JMK v Republic (Criminal Appeal 42 of 2019)
[2025] KECA 398 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 398 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 42 OF 2019

J MOHAMMED, W KARANJA & LK KIMARU, JJA

FEBRUARY 21, 2025

BETWEEN

JMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyeri (R.N. Sitati, J.) delivered on 20th December 2018 in H.C.R.A. No. 19 of 2018)

JUDGMENT

1. JMK, the appellant, was charged before the Chief Magistrate's Court at Nyeri, with several offences under the *Sexual offences Act*. On count1, he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. ("the Act"). The particulars of the offence were that on diverse dates between 25th December to 31st December 2015 at unknown time at Nyeri County, he unlawfully and intentionally caused his penis to penetrate the vagina of E.W.N. a child aged 13 years.

2. In the alternative, he faced an alternative charge of committing an indecent act contrary to Section 11(1) of the Act. The particulars of the offence were that on diverse dates between 25th December to 31st December 2015 at unknown time at Nyeri County unlawfully and intentionally touched the vagina of E.W.N. a child aged 13 years with his penis.

3. On Count 11, the appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 25th December to 31st December 2015 at unknown time at Nyeri County unlawfully and intentionally caused his penis to penetrate the vagina of N.W. a child aged 10 years.

4. He also faced an alternative charge of committing an indecent act contrary to Section 11(1) of the Act. The particulars of the offence were that on diverse dates between 25th December to 31st December 2015 at unknown time at Nyeri County, he unlawfully and intentionally touched the vagina of NW a child aged 10 years with his penis.

5. The appellant pleaded not guilty to the charges and the matter proceeded to trial, where the prosecution called five witnesses. The appellant was thereafter placed on his defence, and upon considering the evidence, the trial magistrate found him guilty on both main counts, convicted him, and sentenced him to 20 years' imprisonment in regards to Count 1 and life imprisonment in Count 11. Both sentences were to run concurrently.

6. His first appeal against both conviction and sentence was unsuccessful, hence the appeal now before this Court. Before we address the grounds of the appeal, we will summarize the evidence that was adduced in the trial court briefly.

7. PW l, E.W.N.N., a class five pupil at [particulars withheld] Primary School aged 13 years told the trial court that on 25th December 2015 she was at home together with her other siblings, E.W.N., N.W. and J.W. She stated that her mother had left home after being chased away by the appellant leaving them under the appellant's custody.

8. She testified that during the night the appellant called her and her sister and told them to have sex with him and he threatened to kill them. That their brother was sleeping.

9. She stated that the appellant took her to bed, removed her clothes and inserted his penis into her vagina and did the same to her sister, N.W. She testified that after one week she informed the village elder who then informed her grandmother. She stated that the appellant used to defile them on a daily basis and that in January her grandmother came and took her and her sister to Murang'a hospital where they were examined by the doctor.

10. PW 2, N.W., was a class three pupil at [particulars withheld] Primary School. She testified that the appellant had assaulted her mother who ran away and that when her mother left, he started sexually assaulting her and her sister. She testified that on 24th December 2015 she was at home with her other siblings and after they took supper, she and her sister went to bed and that the appellant took her and her sister to bed and he started by defiling her sister and then he defiled her and that it was the routine every night.

11. She stated that they informed the village elder who called their grandmother who came and took them to the hospital and the police station.

12. Their grandmother, EW, told the court that she was called by some village elders and told to go and collect her children from their home where their mother had abandoned them. She went there and PW l and PW 2 told her that they were being defiled by a man who was staying with their mother. She testified that she picked the children and reported the incident at the police station and took them to hospital for examination where it was confirmed that they were defiled.

13. On cross- examination by the appellant she stated that she did not find him at the house when she was picking PW 1 and PW 2 and she stated that she did not know him personally.

14. PW 4, No.80xxx, Inspector Hilda Namu, testified that on 6th February 2016 she conducted investigations of this case. She was informed that PW l and PW 2 step-daughters to the appellant were defiled by the appellant after their mother fled to an unknown destination. She stated that she took

them to hospital for medical examination and age assessment and later that the appellant was arrested and charged.

15. PW5, Beatrice Maina a medical doctor attached to Nyeri Referral Hospital produced P3 Forms for PW l and PW 2 which she filled using the treatment notes and Post Rape Care Forms. She testified that on general physical examination of both PW l aged 13 years and PW 2 aged 10 years, it was found that their hymens were broken.

16. Upon considering the prosecution's evidence set out above, the trial magistrate put the appellant on his defence. He gave unsworn statement and denied the offence. The appellant testified that in the month of February he was informed by a neighbour that three people had gone to his house looking for him. He was later arrested for the offence of defilement. They took him to his house and conducted a search. The arresting officer told him to give him Kshs.3,000.00 to drop the charges against him but he refused because he is innocent. He later came to learn that the said officer had an affair with his wife and had even rented a house for her.

17. As stated earlier, he was convicted and sentenced on the two main counts and his appeal to the High Court was dismissed. In the appeal before us, the appellant faults the High Court for, inter alia, relying on mere allegations that were never proved as per requirements of law; believing the prosecution evidence without testing whether the same as alleged was correct or out of coaching witnesses; holding that the prosecution case was proved beyond reasonable doubt and for rejecting his defence.

18. The appeal was heard by way of written submissions with brief oral highlights. The appellant appeared in person for the plenary hearing while David Mwakio, Prosecution Counsel, represented the respondent.

19. The appellant submitted that the age of the victims was not proved as other than the evidence of PW 1 and PW 2, there was no other evidence that corroborated the same. That the birth certificates were not produced. He submitted that PW 4 told the court that upon examining PW 1 and PW 2 it was established that PW 1 was between 12-14 years while PW 2 was between 10-12 years, he stated that it was not clear whether PW 2 was 10 years old or 12 years old for the trial magistrate to know the sentence to mete on the appellant.

20. With regards to penetration, the appellant relied on E.E. -vs- Republic [2015]eKLR on the definition of penetration. He submitted that the statement of PW 1 and PW 2 that he defiled them was not corroborated by any other evidence. He stated that the two lower courts erred in holding that the fact that PW1 and PW2 hymens were missing was a conclusive fact that they were defiled.

21. Further it was submitted that sexual intercourse is not the only reason why a hymen can miss in a girl's genitalia. He stated that it is on record that PW2 used to have sex with other people prior to the alleged offence. Reliance was placed on John Mutua Munyoki v Republic [2017] eKLR.

22. In regard to the charge sheet being defective, it was submitted that the appellant was charged with defilement contrary to section 8(1) and section 8(3) and also section 8(1) and section 8(2) of the *Sexual Offences Act* and that the charge sheet states that she was 7 years old.

23. As for the sentence being harsh and excessive, the appellant submitted that sentence meted out was unconstitutional as held in Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015 [2017] eKLR case and asked that the same be substituted with a lesser sentence.

24. The State submitted with regards to the ages of the victims that the same were proven by the age assessment reports that were tendered in evidence before the trial court. It was stated that the trial court was satisfied that through the oral and documentary evidence, the respective ages of the complainants

were proven to the requisite threshold. That the age of E.W.N. was estimated to be 13 years old while that of N.W. was estimated to be 10 years old and as such that the issue of age remained uncontroverted throughout the trial.

25. With regard to proof of penetration, it was stated that there was medical evidence that was adduced to corroborate the testimonies of the minors. It was stated that the hymens of the minors were found to have been broken, an issue that the victims properly attributed to the appellant in their respective testimonies. Hence that this issue was also uncontroverted.

26. In regard to the appellant's identification, it was submitted that it has been held that recognition is more reliable than mere identification. It was stated that in this case the two victims were able to recount the identity of the perpetrator to be none other than the appellant because he was their step-father and who actually spoke to them before proceeding to defile them. That it was also brought out in evidence that the defilement took place on more than one occasion between 25th December 2015 to 31st December 2015 involving the same assailant and hence leaving no room for error as to the identity of the perpetrator.

27. We are urged to dismiss the appeal.

28. This is a second appeal and by dint of section 361 of the *Criminal Procedure Code*. Our mandate is restricted to addressing issues of law only. The Court will also not normally interfere with concurrent findings of fact by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. See Karani -vs- R. **[2010] 1 KLR 73.**

29. Cognizant of our limited mandate, and having considered the grounds of appeal, submissions by both parties, and the relevant law, we are of the view that the issues turning for consideration are;

    i. Whether the 2 courts below properly analyzed the evidence before arriving at their determination.

    ii. Whether the ingredients of the offence of defilement were proven; and

    iii. Whether the sentence meted out to the appellant is lawful.

30. As stated in the case of Okeno -vs- R. [1972] E.A. 32 and David Njuguna Wairimu -vs- Republic [2010] eKLR, it is trite that the first appellate court is charged with the duty of re-considering, evaluating, and analyzing the evidence taken by the trial court afresh to arrive at an independent opinion. A close look at the judgment of the High Court is evident that the learned Judge reconsidered the evidence of each of the prosecution witnesses, and re-evaluated and analyzed the same in her judgment. As it is, there is no formulae of how a Judge analyzes and evaluates evidence, it is usually a matter of style. The appellant apart from making a mere claim failed to substantiate his claim as stated by this Court in the case of Alexander Ongasia & 8 Others -vs- Republic [1993] eKLR:

> "...it is not enough; indeed, there is no need, to loudly announce in the judgment that the evidence has been re-evaluated. Such re- evaluation must be apparent on the face of the record and if that is done, then there is no occasion to announce it.....but it is clear to us that he broadly agreed with the conclusions reached by the trial magistrate and he also found as a fact that the evidence against the appellants was overwhelming. We think he was right in his general conclusions and in the circumstances of this case, his failure to analyze in detail the evidence before the trial court did not occasion any failure of justice to any of the appellants."

31. On the complaint that the ingredients of the offence of defilement were not proved; on age, the two courts below considered the age assessment reports produced in evidence and were satisfied that the age of the minors was proved. This Court in the case of Mwolongo Chichoro Mwanyembe -vs- Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) held that:

> " ...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, guardian or medical evidence among other forms of proof..."

32. In this case the age of E.W.N. and N.W. was sufficiently proved by their own testimonies and further by the age assessment reports which proved that they were 13 and 10 years old respectively at the time of defilement.

33. On the question of penetration. The two courts below believed the evidence of PW1 and PW2, which was aptly corroborated by the evidence of the medical doctor who produced the Post Rape Care (PRC) and the P3 Forms and testified in court, the two indicated that PW1 and PW2 had broken hymens.

34. As to the question of the identity of the perpetrator, both courts concurred that there could be no mistake in the identity as the appellant was identified by both PW 1 and PW 2 as their step- father having lived with their mother prior to him chasing her away and as such he was not a stranger to them. We therefore find no reason for this Court to interfere with concurrent findings of fact by the two courts below.

35. The final grievance by the appellant is that the life sentence imposed on him is excessively harsh and unconstitutional by virtue of being a mandatory minimum sentence. The appellant was correct that at the time this appeal was argued our jurisprudence on mandatory minimum sentences and indeterminate life sentences had taken a new trajectory where this Court had issued a series of decisions impugning the constitutionality of both. The trend was attributable, if only indirectly, to the Supreme Court's decision in Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015 (Muruatetu 1) and found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases such as Maingi & 5 others -vs- Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) (Odunga J. as he then was) and Edwin Wachira & Others -vs- Republic – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was).

36. However, in a recent decision, to wit, Republic -vs- Joshua Gichuki Mwangi (Petition No. E018 of 2023) [2024] KESC 34 (KLR), the Supreme Court has held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional. Following the doctrine of stare decisis, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

37. From the above holding and under the *Sexual Offences Act* a person found guilty of the offence of defilement of a girl aged between 12 and 15 years is liable to imprisonment for a term of 20 years. The punishment meted out upon the appellant is therefore lawful.

38. Further under the same Act a person found guilty of the offence of defilement of a girl aged between eleven (11) years or less shall upon conviction be sentenced to imprisonment for life. The punishment meted out upon the appellant is therefore lawful, and if the appellant's complaint is on the severity of the sentence by dint of Section 361(1) of the *Criminal Procedure Code*, our mandate is limited as the severity of the sentence is a matter of fact.

39. In the end we find the appeal to be devoid of merit and the same is hereby dismissed in its entirety.**

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a the true copy of the original.

Signed

DEPUTY REGISTRAR