Karugumi v Republic (Criminal Appeal 32 of 2019)
[2023] KEHC 24035 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 32 OF 2019

FN MUCHEMI, J

OCTOBER 24, 2023

BETWEEN

EDWARD GAKUYA KARUGUMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Principal Magistrate Court in Gichugu by Honourable G. K. Odhiambo (RM), in Criminal Sexual Offence Case No. 32 of 2018 on 10th May 2019)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Resident Magistrate Gichugu where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. He was sentenced to serve twenty (20) years imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 5 grounds of appeal which can be condensed as follows:-

    a. The learned trial Magistrate erred in law and in passing the judgment convicting the appellant when the prosecution had not proved its case to the standards required.

    b. The learned trial Magistrate erred in law and in fact in failing to take into account the appellant's defence;

    c. The learned trial Magistrate erred both in law and in fact by sentencing the appellant on a minimum mandatory sentence which was harsh, degrading and unconstitutional.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant cites the decision of *Maingi & others vs Director of Public Prosecution & another* [2022] KEHC 13118 KLR and submits that the trial court erred by meting out the minimum mandatory sentence against him which is in violation to Article 28 of *the Constitution*. He further relies on the cases of *S vs Mchunu & Another* (AR24/11) (2012) ZAKZPHC 6, KwaZulu Natal High Court, *S vs Scott Crossley* 2008 (1) SACR 223 (SCA), *S vs Toms* 1990 (2) SA 802 (A) at 806(h) – 807(b) South African Court of Appeal and *S vs Mofokeng* 1999 (1) SACR 502 (w) at 506 (d) and submits that sentencing discretion lies in the hands of the that court and thus by meting out the minimum mandatory sentence it prevents the trial court from considering the particular circumstances of a case in order to arrive at an appropriate sentence commensurate to the offence.

5. The appellant submits that the age of the minor was not proved as PW7 testified that he examined the minor on 28/11/2018 whom he said was aged 13 years. PW7 later contradicted himself and stated that the minor was 15 years of age. The appellant further submits that PW2, the father of the minor testified that the minor was 14 years old and that she was born on 17/2/2014. He produced a birth certificate to that effect issued on 24/10/2011. According to the appellant, the birth certificate was issued three years before the minor's birth. PW5, the investigating officer testified that the minor was born on 17/2/2014 and that she was 14 years old at the time of the offence the minor testified that she was 15 years old. The appellant argues that the age of the minor was not proved and the birth certificate produced was not genuine.

6. On the element of penetration, the appellant relies on the cases of *Langat Dinyo Domokonyang vs Republic* (2017) eKLR and *PKW vs Republic* Criminal Appeal No. 186 of 2010 (CA) and submits that the medical evidence tendered by PW7 did not conclusively prove penile penetration. He further argues that the witness did not prove what caused penetration as he indicated in his testimony that he found the presence of epithelial cells which are found on the surface of the genitilia and can be caused when anything penetrates the genitilia.

7. The appellant further submits that the prosecution's case was filled with material contradictions and inconsistencies particularly on the age of the minor. The contradictions on the age of PW1 means that the minor was allegedly defiled when she was 4 years old and in class 5 which is not possible practically. The appellant further submits that although the minor testified that she was defiled on three occasions, she contradicted her dates. He argues that the minor testified that he defiled her from 24/11/2018 and 4/12/2018 yet the appellant was arrested on 28/11/2018. The appellant further states that the minor contradicted herself when she claimed that she knew him yet her father is the one who told the minor his name.

8. The appellant submits that PW6, the key witness did not witness him defiling the minor but she only saw him talking to the minor. As such, the appellant submits that the minor was influenced to implicate him with the charges herein. The appellant thus relies on the case of *Wilmington vs DPP* (AC 462) and argues that the prosecution did not prove its case beyond reasonable doubt.

The Respondent's Submissions

9. The respondent relies on the case of *Bakare vs State* {1987} 1 NWLR and submits that the prosecution proved its case beyond reasonable doubt. The respondent submits that PW1 positively identified the appellant as the perpetrator of the crime. Furthermore, PW7 confirmed through the medical evidence that the minor had been sexually molested multiple times.

10. The respondent submits that the minor was born on 17th February 2004 as indicated in the Birth Certificate which was produced by PW5, the investigating officer. Thus the prosecution proved that the minor was 14 years old at the time the offence occurred.

11. On the element of penetration, the respondent submits that PW7 testified that PW1's hymen was broken which indicated that penetration had occurred.

Issues for Determination

12. The appellant has cited 5 grounds of appeal which can be compressed into three main issues:-

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the trial court considered the defence evidence;

    c. Whether the sentence meted out against the appellant is justified.

The Law

13. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu vs 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 that 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."

14. Similarly in the case of *Okeno vs Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " 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 vs Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala vs R* (1957) EA 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 finding and 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 vs Sunday Post* [1958] EA 424." This was also set out in the case of *Kiilu & Another vs Republic* [2005] KLR 174.

Whether the Prosecution Proved Its Case Beyond Any Reasonable Doubt.

15. Relying on the case of *Charles Wamukoya Karani vs Republic*, Criminal Appeal No. 72 of 2013 where it was stated that:-

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

16. On the age of the victim, the court of Appeal in *Edwin Nyambogo Onsongo vs Republic* (2016) eKLR, the court stated as follows in respect of proving the age of the 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."

17. PW1 testified that she was 15 years old at the time of giving her testimony in court. PW2, the father of the minor, testified that the minor was 14 years old and was born on 17/2/2004. PW3, the mother of the minor, also testified that the minor was 14 years old and was in class 5. PW5, the Investigating Officer produced the minor's birth certificate in evidence that the minor was born on 17/2/2004. The Clinical Officer, PW7 testified that PW1 was 15 years. I have perused the birth certificate and confirmed it indicates that the date of birth of PW1 was 17/2/2004. Thus on 27th November 2018 when the incident occurred she was 14 years and 9 months. The minor was below 15 years at the date of the offence and therefore falls within the age bracket provided for under Section 8(2) of the *Act* of twelve to fifteen years. The appellant alleges that the birth certificate was issued on 24/9/2011. It is quite clear from the evidence of PW1, PW2, PW3 and PW5 that the minor was born on 17/2/2004 and the birth certificate was issued 24th October 2011. This court takes judicial notice that birth certificates can be issued any time after a child is born. It is in order like it is this case for a birth certificate to be issued three (3) years after birth. It is therefore my considered view that the prosecution proved the age of the minor.

18. 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."

19. PW1 testified that on 27/11/2018 she was returning home after collecting milk when the appellant whom she referred to as Baba Ciku called her by beckoning her to go where he was.. She further testified that the appellant stated that he wanted to show her something. He then held her hand and forcefully dragged her to his house even though she tried to resist. The minor testified that at the appellant's house, the appellant removed his trouser and underwear, then he removed PW1's skirt, petticoat and biker. The minor explained that *"alinifanya tabia mbaya"*. She further testified that the appellant removed his thin for urinating and inserted it in her hole in hr private parts. The minor further testified that two days later which was a Wednesday she was returning home from getting milk when the appellant called her again. She states that she asked him why he was calling her and asked him if he wanted to do *"tabia mbaya"* that he did to her on Monday. The appellant said "yes" and then proceeded to defile her after undressing her. He removed his thin for urinating and inserted it to her thin for urinating and *"alinifanya"*. On the material day, PW1 said she told her father what happened.

20. PW1 gave three dates being 24/11/2018, 27/11/2018 and 4/12/2018 when the appellant defiled her. The appellant used to wait for PW1 as he went to collect milk from a neighbours house.

21. Fredrick Mutea, Clinical Officer testified that he examined the minor on 28/11/2018 and filled the P3 form of the minor. He testified that he did a high vaginal swab and found pus cells and epithelial cells which indicated the occurrence of sexual intercourse and penile penetration. He further testified that there was inflammation of labia majora and minora and a whitish discharge was noted. The witness

produced the P3 form, Post Rape Care form and treatment notes as exhibits. He further testified that the minor's hymen was broken but not freshly broken.

22. The appellant argues that the medical evidence did not prove penile penetration as PW7 testified that the presence of epithelial cells on the surface of the genitilia can be caused when anything penetrates the genitilia. In the case of *JOO vs Republic* [2015] eKLR the court held that:-

> There is also the presence of the epithelial cells when PW5 took a vaginal swab on the complainant. That indicated that the complainant had indeed engaged in a sexual act with a person of the opposite sex. However, it was not revealed how long such cells can remain alive upon intercourse. On a reconsideration of the evidence on this issue in totality, I have to return the finding that there was proof that the complainant had engaged in a sexual intercourse as evidenced by the presence of the epithelial cells in her vagina hence penetration was proved.

23. For the prosecution to prove penetration in a defiled case, the complainant's testimony is key, which is usually corroborated by the medical evidence produced by the medical officer. Thus the evidence of PW1 is corroborated by the medical evidence of PW7. PW7 pointed out that the presence of epithelial cells indicated that there was penile penetration on the minor's vagina. Thus the inevitable conclusion from the analysis of the evidence is that penetration was proved.

24. On the issue of identification, PW1 testified that the appellant is known to her and referred to him as Baba Ciku as he was known in the neighbourhood. She further testified that she had been passing through the appellant's compound for many years and he would greet her on some occasions without interfering with her movements. PW1 testified that the appellant had sexually assaulted her on three instances. Although she resisted, the appellant forcefully dragged her to his house. PW1 further testified that on the last occasion, PW6 found her when she was standing at the tree next to the appellant's house. This was corroborated by PW6 who testified that on 27/11/2018 she passed by the appellant's home and found the appellant and PW1 talking in a secluded place. The appellant also admitted in his defence that on 27/11/2018 he was seen by PW6 talking to the minor. The appellant also testified that PW1 often passes by his house on her way to get milk.

25. From the testimony of PW1 and PW6 the appellant was positively identified. He was known to PW1 even by his popular name "Baba Chiku". PW6 also knew the appellant pretty well being a neighbour. The prosecution in my view, satisfied the court on the element of identification.

26. The appellant further argues that the prosecution's case was filled with material inconsistencies and contradictions thus causing doubt on the alleged offence. Relying on the case in the Court of Appeal Tanzania of *Dickson Elia Nsamba Shapwata & Another vs The Republic* Cr App. No. 92 of 2007, addressed the issue of discrepancies in evidence and concluded as follows:-

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

27. The appellant raised the issue of contradictions on the dates that the appellant sexually assaulted her which PW1 gave as 27/11/2018, 4/12/2018 and 24/11/2018. As some point in her testimony, PW1 mixed up the dates of the incident. It is noted that she testified that she was defiled by the appellant three (3) times and the multiple incidents may have caused her confusion on the dates. Furthermore, the incidents occurred in the month of late November and early December 2018 while the appellant

testified more than a year later on 12/02/2020. The passage of time may have affected the memory of the minor. The most crucial thing was proof of the incident of defilement that took place on 5th October 2018 according to the charge. Even if the complainant forgot the date of the offence, and gave sound evidence on how the offence was committed, this would have been sufficient. The evidence of PW1 was indeed consistent and detailed and not shaken during cross-examination. Furthermore, the dates given by other witnesses were helpful to the court in establishing the period that the incident occurred. It is important to note that the minor said she was defiled three (3) times although the prosecution charged him only in regard to one incident. The minor was aged only 9 years at the time of the incident, a very tender age indeed. The contradictions in my view were minor and do not go into the substance of the case. Further, the incidence was reported on 28/11/2018 by PW2 and PW3 and the P3 Form was filled on the same date. The P3 form also indicates that the injuries were one day old, thus buttressing the evidence that the minor was lastly defiled on 27/11/2018. It is therefore clear that PW1 mistook the last date of 4/12/2018 as the appellant was arrested on the said date. Notwithstanding the mix up in the last date, the minor was very consistent in giving her evidence as how the appellant defiled her and describing the occurrence in detail. Her testimony was cogent, consistent and was not shaken during cross examination.

28. The appellant submits that the trial court did not consider his defence. He denied committing the offence and stated that PW1 framed him. I have perused the court record and noted that the trial court considered the appellant's defence and said it that the appellant did not give any reasons why PW1 would have framed him as he alleged. The court did not believe the appellants defence that PW2 and PW3, the parents of the minor had a grudge against the appellant. Moreover, the evidence of PW6 corroborated that of PW1 that the appellant was seen with the minor on the material day.

29. It is therefore my considered view that the trial court considered the defence of the appellant but found it not plausible.

30. All the evidence considered in totality was cogent and sufficient in my view. The offence of defilement was proved in all the necessary aspects beyond any reasonable doubt.

Whether the Sentence Meted Against the Appellant Was Lawful

31. As regards the sentence, Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

> 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 not less than twenty years.

32. The Court of Appeal applied the same principle in *Evans Wanjala Wanyonyi vs Republic* [2019] eKLR and *Christopher Ochieng vs Republic* [2018] eKLR in holding that the mandatory minimum sentences deprive courts of their legitimate jurisdiction to exercise discretion not to impose these sentences where circumstances dictate otherwise. The only caution to be taken by the court is that such discretion must be exercised judiciously and not capriciously. The trial court must subject its mind to sound legal principles and take account of all the relevant factors while eschewing extraneous or irrelevant factors. An appellate court will therefore only interfere with the sentence where it is shown that the sentence imposed is either illegal or is either too harsh or too lenient in the circumstances of the case.

33. In conclusion, I make the following orders:-

    a. That the conviction was based on cogent evidence and is hereby upheld.

    b. That the sentence of twenty (20) years imprisonment is upheld.

34. The appeal is only partly successful.

35. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 24TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE