Sang v Republic (Criminal Appeal E027 of 2024)
[2024] KEHC 14364 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14364 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E027 OF 2024

RE ABURILI, J

NOVEMBER 19, 2024

BETWEEN

SAMSON KIMUTAI SANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the conviction, Judgment and sentence in Tamu SPM SO Case No E021 of 2022 delivered on 3/5/2023 by Hon. A.K.Makoross, SPM)

JUDGMENT

1. The appellant herein Samson Kimutai Sang was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on 24th October 2022 at around 0900hrs at [Partculars withheld] area in Kipkelion West sub-county within Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of Y.C. a child 12 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The appellant denied committing the offences as charged.

2. The prosecution called three (3) witnesses in support of its case and the appellant the appellant was put on his defence where the appellant gave an unsworn testimony.

3. In his judgment, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt, that the alibi given by the appellant was an afterthought as it had only been raised during the defence. The trial magistrate went on to sentence the appellant to 20 years' imprisonment.

4. Aggrieved by the sentence imposed, the appellant filed his petition of appeal dated 2nd May 2024 raising the following grounds of appeal;

1. That the trial court erred in law and facts in not observing that the prosecution case was full of contradictions discrepancies and inconsistencies which were inconsequential to conviction.

2. That the trial court erred in law and facts in not observing that the prosecution failed to prove its case beyond reasonable doubt as legally required by law.

3. That the trial court erred in law and facts in not observing that the key ingredients of defilement were not proved beyond reasonable doubt.

4. That the minimum mandatory nature of the sentence under section 8 (3) of the SOA No. 3 of 2006 is unconstitutional and not warranted on plea.

5. That the sentence imposed is manifestly excessive in view of the circumstances of the case.

6. That the trial court erred in law in not admitting the appellant's mitigation as provided for under section 216 and 329 of *CPC* for proper sentencing pursuant to section 323 of *CPC*.

7. That the trial court erred in law and facts in disregarding the appellant's defence despite the same being worth of acquittal.

8. That further grounds be adduced once the trial court records (proceedings) are received and after pursuant of the same.

5. The appellant filed written submissions.

The Appellant's Submissions

6. It was submitted that the trial court relied on inconclusive medical evidence to convict the appellant as the clinical officer, PW2, failed to prove penetration as required in the case of Charles Wamukaya v Republic.[no full citation given]

7. The appellant also submitted that the age of the victim was not proved beyond reasonable doubt as legally required by law as the birth certificate produced by the investigating officer PW3 was not enough and that a medical officer was best placed to determine the age of the victim.

8. It was submitted that the nature of the sentence under section 8 (3) of the *Sexual Offences Act* was unconstitutional and not warranted on plea especially considering the circumstances of this case specifically that the appellant never used any threats, intimidation or force whatsoever and further as he was a first offender with no criminal record.

9. The appellant further submitted that the trial court erred in not considering the consonance of section 333 (2) of the *Criminal Procedure Code* regarding the time spent in custody during trial prior to sentencing.

10. The appellant made oral submissions to the effect that he wanted the court to reduce his sentence.

The Respondent's Submissions

11. Mr. Marete Principal Prosecution Counsel for the state made oral submissions opposing the appeal stating that the conviction and sentence were sound and lawful as all the ingredients of the charge against the appellant were proved beyond reasonable doubt. Counsel further submitted that the victim was aged 12 years old, that she was penetrated and further that the appellant was her neighbour who took her to his house and defiled her. He further submitted that the hymen was freshly torn, she had lacerations and bleeding in her genitalia.

12. Mr. Marete for the state submitted that the defence was rightfully dismissed as an afterthought and that the sentence of 20 years' imprisonment was lawful.

Analysis & Determination

13. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R* [1977] EALR 32 and later in *Mark Oiruri Mose v R* [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

14. The evidence before the trial court was as follows: The complainant testified as PW1. It was her testimony that she was 12 years old. She testified on the 24.10.2022 as she returned from taking the cows to the river, she found the appellant at his date. The complainant testified that the appellant called her and locked the gate after she entered then proceeded to place her on his bed, opened his zip and opened her dress and removed her panty as well as his and proceeded to rape her (do bad manners to her).

15. The complainant testified that she wanted to scream but decided to keep quiet as she knew the appellant would cover her mouth and nobody would hear her. It was her testimony that she went home and, on the way, informed her mother who was at the market and who in turn informed her father that the appellant had raped her after which she was taken to the hospital at Fort Ternan.

16. In cross—examination, the complainant testified that she checked herself after the incident and her private parts had swollen. She reiterated in re-examination that the appellant had raped her and that she felt pain during the incidence.

17. PW2, the Clinical Officer at Fort Ternan sub-county Hospital testified that he examined the complainant when she went to the hospital. It was his testimony that the complainant was not walking well and was in pain and had palpitation on the groin area. He testified that the complainant's vulva was swollen, she was bleeding, her hymen was broken and had lacerations.

18. PW3, PC Korir was the arresting officer and she reiterated the complainant's testimony, on what the complainant reported to them concerning the incident. And how they arrested the appellant herein.

19. In his defence, the appellant gave an unsworn testimony raising an alibi that on the material day of the alleged incidence, he went to the farm until 8.30am after which he proceeded to Fort Ternan market where he stayed until 6.30pm then had supper and slept. It was his testimony that at 2am he heard people banging on his door by people he later learnt were police officers and who arrested him and took him to Fort Ternan Police Station.

20. The appellant denied committing the offence and testified that he was framed by his jealous neighbours concerning the progress of his farm.

21. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:

    a. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and

    b. Whether the sentence imposed on the appellant was excessive and harsh or unconstitutional.

22. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim.

23. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.

24. The appellant's identity is not in issue, he is the complainant's neighbour and the complainant testified that she knew him before the incident.

25. Regarding the complainant's age, she testified that she was 12 years old. PW3, the investigating officer produced a copy of the complainant's birth certificate as PEX 1 showing that the complainant was born on the 9th December 2010 meaning that by the time of the offence the complainant was 12 years 2 months old.

26. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified that the appellant lured her into his house and raped her (did bad manners to her).

27. On his part, the appellant denied committing the offence gave an alibi that on the date of the incident he went to the farm then proceeded to the market where he stayed till the evening when he went home ate and slept.

28. Section 124 of the *Evidence Act* provides that:

> '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 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 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.'

29. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW2-Kipyegon Alex Ngetich, the Clinical Officer as indicated in the P3 form and treatment notes with laboratory results. PW2 testified that on examination of the complainant he noticed that complainant's vulva was swollen, she was bleeding, her hymen was broken and had lacerations. PW1, the complainant, was firm in her testimony that the appellant defiled her.

30. This evidence adduced by the prosecution witnesses, compared with the defence by the appellant which was basically an alibi which was basically raised during the defence hearing and at no time did it come up during his cross-examination of the prosecution witnesses all point to the appellant as the individual who penetrated the complainant.

31. Further, I have considered evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged by the appellant in his appeal. I therefore find no

material contradiction in the evidence adduced by the prosecution witnesses. Furthermore, the Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows on contradictions in evidence:

> 'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

32. Accordingly, in this case, I find that the assertions by the appellant that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. I therefore find that the prosecution proved all the element of penetration beyond reasonable doubt.

33. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant for the said offence was sound and safe.

34. As to whether the sentence imposed on the appellant was excessive, harsh or unconstitutional, the appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive. Article 50 (2) (p) of the *Constitution*, 2010, which provides that:

> 'Every accused person has the right to fair trial, which includes the right.
>
> (p) To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence:'

35. In *Alister Antony Pariera v State of Maharashtra*, {2012}2 SCC 648 para 69, by the Indian Supreme as cited in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:

> " Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

36. Section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be liable to imprisonment for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.

37. The Court of Appeal on its part, and following the spirit of the Francis Muruatetu (supra) case stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See *Jared Injiri Koita v Republic* [2019] eKLR.

38. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise the unfettered discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the Constitution. See *Christopher Ochieng v Republic* KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and *Jared Koita Injiri v Republic*, KSM CA Criminal Appe84567890al No 93 of 2014 [2019] eKLR.

39. However, the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] KLR [Muruatetu II] Case clarified the position and stated *inter alia* that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court.

40. In *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) the Supreme Court quite recently stated as follows, referring to the ratio decidendi in the Muruatetu 1 case:

    14. The ratio decidendi in the decision was summarized as follows:

        > "Consequently, we find that section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment". We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."
        >
        > It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

    15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours]

        Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum'

can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities.

58. The amici in that context submitted, and we agree, that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which the courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and, the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability.

59. South Africa introduced minimum sentencing in 1997 through the Criminal Law Amendment Act with the intention of reducing serious and violent crime, achieving consistency in sentencing and to address public perceptions that the sentences meted out were not sufficiently severe. The Supreme Court of Appeal in the case of *S v Malgas* 2001 (1) SACR 469 (SCA) para. 25 explained and declared the purpose of minimum sentences as follows:

> "In short, the legislature aimed at ensuring a severe, standardized and consistent response from the courts to the commission of such [serious] crimes"

41. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra) and in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023), it is clear that the mandatory minimum sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory or unconstitutional.

42. In the lower court, the appellant indicated that he would not offer any mitigation as he intended to appeal the court's decision. That notwithstanding, I note that the trial court on the 19.4.2023 ordered for a pre-sentencing report to be prepared and subsequently, one was filed which indicated that whereas the appellant's family were in favour of a lenient sentence, the victim's family, neighbours and the local administration all called for a harsh sentence.

43. Further, taking into consideration the circumstances of this case, the nature of how the appellant committed the offence I find no reason to interfere with the trial court's sentencing of the appellant.

44. I note that the appellant spent his whole trial in custody. The appellant was arrested on the 25.10.2022 and presented to court the following day when he was granted bond however he was not able to meet the said terms. The terms of bond were then reviewed on the 16.11.2022 but still the appellant could not satisfy them. Subsequently, the appellant was sentenced on the 3.5.2023 and thus spent 6 months and around 9 days in custody.

45. In the circumstances, I find that in computing the sentence imposed on the appellant, the prisons authorities shall consider the period spent in custody by the appellant from the date of arrest until the date of being released on bond which was 6 months and 9 days. This File is closed. I so order

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE