Mubalia v Republic (Criminal Appeal E060 of 2022) [2024] KECA 617 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 617 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E060 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MAY 24, 2024

BETWEEN

EZRA JUMA MUBALIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kitale (H. Chemitei, J.) delivered on 25th March 2019 in H.C.CR.A. No. 30 of 2018)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.
2. The particulars of the offence, as set out in the charge sheet were that on 13th February 2017 at [Particulars Withheld] Farm, within Trans Nzoia County, the appellant intentionally caused his genital organ, namely the penis, to penetrate the genital organ, namely vagina, of F.C, a child who was 10 years old.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were similar to those of the offence of defilement, as set out above, save that instead of penetration of the complainant's vagina, it was asserted that the appellant intentionally caused his penis to come into contact with the complainant's vagina.
4. After a full trial, at which six witnesses testified for the prosecution, whilst the appellant gave a sworn defence, the learned trial Magistrate convicted the appellant for the offence of defilement.
5. Thereafter, the appellant was sentenced to life imprisonment.

6. Being displeased with the judgment, the appellant lodged an appeal at the High Court, challenging both the conviction and the sentence.

7. On 25th March 2018, H. K. Chemitei J. delivered his judgment, dismissing the appeal in its entirety. The learned Judge held that the prosecution had;

   a. Clearly proved that the complaint was 10 years old at the material time;

   b. Established that the complainant had been penetrated, resulting in injuries to her genitalia, which necessitated stitching;

   c. The appellant was definitely the perpetrator of the offence. The offence occurred in broad daylight, at about 10:30 am; and the complainant's brother was an eye-witness.

8. Following the dismissal of his first appeal, at the High Court, the appellant lodged an appeal before this Court.

9. In his grounds of appeal, as well as in his written submissions, the appellant challenged both the conviction and the sentence.

10. The appeal came up for hearing on 4th March 2024. On that day, the appellant presented his own appeal, whilst Ms. Jacklyne Kiptoo, Senior Assistant Director of Public Prosecution, represented the respondent.

11. In his oral submissions the appellant told the court that he was convicted and jailed when he was still under the age of 18 years. He requested the court to be of assistance to him so that he could serve a sentence that would enable him to get out of prison and get reunited with his family.

12. The appellant pointed out that both his parents died whilst he was in prison, leaving behind, his younger siblings who now have nobody to look after them. The said younger siblings were, reportedly, living with their elderly grandmother.

13. It was for those reasons that the appellant beseeched this Court to give him a second chance in life.

14. In the face of that line of submissions, the court requested the appellant to clarify whether or not he had now decided to only challenge the sentence.

15. The appellant's express answer was that he was not challenging the conviction.

16. Secondly, he asked the court to take into account the period which he spent in custody, whilst he was still undergoing trial.

17. Another issue which the appellant raised was concerning his age. He said that at the material time he was 17 years old; and that he provided the trial court with information about his said age.

18. Although the court asked the appellant to point out the date when he gave the information to the trial court, he did not pinpoint the exact date. However, he said that the information was provided to the trial court at the time when his trial began.

19. In answer to the appeal, Ms. Kiptoo said that the appellant never told the trial court that he was a minor. Learned State counsel

    also said that even at the first appeal, the appellant did not raise the issue of his young age.

20. She described as an afterthought, the appellant's complaint that he was a minor at the material time. The respondent also urged the court to find that the case against the appellant was proved beyond any reasonable doubt.

21. As regards the sentence, the respondent pointed out that the term of imprisonment for life was reasonable in the circumstances when it is borne in mind that the complainant, who was mentally challenged, was only 10 years old.

22. In reply to the respondent's submissions, the appellant stated that the sentence of life imprisonment had been removed from our statutes. In his considered opinion, the courts now had the discretion to formulate any sentence that was appropriate in the circumstances of the offence for which an accused person was convicted.

23. Although the court asked the appellant to specify when and how the sentence of life imprisonment had been outlawed, he only requested the court to set aside the sentence in this case, adding that the Court of Appeal had done so in the case of an appellant named Ngugi, when the Court dealt with that case at Kisumu, on 8th December 2023.

24. We appreciate that the appellant chose to abandon the appeal he had mounted against the conviction; however, we feel obliged to make a few points on the conviction.

25. The learned trial Magistrate was informed by the prosecution that the complainant was mentally unstable. The said information was provided to the court on 14th September 2017, and it resulted in the adjournment of the case, although the accused had told the court that he was ready to proceed.

26. Thereafter, on 15th December 2017, the prosecution informed the court that the complainant was not able to communicate.

27. PW1, testified that she is the complainant's mother. She told the court that the complainant;

> " ... was born on 18/3/2006, and I have the notification card. She got ill when she was 3 years old; she suffered from meningitis. She has never spoken; she cannot touch anything by her hands; can't hear and cannot take instructions. She is not stable; often falls down. She cannot even express herself ..."

28. From that testimony, we get a clear picture of the complainant's condition. She had to be helped to do everything, including bathing, feeding, and using the toilet. In a word, the complainant was vulnerable.

29. In her judgment, the learned trial Magistrate expressed herself as follows, regarding the complainant;

> "13. On issue number 2, I note that the victim never testified. From my own observation, which was supported by PW4, she could not communicate, therefore, an intermediary would have been of no use."

30. We understand that the complainant's mother did not thus testify as an intermediary. She testified in her own right, as the person who gave birth to the complainant; and who knew about the complainant's condition; and also as a person who saw the appellant grazing animals close to her house, on the material day.

31. PW1 had left the complainant inside the house, where the complainant was in the company of PW2 (a brother to the complainant).

32. In the said circumstances, the fact that the trial court did not comply with the legal requirement that could lead to a position in which the mother testified as an intermediary, did not have any merit. She did not testify as an intermediary.

33. As regards the ingredients of the offence of defilement, we find that the complainant's mother gave the precise date when she gave birth to the complainant. The mother also produced the birth certificate. In the circumstances, the complainant's age was proved beyond any reasonable doubt.

34. On the issue of penetration, the complainant's mother arrived at home and found the complainant bleeding from her vaginal area.

35. On his part, PW2 told the court that he saw the appellant defiling the complainant. He gave a graphic testimony about how the act was committed on a chair, saying;

> " Alitomba yeye; alitumia chuli chuli yake kama yangu ya kukojolea. Aliweka chuli chuli yake kwa nini, hapa anatumia kususu na kupupu."

36. After that eyewitness testimony, the prosecution brought the complainant to court. The record of the proceedings shows that the following transpired;

> " The minor/victim is availed in court by PW1. I do note that she has no control over herself; is laughing and is screaming and making noises and expressions. I call out Faith Cherono and she is not responding. She is just checking (sic) aimlessly."

37. After the court made the foregoing observation about the complainant, the prosecution made an application to dispense with the complainant's evidence.

38. The appellant responded by saying;

> " She is the only one to tell the court that I am the perpetrator."

39. The trial court then proceeded to direct that the complainant's evidence be dispensed with. However, although the complainant did not testify, the identity of the perpetrator was disclosed by PW2, who was an eyewitness.

40. PW4, was a Clinical Officer who was working at the Kitale County Referral Hospital. He testified that he examined the complainant, and he saw sperms on her vaginal swab.

41. The offense took place on February 13, 2017, and PW4 examined the complainant on February 22, 2017. The complainant had tears in the vaginal and anal orifices. When a high vaginal swab was conducted, pus cells, sperm cells, and red blood cells were observed.

42. In the light of the foregoing, PW4 concluded that there was penetration.

43. We therefore find that the appellant was right to have decided to abandon his appeal against conviction, as the evidence adduced by the prosecution had proved all the ingredients of defilement.

44. The appeal against the conviction is unmeritorious and is dismissed.

45. On the question of the sentence, we note that the appellant very cunningly and with speed, entered into the house where the complainant had been left briefly, by her mother, who had just stepped out to pick vegetables from the shamba.

46. He took advantage of a young and helpless child, who was mentally unstable. That was a deliberate but very unfortunate incident. It is an aggravating factor; which would serve to enhance the sentence.

47. The appellant was sentenced to life imprisonment as provided for by Section 8(2) of the *Sexual Offences Act*. It provides that:

> "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."

48. At the time when the appellant was convicted and sentenced, the prevailing jurisprudence in Kenya was that a person who had been convicted for an offence that was punishable with a prescribed mandatory sentence would be sentenced in accordance with the letter of the applicable statutory provisions.

49. However, the jurisprudence currently prevailing is that the court's hands were not tied by the prescribed minimum or prescribed mandatory sentences, as that deprived the court of its discretion, in determining the most appropriate sentence, in the circumstances of the particular case.

50. In the case of *Christopher Ochieng v Republic* [2018] eKLR, this Court stated thus:

> "In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ..... Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic* (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

51. Furthermore, life imprisonment is now deemed as an indeterminate sentence, as it is not known how long the person so sentenced has to serve the sentence.

52. The indeterminate length of the sentence of life imprisonment serves to deprive the convict of the benefit of remission, which is available to inmates who comply with the rules and regulations that govern prisons.

53. Ordinarily, a sentence of imprisonment, beyond a period of six months is to be reduced by one-third, unless the prison authorities have good reason to justify the cancellation of remission.

54. In this case, we are satisfied that a sentence of 30 years will be appropriate in the circumstances. Consequently, we set aside the sentence of life imprisonment; and we substitute it with a sentence of 30 years imprisonment.

55. The said sentence shall run from the date when the appellant was first sentenced by the trial court.

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

F. OCHIENG

...

JUDGE OF APPEAL

L. ACHODE

...

JUDGE OF APPEAL

W. KORIR

……………………………………………

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR