Kaingu v Republic (Criminal Appeal 28 of 2021)
[2024] KECA 566 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 566 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 28 OF 2021

JW LESSIT, PM GACHOKA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

CHARO MKUTANO KAINGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 22nd February 2020 from the original Criminal Case No. 7 of 2017 in High Court Criminal Appeal No. 72 of 2018)

JUDGMENT

1. The appellant, Charo Mkutano Kaingu, was charged with and convicted of the offence of rape contrary to section 3(1)(a) and (b) as read with section 1(3) of the *Sexual Offences Act* by the Chief Magistrate Court, Malindi (Hon. Oseko) and sentenced to life imprisonment. The allegations were that on diverse days between 7th day of January 2016 and 15th January 2016 in Magarini Subcounty within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate into the vagina of LPF by using threats.

2. The appellant also faced the second count of threatening to kill contrary to section 223(1) of the Penal Code, the allegations being that during the same period at the same place, he without lawful cause uttered words to the effect that "tell your relatives to send this amount of money and if the money is not sent we shall kill you using a mirror". He was convicted of the said offence and sentenced to 5 years imprisonment.

3. In addition, he was charged with the offence of kidnapping contrary to section 256 as read with section 257 of the Penal Code, particulars being that on the aforesaid dates and at the same place, he kidnapped Lilian Pendo Furaha aged 22 years in order for her relatives to send money to secure her freedom. He was convicted and sentenced to 10 years imprisonment.

4. In Count IV, the appellant faced the charge of obtaining money by false pretences contrary to section 313 of the Penal Code the particulars being that during the same period at the same place, he, with intent to defraud obtained cash Kshs 20,000 from the mother, husband and relatives of LPF aged 22 years pretending that he will kill her using mirror if money was not sent to her. The appellant was however acquitted in respect of this count.

5. However, the 5 and 10 years imprisonment for the second and third counts were held in abeyance in light of his imprisonment for life in respect of the first count.

6. The prosecution's case was that on 7th January 2017 the appellant met the complainant in Malindi Town and told her that she needed an urgent treatment for her headaches and stomach pains, otherwise, she would get mad. They then exchanged contacts and after two days the appellant called the complainant and asked her to meet him at Sabaki bridge and carry with her Kshs 300. On the said date the complainant went to Sabaki bridge as agreed where she met the appellant who led her to a homestead with a huge baobab tree under which were gourds and pots. According to the complainant, she was welcomed by some invisible voices which commanded her to kneel and place the money inside a pot and she placed the Kshs 3,500 she had with her inside the pot. However, the voice asked her to call for more money which she did from the relatives and the same was sent to her by M-pesa. The same voice asked her to allow the appellant to make incisions on her breasts and thighs using a razor blade after which some powder was rubbed at the tip of her tongue. After that, the complainant felt dizzy and fell asleep. She was awoken by pain in her vagina and found herself naked on top of a grave with the appellant on top of her having sex with her. Despite her protestations, she was threatened by the appellant and commanded by the invisible voice to continue having sex with the appellant in the morning, lunch and evening. After that and for 7 days, the voice kept on demanding for money from her relatives which was transmitted to her by M-pesa which the appellant withdrew whilst the appellant continued having forceful sex with her.

7. Eventually, she was sore and started bleeding. During the period of captivity, the complainant never showered and was only being fed 2 biscuits and water daily. She begged to be released but was asked to call for more money until she ran out of people to call. As she was bleeding, the voice told her that the spirits (majini) will want to suck her blood. She was thus released to go with the appellant. After walking for about one and a half hours they came to a pub where she secretly inquired from the waitress the name of the pub, after which she hid and called for help from her father. She was eventually rescued by her parents and husband in the company of police officers. They had a brief conversation with the appellant and once he figured that there were police in civilian clothing, he ran away.

8. Even after the complainant had been rescued, the appellant kept calling her phone threatening to kill her and even sent threats through text message. The police tracked his number leading to his arrest and he was positively identified as the perpetrator.

9. The complainant's father, PW2, SJ, confirmed that he received a call from the complainant asking for Kshs. 3000 claiming that it was a chama loan she needed to repay. After that, her phone was unavailable most of the time which got him worried. Several people told him she had called them asking for money. On 15th January, 2017 he received an emergency text from the complainant asking him to go with the Pastor to the location where she was. He consulted her husband and they decided to seek help from the police who assisted them in rescuing the complainant after the appellant ran away.

10. PW3, DCI Cyprian Ibrahim Noor, confirmed that he accompanied PW2 to go and rescue the complainant and that when they traced the complainant, the appellant ran away upon realising that they were police officers but not before warning them that they would not reach Malindi Town with the complainant. In his evidence, the complainant was in a pathetic condition. Later through the assistance

of an undercover agent, they called the appellant and tricked him into availing himself at a place where he was arrested.

11. PW4, Abdullahi Ibrahim, a clinical Officer at Malindi Sub- County Hospital produced the P3 form, lab results and treatment notes indicating the victim was in her menses, had vulva and vaginal pain, vaginal itchiness, yellowish discharge and an infection (vaginal candidiasis). He formed an opinion that rape was highly possible.

12. PW5, Sgt Julius Maina, was the officer in charge of tracing the suspect. He was accompanied by other officers during the appellant's arrest after baiting him using an undercover posing as a client in need of assistance of a witchdoctor's services.

13. PW6 PC Humphrey Kosgei was the investigating officer who took over the file after PC Robert Kinuthia who was transferred to Tigania East Police Headquarters. He produced the original investigating officer's statement, the scene of crime photos, copy of the investigation diary, PW1's M-pesa statements and the appellant's phone.

14. Upon being found with a case to answer, the appellant was placed on his defence and in his unsworn statement he stated that that in February 2017 he was at his house and later went to town where he met people at B.P Petrol Station who were in plain clothes. They introduced themselves as police officers, arrested him and took him to the police station where he was shown a person he had never seen before.

15. In her judgement, the learned trial magistrate found that the appellant was with the complainant for 5 days and she narrated how the appellant took money from her and how during those four days, the appellant had sexual intercourse with her against her will; that the complainant was drugged and coerced by a faceless voice to have sex with the appellant and to seek for money; that the complainant's evidence was corroborated by her father who traced the appellant's phone number where they found the appellant and the complainant; that the complainant's evidence was corroborated by the evidence of the other witnesses; that the appellant's defence did not displace the prosecution case; and that all the three counts were proved. She convicted the appellant in respect of counts I, II and III and sentence the appellant to life, 5 years and 10 years respectively. As we stated at the beginning of this judgement, the sentences in respect of count II and III were kept in abeyance.

16. The appellant was dissatisfied with the decision made by the learned trial magistrate and appealed before the High Court citing 5 grounds that the learned trial magistrate erred in law and fact: by failing to consider that the prosecution witnesses failed to prove their case beyond reasonable doubt; by relying on the evidence of a single witness which was insufficient to warrant safe conviction; by failing to consider that the sentence imposed on him was manifestly harsh and excessive in all the circumstances; by failing to consider that the defence was unchallenged; and by failing to consider that the prosecution case was contradictory.

17. After considering the appeal, the learned Judge found that the complainant spent a lot of time with the appellant hence there was positive identification which was free from error; that her evidence was corroborated by the medical evidence and the testimony of other witnesses; that the facts presented in the case demonstrated absence of consent; that there was evidence that the complainant was drugged, fell asleep and when she woke up, she found the appellant having sex with her under the threats of the invisible voice; that the learned trial magistrate arrived at the correct finding that the offence of rape was proved to the required standard; and that the conviction was proper and was supported by the law and the evidence.

18. Regarding the alleged contradictions and discrepancies in the prosecution evidence, the learned Judge found that inconsistencies unless satisfactorily explained would usually but not necessarily result in the

evidence of a witness being rejected since the question is whether the contradictions are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. The learned Judge found that what the appellant referred to as contradictions and inconsistencies did not qualify to be contradictions but even if they did, they were not substantial to the extent that they could affect the conviction.

19. As regards the sentence, the learned Judge found that there existed aggravating circumstances that warranted the stiff penalty that was imposed by the learned trial magistrate. He accordingly dismissed the appeal in its entirety.

20. The appellant was once again dissatisfied with the decision and preferred a second appeal before us on the grounds that: the learned Judge erred in law and in fact by failing to appreciate that the prosecution had not proved their case beyond any reasonable doubt; the learned Judge erred in law by upholding the conviction of the trial court without considering that the medical exhibits violated sections (sic); the learned Judge erred in law by failing to appreciate that identification parade was never conducted; and that the learned Judge erred in law by upholding unconstitutional and harsh sentence imposed by the trial magistrate.

21. We heard the appeal on the Court's GoTo virtual platform on 20th December 2023 when the appellant appeared in person from Malindi Prison while learned Principal Prosecution Counsel, Ms Keya Ombele, appeared for the respondent. Both the appellant and Ms Keya relied entirely on their written submissions. In his submissions, the appellant contended that the threat to kill was based on theoretical and mystical spiritual beliefs; that there was no evidence that the complainant was kidnapped since she went to the agreed place voluntarily; that the complainant's allegations of rape were not supported by the medical report; that there were discrepancies in the documentary evidence produced before the trial court; that since the identification parade was not conducted the appellant might have been convicted on mistaken identity; that the data from Safaricom Mobile Phone Service Provider ought to have been produced to confirm the ownership of the phone that was used to trick the appellant; that the sentence in so far as it imposed life sentence was unconstitutional

22. In opposing the appeal, the respondent submitted that the prosecution established through the evidence of the complainant that the appellant had sex with her through threats of death in a grave yard with an aspect of ghosts/spirits communicating to her; that after waking up from the induced sleep by the appellant, the complainant found that the appellant had stripped her naked and was already on top of her having sex with her; that the appellant kept her for another seven days against her will having sex with her and extorting money from her friends and relatives through her; that her evidence demonstrated penetration and absence of consent; that the appellant was well known to the complainant having held her hostage for a whole week; that he was also seen by PW2 and PW3 at the time of rescuing the complainant, who then later identified him; and that it was therefore a case of recognition and not identification of a stranger. In support of her submissions, Ms Keya relied on the case of Anjononi & Others vs. Republic [1980] KLR 59 in which this Court held that recognition of an assailant is more satisfactory, more reassuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or another.

23. It was submitted that from the evidence, the appellant kept on extorting money from the complainant under threats that the appellant would produce her face in a mirror and kill her.

24. As regards the offence of kidnapping, it was submitted that the complainant was held at the "shrine" against her will in disguise of treatment. The Appellant drugged her thus physically restraining her from leaving. He also threatened to kill her and further induced her to believe through an unseen woman's voice that she would die if she tried to leave.

25. In the respondent's submissions, there were no inconsistencies in the evidence produced before the court; that the other witnesses and exhibits corroborated PW1's story and in any case any inconsistencies, were minor and cannot affect the credibility of evidence. In this regard, reliance was placed on the case of Phillip Nzaka Watu vs. R (2016) e KLR, where his Court held that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail and that some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. That ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

26. Regarding sentence, it was submitted that the complainant was psychologically traumatized by the ordeal which affected her and her marriage; that the trial court in sentencing the appellant considered the appellant's mitigation, the pre- sentence report and victim Impact assessment reports; that sentence is essentially an exercise of the discretion of the trial court and for the Court to interfere it must be shown that the lower court took into account an irrelevant factor or applied the wrong principle or the sentence was so harsh and excessive that an error in principle must be inferred; that the High Court in upholding the sentence, carefully considered the facts of the case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation; that the court also looked at the mitigating and aggravating factors and the scar the incident left in the life of the victim and found the circumstances aggravating hence need for a stiff penalty; and that the sentence was lawful and just in the circumstances of the case.

27. We have considered the submissions made before us in this appeal. This being a second appeal, this Court's mandate is limited by section 361(1)(a) of the Criminal Procedure Code to consider issues of law only, unless it is demonstrated that the two courts below 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 that event, such omission or commission would be treated as matters of law entitling this Court to interfere with the decision. This position was restated in in Karani vs. R [2010] 1 KLR 73 that: -

> " 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."

28. In the appeal before us, the appellant took issue with the sufficiency of the evidence adduced before the trial court. In this appeal, we cannot revisit the issue whether or not the evidence adduced was sufficient to warrant a conviction. The two courts below considered the evidence adduced and were satisfied that the same met the threshold of proof beyond reasonable doubt. We are mindful of the position adopted by this Court in Njoroge v Republic [1982] KLR 388 that:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

29. We are also guided by the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007 where it was held thus:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

30. We therefore cannot interfere with the concurrent findings of fact by the two courts below.

31. The second issue was that there were inconsistencies and discrepancies in the evidence of the prosecution witnesses. This issue was raised before the High Court on the first appeal and the said court considered it and found it unmerited. We agree that where the first appellate court fails to evaluate the evidence and subject it to fresh scrutiny, that may be a ground for a second appeal. That was the position adopted by this Court in Jonas Akuno O'kubasu v Republic [2000] eKLR where it was held that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

32. In this appeal it has not been alleged that the first appellate court failed to undertake its mandate as by law prescribed. We have considered the judgement of the High Court and we find that the issue of inconsistencies and discrepancies was sufficiently considered and found unmerited. On our part we find no reason to disturb that finding. We similarly find no merit in this ground of appeal.

33. The other ground raised was that no identification parade was conducted. In this case, the issue was not identification of a stranger but recognition of an assailant. The complaint was with the appellant for 7 consecutive days. The day when she was abducted was not the first time she met the appellant having met him earlier on and struck a conversation with him in Malindi. After the abduction she spent several days with the appellant at very close proximity. Apart from the complainant, PW2, the complainant's father saw the appellant when he ran away on the day the complainant was rescued. In those circumstances, we find that it was not necessary to hold an identification parade. In Robert Mwangi Njoroge vs. Republic [2015] eKLR this Court held that:

> "With greatest respect to the two judges of the High Court, it is our view that this conclusion was erroneous as the High Court ought to have found that where there is recognition then there is no need for an identification parade. Indeed, recognition and identification are mutually exclusive and it can never be that a case is made much stronger by both identification and recognition as the learned judges seemed to have been saying in the appeal before them."

34. In our view, it is not merely the number of times that the witness has seen the accused that determines whether or not the case is one of identification or recognition. What is to be determined is whether, based on the circumstances, the conditions are such that the witness is able to recognise with certainty the accused at a later date. Therefore, even where the witness meets the accused for the first time but

spends a considerable amount of time with the accused at very close proximity and the time span between the incident and the date of recognition is not long, the case may well be that of recognition rather than identification. Similarly, the fact that a witness gets fleeting sight of the accused even if on a daily basis may not qualify as a case of recognition. Everything depends on how long the witness kept the accused under close watch. In other words, each case must depend on its own facts. In this case there was no room for mistaken identity, based on the circumstances of the case.

35. It must also be noted that the appellant was arrested after he was tracked using the very phone that the complainant used to communicate with him.

36. The last issue is that of sentence. This court in Malindi Criminal Appeal No 12 of 2021 - Julius Kitsao Manyeso v Republic expressed itself on the imposition of life sentence:

> " We are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

37. This court further noted that the question of whether the indeterminate life sentence was unconstitutional was raised in Francis Karioko Muruatetu & another v Republic [2017] eKLR, and the Supreme Court recommended to the Attorney General and Parliament to commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'. No concrete step seems to have been taken toward that direction notwithstanding the evident injustice that the lack of clarity as to what constitutes "life sentence" is causing to those facing that indeterminate sentence, if sentence it might be called.

38. The Supreme Court in in Francis Karioko Muruatetu & another v Republic (supra) concluded that:

> " We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

39. Guided by the Supreme Court decision, this court in Julius Kitsao Manyeso v Republic (supra) found that it has the discretion to interfere with the life sentence.

40. The emerging jurisprudence worldwide is that in cases where the maximum sentence is grave and in our view this includes discretionary death sentence and life sentence, such grave sentences, even in cases where their constitutionality is not challenged, ought to be reserved only for the "rarest of the rare" cases. It ought only to be imposed where there is evidence that no matter how long a prisoner

is incarcerated, the principle objectives of sentencing cannot be achieved. It is for the sentencing authority to make out a case for such exceptions. See Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498.

41. In this case the learned trial magistrate found that the section under which the offence for rape was charged did not provide for minimum sentence but only a maximum sentence but considered what in her view were aggravating circumstances in meting out the life imprisonment. We appreciate the fact that the complainant underwent a heinous ordeal for the 7 days she was under the stranglehold of the appellant. She suffered both physically and psychologically. We are, however, not of the view that life imprisonment meets the objectives of sentencing. It is a sentence whose service depends on how long one lives. The longer you live the longer the length of the sentence you serve. The possibility of two individuals who commit similar or even the same offence serving different sentences depending on their longevity on earth, in such event, is very real. Where is the incentive for a person sent to life imprisonment to reform or to be rehabilitated? Where such a person lives for a long time, the person becomes a vegetable with the result that the punishment is transferred from the prisoner to the prison authorities who have to take care of his daily needs until he dies. In those circumstances, the sentence does not serve its purpose. It is a sentence incapable of being executed save by the deity.

42. Apart from that in our case, there is no difference in practical terms between death sentence and life sentence in so far as their execution is concerned. In a country such as ours where the most heinous crime, murder, is no longer punishable by death, it defeats reason to hold that "lesser offences" are still subject to life imprisonment when those who were sentenced to death are getting their sentences reduced to definite term sentences. In our view the judiciary ought to be at the forefront in championing for legal reforms that reflect the reality in society. Article 20(3) of *the Constitution* enjoins the court to develop the law to the extent that it does not give effect to a right or fundamental freedom. Where for example the law does not give effect to the right to dignity, the court is constitutionally enjoined to develop it. The reasoning that the court's hands are tied even in cases where a provision of the statute no longer serves any useful purpose and where its adherence has since been discarded by the executive whose mandate is to impose or implement it cannot be justified.

43. We have said enough to show that the sentence of life imprisonment as meted by the trial court and confirmed by the High Court must be interfered with. Being cognisant however of the trauma, both physical and emotional to which the complainant was subjected we set aside the life imprisonment imposed on the appellant in count I and substitute therefor a sentence of 45 years in prison. Save for that the appeal otherwise fails. Having interfered with the sentence it follows that the direction by the trial court keeping the other two sentences in abeyance is also set aside. The said sentences will run concurrently having been committed in one transaction.

44. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

J. LESIIT

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR