KENYA LAW
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John v Republic (Criminal Appeal E118 of 2023)
[2024] KECA 237 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 237 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E118 OF 2023

MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA

MARCH 8, 2024

BETWEEN

ALEX MULE JOHN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Makueni (Kariuki, J.) dated 24th October, 2017 in HCCRA No. 112 of 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 24th July 2012 at (Particulars withheld) Market, within Makindu County, he intentionally and unlawfully caused his male genital organ, namely, the penis, to penetrate the female genital organ namely the vagina of MK, a child aged ten years. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. It was alleged that on the same date and place, he intentionally and unlawfully committed an indecent act by touching the vagina of MK, a child aged ten years, with his penis.

2. The appellant denied the charges but was tried, convicted and sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant preferred a first appeal against both the conviction and sentence in the High Court at Makueni. The appeal was heard by Kariuki, J. who, by a judgment delivered on 24th October, 2017 dismissed the appeal in its entirety. Undeterred, the appellant is now before us on a second and perhaps last appeal.

3. During the trial, the prosecution called a total of four witnesses in a bid to prove its case against the appellant which we shall endeavour to highlight albeit in an abridged form.

4. PW1, MK, testified that on 24th July 2012 at 7.00 p.m. whilst she was in the toilet, the appellant ambushed and defiled her therein. She screamed and the appellant ran away. She was subsequently taken to Makindu Sub-County Hospital where she was examined by the doctor and the P3 form was filled. The incident was thereafter reported at Makindu Police Station.

5. On her part, JMK (PW2), had followed PW1 to the toilet and found the toilet locked from inside. She knocked on the door and the appellant opened the toilet door and got out. PW1 was also in the toilet. Upon inquiry, PW1 told her that the appellant had sex with her in the toilet. They thereafter took PW1 to hospital for examination after reporting the incident at Makindu Police Station where PW1 was issued with a P3 form.

6. PW3, Dr. Makau, a medical doctor at Makindu Sub-County Hospital, upon examining PW1, noted that her hymen was perforated. He concluded that she had been defiled and categorized the degree of injury as “harm”.

7. The investigating officer, CPL Peter Karanka (PW4), from Makindu Police Station stated that on 24th July 2014, PC Ngare informed him that the appellant had defiled a child. He visited the scene and found PC Ngare with PW2. He testified that he took the appellant and PW1 to Makindu Sub-County Hospital where they were examined and the P3 form filled by PW3. Upon conclusion of the investigations, he preferred the charges against the appellant.

8. Put on his defence, the appellant opted to give an unsworn statement and called no witnesses. According to him, on the material day at around 6.00 p.m., he went to Nyekini Bar with his friend Alex Kilonzo for refreshments. Police later entered the bar in the company of PW2 and arrested him without informing him why he was being arrested, and he was later charged with the offences he knew nothing about.

9. As already stated, the appellant was nonetheless convicted and sentenced. His appeal in the High Court was dismissed.

10. In his memorandum of appeal before us, the appellant has raised four (4) grounds of appeal, being that: the learned Judge erred in law by failing: to conduct a voire dire examination on PW1; to find that penetration of PW1's genitalia was not proved as required in law; to find that PW1's age was not proved as required in law and lastly, the sentence imposed was harsh and excessive. However, when the appeal came up for hearing on 6th of December 2023, the appellant opted to withdraw the appeal against conviction but proceeded with the appeal on sentence. The appellant submitted that the prosecution confirmed that he was a first offender and had been in remand custody since 2012. Further, it is the appellant's submission that he was convicted and sentenced under the provisions of section 8(2) of the *Sexual Offences Act*. This section provides for a prima facie mandatory minimum sentence of life imprisonment, which denies a convicted person the right to a fair trial under Article 50 of *the Constitution* which is a non-derogable right under Article 25(c).

11. Relying on the cases of *Manyeso v Republic* KECA 827 (KLR) and *Boniface Keya v Republic* Misc. Criminal Application No. E007 of 2023, he submitted that the life sentence had been held to be unconstitutional and asked this court to be persuaded by the said authorities. The appellant further submitted that although the Judiciary had released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. The appellant prayed that we reduce his sentence to twenty (20) years, having spent 11 years in lawful custody. Lastly, whilst relying on the case of *Ahamad Abolfathi Mohammed & Another v Republic* (2018) eKLR, the appellant submitted that this Court, when substituting his sentence, should consider the period spent in remand custody as from 24th July 2012.

12. The respondent through Mr. Omondi, learned prosecution counsel, submitted that the sentence which was meted out was lawful. That the victim of the offence was proved to be 10 years old. That the law provided a mandatory sentence of life sentence and that is what was meted out. He further urged this Court to uphold the sentence and, in the premises, dismiss the appeal on sentence.

13. We have considered the record and the submissions by the parties, noting that the appellant has abandoned his appeal against conviction and elected to pursue the appeal on sentence only. In the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR, this Court stated on matters of sentence 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 appellant submits that the mandatory nature of the sentence provided under section 8(2) of the *Sexual Offences Act* is unconstitutional and throws his weight behind this Court's decision in *Manyeso v Republic* (*supra*) and the persuasive authority of Boniface Keya v Republic (*supra*).

14. On our part, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court was not unconstitutional at all. In the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the Supreme Court only outlawed the mandatory nature of the death sentence. That case, which the appellant heavily relies on, did not outlaw the mandatory minimum sentences under the *Sexual Offences Act*.

15. On the whole, we are satisfied that the sentence imposed was lawful and deserved. There was no error by the two courts below in their exercise of discretion regarding the sentence. Accordingly, we dismiss the appeal on sentence.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR