



REPUBLIC OF KENYA



Mutia v Republic (Criminal Appeal 8 of 2021) [2024] KECA 535 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 535 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 8 OF 2021
PO KIAGE, A ALI-ARONI & LA ACHODE, JJA
MAY 9, 2024

BETWEEN

JUSTUS MUSYOKA MUTIA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Machakos
(P. Nyamweya, J.) dated 25th April, 2017 in HCCRA No. 13 of 2013)*

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on 28th of July 2012 in Yatta District within (the then) Eastern Province, he intentionally and unlawfully caused his penis to penetrate the vagina and anus of K. M. N (minor), a girl aged 8 years.
2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11 (1) of the SOA, the particulars being that on the same day and place, he intentionally and unlawfully touched the vagina/anus of the minor with his penis.
3. The appellant denied the charges leading to a trial in which the prosecution called 6 witnesses. Evidence was adduced that, on 30th July 2012, FKN, PW1, the minor's mother, was washing her when she smelt an unusual odour from her vagina. When she asked her what had happened, she revealed that the accused had done bad things to her two days earlier, and warned her not to tell anyone. PW1 recalled that on the 28th July 2012 she had gone for a chama meeting and when she went back home she found the minor sleeping on the seat. On inquiring from her what the problem was, she responded that she was feeling pain on her neck. She gave her painkillers and they went to sleep. PW1 testified that when the minor informed her what had transpired, she reported the matter to the community policing officers and took her to hospital. She produced in court the treatment notes of the minor and the P3 form. PW1 stated that the appellant was known to her.



4. The minor, PW2, testified for first time on 22nd October 2012, after undergoing age assessment. The trial magistrate also conducted a *voire dire* examination and found that she was capable of giving sworn evidence. The minor gave evidence that on 28th July 2012, at around lunch time, she had gone to River Kinyongo with her friend called Mercy when the appellant, who was known to her, approached them. He chased after them and caught her while her friend, Mercy, fled. The minor narrated that the appellant pulled her and took her to the bush. He removed her clothes and panty. He also removed his clothes, did a bad thing to her, and left. Thereafter, she went home where she did not find anyone. Later, when her mother was washing her, she disclosed what had happened. Her mother took her to Machakos hospital where she was admitted and stitched.
5. On 6th November 2012, the prosecution applied to recall the minor to give evidence once again subject to cross-examination. The application was allowed and on 6th December 2012, upon the court administering a *voire dire* examination, the minor testified a second time explaining how the incident happened. She recounted that, the appellant removed her clothes while she was lying on the ground, he also removed his and lay on her with his stomach. Pointing to her vaginal area, the minor stated that the appellant removed his penis and put it into her, and she felt pain. He then stood up, dressed, and left. She also dressed up and went home but did not inform her mother about the incident on the same day. The minor testified that she knew the appellant before the incident: he is known as Musyoka and he was a herdsman for their neighbour called Ndinda.
6. Kavuve Mutune, PW3, the head of community policing in Kenyatta area, gave testimony that on 28th July 2012, he was at home when PW1 informed her that her daughter had been defiled by one Musyoka Mutia. She went to PW1's house and found the minor. She noticed that the minor was emitting a bad smell and was suffering from diarrhoea. The minor also complained of feeling pain in her neck. PW3 stated that together with one Kalia, they proceeded to find the appellant. They found him herding home cattle, and arrested him.
7. Kalia Mbuten, PW4, a community policing officer, corroborated PW3's evidence that PW1 reported to them the defilement of her daughter. He testified that upon examining the minor, they observed that she was frequently going to the toilet and had a swelling on her lower abdomen. She also complained of pain. When they asked her who had hurt her, she said it was one Musyoka Mutia. PW4 explained that while accompanied with PW2 and PW3, they waited for the appellant on the path where he frequented. They met him as he was herding cattle, and arrested him.
8. Dr. Emmanuel Loiposha, PW5, of Machakos Level 5 Hospital gave evidence on the nature of injuries suffered by the minor, as observed by his colleague Dr. Kamwele who examined her and filled the P3 form but was no longer at the hospital. He was familiar with Dr. Kamwele's handwriting and signature. He indicated that the minor was found to have a mid-line posterior tear of the vagina. The elasticity of the anus was loose and it could not hold stool. The bladder was tender. As a result, the minor had urine and stool incontinence. PW5 produced the P3 form and the post-rape-care form filled in respect of the minor, as well as her age assessment report.
9. Thomas Kinyanze, PW6, the investigating officer, testified that on 31st July 2012, at around 8.00 pm, he was at the Masii Police Station when he received a telephone call from the OCS informing him that there was a prisoner at Katangi Patrol Base who was supposed to be taken to the station. He went with the station driver and collected the prisoner. He then learnt that the complainant had reported the matter to the patrol base where she had been issued with a note to seek medical assistance.
10. At the close of the prosecution case, the learned Resident Magistrate (A. Odawo) found that the prosecution had established a *prima facie* case against the appellant and she placed him on his defence.



11. The appellant gave a sworn statement and denied defiling the minor. He claimed that PW1, the mother of the minor, had a grudge against him for the reason that he had caught her having an affair with another man, which information their neighbours came to know. The appellant denied knowledge of the minor although he confirmed that he knew their home and the river where they fetched water.
12. The trial Magistrate evaluated the entire evidence tendered and found the appellant guilty as charged. She proceeded to sentence him to life imprisonment.
13. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. Nyamweya, J. (as she then was) re- evaluated the evidence on record and delivered judgment on 25th April, 2017 upholding the conviction and sentence meted on the appellant. The learned judge, however, found that there was an error in the penalty section in the charge sheet to the effect that the appellant was charged under sections 8(1) and (3) of the SOA which provide for defilement of a child aged between 12 and 15 years, and a penalty of imprisonment for not less than twenty years, yet the minor herein was aged 8 years, hence the penalty section ought to have been section 8(2) which provides for a penalty of life imprisonment. The learned judge determined that the mistake as to the applicable penalty section was curable under section 382 of the Criminal Procedure Code, as it only became relevant for purposes of sentencing, once the ingredients of defilement have been proved. Further, as the key section creating the offence of defilement and the particulars reflecting the nature of the said offence were indicated in the charge sheet, no prejudice was occasioned to the appellant in indicating the penalty section as section 8(3).
14. Aggrieved by the decision of the High Court, the appellant preferred the instant appeal raising 4 grounds in a self-crafted supplementary memorandum of appeal, which are that the learned Judge erred by failing to find that;
 - a. The recall of PW2 to give evidence afresh was an illegality in law which ultimately led to the violation of the appellant's fair trial.
 - b. The prosecution did not prove its case beyond reasonable doubt pursuant to section 107 of the *Evidence Act*.
 - c. The prosecution's case was marred with inconsistencies that should not support a conviction.
 - d. The sentence imposed was harsh and excessive since it was applied without considering the appellant's mitigation and the facts of the case.
15. During the hearing of the appeal, the appellant appeared in person while Mr. Kimanthi, the learned prosecution counsel, appeared for the state. Both parties had lodged written submissions which they relied on with Mr. Kimathi highlighting his.
16. While acknowledging that the minor was recalled to give evidence pursuant to section 150 of the Criminal Procedure Code, the appellant contended that recalling the minor to give evidence afresh was a gross violation of his right to a fair trial and a violation of sections 146 and 150 of the *Evidence Act*. He urged that the prosecution failed to prove its case beyond reasonable doubt as no age assessment report was produced to show that the age of the minor was established to be 8 years. The appellant however proceeded to argue that although the age assessment report was produced as an exhibit, it failed to adequately state the parameters that the examiner used to arrive at his deduction. It was also alleged that PW1 had a grudge against the appellant because she had wanted to befriend him but he refused.
17. Citing section 2 of the SOA which defines penetration as the partial or complete insertion of the genital organs of a person into the genital organs of another, the appellant argued that penetration was not



proved. He asserted that the life imprisonment sentence imposed on him was unconstitutional. For this proposition, this Court's decision in *MANYESO Vs. REPUBLIC, Criminal Appeal No. 12 of 2021* was cited.

18. The appellant implored us to give him a term sentence instead and while doing so, consider the period that he had already spent in custody which is from 31st July 2012 when he was arrested. In the end, he urged us to allow the appeal, quash the conviction, set aside the sentence, and set him at liberty.
19. For the respondent, Mr. Kimanthi opposed the appeal affirming that the age of the minor was established as 8 years; penetration was proved by the minor and the medical doctor, PW5, who produced a P3 form on behalf of his colleague showing the nature of injuries inflicted on the minor during the ordeal. PW5 also produced the age assessment note which confirmed that PW2 was 8 years old. Moreover, the identity of the appellant was proved beyond reasonable doubt, having been known to the victim by name. Counsel urged that the ingredients of the offence of defilement were established beyond reasonable doubt. He rejected the claim that the prosecution evidence was marred with inconsistencies, asserting that there were none. Counsel maintained that all the witnesses corroborated the testimonies of each other in material particulars.
20. On sentencing, Mr. Kimanthi submitted that the life imprisonment sentence imposed was lawful as it is provided for under section 8(2) of the SOA. Further, the nature of the injuries suffered by the victim warranted the imposing of that sentence.
21. This being a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(1)(a) of the Criminal Procedure Code. This was affirmed by the holding of this Court in *David Njoroge Macharia Vs. Republic*[2011] eKLR;

“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As 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 *Chemagong v. R* [1984] KLR 611.”

22. The appellant complains that, the recalling of the minor to give evidence afresh violated his right to a fair trial; the prosecution did not prove its case beyond reasonable doubt, and evidence was marred with inconsistencies; the sentence imposed was harsh and excessive, and it didn't consider his mitigation.
23. We note that the appellant did not explain how the recall of the minor to testify infringed on his right to a fair trial, considering that he was well aware that the right to recall a witness is guaranteed pursuant to section 150 of the Criminal Procedure Code. Moreover, when the prosecution applied to recall the minor to give evidence, the accused did not object to that application. Notably, upon the minor testifying, the appellant was afforded an opportunity to cross-examine her. Consequently, we find the appellant's complaint to be non-availing and we reject it.
24. It is further argued that the prosecution did not prove its case beyond reasonable doubt and that its evidence was marred with inconsistencies. A perusal of the record, however, reveals that the minor described vividly her encounter with the appellant who was known to her. PW5 corroborated the minor's evidence on defilement by describing the type of injuries that she suffered during the ordeal. She was found to have a mid-line posterior tear of the vagina and, the elasticity of her anus was loose. She could not hold stool, the bladder was tender and she had urine and stool incontinence. Indeed, the learned judge made a finding, which we are in agreement with, that the testimony of the minor proved beyond doubt that there was penetration by the appellant, and the same was corroborated by PW5.



- 25. Moreover, it was also the learned judge’s finding that the age of the complainant was proved by the age assessment note which was produced by PW5 which showed that on 11th October 2012, the complainant was assessed at Machakos Level 5 Hospital and found to be 8 years old. Although we note that the age assessment note is not on record, we are also mindful that the question of the age of the minor was never contested during trial and neither was there an age assessment note. The charge that there were inconsistencies in the prosecution evidence is also discounted, such inconsistencies being inconsequential to the compelling case against the appellant.
- 26. On sentencing, the appellant argues that the sentence he was given is harsh and excessive and that, his mitigation was disregarded. He asserts that this Court’s decision in Manyeso (supra) determined that sentence to life was unconstitutional.
- 27. The prosecution objected to that assertion contending that life imprisonment is lawful as it is provided for under section 8(2) of the SOA. In addition, the nature of the injuries suffered by the victim warranted the imposition of that sentence. We note that the trial court meted out the maximum sentence for the offence as provided for in law which is life imprisonment and the High Court upheld that sentence.
- 28. From jurisprudence which is fast-setting pace, starting with the Supreme Court decision in Francis Karioko Muruatetu & AnorVs. Republic[2017] eKLR, it is plain that sentencing is a judicial function which enables the courts to exercise discretion, and determine the appropriate sentence to impose.
- 29. Bearing in mind the said decision and the sequel thereto in which the Supreme Court gave certain directions, the High Court and this Court have pronounced themselves on the unconstitutionality of mandatory minimum sentences in the SOA in several cases including, Maingi & 5 Others Vs. Director Of Public Prosecutions & Another(Petition E017 of 2021) [2022] KEHC 13118 (KLR) and Joshua Gichuki Vs. Republic, Criminal Appeal No. 84 of 2015 (Unreported). In the circumstances, and in view of the Sentencing Policy Guidelines, we are inclined to interfere with the sentence imposed by the Chief Magistrate’s Court and upheld by the High Court. We do so considering both the aggravating factors including the seriousness of the injuries suffered and the appellant’s mitigation on record.
- 30. As a result, this appeal partly succeeds to the extent that we set aside the sentence to life and substitute therefore a term of twenty-five (25) years imprisonment to run from the date the appellant was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

