Okoth v Republic (Criminal Appeal 154 of 2019)
[2025] KECA 632 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 632 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 154 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 4, 2025

BETWEEN

JOHN OCHICHI OKOTH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Siaya (Majanja, J.) dated 19th June, 2016 in HCCRA No. 17 of 2016)

JUDGMENT

1. The appellant, John Ochichi Okoth, was the accused person in the trial before the Senior Principal's Magistrate's Court at Siaya in Criminal Case No. 807 of 2012. He was charged with the offence 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 27th day of September, 2012, at Gem district within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of VAO, a child aged 8 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences *Act No. 3 of 2006*. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment as provided for by the law.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (D.S. Majanja, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 19th June, 2016.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised three (3) grounds in his Memorandum of Appeal, which, reproduced verbatim, are that:

> " 1. The two courts erred in law in not weighing the conflicting evidence in the instant case that were inconsequential to conviction. Hence not wholesomely analyzing the case.
>
> 2. The two courts erred in law in not appreciating the appellant's cogent defense that overwhelmed the prosecution case.
>
> 3. The two courts erred in not making a finding that the mandatory nature of sentence under section 8(1) as read with section 8(2) of the *Sexual Offences Act* is unconstitutional as well as the sentence is not warranted on plea."

7. Consequently, he prayed that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

8. A summary of the evidence that emerged at the trial through five

   (5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

9. The complainant, VAO, was a class two pupil at [Particulars Withheld] at the time of the incident. She testified as PW1. She recalled that on the material day, the appellant, who was a neighbour, came to her home and asked her to go and collect groundnuts from his house. She refused and ran to her grandfather's doorstep. The appellant followed her there and told the complainant's grandfather that he wanted to send her to collect groundnuts for their use but she had refused. The grandfather then asked her to go and collect the groundnuts from the appellant's house and she heeded.

10. The appellant followed the complainant and upon reaching his house, he grabbed her and asked her to "have bad manners" with him. She refused but then he closed the door, threw her on top of the bed, partially removed her panties, unzipped his trousers and inserted his penis into her vagina. She screamed because of the pain she felt but there was no one else at the appellant's house who could come to her aid. After the ordeal, the appellant gave her the groundnuts and warned her not to tell anyone about what had happened lest he would cut her up with a panga and throw her in the bush.

11. When the complainant got back home, she consumed the groundnuts with her grandfather and brother, C. However, she was in pain, especially when walking. The following day, her mother noticed that she had difficulty in walking and made inquiries. It was then that the complainant told her what had happened when she went to fetch groundnuts from the appellant's house. Her mother checked her and she was later taken to hospital.

12. The complainant also told the court that the appellant had previously defiled her although she could not recall the particular date it happened.

13. The complainant's mother, EAO, testified as PW3. She told the court that on 29th September, 2012, at around 9.00am, she noticed that her daughter, PW1, looked sickly and on the other hand, she also looked like she did not want to disclose what the problem was. PW3's husband asked her to examine PW1 and when she did, she found discharge emanating from her vagina. It was then that

PW1 explained what had happened when her grandfather sent her to go and pick groundnuts from the appellant's house. She also told PW3 that the appellant had threatened to kill her if she told anyone what transpired between them.

14. PW3 narrated to her husband what she had been told and what she had seen and her husband took PW1 to hospital. Thereafter, the matter was reported to the assistant chief and PW3 called the appellant to do some casual work for her, with the intention of getting him arrested. Luckily for her, the appellant went and he was restrained and arrested by the assistant chief.

15. David Otieno Wasawo, the assistant chief, testified as PW2. He told the court that on 30th September, 2012, at around 11.00am, he received a phone call from one Jennipher Achieng Otieno (Jennipher), who informed him that a child had been defiled by a person known to her and that he should go and arrest the culprit who was at PW3's home. He immediately proceeded to PW3's home and arrested the appellant upon informing him of the offence he had committed, which he denied. Afterwards, he took the appellant to Yala Police Station for further action.

16. The fourth witness was Collins Otieno Oginga, the doctor in- charge of Yala Sub-District Hospital. He testified on behalf of Diana Byegon who examined the complainant on 29th, September, 2012. He told the court that the complainant reported that she had been defiled by a person who was well known to her; and that the same person had prior to the instant incident, defiled her but she could not remember the dates. The medical examination showed that her labia had lacerations and was inflamed; the hymen was broken; there was a yellowish discharge; but no bleeding was noted. Examination of urine and high vaginal swab revealed the presence of puss cells, indicative of a bacterial infection. HIV and VDRL tests showed negative results. It was concluded that the complainant had been defiled. PW4 produced the complainant's P3 form and treatment book as Exhibits P1 and P2 respectively.

17. The last witness was Cpl Edward Thuranira, the investigating officer. He testified that the matter was reported on 30th September, 2012, where after he re-arrested the appellant who was in the custody of PW2. He also interrogated and recorded the statements of PW1 and PW3 and issued them with a P3 form which was filled and returned to him. He further testified that the appellant was not subjected to any medical examination as he opined that the P3 form established sufficient evidence of defilement. He produced the complainant's birth certificate as Exhibit P3, which showed that she was born on 5th September, 2004; and meant that she was eight (8) years old at the time the offence was committed.

18. When he was placed on his defence, the appellant gave unsworn testimony and called no witnesses. He denied the charge against him and testified that he could not recall anything that happened on the material day. He testified that the only thing he remembered was that he was arrested on 30th September, 2012, after he was called by the complainant's mother to go to her home. Upon arrival, the complainant's grandfather instructed him to clear the compound and mend the toilet. He did as he was told but realized that there were no sufficient building materials to mend the toilet. He waited for the materials to be brought by the complainant's grandfather. But instead, he came with the assistant chief who handcuffed and arrested him. It was his testimony that he was accused of defiling the complainant because he refused to sell land to her grandfather.

19. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango appeared for the respondent. Both parties relied on their submissions.

20. On the first ground, the appellant argued that it was difficult to comprehend the fact that PW3 was the only one who noticed that the complainant walked with difficulty after she returned from his house,

two days after the incident had occurred. He wondered why no one had noticed it the previous day when she returned home with groundnuts.

21. The appellant also argued that he is HIV positive. Yet, he argued, the complainant was found to be HIV negative. Therefore, according to him, this negates his having defiled the complainant. He further complained that he had not been medically examined.

22. On the second ground, the appellant argued that his behavior of going to PW3's home when he was called on 30th September, 2012, depicted that of an innocent person. According to him, he could not have quickly and willingly accepted to go and work for the family in the compound, knowing very well that he had wronged them.

23. Lastly, the appellant contended that his sentence was unconstitutional because of its mandatory nature and relied on the High Court case of Maingi & 5 Others vs. *Director of Public Prosecutions & Another (Petition No. E017 of 2021*) (2022) KEHC 1318 (KLR) eKLR, which was cited with approval by this court in Joshua Gichuki Mwangi vs. Republic (2022) eKLR. As such, he urged this Court to consider his mitigating circumstances and use its discretion to prescribe a lesser sentence that runs from the day of his arrest, pursuant to section 333(2) of the *Criminal Procedure Code* since he is relatively old and is living with HIV.

24. Opposing the appeal, Mr. Okango reminded the court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*, as was held in the case of Njoroge vs. Republic [1982] KLR 388.

25. First, counsel rejected the appellant's submission on his first ground and argued that it was never raised in the first appellate court. Hence it was improperly before this Court. However, he urged that there was no contradiction as alleged since the complainant testified that after the incident, she was in pain during the time that she was walking. She never testified that she was walking with difficulty a day after the incident. But that the difficulty in walking was observed by her mother. Thus, there was no contradiction in the testimony of the two witnesses.

26. On the issue of the appellant's HIV status, counsel submitted that the same was never an issue during trial as PW5 testified that the appellant was never subjected to any medical examination. Hence, there was no basis for the alleged contradiction in the medical tests of the complainant and that of the appellant; and urged that this ground be dismissed.

27. Second, counsel rejected the appellant's submission on his second ground and argued that the trial court considered the appellant's defense and dismissed it on the basis that it was unbelievable. Counsel contended that the appellant gave unsworn evidence whereby he testified that he could not remember the events of the material day; and only gave an account of the events that took place on the day he was arrested. This out rightly meant that the prosecution evidence regarding the incident that took place on the material day remained unrebutted. Hence, the appellant's allegation that his defense was not considered is baseless.

28. As regards his conduct, counsel submitted that the same was not proof enough that he was innocent; since he had threatened PW1 with death and was certain that he would not be discovered. Furthermore, PW1 testified that the appellant had previously defiled her and evidently, the appellant was certain that his threats were working since she had not reported him on previous occasions. He urged that the prosecution proved its case to the required standard and that this Court should uphold the conviction.

29. Lastly on sentence, counsel noted that the trial magistrate meted out a severe sentence as provided for by statute. In this respect, he submitted that he was cognizant of the declaration of the unconstitutionality of indeterminate life imprisonment as was held by this Court in Julius Kitsao Manyeso vs. Republic,

Malindi Criminal Appeal No. 12 of 2021 and Evans Nyamori Ayako vs. Republic, Kisumu Criminal Appeal No. 22 of 2018. Consequently, considering the circumstances of this case, the tender years of the survivor who was 8 years old at the time of the incident and the gravity of the offence, counsel urged this Court to set aside the life imprisonment meted and substitute it with thirty (30) years imprisonment.

30. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

31. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, two issues fall for determination on this second appeal: whether the prosecution proved its case beyond reasonable doubt as required by the law; and whether the sentence imposed was unconstitutional due to its mandatory nature.

32. As regards the first issue, it is now settled law that before an accused person is convicted for the offence of defilement, the prosecution ought to prove three essential elements, that is, the age of the complainant, proof of penetration and identity of the perpetrator.

33. We take note that two elements, that is, the age of the complainant and proof of penetration were not in dispute, in the two lower courts. They both found that the age of the complainant was conclusively proved by her birth certificate which showed that she was eight (8) years old at the time the of the incident whereas the medical report (P3 form) produced by PW4 established that the complainant was defiled. On this second appeal, the appellant does not revisit either of those ingredients.

34. The bone of contention at the first appellate and this Court was and is the identity of the perpetrator. From the evidence on record, it is our considered view that the complainant could not have mistaken the identity of her perpetrator as the appellant was a neighbour and someone who she knew very well, as he also worked as a casual worker in their compound. Furthermore, the complainant also stated that the appellant had defiled her several times before, and warned her not to tell anyone lest he would kill her. This was, therefore, evidence of recognition as opposed to that of identification of a stranger. As this Court held in Anjononi & 2 Others v Republic [1980] eKLR:

> " This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

35. We note that the incident happened during the day in favourable lighting conditions; that the complainant had plenty of time to see her assailant; and that she made a report as soon as her mother made an inquiry. We are satisfied that there can be no reasonable doubt as to the identity of the person who defiled the complainant.

36. Nothing really turns on the latter-day argument by the appellant that he is HIV-positive; and that the fact that the complainant was found to be HIV-negative should mean that he was not the perpetrator.

There is nowhere on the record where the appellant's HIV status is established and he cannot adduce that evidence on second appeal by way of submissions. In any event, the fact of discordance in the HIV-status of a perpetrator and a victim of sexual assault is a common phenomenon that has scientific explanation.

37. Similarly, nothing turns on his argument that his conduct of going to the home of the complainant the day after the attack was conduct consistent with innocence. The bottom line is that two courts below reached concurrent findings of fact that he was, in fact, the perpetrator. We have no reason to depart from those findings. We would only observe that the complainant testified that the appellant had defiled her before and the appellant's threats of violence to elicit her silence had worked previously. There is no doubt that the appellant assumed that the threats had worked similarly this time too.

38. Lastly on sentence, we acknowledge the submissions and authorities cited by both parties. However, a fairly recent decision by the Supreme Court in Republic vs. Joshua Gichuki Mwangi and 4 Others, Petition No. E018 of 2023, has settled the debate on whether minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional and whether courts have discretion to impose sentences below minimum those prescribed by the *Sexual Offences Act*. In short, the apex court has held that they are not unconstitutional thus:

> "56. 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 recognised 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."

39. To this extent, therefore, we are bound by the judgment of the Supreme Court and cannot interfere with the life sentence that was imposed on the appellant by the trial court and upheld by the High Court since the appellant was charged and convicted under section 8(2) of the *Sexual Offences Act*.

40. The upshot is that the appellant's appeal against both conviction and sentence is dismissed.

41. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 4 TH DAY OF APRIL, 2025.

HANNAH OKWENGU

....

JUDGE OF APPEAL

H. A. OMONDI

....

JUDGE OF APPEAL

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar