Mugo v Republic (Criminal Appeal E020 of 2021)
[2023] KEHC 24054 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24054 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E020 OF 2021

FN MUCHEMI, J

OCTOBER 24, 2023

BETWEEN

ANTONY MWANGI MUGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Principal Magistrate Court in Wang'uru by Honourable P. M. Mugure (PM), in Criminal Sexual Offence Case No. 22 of 2019 on 26th October 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Principal Magistrate Wang'uru where he was charged and convicted of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006 and 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. He was convicted of the principal charge and sentenced to life imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 4 grounds of appeal which can be summarised 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 required burden of proof;

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

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that investigations were conducted shoddily which occasioned a miscarriage of justice on his end. He argues that the offence allegedly took place on 5/10/2019 yet the complainant was taken to hospital on 19/10/2019. The appellant further argues that the investigating officer did not explain why it took so long to take the complainant to hospital. The appellant further submits that although the investigating officer visited the scene, he did not produce any sketches or photographs. Neither did he produce any medical tests carried out on the appellant to link him to the offence. Furthermore, the appellant argues that the investigating officer only relied on the report made by the complainant as she was the only one present during the commission of the offence. He thus argues that identification was by a single witness and thus needed corroboration.

5. The appellant further argued that the clinical officer testified that the complainant mentioned that a neighbour had defiled her but the appellant argues that the minor did not specifically say it was him.

6. The appellant relies on the cases of Cyrus Maina Gakuru vs Republic Criminal Appeal No. 58 of 2014 and Philip Nzaku Watu vs Republic (2016) eKLR and submits that the prosecution's case was filled with material contradictions and inconsistencies particularly the date and time of the offence contradicts the date of birth of the minor as she testified that she was born on 16/9/2020 and the offence occurred on 5/10/2019. The appellant also states that the time of reporting of the alleged offence contradicts the time the actual offence is said to have occurred.

7. The appellant states that the prosecution did not prove its case beyond reasonable doubt as the case was based on circumstantial evidence and yet the prosecution did not link the chain of events to conclude that he was the perpetrator of the offence. Furthermore, the appellant relies on the case of Matianyi vs Republic (1986) eKLR and argues that the evidence needed to be corroborated.

8. The appellant submits that the prosecution did not prove the ingredient of penetration as he was not taken to hospital for any medical tests to link him to the offence. He further argues that no spermatozoa were found and the clinical officer failed to prove what caused penetration. On the element of identification, the appellant argues that this was a case of mistaken identity.

9. The appellant relies on the cases of Julius Kitsao Manyeso vs Republic (2023)eKLR, Philip Mueke Maingi & Others vs DPP & Another [2022] eKLR and Edwin Wachira & Others vs DPP & Another [2022] eKLR and argues that the sentence meted against him is harsh and excessive as the courts above found that life sentence is unconstitutional.

10. The appellant argues that the trial court failed to consider his defence as per Section 169 of the Criminal Procedure Code and rejected the same without cogent reasons to do so.

The Respondent's Submissions

11. The respondent submits that the prosecution proved its case beyond reasonable doubt. The respondent states that the minor, PW2 identified the appellant as a person she knew and referred to him as Baba Purity. PW3, the mother of the minor confirmed that she knew the appellant very well. To prove the element of penetration, PW2 testified that on the material day she took a jiko to Baba Purity and he said that he would escort her a he went to buy paraffin. She further stated that he told her to wait for at the highway and then he took her to a bush and did bad manners to her. She further stated that he put his penis into her vagina. He removed her underwear, his trousers and did bad manners to her. The respondent further submits that PW2's evidence was corroborated by PW1, the clinical officer who testified that she examined the complainant and found external bruises of the labia minora,

excessive bleeding on exploration as the entire outer hymen was bleeding. She further testified that she found lacerations of 2mm deep on the external part of the genitilia, blood at the opening of the external to internal genitilia and injuries from vaginal penetration positive for blood. The respondent submits that the witness produced the PRC Form, P3 Form and lab tests as exhibits.

12. On the element of age, the respondent testified that PW6, the investigating officer produced the complainant's birth certificate. PW2 testified that she was 9 years old at the time the offence occurred and PW3 confirmed that the minor was 9 years old.

13. The respondent submits that the appellant denied committing the offence although he did not call any witnesses and neither did he deny knowing the complainant. The appellant further maintained that he was arrested on 14th October 2019.

Issues for determination

14. The appellant has cited 4 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 of the appellant.

    c. Whether the sentence was harsh and excessive.

The Law

15. 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.

16. 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.

17. 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."

18. 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.

19. PW2 testified that she was 9 years old at the time of giving the testimony. PW3, the mother of the minor testified that the minor was 9 years old at the time the offence was committed. PW5, the investigating officer testified that the minor was 9 years old when the incident occurred and that the minor was born on 16/9/2010 as indicated in her birth certificate which was produced in evidence. The birth certificate shows that the minor was born on 16/9/2010 and as such she was 9 years old at the time of the commission of the offence. Therefore it is my considered view that the prosecution proved the age of the minor.

20. 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."

21. On the element of penetration, PW2 testified that on the night of 5/10/2019, she took a jiko to the appellant's house whom she referred to as Baba Pury. PW1 then asked Pury see her off but the appellant said that he would escort her as he was going to buy paraffin. PW1 then went with the appellant who told her to wait for him at the highway as he bought paraffin. When the appellant returned, he took PW1 to a bush and did bad manners to her. the minor said that the appellant put his penis into her vagina after that she was wearing a skirt and the appellant removed her panty, then he removed his trouser and did bad manners. PW1said she was lying on the ground as she was defiled after which she went home alone and reported the incident to her big brother.

22. Dr. Phyllis Muhonja, PW1 testified that she examined the minor on 7/10/2019 and found that there was external bruising of the labia minora and extensive bleeding on exploration. The doctor further testified that there was outer hymen bleeding and the external part of the minor's genitals had lacerations of 2 metres in depth. There was blood at the opening on the anal and injuries resulting from vaginal penetration. The minor was admitted in hospital 7/10/2019 due to the genital bleeding for 3 days. The witness said that she administered post exposure prophylaxis and anti therapeutic medication to stop the bleeding. The minor underwent intensive trauma counselling. PW1 produced the P3 Form, Post Rape Care Form and the treatment notes.

23. The appellant argues that the absence of spermatozoa indicates that he did not defile the minor and furthermore the prosecution did not prove penile penetration as such, this element was not proved to the required degree. On the issue of absence of spermatozoa, the Court of Appeal in the case of Mark Muiruri Mose vs Republic [2013] eKLR observed

Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. Thus it is evident that the evidence of spermatozoa is not necessary so long as the prosecution proved that there was penetration.

24. Upon perusal of the complainant's evidence, I find that she was a reliable witness who described the incident in vivid details even at her tender age of 9 years. The doctor confirmed that the victim suffered severe injuries on her private parts that caused severe bleeding to an extent that hospital admission became necessary to control bleeding of PW2. It was confirmed that the outer hymen was broken and externally the victim had extensive lacerations of up to 2cm deep. The evidence of PW2 and the doctor PW6 proves penetration. As pointed out earlier, the presence of spermatozoa was not necessary in proof of penetration.

25. On the issue of identification, PW1 testified that she knew the appellant well for he was their neighbour. She referred to him as baba Purity. On the material day PW2 said that she went to take a jiko to the appellant's house. The appellant rejected the request of PW2 to be escorted by Pury. He offered to escort her as he went to the shops buy paraffin. PW5, the landlord and member of nyumba kumi Karimadawa testified that he knew the appellant as his neighbour. The testimony of PW2, PW3 and PW5 positively identified the appellant as the person who defiled PW2. Furthermore, identification of the appellant was by recognition which was free from error in that PW2 had been to the house of the appellant before he escorted her and defiled her. The Court of Appeal in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR it upheld the evidence of recognition at night based of the fact that the witness had flashed her torch at the assailant.

In this case, PW2 was not a stranger to the appellant. In his house where she took the jiko, there must have been light. I therefore rule out the appellant's defence that it was mistaken identity. I am of the considered view that the appellant was positively identified.

26. The appellant has complained that the medical evidence did not implicate him and no tests were carried out which were necessary. As the Court of Appeal noted in Geoffrey Kioji vs Republic Nyeri Criminal Appeal No. 270 of 2010 (UR):-

> Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.
>
> I agree with finding in the Geoffrey Kioji case that medical evidence on the examination of the appellant was unnecessary for proof of the offence. As such, it was not a legal requirement to subject the appellant for medical tests to prove the offence.

Whether the trial court considered the defence evidence.

27. The appellant submits that the trial court did not consider his defence. He testified that he did not know the complainant. He further testified that on the material day, he was harvesting miraa at Makuti from 5pm till 4.00am. He then went back to his home. It was at the time he was preparing breakfast in his house that he was arrested. The trial court analysed the defence and found that there was overwhelming evidence that the appellant defiled PW2 and that his evidence was not plausible. My

view is that the trial court considered the defence but found that it did not displace the evidence of the prosecution.

28. After carefully analysing the evidence of the prosecution, I find that it was overwhelming and proves the offence of defilement against the appellant to the standards required in criminal cases.

29. The conviction in my considered view was based on cogent evidence and must be upheld.

Whether the sentence is harsh and excessive

30. As regards the sentence, Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 provides that:-

> 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.

31. 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.

32. The Supreme Court Petition of Francis Karioko Muruatetu & Another vs Republic [2017]eKLR declared the mandatory death sentence under Section 204 of the Penal Code as unconstitutional for it deprives the trial courts of discretion to mete out sentences that are commensurate with the gravity of the offence and to consider circumstances surround the commission of the offence.

33. There exists a number of Court of Appeal and High Court decisions to the effect that the provisions of the *Sexual Offences Act* must be interpreted in such a manner that the discretion of the court in sentencing remains unhindered. In the case of Maingi Vs Republic, Odunga J, as he then was, held that the principles in the Muruatetu petition are applicable to sexual offences in regard to minimum sentences. This holding was based on the fact that minimum sentences take away the discretion of courts in meeting our appropriate sentences.

34. Jurisprudence in sentencing has continued to grow in this country in regard to minimum sentences. In a recent case of the Court of Appeal sitting in Mombasa Julius Kitsao Manyeso Vs Republic Nyamweya, Lessit, Odunga J.A's the court was dealing with a second appeal whereas the High court had upheld the conviction and life imprisonment for the offence of defilement. The court held that the principles set out in the Muruatetu petition in regard to the unconstitutionality of the mandatory nature of death sentence were applicable to minimum sentences prescribed in the *Sexual Offences Act*. The court upheld conviction and set aside the sentence of life imprisonment substituting it with thirty (30) years imprisonment.

35. The foregoing authorities of superior courts are a good guide in dealing with minimum sentences in sexual offences. The complainant in this case was aged nine 9) years at the time of the offence. The accused a neighbour of the victim was a father of young children including Pury whom the complainant requested she escorts her before the appellant offered to do so himself. In mitigation the appellant said he was remorseful and that he was a first offender. The victim was seriously traumatised

and was taken for counselling that was still in progress at the time of sentencing. All these factors were key to the sentencing of the appellant and were taken into consideration by the trial court.

36. The victim sustained very severe injuries during the incident that led to hospitalisation to manage bleeding. I am also guided by the Judiciary Sentencing Guidelines in considering all the factors set out therein as I sentence the appellant. Due to the grave nature of the offence and its impact on the victim as well as considering all the relevant factors, I am of the considered view that the accused deserves a deterrent sentence.

37. Consequently, this court makes the following orders:-

    a. That the conviction is hereby upheld

    b. That the sentence of life imprisonment is hereby set aside and substituted with forty (40) years imprisonment.

38. That the appeal is only partly successful

39. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

Judgement delivered through video link this 24th day of October , 2023