Muriithi v Republic (Criminal Appeal 18 of 2017)
[2023] KEHC 24057 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24057 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 18 OF 2017

FN MUCHEMI, J

OCTOBER 24, 2023

BETWEEN

BONIFACE KINYUA MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in Gichugu Principal Magistrate Court by Honourable M. Nasimiyu (SRM), in Criminal Sexual Offence Case No. 9 of 2014 on 17th March 2017)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Gichugu 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 with an alternative charge of committing indecent act with a child contrary to Section 11(1) of the same. He was convicted of the principal charge and sentenced to life imprisonment.

2. Being aggrieved by the decision of the trial court, the appellant 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 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 sentence meted out against the appellant was harsh and excessive.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the trial court erred by meeting out the mandatory sentence against him which violates his constitutional rights. He further argues that sentencing is at the trial court's discretion and by meting out a mandatory sentence the trial court did not consider the evidence adduced, the nature of the offence, the circumstances of the case and his mitigation in order to arrive at an appropriate sentence. In support of his submission, the appellant relies on the case of Shadrack Kipkoech Kogo v Republic Eldoret Criminal Appeal No. 253 of 2003. The appellant submits that the court ought to take into account Section 333(2) of the Criminal Procedure Code and the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR and consider the time he has spent in custody.

5. The appellant relies on the case of *Daniel Kamau v Republic* [2019] eKLR and submits that the prosecution did not prove the age of the complainant. He further states that the minor said that she was aged 12 years, while her mother PW2 testified that the minor was 11 years having been born on 27/12/2003. The birth certificate was produced to prove the age of the minor. It indicated that the minor was born on 31/12/2003 and was thus eleven years old.

6. On the element of penetration, the appellant relies on the case of *P.K.W. v Republi*c, but did not give the citation. He submits that the prosecution did not prove penetration and further that the evidence of a broken hymen is not conclusive prove of penile penetration. The appellant further argued that the medical evidence revealed that there were no other injuries to the complainant's genitilia nor was there any spermatozoa. Moreover, the appellant states that he was not examined to ascertain that he is the one who defiled PW1.

7. According to the appellant, further submits that the trial court did not consider his defence that he was threatened by PW2. He argues that his defence ought to have carried more weight since the prosecution never proved that he defiled the minor.

The Respondent's Submissions

8. The respondent filed submissions on 23rd August 2022 and summarised the prosecution's evidence. However, the submissions were not related to the case herein.

Issues for determination

9. The issues for determination are as follows:-

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

    b. Whether the trial court considered the defence evidence;

    c. Whether the sentence is harsh and excessive.

The Law

10. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v 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.

11. Similarly in the case of *Okeno v 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 v 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 v 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 v Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

Whether the prosecution proved its case beyond any reasonable doubt.

12. Relying on the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was observed that:- "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

13. In regard to the age of the complainant, the Court of Appeal in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, the court held:

> " ....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.

14. PW1 testified that she was 12 years old at the time of giving the testimony. She further testified that she did not know her date of birth. PW2, the mother of the minor testified that the minor was 11 years old and stated that she was born on 27/12/2003 as indicated in her birth certificate which was produced in evidence by PW5, the investigating officer. The birth certificate clearly indicates that the minor was born on 27/12/2003 placing her at the age of 11 years and approximately 9 months at the time of the commission of the offence. Therefore it is my considered view that the prosecution proved the age of the minor as required by the law.

15. 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."

16. On the element of penetration, PW1 testified that on one night between 29/9/2014 and 3/10/2014, the appellant who was her step father came home when they were asleep and beat her mother and subsequently chased her away. PW1 stated that their house consisted of one room separated with a curtain and the appellant came towards her and took her to his bed. She stated that she had a torch with her which her mother had left for her. The complainant testified that the appellant squeezed her throat and removed her clothes and then lay on top of her after removing his clothes. PW1 further testified that he removed his penis from between his legs and inserted it between her legs in her vagina. The appellant failed to achieve penetration into PW1's vagina. He then turned her around and inserted his penis into her anus and started pushing in and out. The complainant stated that she felt pain and began shouting. The appellant reacted by holding PW1's hands and legs. PW1 bit his hands with her teeth and the appellant released her. PW1 then escaped from the bed and ran out. The witness testified that the appellant threatened to kill her if she ever told anyone about the incident.

17. PW1 further testified that on the next day the appellant went to work. When he came back later, in the day he touched her on her private parts but she ran away again. On that day PW1 reported to her mother what had happened. After being sexually assaulted the complainant started bleeding from her private parts.

18. PW4, the clinical officer testified that he examined the minor on 6/10/2014 and found that her hymen was freshly partially broken and the outer covering of the vagina was reddish in colour. He further testified that he found that the minor's anus was tender and painful. PW4 further testified that he did a high vaginal swab and found a bacterial infection which he concluded was secondary to a sexually transmitted infection (STI). The P3 Form, Post Rape Care Form and the treatment notes were produced in evidence.

19. 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 v Republic* [2013] eKLR stated as follows:-

    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.

20. Thus it is evident that the presence of spermatozoa in the vagina is not necessary so long as penetration is proved.

21. It is important to note that the key evidence relied on by courts in a defilement case, the complainant's testimony is usually corroborated by the medical evidence. The evidence of PW1 in this case was corroborated by the medical evidence produced by PW4. PW4 pointed out that the minor's hymen was partially broken and that the minor had vaginal hyperemia which was caused by friction, infections or a blunt injury. PW4 further testified that he examined the minor six (6) days after the incident and that sperm in a victim's body for 3 days could not be traced due to passage of time. It is my considered view that there is ample evidence to prove that penetration occurred.

22. On identification, PW1 testified that the appellant was her step father and they lived with him in the same house and that on the material day, he attacked her after beating and chasing her away her mother. She stated that she had a torch which she switched on and it lit the room and was able to see the appellant. Furthermore, the complainant testified that the appellant carried her from her bed to his bed and squeezed her throat. PW2 corroborated PW1's evidence that she was married to the appellant and on the material day she was beaten up and chased away. The appellant was left in the house with the complainant. The testimony of PW1 and PW2 positively identifies the appellant as the person who

defiled the complainant. Identification of the perpetrator in this case was by recognition which is more reliable than identification of a person one may have met for the first time. The Court of Appeal in *Douglas Muthanwa Ntoribi v Republic* [2014] eKLR in upholding the evidence of recognition at night held as follows:-

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified:-

"I flashed my torch and I saw the accused. He was 2 metres away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

The Learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error.....

23. The evidence of the prosecution, in my view demonstrates that the appellant was positively identified by PW1.

Whether the trial court considered the defence.

24. The appellant submits that the trial court did not consider his defence. He testified that he did not know the complainant and that in August 2014, he saw PW2 being thrown out of a club at Soko Mjinga Kianyaga and together with his workmate they took her to hospital. He further stated that he met PW2 again on 5/10/2014 at a club where she was drinking and advised the bar attendant not to sell more alcohol to her. He then paid the bill of PW2 but she insulted him. The appellant then left the bar and returned to his place of work. At around 3pm, PW2 went to his place of work with another lady and they requested him to accompany them to go repair an umbrella and when they arrived at the club he was beaten thoroughly and locked up in a room in the club.

25. After analysing the defence of the appellant, the court said that it consisted of mere denials and did not displace the evidence of the complainant which was direct and consistent despite being recalled by the appellant several times for cross examination. In my considered view, PW1 gave comprehensive testimony of what happened on the fateful day and that her evidence was firm and consistent as opposed to the shaky defence of the appellant.

26. Having carefully analysed the evidence on record, I find that the prosecution proved all the elements of the offence of defilement.

Whether the sentence was harsh and excessive

27. 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.

28. The Court of Appeal applied the same principle in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR and *Christopher Ochieng v 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.

29. The appellant in his submissions urged this court in review of sentence to consider the period he spent in custody because the trial court failed to do so. On perusal of the record, the accused was arrested on 5/10/2014 and released on bond on 19/11/2015. He therefore spent a period of one year and 1 month in custody. Section 333(2) of the *Criminal Procedure Code* provides:-

> 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 otherwise provided in this code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been in custody, the sentence shall take account of the period spent in custody.

30. It is the duty of the trial court to take into account the period spent in custody during the pendency of the trial the accused relied on the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR where the court emphasized this principle as follows:-

> .....by dint of Section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period spent in custody before they were sentenced.

31. I therefore find that failure to comply with Section 333(2) of the Criminal Procedure Code was an omission that has legal consequences. As such, this court has an obligation to correct this omission in this appeal.

32. There are a number of Court of Appeal decisions to the effect that the provisions of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Some of these cases include the recent decision of Manyeso v Republic (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR), Dismas Wafula Kilwake v Republic Criminal Appeal No. 129 of 2014 [2018]eKLR; *Christopher Ochieng v R* [2018]eKLR (as cited above); *Jared Koita Injiri v R* [2019]eKLR; Evans Wanjala Wanyonyi v R [2019]eKLR and the recent decision by the High Court in *Maingi & 5 Others v Director of Public Prosecutions & Another* [2022] eKLR.

33. In the case of *Manyeso v Republic* (Criminal Appeal No. 12 of 2021) [2023] KECA 827 (KLR) (Nyamweya, Lessit and Odunga JJA) held that courts have discretion to give an appropriate sentence in cases with minimum sentences based on the principle that such discretion should not be taken away by statute. Before the court was a second appeal in a case of defilement where the High Court had upheld the sentence of life imprisonment imposed by the trial court. The court emphasized that depending on the circumstances of each case, a life imprisonment sentence could still be found appropriate. In my considered view the appellant herein has a right to benefit from the discretion of the court in awarding the appropriate sentence.

34. I have perused the record and noted that the appellant was given a chance to give his mitigation where he pleaded for mercy from the court adding that he was framed. The circumstances under which the offence was committed were duly considered by the court in sentencing the appellant. These include the tender age of the complainant who was aged eleven years; the fact that the appellant was the stepfather of the complainant and her caregiver in absence of her mother, PW2 whom he had chased away from home the same evening he commenced a series of sexual assaults on the victim. The fact that the child was seriously traumatised was a factor that was given weight by the trial court. In addition to these factors, this court also takes into account the factors in the Judiciary Sentencing Policy Guidelines. The accused no doubt deserves a deterrent sentence to send a message to would-be offenders.

35. Consequently, I make the following orders:-

a. That the conviction is hereby upheld.

b. That the sentence of life imprisonment is hereby set aside and substituted with twenty nine (29) years imprisonment having taken into consideration the one year (1) spent in remand custody.

36. This appeal is only partly successful.

37. 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