Oketi v Republic (Criminal Appeal E053 of 2022)
[2024] KECA 744 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 744 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E053 OF 2022

S OLE KANTAI, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

PHILIP OKETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale (S. Riech, J.) dated 21st November, 2016 in H.C.CR.A. No. 83 of 2016)

JUDGMENT

1. This is a second appeal from the conviction and sentence of the appellant Philip Oketi who was charged at the Magistrate's Court at Kitale with the offence of defilement of a child contrary to Section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006 it being alleged that on 14th December, 2012 at the place named in the charge sheet he intentionally caused his penis to penetrate into the vagina of DC, a child aged 8 years. There was an alternative charge of indecent act with a child contrary to Section 11(1) of the said Act it being alleged that on the same day at the same place, he intentionally caused his penis to come into contact with the vagina of the said child.

2. He was convicted after a trial and was sentenced to life imprisonment and his first appeal to the High Court of Kenya at Kitale was dismissed by Riechi, J. in a judgment delivered on 16th November, 2016.

3. Being a second appeal our mandate is circumscribed by Section 361(1) (a) Criminal Procedure Code to consider issues of law only and avoid a consideration of facts which have been considered by the trial court and reconsidered on first appeal. That mandate has been the subject of various judicial

pronouncements in such cases as Stephen M'Irungi & Another vs. Republic [1982-88] 1 KAR 360 where it was held:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

4. Our visit of the facts is purely to satisfy ourselves that the trial court and the High Court carried out their mandates as required in law.

5. The child minor (DC) (PW1), a class 2 pupil in a local school told the court that she was 8 years old at the material time. On 14th December, 2012 at noon she sought and obtained permission from her mother PC (PW3) to go and play with the appellant's children. Both PW1 and PW3 knew the appellant very well as a neighbour and a teacher in a local school. When PW1 was playing with the appellant's children he called her and took her to the farm, lay her on the ground, removed her clothes and proceeded to defile her after which he warned her not to tell anyone of what had happened. He gave her Kshs.5 to buy mandazi. The incident was witnessed by MTC (PW2) who happened to be atop a guava tree where he was harvesting fruits. PW2 immediately informed his mother CM (PW4) who reported the issue to the child's mother PW3. PW1 confessed to her mother what had happened. When PW3 and PW4 examined the child they saw a white discharge. The matter was reported at Bondeni Police Station and PC Francis Mutuku Miteu (PW5) who received the report and testified of what police had done upon receiving the report.

6. Chrisandus Masinde, a Clinical Officer at Kitale District Hospital testified that PW1 was 8 years old who upon examination had a broken hymen which was freshly torn. He formed the opinion that there had been penetration. He produced P3 form and other documents into evidence. PW3 produced the child's health card into evidence.

7. The trial court evaluated the case put forth by the prosecution and finding a case to answer asked the appellant for a defence and in an unsworn statement the appellant testified that he was a deputy head teacher in a local school; he had 2 wives; of the charges facing him he stated that on 14th December, 2012 he was at Matunda Kiminini from morning to noon when Victor Kalia, whom he called as his witness, summoned him to his home to do photography (the appellant's other occupation) as the later was being visited by his grandchildren. He was there until evening when he went home and his wife told him that PW4, with whom he had a land dispute, was spreading a lie to the effect that he (the appellant) had been found defiling a child in a plantation. He was summoned to Saboti Police Station on 26th December, 2012 and then to Kitale Police Station where he was arrested. He denied committing the offence stating that the charges were fabricated because he had a grudge against PW1's father who had an affair with one of his wives. He also stated that he had a grudge against the headmistress of his school over some school issues. His witness, Victor Omnyini Kaliana, told the trial court that the appellant was a teacher at his children's school. He was visited by his grandchildren on 14th December, 2012 and he called the appellant to take photographs; the appellant took photographs until evening

and he was surprised that the appellant was said to have committed an offence the same day. In cross-examination, he said:

> "...I was visited by my grandchildren in December 2012. I cannot remember the exact day. He came at midday and the photographs were taken after midday..."

8. As we have seen the appellant was convicted and sentenced; his first appeal failed and those findings provoked this appeal which is contained in homemade "Grounds of Appeal" where the appellant faults the Judge on first appeal for rejecting his defence of alibi; that the succeeding magistrate did not warn herself that she did not have the benefit of seeing PW1, PW2, PW3 and PW4 testify and did not have the benefit of seeing their demeanour; that the trial court erred

> "in law and facts" by not noting that crucial witnesses were not called to testify in the case; that prosecution evidence was contradictory; that age of PW1 was not proved and that he would raise other grounds of appeal at the hearing.

9. When the appeal came up for hearing before us on 7th February, 2024 the appellant appeared in person from Naivasha Maximum Prison while learned counsel Miss. Kiptoo appeared for the Office of Director of Public Prosecutions. Both sides had filed written submissions which we have perused. In a highlight of the same, the appellant submitted that PW1 was under duress during testimony in Court and was not consistent. According to him, the trial court had wrongly applied the provisions of Section 124 of the *Evidence Act*; that no voire dire had been conducted for PW2 who was 13 years old. He complained that a life sentence had been imposed on him when there was case law to the effect that life imprisonment was unconstitutional.

10. In opposing the appeal, Miss Kiptoo submitted that even if the evidence of PW2 was to be discounted the other evidence proved the charge beyond reasonable doubt. She continued in the same vein by submitting that PW2 was 13 years old, was intelligent enough and was not a child of tender years.

What are the issues of law raised that call for our consideration?

11. From what is raised by the appellant they are: whether his defence was considered; whether Section 124 of the *Evidence Act* was wrongly applied; whether crucial witnesses were not called; whether PW1's age was proved and lastly, the sentence that was awarded.

12. On whether the appellant's defence was considered we note that the appellant alleged in the defence that he was at a different home on the material day taking photographs; that he had a grudge with PW4 and also with PW1's father and a different grudge with the headteacher of his school. The trial magistrate had this to say of those issues in the judgment;

> "...On his part the accused person denied the offence and alleged that the complainant's father had a grudge with him and also that he had a land dispute with PW4 hence the fabricated charges. The accused person also raised an alibi defence and alleged that at the material time he was taking photographs for one Victor (DW2). However, the court notes that the alleged grudge, land dispute and alibi defence were only raised during defence hearing. I therefore believe they were an afterthought..."

13. The Judge on first appeal considered the issue and reached the conclusion that the appellant, who was well known to the witnesses as a neighbour and teacher at a local school had been seen in a compromising position by PW2 who was on top of a tree harvesting fruits. PW2 immediately informed his mother PW4 and PW1 informed both her mother PW3 and PW4 of what had happened. The

witness called by the appellant could not remember the date when he invited the appellant to take photographs of him and his grandchildren.

14. The offence was committed during the day at about mid-day and reports made immediately to PW3 and PW4. Medical evidence proved that PW1 had been defiled as her hymen was freshly torn. The prosecution evidence was strong and totally displaced alibi defence by the appellant. As correctly held by the High Court alibi defence should have been raised earlier for the prosecution to have an opportunity to examine it and investigate it if found necessary to do so.

15. On whether Section 124 of the *Evidence Act* was wrongly applied it is true that the case was partly heard by a magistrate who took testimony of PW1, PW2, PW3 and PW4. On 18th September, 2013 Resident Magistrate P.W. Wasike was on the bench and it is recorded that the case was part heard; that Section 200 of the Criminal Procedure Code had been explained to the appellant in Kiswahili and that he had responded by saying:

> "...my advocate got an accident. He died. I need another advocate..."

The case was adjourned and upon resumption on 23rd October, 2013 the said section was again explained to the appellant who said:

> "...Tuendelee penye imefika..."

16. The appellant then engaged the services of another lawyer who represented him for the rest of the case.

17. After considering the provisions of Section 124 of the *Evidence Act* the trial magistrate in the judgment recognized that crucial evidence had been taken by his predecessor. He said he would consider and evaluate that evidence and other evidence. He found that the child was 8 years old. She had a freshly torn hymen broken less than 36 hours after the incident which tallied with the victim's assertions that she had been defiled. The magistrate considered the evidence that had been given by the clinical officer and did not apply the provision to Section 124 of the *Evidence Act* at all.

18. When the appellant was informed of his rights donated by Section 200 of the Criminal Procedure Code he elected that the case should proceed from where it had reached. He was represented by counsel. He should have asked that witnesses who had testified before be re-called. He could have asked for a hearing de-novo. He did not exercise any of these options. His complaint that Section 124 of the *Evidence Act* or section 200 Criminal Procedure Code were wrongly applied is not supported by the record. The complaint is misplaced, has no merit and is dismissed.

19. On whether crucial witnesses were not called the appellant says that his children should have been called as witnesses. We cannot see how this would have helped his case at all. We note in any event that he did not call them as his witnesses. The law is that the prosecution has a duty to call witnesses to prove a charge against an accused person beyond reasonable doubt. It was held in the celebrated case of Bukenya vs. Uganda [1972] EA 549, at page 550, the Court of Appeal for East Africa stated:

> "It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law

of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

20. The prosecution in the case subject of this appeal called all the necessary witnesses and we cannot see any that were left out.

21. The appellant says that the victim's age was not proved. We note that the victim's mother (PW3) produced a clinic card which showed that the victim was 8 years old. The clinical officer testified that the victim was of that age. It has been held by this Court that age of a victim in a criminal offence can be proved without documents. The victim here was a child of tender years. This Court held in the case of Francis Omuromi vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which held that: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

22. Age of the victim in the case before the trial court was proved to the required standard.

23. The last issue for our consideration is the sentence meted out. The appellant was convicted and sentenced to life imprisonment, a sentence that was upheld by the High Court on first appeal.

24. This Court has now held that the rationale of the Supreme Court decision in Francis Karioko Muruatetu & Others vs. Republic [2017] eKLR applies in equal measure to the minimum sentences prescribed in the *Sexual Offences Act*. For example, in *Okello vs. Republic (Criminal Appeal 189 of 2016)* [2022] KECA 1034 (KLR) (23 September 2022 (Judgment) this Court held:

> " 14. We turn to the question of sentence. The Supreme Court in the Directions in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR stated:
>
> '[14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.
>
> (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.'

15. Perhaps taking a cue from those directions, a challenge to the constitutional validity of the minimum sentences prescribed in the *Sexual Offences Act* was taken up in Philip Mueke *Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021)* [2022] KEELC 2936 (KLR) (17 May 2022) (Judgment), where Odunga J (as he then was) held:

> '107. In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of *the Constitution*.
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> ....
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> 111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of *the Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.
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> 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed.'

16. Even more recently, Mativo, J. (as he then was) weighed in on the matter in Edwin Wachira & 9 others v Republic: Mombasa Petition Nos. 97, 88, 90 and 57 of 2021 (Consolidated) (Unreported):

> '35. Lucky for me the Supreme Court in Muruatetu one was categorical that mitigation forms an integral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a

sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to Article 27 as earlier discussed.

36. For the avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.'

17. We think there is merit in these holdings and observe that in a long line of cases this Court had, before Muruatetu 2, held that the prescription of a minimum sentence could not fetter the judicial power of a court at sentencing. See for example Dismas Wafula Kilwake v Republic [2019] eKLR, Jared Koita Injiri v Republic [2019] eKLR, Christopher Ochieng v Republic [2018] eKLR and Daniel Kipkosgei Letting v Republic [2021] eKLR."

25. We note that the child victim was 8 years old who was defiled by her neighbour and teacher. This is conduct that must be deprecated. The appellant had a duty as a neighbour, teacher and parent to protect the victim, not to use her to satisfy his depraved sexual needs.

26. Upon conviction, the appellant stated in mitigation that he had 2 wives who depended on him and that he took care of his 74 years old mother.

27. When he appeared before us for hearing of the appeal he told us that he was 56 years old, he had been in prison since 2013 and he prayed that we consider his case with leniency.

28. We have considered all relevant factors including the emerging jurisprudence which we have cited in this judgment. We have also considered the plea in mitigation. Having done so we think that a custodial sentence will be appropriate in this case.

29. The upshot of our findings is that the appeal on conviction fails and is dismissed. We set aside the sentence imposed and substitute it with a sentence of 30 years imprisonment from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR