Matoke v Republic (Criminal Appeal 28 of 2019)
[2025] KECA 151 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 151 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 28 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

ZABLON ONGONYO MATOKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (Ruth N. Sitati, J.) dated 5th June 2014 in HCCRA No. 168 of 2012)

JUDGMENT

1. Zablon Ongonyo Matoke, the appellant herein, was charged in the lower court of the offence of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act* and on the alternative the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars being that on 26th April 2008 at Riamoni sub location in Masaba District within Nyanza Province, the appellant unlawfully and indecently assaulted L.O[1] a girl aged 10 years by touching her private parts. The appellant pleaded not guilty to both counts and was acquitted on the alternative charge but sentenced to life imprisonment on the main charge.

2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the sentence, the appellant has now filed this appeal setting out the grounds as follows:

    i. the charge sheet was defective.

    ii. the age of the complainant was not proved and both the trial court and the first appellate court fell in error in finding that the complaint was ten (10) years old.

    iii. the two courts below erred in relying on the evidence of both PW2 and PW3.

iv. both courts erred in rejecting the appellant's defence.

v. the two courts below failed to consider the provisions of section 333(2) of the Criminal Procedure Code when passing the sentence.

vi. The sentence imposed was harsh, unjust and unfair.

3. This being a second appeal, this Court is mindful of its duty under section 361 of the Criminal Procedure Code, that a second appeal must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

4. The evidence before the trial court, and which was also considered by the High Court was as follows. LO the complainant, who testified as PW1, recounted that on the material day she had gone to church with her younger brother and stayed there until 4pm. As they left church for home, they met the appellant next to his home who told them that he had lost his phone; and that should they find it they should give it to their father who would in turn give it to him.

5. Shortly the appellant told the complainant and her brother that he had found the phone; and after some conversation the complainant climbed a guava tree to get some guavas for her brother; and the appellant told her that he would pay for the guavas. The appellant then slapped her brother who ran away.

6. PW1, sensing danger, also started to run but her shoe fell off causing her to fall. The appellant who was armed with a knife threatened the complainant that he would cut off her hand and grabbed her by the neck, took her to a nearby plantation and ordered her to remove her clothes. The complainant refused but the appellant removed her panties, removed his penis, applied saliva on it and inserted it into the complainant's vagina, all the while threatening to kill her if she screamed.

7. The appellant defiled PW1 several times and after he was done, he left.

   PW1 went home and, on arrival, JK, her mother who testified as PW2, asked her where she had been; why she was not walking properly; and why her clothes were crumpled. PW1 then explained to her mother what had happened and she was taken to Gesima hospital from where she was referred to Keroka District Hospital; admitted for two days and later taken to Keroka police station.

8. PW5 was Sgt. Molice Kimani, who escorted PW1 for treatment after booking the report. The appellant was later arrested by Administration Police; and taken to the police station; then after investigations the appellant was charged.

9. Jackson Muruani, the clinical officer, testified as PW4; and it was his evidence that after examining the complainant, he found that she had a bruise on the neck, a cut wound on her left palm, an injury that could have been caused by a sharp object. On examination of the complainant's genitalia PW4 established that her clitoris was painful, tender and bruised, the vaginal canal was wide open though no spermatozoa was found as the examination was done 5 days after the alleged offence, and PW4 explained that any surviving spermatozoa would be dead within 72 hours from the time of discharge. PW4 confirmed that the broken hymen was evidence of penetration.

10. PW2 the complainant's mother told the court that PW1 was 10 years old, and a standard 6 pupil of [particulars withheld] primary school; that PW1 had told her about the incident; and that she knew the appellant from before.

11. DOK, the complainant's father, testified as PW3, his evidence corroborated PW2's testimony with regard to PW1's age, and what happened to PW1. PW3 also confirmed that he knew the appellant and that at some point he had employed the appellant's mother and in the course of that employment, the appellant stole PW3's radio. During cross-examination, PW3 told the court that the dispute over the radio had long been resolved before the incident.

12. In his defence the appellant gave an unsworn statement and stated that he was coming from the shop when he met some children taking his guavas; the said children ran away; the next day PW3 swore to fix the appellant because of a quarrel they had at a drinking party; and the appellant was then arrested on allegations that he had defiled PW1. He maintained that the reason he was charged was an issue of a personal vendetta where PW3 wanted a shamba in order to settle the issue of the radio stolen by the appellant.

13. The trial court, having considered both the prosecution and appellant's case, was satisfied that the ingredients of the offence of defilement had been proved by the prosecution. The court noted that PW1, in her unsworn testimony, stated that the appellant threatened her and held the knife at her hand and that he also grabbed her by the neck and took her to a maize plantation where he proceeded to defile her and threatened to kill her should she scream that PW1's testimony was corroborated by PW4, who on examination found a cut wound on her right palm caused by a sharp object, bruises on the neck, bruised and tender genitalia and broken hymen leading to the conclusion of penetration.

14. The court noted that on the issue of the complainant's age, although no birth certificate nor baptismal card was produced, it was satisfied that the complainant's parents were in a position to testify as to the complainant's age.

15. With regard to the identity of the appellant the court was satisfied that the identification was proper as the incident took place during early evening between 4-5pm and visibility was good. The appellant was identified by the complainant on the dock. This was corroborated by the evidence of PW2 & 3.

16. On the issue of whether or not penetration took place, the court was of the opinion that penetration took place, placing reliance on the testimony of PW4 who noted the complainant's bruised genitalia, and broken hymen, leading the medic to conclude that there was partial penetration.

17. On the appellant's defence that the case against him was a frame up, the court noted that the same was an afterthought as the appellant had been positively identified, and did not shake the prosecution's case.

18. The learned judge considered the evidence, and found that one of most critical elements of defilement being penetration was proved by medical evidence. Drawing from I.E. Collingwood's Criminal Law of East and Central Africa (London; sweet and Maxwell) 1967 Ed. of page 123, which observed:-

> "Age may be proved by a birth certificate, or particularly in the case of Africans, by the evidence of a person present at the birth."

19. The learned judge pointed out that in the instant case PW2 who gave birth to PW1 attested to the fact that the complainant was 10 years old; and there could be no better evidence than what the biological mother gave on the issue of age. The learned judge thus found that: "Therefore the age of the complainant in this case was proved beyond reasonable doubt for purposes of the charges against the appellant."

20. As regards identification, the learned judge considered PW1's evidence in chief that:

> " I saw the person previously. I can identify the person. He is the one in the dock."

In addition to this, the learned judge observed that:

> " It is also worth noting that the defilement took place between 4.00-500p.m. and at such time there is usually light from the sun and visibility is very clear. I do not doubt that the circumstances under which the offence was committed were conducive for proper and error-free identification"

In dismissing the appeal, the learned judge found the conviction safe, and affirmed the sentence.

21. In his written submissions, the appellant delves mainly on the unconstitutionality of the mandatory nature of the sentence meted out, urging us to consider the purpose of sentences as set out in the Kenya Judiciary Sentencing Policy Guidelines; that he is now a reformed and disciplined person, whose change in character has earned him the distinct honour of being a Trustee in prison and he has undergone courses that has resulted in acquiring life changing skills.

22. The appellant also urges us to consider that he has been in custody for a period of 16 years down the line, it is the prerogative of this Court to consider the trauma and agony he has undergone while delivering the maiden judgement on this appeal; and hence consider such period since remand custody as envisaged in section 333(2) of the criminal procedure code; and substitute the sentence to a lighter and appropriate one.

23. In opposing the appeal, the respondent through learned counsel Mr. Joseph Kimanthi, contends that there is nothing defective about the charge sheet, and if there exists a defect, it is curable under section 382 of the Criminal Procedure Code; that taking into account all the evidence adduced by the prosecution and in the circumstances of the case, the prosecution did discharge its burden; that the evidence tendered at the trial was not discredited by the defense during cross examination; and the conviction was therefore proper as to warrant dismissing the appeal in its entirety.

24. The issues that we must consider is whether the prosecution proved the age of the complainant as required by the law; second, whether penetration was proved; whether the person who defiled the complainant was properly identified; whether the mandatory nature of the sentence meted out was unconstitutional; and whether the sentence was harsh and severe in the circumstances.

25. However, it is also true that the age of the complainant on a charge of defilement is not only proved by way of a birth certificate or age assessment report. The age of a victim of defilement may be proved in various ways as was stated by this Court in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR 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 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."

26. From the record, it is clear to us that both the trial court and the High Court considered the issue regarding proof of age in the absence of a birth certificate, pointing out why the evidence of the mother, as the person who was present at her birth, regarding PW1's age was credible.

27. As regards identification both courts took into consideration that identification was by recognition, and the incident took place in broad daylight, thus giving a favourable opportunity for positive identification. We draw from Wamunga vs. Republic (1989) KLR 426 where this Court stated:

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

We thus detect no fault with the findings of the learned Judge, all the elements of the ingredients of the offence of defilement were proved by the prosecution beyond reasonable doubt.

28. With regard to the severity of sentence, This Court's mandate on a second appeal is conferred by Section 361(1) (a) of the Criminal Procedure Code, which provides:

1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

    a. on a matter of fact, and severity of sentence is a matter of fact.

    The appellant was sentenced to life imprisonment for defiling a 10 year old girl. Both the trial court and the first appellate court found that there was sufficient evidence that the minor complainant was defiled, and that it was the appellant who defiled her. Under section 8 (2) of the *Sexual Offences Act*, 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. In Bernard Kimani Gacheru vs. Republic [2002] eKLR, this Court 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."

    The position regarding the minimum and mandatory sentences in sexual offences has been clarified by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae) (Petition E018 of 2023) [2024] KESC 34 KLR, where it was categorical that:

    > "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 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.""

29. What this means is that neither the trial court nor the learned Judge of the first appellate court, nor this Court have any discretion to impose a sentence other than what is prescribed under section 8(2) of the *Sexual Offences Act*. The decision by the Supreme Court is binding on us under the doctrine of stare decisis; and we are bound to hold that in the present case, the appellant was convicted under section 8(2) of the *Sexual Offences Act* and that the sentence was lawful. Moreover, in the circumstances of the offence, in which the appellant a male adult defiled a 10 year old girl threatening her with a knife, the sentence of life imprisonment was neither harsh nor excessive.

The upshot of the foregoing is that the appellant's appeal fails in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR