Muriu v Republic (Criminal Appeal 64 of 2019)
[2025] KECA 1252 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1252 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 64 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JULY 11, 2025

BETWEEN

SAMMY MURIU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Meru (F.M. Gikonyo J.) delivered on 27th February, 2018 in Criminal Appeal No. 21 of 2017)

JUDGMENT

Background

1. This is a second appeal. Sammy Muriu (the appellant) is aggrieved by the judgment of the High Court (F. M. Gikonyo, J.), which upheld his conviction for the offence of defilement contrary to Section 8(1), as read with Section 8(3), of the *Sexual Offences Act*, and affirmed the sentence of twenty (20) years' imprisonment.

2. The particulars of the offence were that between 19th and 20th of May 2013, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MK, a child aged fifteen (15) years. The prosecution called four (4) witnesses in support of its case.

3. The complainant, MK (PW1), testified that on 19th May 2013, her mother (PW2) sent her to a shop. At about 6:00 p.m., on her way home, she encountered the appellant, a stranger at the time, who advised her to spend the night at his sister's house due to the late hour. PW1 agreed and accompanied him to the purported location. Upon discovering that the sister was absent, the appellant suggested that they go to his house instead. At his house, he attempted to undress her. When she resisted, he forcibly removed her clothes, laid her on his bed, and defiled her. She remained in the house until 5:00 a.m. the following day and requested to leave for school, but the appellant declined her request. He eventually released her around 7:00 p.m. on 20th May 2013. She immediately reported the incident to her mother.

The matter was reported to the area Chief, who referred them to the police and subsequently to the hospital. PW1 led the police to the appellant's house, where he was arrested. She only learned of the appellant's name at the time of his arrest.

4. PR (PW2) the complainant's mother, confirmed that PW1 had been sent to a kiosk on the evening of 19th May 2013 and failed to return until the evening of the 20th. She testified that PW1 informed her that she had been defiled by the appellant. It was her testimony that PW1 was born on 14th November 1998.

5. Nelson Kimathi Mate (PW3), a Clinical Officer, examined the complainant and testified that the hymen was absent and that PW1 was 15 years old at the time of the examination. Although no bruising or abnormal discharge was observed and laboratory results were normal, he concluded that the complainant had been defiled.

6. No. 66977 PC Abraham Mbatha (PW4) the Investigating Officer, testified that he accompanied the complainant to the appellant's house, where he arrested the appellant.

7. The prosecution produced PW1's Immunization card which indicated that she was born on 14th November 1998. At the close of the prosecution case, the trial court found that the appellant had a case to answer. The appellant gave a sworn statement in defence, denying the offence and alleging fabrication.

8. After evaluating the evidence, the trial court found the prosecution's case proven beyond reasonable doubt. The trial court held:

> "There is nothing to make me doubt this witness having earlier stated that there was no chance of grudge between complainant and accused. I find that it is the accused who defiled the complainant and the complainant positively recognized him after spending long hours in his company. I dismiss the accused's defence and find the charge as preferred against him to have been proved beyond reasonable doubt. I hereby convict the accused under Section 215 of the *Criminal Procedure Code*."

9. The appellant was accordingly convicted and sentenced to twenty (20) years' imprisonment.

10. Aggrieved by the conviction and sentence, the appellant appealed to the High Court, citing grounds inter alia: that vital witnesses were not called; absence of a medical examination of the appellant; insufficiency of the medical evidence; and that his defence was rejected without giving cogent reasons.

11. Upon review, the High Court (F.M. Gikonyo, J.) found no merit in the appeal and dismissed it, stating:

> "The appellant caused an act of penetration with PW1—a child aged between 12 and 15 years. He is therefore guilty of the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act*. Given the age of the child, the appropriate sentence was imposed in accordance with Section 8(3). The entire appeal fails and is dismissed."

12. Undeterred, the appellant lodged this second appeal. The amended grounds of appeal are that:

    a. the mandatory sentence under the *Sexual Offences Act* is unconstitutional as it denies judicial officers' discretion in sentencing, contrary to Article 27(1), (2), and (4) of the *Constitution*;

    b. no identification parade was conducted to confirm that the appellant was the perpetrator;

    c. the failure to conduct an identification parade created doubt as to the identity of the perpetrator;

d. penetration was not proved by medical evidence;

e. a key witness was not called to corroborate the complainant's testimony.

Submissions

13. At the hearing, the appellant, appearing in person, relied on written submissions which he briefly highlighted. He contended that the sentence meted out by the trial court and confirmed by the 1st appellate court was harsh and excessive and that the mandatory nature of the sentence was unconstitutional. He cited *Julius Kitsao Manyeso v Republic* [2023]eKLR; *Evans Wanjala Wanyonyi v Republic* [2019] eKLR; and *Jared Koita Injiri v Republic*, Kisumu Cr. App. No. 93 of 2014 in support of this proposition. The appellant further submitted that his identification was not properly established and that an identification parade should have been conducted, referencing *James Omwenga v Republic* [2014] eKLR, *Cleophas Otieno Wamunga v Republic*, and *R v Turnbull* [1976] 3 All ER 551. Additionally, he asserted that the medical evidence was insufficient to establish penetration and that the prosecution's case did not meet the threshold required to support a conviction.

14. Ms. Nandwa, learned State Counsel, opposed the appeal. She submitted that the complainant's age was proved by a health card indicating that she was born on 14th November 1998, thus confirming that she was 15 years old at the time of the offence. Counsel emphasized that penetration can be established by the victim's testimony alone, as supported by Section 124 of the *Evidence Act*, provided the court finds the victim credible. Counsel submitted that the complainant's evidence was consistent and truthful.

15. With respect to identification, counsel submitted that the complainant had positively identified the appellant, having spent extended time with him. Counsel submitted that PW1 led police officers to his residence, where he was arrested. PW1 also referred to the appellant by name when reporting the incident to her mother.

16. Counsel further submitted that the defence of mistaken identity was an afterthought. The appellant responded to his name throughout the proceedings, and there was no evidence of malice or grudge that would have motivated PW1 to falsely accuse him.

17. On sentence, counsel submitted that the twenty (20) year sentence was lawful and lenient. Counsel submitted that the trial court took into account Section 333(2) of the *Criminal Procedure Code* and applied the *2023 Sentencing Guidelines*, Gazette Notice No. 11587, which reiterates that where the law prescribes mandatory minimum sentences, the court is bound to adhere to them. Counsel urged the Court to uphold the conviction and sentence, and dismiss the appeal for lack of merit.

Determination

18. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 this Court stated as follows:

> "This is a second appeal. By dint of the provisions of Section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

19. We discern three (3) main issues for determination in this appeal: whether the prosecution proved its case beyond all reasonable doubt, whether the appellant's defence was considered, and whether the sentence imposed on the appellant by the trial court and upheld by the 1st appellate court was harsh and excessive.

20. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three (3) key ingredients: the age of the victim; that there was penetration; and the positive identification of the perpetrator. See: *Charles Karani v.Republic*, Criminal Appeal No. 72 of 2013.

21. In the instant appeal, regarding PW1's age, PW1 testified that she was born in 1998. A child health card was produced which indicated that PW1 was born on 14th November 1998. Further, there were treatment notes and the P3 form, which indicated that PW1 was 15 years of age at the time of the commission of the offence. PW2 who is PW1's mother, further corroborated this evidence by testifying that PW1 was born on 14th November, 1998. Accordingly, we find that the prosecution proved that PW1 was aged 15 years at the time when the offence of defilement was committed.

22. On penetration, PW1 testified that the appellant defiled her on the material day. Medical evidence produced by the Clinical Officer (PW3) proved that upon examination of PW1, his findings were that there was evidence of defilement. PW3 produced medical documents to prove that there was penetration and that PW1 was defiled. The trial court found the evidence of PW1 to be truthful and the same was not shaken by the appellant's evidence. The trial court observed that PW1 remained firm during cross- examination regarding how the appellant defiled her. The 1st appellate court after analyzing the evidence found it to be "...cogent, credible, reliable and unshaken throughout the trial."

23. Section 124 of the *Evidence Act* provides as follows:

> " 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."

24. This Court in the case of *Mark Oiruri v Republic* Criminal Appeal 295 of 2012 [2013] eKLR stated as follows:

> "...and the effect that the medical examination was carried out on her on 16th November, 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ..."

25. In the case of *Alex Chemwotel Sakong v Republic* [2018] eKLR as quoted by the respondent's counsel, it was stated that:

> "... and the effect that medical examination was carried out on her on 16th November. 2008 five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. ..."

26. Similarly, in the case of *AML v Republic* [2012] eKLR, this Court held that:

> "It was submitted that there was no medical evidence to connect the appellant with the offence as no DNA test was conducted. The position of the law is that the offence of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily medical evidence."

27. We therefore find that the two courts below did not err when they found that the prosecution proved that PW1 was defiled.

28. On the identity of the perpetrator, there was positive identification of the appellant by PW1 who testified that she spent over 24 hours with the appellant in his house when he defiled her. Further, PW1 testified that when the appellant released her, she reported the matter to the police and later led the police to the appellant's house whereby he was arrested.

29. The appellant contended that no identification parade was conducted and thus he was not properly identified. We note from the record that although PW1 did not know the appellant before the incident, the time spent together from 19th May, 2013 at about 6: 00p.m to 20th May 2013 at 7: 00p.m was substantial to identify the appellant as the perpetrator. This Court in the case of *John Mwangi Kamau V Republic* [2014] eKLR observed that identification parades are meant to test the correctness of a witness's identification of a suspect.

30. This Court in *Andrea Nahashon Mwarisha v Republic* [2016] eKLR stated the applicable principles in the conduct of identification parades in the following terms:

> "Identification parades are necessary though not absolutely when the witness purports to identify a suspect in extremely difficult conditions, say, where the offence is committed at night and when visibility may have been a challenge having regard to the availability or lack of light and when the circumstances under which the offence is committed are harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time. The purpose of identification parade as explained in *Kinyanjui & Others v Republic*, [1989] KLR 60: "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion..." Further identification parades are meant to gauge and test the correctness of a witness's identification of a suspect given the circumstances under which he claims to have identified the suspect."

31. In the instant case, the offence was not committed in difficult circumstances. PW1 was in the company of the appellant for a period of over 24 hours at his house. Further, PW1 led the police to the appellant's house leading to his arrest. The identity of the appellant as the perpetrator was therefore proved the required standard.

32. On the appellant's defence, the appellant raised the issue of mistaken identity during the defence hearing. From the record, the appellant answered to the name Sammy Muriu whenever he was called. The question of mistaken identity was therefore an afterthought. In response to the question posed to PW1 by PW2 regarding where PW1 was on the material night, her response was that she was at Sammy Muriu's house. PW1's evidence therefore placed the appellant at the scene of the crime. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We therefore find that the appellant's conviction was safe.

33. The appellant challenges the sentence of 20 years' imprisonment meted upon him contending that it is unconstitutional and unlawful in that the trial court had no discretion to impose any other sentence save for the mandatory minimum sentence.

34. In *Ahamad Abolfathi Mohammed & Another v. Republic* [2018] eKLR this Court stated as follows:

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

35. Section 8(3) of the *Sexual Offences Act* provides as follows:

> " 8(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

36. This Court in the decision of *Octavious Waweru Kibugi v Republic* Criminal Appeal No. 41 of 2018 stated as follows:

> " On the issue of sentence, we defer to the recent decision of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others {Amicus Curia}* (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the *Sexual Offences Act* remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361 (2) of the *Criminal Procedure Code*, outside our remit."

37. In the circumstances, we find that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF JULY, 2025

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar