to dignity under Article 28. The court of appeal was persuaded by the reasoning in the European Court of Human Rights in *Vinter & Others v The United Kingdom* that an indeterminate life sentence without any prospect of release or a possibility of review is a degrading punishment and that it is now a principle in international law that all prisoners including those serving life sentences be offered the possibility of rehabilitation and the prospects of release if that rehabilitation is achieved.

38. In conclusion, this court finds that the appeal on conviction lacks merit and the same is dismissed. The appeal on sentence is allowed and the life sentence is set aside and substituted with 30 years imprisonment from 18.9.2021. Orders accordingly. Right of appeal 14 days explained.



**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 21ST DAY OF SEPTEMBER 2023**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Mr. Ngiri for the Respondent

Appellant present in person

