Mugambi v Republic (Criminal Appeal E032 of 2023)
[2024] KEHC 13573 (KLR) (6 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E032 OF 2023

AK NDUNG'U, J

NOVEMBER 6, 2024

BETWEEN

STEPHEN MWAITI MUGAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki Sexual Offence Case No.E017 of 2022 – Hon. Mararo, PM)

JUDGMENT

1. The Appellant, Stephen Mwaiti Mugambi, was convicted after trial of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that on the 8th day of March, 2022 at [Particulars Witheld] Sub-County Meru County within the Republic of Kenya intentionally caused his penis to penetrate the vagina of AK a child aged 11 years. After trial he was sentenced to serve 30 years imprisonment.

2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal. His memorandum of appeal challenges the conviction and sentence on the following grounds;

    i. That the Learned Trial Magistrate erred in matters of law and fact by failing to note that that the case was not proved beyond reasonable doubt.

    ii. That the Learned Trial Magistrate erred in matters of law and fact by not appreciating that the birth certificate was never availed.

    iii. That the Learned Trial magistrate erred in matters of law and fact by failing to note that he was not subjected to medical examination.

iv. That the Trial Magistrate erred in matters of law and fact by failing to note that he prosecution case exorbitant and full of disparities.

v. That this appeal is written in the absence of court proceedings and he prays that he be served, in order to adduce more grounds.

vi. That the Learned Trial Magistrate erred in matters of law and facts by failing to note that the case was full of discrepancies and inconsistency and I was not accorded a fair trial.

vii. That, he prays to be present during the hearing of this appeal in order to adduce more grounds and may this appeal be given the earliest date possible.

viii. That he prays that the appeal to succeeds, sentence quashed and he be set at liberty.

3. The appeal was canvassed by way of written submissions.

4. On his part, the Appellant in addition to filing submissions filed supplementary grounds of appeal. This was without leave of court as envisaged under Section 350(2) of the *Criminal Procedure Code*. The said filing is opposed by the Respondent's counsel citing the requirement of the law. There is no gainsaying that counsel is spot on as the filing of the additional grounds is irregular.

5. This court has stated before that the frequency in such filings is reaching alarming proportions and if allowed to thrive unchecked, it is likely to muddle the administration of justice at the appellate level as the element of surprise visited on the Respondent denies them the opportunity to respond appropriately to the said grounds.

6. I do note that the Appellant is appearing in person and this court appreciates his obvious handicap in so far as court procedures are concerned. Noting that the Respondent has since responded to the supplementary grounds, I will very reluctantly deem the said grounds as regularly filed.

7. The mainstay of the Appellant's case in this appeal is that nobody saw PW1 entering the Appellant's house and it is strange that nobody else was home in the night in the multi dwelling plot and further that there was no evidence that the victim raised alarm that she was being defiled.

8. The medical evidence is challenged as riddled with grave discrepancies. It is submitted that the PRC and P3 forms were filled late.

9. It is urged that the single witness evidence adduced was doubtful and that the evidence of PW1 and 2 was conflicting in terms of date of offence and the place where the offence took place. The Appellant adds that investigations were poorly conducted and the delay in the arrest of the Appellant is not explained.

10. The sentence is challenged on the basis that the minimum mandatory sentence was meted out despite the Appellant despite the Appellant being deemed a first offender. The mandatory nature of the sentence is attacked as unconstitutional.

11. The Respondent on the other hand maintains that the three ingredients of the offence, being penetration, age and identification of the perpetrator, were proved to the required degree. That the evidence of PW1 was solid and consistent and she was clear in who defiled her and how.

12. Further, that the medical evidence corroborated PW1's evidence and prove of age was achieved through the production of a birth certificate. On identification, it is submitted that the Appellant was well known to PW1 and PW2 as he worked for one Fridah in a hotel. It is urged that there was no possibility

of error in identification. Beyond the familiarity, there was, according to PW1's evidence, a full moon and therefore enough light to identify the Appellant.

13. Counsel further places reliance on the provisions of Section 124 of the *Evidence Act* as affirmed in the case of *J.W.A v Republic* [2014] eKLR.

14. It is urged that the inconsistences raised by the Appellant in the medical reports are peripheral and not fatal as to raise doubts in the prosecution's case.

15. The defence by the Appellant did not cast any doubts on the prosecution's case and a line of defence that PW1 was penetrated by one Gitonga, her age mate, appears to have been abandoned at the defence hearing.

16. As regards sentence, it is submitted that no grounds are raised upon which this court can interfere with the discretion of the trial court in sentencing.

17. This being a first appeal, the duty of the court is well settled in law. It is the duty of this court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal laid down the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the e*vidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R., [1957] EA 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] 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 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] EA 424."

18. The Court of Appeal for Eastern Africa in *Pandya -v- Republic* [1957] EA 336 stated: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

19. In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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.

20. A recap of the evidence at trial is as follows. Pw1 stated that she was accosted by the Appellant when she went to check water at her friend's place, held her mouth and pulled her into his house. He removed her skirt and skin tight and then her pant. He put her on his bed and did "tambia mbaya" to her. 9 at testimony she broke down at this point). She said the Appellant had sex with her. He took a panga and threatened to kill her should she tell anyone about the matter. He opened the door. PW1 went home and washed. She was feeling pain in her private parts. She saw blood and a whitish substance on her panty.

21. She never told anyone about the ordeal as she was scared. The next day she was assigned to cook by her mother but she couldn't and she said she had a headache. She was given money for medicine but she continued crying. Her mother threatened to beat her and she told her the truth. Matter was reported to police.

22. PW1 was then taken to Timau hospital. She identified the PRC and P3 forms filled at the hospital.

23. PW2 was informed by PW1 that mwiti had raped her. This aftr observing her crying for long which wsas unusual. PW2 knew the Appellant. She reported the matter to the police the next day. She took PW1 to Timau hospital. The Appellant was then arrested.

24. PW3 examined PW1. She produced the P3 and PRC forms as exhibits. PW4 testified on behalf of the investigating officer who ws on maternity leave. She produced the birth certificate of the victim as an exhibit.

25. On being placed on his own defence, the Appellant in an unsworn statement staed that he was at the hotel. He did not see the child. He had given PW2 Sh.5000 which she did not return. The Appellant demanded money on that day but PW2 said she would not pay and called the police. At the police station, PW2 demanded Sh50000.

26. Alive to my duty to re-evaluate the evidence herein, I have read and considered the evidence as recorded at trial. I have taken cognizance that I neither saw no heard the testimony first hand and have given due allowance for that fact. I have taken it=nto account the submissions on record.

27. Of determination is whether the prosecution proved the charges herein to the required degree and if in the affirmative, whether the sentence was legal and appropriate in the circumstances of this case.

28. The duty to prove criminal charges is an onerous one and it lies with the prosecution with an accused bearing no duty to prove his innocence.

29. The age of the minor in this case was proved through a birth certificate which corroborates the evidence of PW1 and 2. I have no difficulty at all in reaching the conclusion that age was proved and which age places the victim's defilement under the ambit of Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

30. As regards penetration, the evidence of PW1 is the evidence of a single witness. I have considered her narration of the events of the day. She was cogent in her evidence. She gave a clear sequence of how the Appellant beckoned her, held her mouth, opened the door, pushed her in, removed her clothes and pant and had sex with her. She explained the warning not to divulge the information to anyone. She

explained her subsequent pain which unusual situation was noticed by her mother leading her to be pressured to tell the truth.

31. Having considered this evidence, I cannot agree more with the findings of the trial which in my view applied the law of evidence in respect of sexual offences correctly and made proper findings.

32. The medical evidence in this matter is not conclusive and it is easy to find why. The victim went to hospital belatedly owing to what she described as being scared after the incident and of course the waring of dire consequences by the Appellant if she dared tell anyone.

33. That notwithstanding, the provisions of Section 124 of the *Evidence Act* come into play. The section provides;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 offence, 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.

34. Therefore, and to quote verbatim the words of the trial court, 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.

35. My evaluation of PW1's evidence leads me to the conclusion that she was penetrated at the material time.

36. As regards the identification of the Appellant as the perpetrator, the evidence adduced is to the effect that the Appellant was well known to the victim. There was a full moon. The Appellant spent considerable time with the victim, talked to her and even warned her.

37. In rejoinder to this evidence, the Appellant only succeeds in monumental vacillation which leaves his defence shorn of any credibility. During the prosecution's case, the Appellant took a line of defence that one Gitonga, an age mate of the victim was the culprit in the defilement. In his defence, Gitonga does not feature and the Appellant now springs a narrative of Sh. 5000 she had lent PW2 and who did not pay. He also mentions a demand for Kshs. 50,000.

38. While in law the Appellant shoulders no burden to prove his innocence and he may opt to keep quiet without lessening the burden of the prosecution to prove its case, the defence he put up before the trial court was inconsistent and hollow and in light of the evidence on record, it cannot be true. Am satisfied his identification as the perpetrator of the act was proper.

39. As regards sentence, it is trite law as set out by the court of Appeal in *Shadrack Kipchoge Kogo v. Republic* Criminal Appeal No. 253 of 2003 that;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into an account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

40. In *Bernard Kimani Gacheru v. Republic* [2002] eKLR the Court of Appeal restated that:

> " 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 states is shown to exist."

41. In his mitigation at the trial court, the Appellant stated that he has no parents, no land and he lives in a plot with a wife and children. His wife was unwell and his child was at school.

42. In sentencing him, the trial court considered the mitigation and the fact that the Appellant was a first offender. The court also considered a remand period of 1 year. The court found that the victim, a girl aged 11 years, would be permanently scared. A sentence of 30 years was considered appropriate as a deterrent one.

43. The sentence is provided in law, thus legal. The trial court did not consider irrelevant matters nor did it fail to consider relevant matters. The sentence is not harsh or excessive. I find no ground upon which to interfere with the sentence. I hasten however to add that despite the trial court acknowledging that the Appellant was in remand for 1 year, the court did not apply Section 333(2) of the *Criminal Procedure Code*.

44. From the foregoing, the Appeal herein lacks merit and is dismissed save for an order that the sentence of 30years imprisonment is to run from 4/4/22.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF NOVEMBER 2024

AK NDUNG'U

JUDGE