Mbithi v Republic (Criminal Appeal E015 of 2024)
[2024] KEHC 14510 (KLR) (18 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14510 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E015 OF 2024

MW MUIGAI, J

NOVEMBER 18, 2024

BETWEEN

BENARD MUTISYA MBITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon. A.N Sure (PM) in Kangundo Senior Principal Magistrate's Court in Cr. S.O No. E017 of 2022 Delivered on 14 th February, 2024)

JUDGMENT

Background

1. The Appellant herein Benard Mutisya Mbithi was charged with an offence of Defilement contrary to Section 8(1)(B) of the *Sexual offences Act* No.3 of 2006.

2. The particulars of the offence being that on diverse dates between the month of March 2022 and 29th day of April 2022 in Matungulu Sub-County Machakos County intentionally caused his penis to penetrate the vagina of JNN, a child aged 15 years thereby impregnating her.

3. In the Alternative Charge the Appellant herein was charged with the offence of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006.

4. The particulars of the offence being that on diverse dates between the month of March 2022 and 29th day of April 2022 in Matungulu Sub-County Machakos County intentionally touched the vagina of JNN, a child aged 15 years with his penis.

5. Plea was taken on 20/05/2022 and the Appellant denied the charges and a Plea of Not Guilty entered on his behalf.

6. The Prosecution called a total of four (4) witnesses in support of its case while the Defence gave unsworn testimony and called one witness.

Prosecution Case

7. PW1 No. JN stated that she was 15 years old and goes to school in [Particulars Withheld] Secondary school in form one. That on diverse dates between March 2022 and April 2022 the accused befriended her and they since March 2022 they had sex without protection and continued until May 2022 . Pw1 ran away to Kilungu to hide because her mother had threatened to take her to the Police. The Appellant gave her Kshs 500/- and told her to run away so that they are not taken to the police. She ran away on Monday 16th at 8 am and went to her aunt's place kwa shosho. They used to meet with the appellant at 2pm at his house. they made love and had sex without protection. Gabriel a police from Sengani Post and two other police officers from Tala went for her in Kilungu and taken to Tala Police Station. She was then taken to Kangundo hospital where she was examined and found to be pregnant, she was then taken back to Tala Police Station where she wrote her statement.

8. On cross – examination she stated that he gave her Kshs 500/-.

9. PW.2 MMM mother to the PW1 told the Court on 16/5/22 her daughter PW1 got lost and she reported it at Sengani Police Post and when she made a call home she was told that PW1 was at Kilungu.PW1 ran away because she had questioned her about Ben. On 15/5/22 the appellant's wife complained to her that PW1 goes to the appellant's house all the time a fact which PW1 agreed to be true. They went for her at Kilungu with some police officers. She was taken to Kangundo Level four where she was examined and treated. PW1 remained at the police post and she later recorded her statement. The appellant had a shop where she used to send PW1 and she did not know they had started a love relationship. They had unprotected sex severally. The appellant is a cousin brother to her husband. The appellant was later arrested. PW1 was found to be expectant and said the appellant was responsible.

10. On cross – examination PW.2 told the court that she used to send PW1 to the shop and it was the appellant's wife who told her that she used to see PW1 with the appellant.

11. Pw3 force No 94864 PC W Trifonia Mwanyolo from Tala Police Station stated that on 18/5/2022 a case of defilement was reported at Sengani Police Post and brought to Tala Gender Desk. The appellant was arrested by members of the Public. The mother of the victim reported that the girl got lost from home and was found at the home of the appellant a fact which he denied when asked. It was found that the appellant gave PW1 kshs 500 to go hide in Makueni at accused aunt's place. Police were informed and they went for her. She was taken to hospital and found to be pregnant. It was also discovered that PW1 and the appellant were girlfriend and boyfriend. The victim availed her health card date of birth was 7/10/2006. The accused was arrested and taken to Sengani Police Post and positively identified.

12. Upon cross examination Pw3 stated that she did not arrest the appellant.

13. There was no re-examination.

14. Pw.4 Dominic Mbindyo the Clinical Officer stated that he filled the P.3 form, lab results and treatment notes for patient JNN. She came to the hospital with a history of defilement by a known person on diverse dates in the month of May 2022. On examination she was of a calm demeanor, the hymen was torn long ago, no lacerations but there was a smelly thick whitish discharge on the external genitalia. Many pus cells on a high vaginal swap and on urinalysis. Pregnancy test was positive.

15. Pw1 recalled to testify after matter was taken over by different Trial Court and Section 200 CPC applied.

Defence Hearing

16. Dw1 Benard Mutisya Mbithi gave unsworn testimony. He told the court that the girl used to go to his kiosk with another person. She would ask him to buy her things.

Judgment of the Trial Court

17. The Trial Court delivered its Judgment dated 14/02/2024 and found the appellant guilty of the offence of defilement and sentenced him to serve Ten (20) years imprisonment.

Appeal:

18. Aggrieved by the Judgment the appellant filed his amended Petition of appeal based on the following grounds;

    1. That the trial court convicted and sentenced the appellant herein notwithstanding the prosecution failed to prove the primary ingredients of the offence charged.

    2. That the Learned Magistrate erred in law and fact by convicting him while failing to observe and find that he was unrepresented a violation that the trial court took advantage of by commencing the trial process.

    3. That the Trial Court imposed twenty (20) years imprisonment which is manifestly harsh, excessive and the mandatory minimum against the recent jurisprudence.

    4. That the trial process was unprocedural and it did not warrant conviction.

19. The Appeal was canvassed by way of written submissions.

Written Submissions

Appellant Submissions

20. The Appellant submitted on three issues. On the issue of whether the prosecution proved the primary ingredients of defilement. On penetration it was submitted that it was not conclusively established. He relied on the case of Chrispine Waweru Njeri v Republic [2015] and the case of John Mutua Munyoki v Republic [2017] he called upon the court to conclude that there is no corroborative evidence from the medical report to show the minor was defiled.

21. Secondly, as to identification, it was submitted that the trial court convicted the appellant despite having been on record requesting for DNA test. He relied on the case of Albert Kinyua Ngari vs Republic[2017].

22. On age, it was submitted that failure e by the prosecution to adduce documentary evidence to prove the age of the victim was tantamount to assumption and dangerous bearing in mind the charge faced by the accused. Reliance was placed in the case of Daniel Otieno Yugi vs Republic [2018] and the case of J KB vs Republic [2018] eKLR.

23. The Appellant took issue with the fact that he was unrepresented and this amounted to his conviction. He stated that there was breach of his rights under Article 50 (2) (g) and (h) of *the Constitution* of Kenya 2010.

24. Lastly, as to the issue that the Trial Court imposed excessive and minimum mandatory sentence, he relied on the case of Edwin Wachira & others [2021]. He invited the court to order that the mistake made by the Trial Court of imposing harsh sentence without considering the Appellant's mitigation and the circumstances that surrounded the case was grievous and incurable thus the appeal should succeed.

25. It was contended that upon coming of a new trial magistrate, Section 200 of the CPC ought to have been explained to the appellant and other grounds was that there was material contradictions and inconsistencies which created a huge doubt on culpability of the appellant's commission of the offence. Reliance was placed to the case of Elizabeth Waithiengeni Gatimu[2015].

Respondent's Submissions

26. On behalf of the Respondent, reliance was placed on the case of George Opondo v Republic [2016] eKLR where the ingredients of the offence of defilement were defined as identification, penetration and the age of the victim.

27. On identification, reliance was made to the case of R vs Turnbull & Others (1973) and submitted that the complainant positively recognized the appellant and the appellant in his defence stated that the victim used to go to his shop.

28. On proof of penetration, reliance was placed in the case of FOD vs Republic (2014) and the case of Bassita vs Uganda S.C [1995] the complainant testified that the appellant did have sexual intercourse with her multiple times and which was corroborated by the evidence of the medical officer.

29. On age reliance was placed on the case of Kaingu Elias Kasomo v R Malindi. PW1 stated that she was 15 years and this was corroborated by PW3 who produced the complainant's health card which indicated the date of birth as 7.10.2006.

30. On sentence it was submitted that 20 years was appropriate and within the law given the fact that the minimum sentence for the offence is 20 years.

31. On contradictions and inconsistencies, it was submitted that the prosecution witnesses testimonies were consistent and were corroborated. Reliance was placed in the case of Richard Munene vs Republic[2018].

32. It was finally submitted that the conviction and sentence against the appellant was sufficient and appropriate.

Determination

33. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

34. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

> " 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. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own 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] E. A. 424."

35. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

36. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the *Sexual Offences Act*.

37. Section 8 (1) and (3) of the Act provide as follows;

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 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.

38. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

39. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a 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."

40. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

41. In this case, PW1 stated that she as 15 years when she was testifying. According to the health card produced by PW3 , the victim was born on 7th October 2006. This was corroborated by the statement of PW2, the mother of the victim. This means that the accused was 15 years old at the time and thus a child. A child is defined as a person under the age of 18 years old by the Children's Act. No 29 of 2002 under section 2.

42. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*"

43. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

44. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

45. In the case of DS v Republic [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

46. In this case, the victim said that on diverse dates between march 2022 and April 2022 the accused befriended her and they since March 2022 they had sex without protection and continued until May 2022. she ran away to Kilungu to hide because her mother had threatened to take her to the Police. The appellant gave her kshs 500 and told her to run away so that they are not taken to the police. She ran away on Monday 16th at 8 am and went to her aunt's place kwa shosho. They used to meet with the appellant at 2 pm at his house. they made love and had sex without protection .

47. Medical evidence was produced by PW4 who was the clinical officer who wrote the P3 form. The Victim went to the hospital with a history of defilement by a known person on diverse dates in the month of May 2022. On examination she was of a calm demeanor, the hymen was torn long ago, no lacerations but there was a smelly thick whitish discharge on the external genitalia. Many pus cells on a high vaginal swap and on urinalysis. Pregnancy test was positive. I find that indeed there was penetration.

48. The last ingredient is identification. The victim in this case stated that the appellant had sexual intercourse with her on diverse dates and that they were in a girlfriend/boyfriend relationship. The appellant in his unsworn statement stated that PW1 used to go to his shop. There is no doubt that identification in this case was by way of recognition. Pw1 identified the Appellant as one whom they had intercourse between March 2022 – April 2022 – every time and in close contact to rule out mistaken identity. Pw2 stated Appellant is cousin to the victim's father.

49. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> " with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

50. Also, in the case of *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> " In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

51. The discrepancies and/or contradictions alleged by Appellant were not spelt out for the proceedings during the Trial Court proceedings. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the decision.

52. The Trial Court record confirms that upon another Magistrate taking over the matter Section 200 CPC was applied and Pw1 was recalled and the rest of the witnesses proceeded. Article 50 Constitution of Kenya complied with.

53. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

54. The Court of Appeal also rendered itself as follows on sentences in sexual offences in the case of Athanus Lijodi Vs. Republic [2021] eKLR;

> " On the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences. (See for instance Evans Wanjala Wanyonyi v Republic [2019] eKLR). Having said that however, we must hasten to add that this Court will uphold a sentence

prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited."

55. The same Court in the case of Dismas Wafula Kilwake Vs. Republic [2019] eKLR stated as follows;

> "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."

56. In Maingi & 5 others Vs. *Director of Public Prosecution & Another (Petition No.E117 of 2021*) (2022) KEHC 13118 (KLR) the Petitioners who were convicts serving offences under *Sexual Offences Act* No 3 of 2006 sued the Attorney General and sought for declaration that the mandatory nature of sentence under the *Sexual Offences Act* were unconstitutional as it fettered the discretion of Judges and Magistrates in meting out sentence. Justice G.V Odunga vide his considered judgment dated 17th May, 2022 did find that –

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

57. The provision of section 8(1) as read together with provisions of section 8(2) of the *Sexual Offences Act* No 3 2006 and legislation that was in force before commencement of *the Constitution* of Kenya 2010 must be considered with adaptation, qualification and exception when it comes to the mandatory minimum sentence and in particular when the said sentences do not take into account the dignity of the individual as mandated under article 27 of *the Constitution* and as appreciated in the Francis Muruatetu case and applied by courts in several cases . See *Christopher Ochieng Vrs Republic Kisumu CA Criminal Appeal No 202 of 2011* and Jared Koita Injiri Vrs Republic Kisumu CA Criminal Appeal No 92 of 2014.

58. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in Thomas Mwamba Wanyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Antony Pereira Vs The state of Maharastra at paragraph 70 – 71 where the court held;

> "Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts

and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

59. In Francis Karioki Muruatetu & another Vs Republic the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing At. Paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

60. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(2) of the *Sexual offences Act* No 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was reasonable given proportionality between the sentence passed and the crime committed. In Republic vs Scott (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purposes of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

61. In Republic vs Joshua Gichuki Mwangi – Supreme Court Petition No. E018 of 2023 held Judgment of Court of Appeal reducing mandatory minimum sentence from 20 years to 15 years was set aside and 20 years imposed reinstated.

> " Minimum mandatory sentences are not unconstitutional.....
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> Although sentencing is an exercise in judicial discretion it is Parliament and not Judiciary that sets the parameters of sentencing for each crime in statute."
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> Disposition
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> 1. The Upshot is that the appeal lacks merit and is hereby dismissed.
> 2. The judgement of the Trial Court on Conviction and Sentence is thus upheld.

It is so ordered.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 18/11/2024 (VIRTUAL/ PHYSICAL CONFERENCE)

M.W.MUIGAI

JUDGE