**Mutia v Republic (Criminal Appeal E081 of 2023)**
**[2024] KECA 684 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KECA 684 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CRIMINAL APPEAL E081 OF 2023**

**PO KIAGE, A ALI-ARONI & LA ACHODE, JJA**

**JUNE 14, 2024**

**BETWEEN**

**GEORGE K MUTIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Kitui (R.K. Limo, J.) dated 1st November, 2022 in HCCRA No. E018 of 2022)***

## JUDGMENT

1. The appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on 21st October 2016, in Migwani Sub-county within Kitui County, he intentionally did an act which caused the contact of his fingers with the female genital organ namely vagina, of MM (minor), a girl aged 12 years, 5 months and 3 weeks.

2. The appellant denied the charge leading to a trial in which the prosecution called 6 witnesses. The evidence that was led by the prosecution, and which the trial magistrate believed, was that on 21st October 2016, the appellant, a teacher at [Particulars withheld] Primary School where the minor schooled, called the minor out of class and asked her why she was 'looking bad'. The minor responded that she was fine. The appellant instructed her to go back to class but later he sent another pupil, PW4, to tell her to go to class 3. The minor proceeded to the said class 3 where she found the appellant. The appellant asked her to move closer to him. When she did, he inquired whether she had worn a 'biker'. The minor replied in the affirmative. The appellant then lifted her dress and inserted his finger into her vagina. The minor started crying and the appellant ordered her to go back to class. She later reported the incident to her class teacher, Ms. Mwinzi and her fellow pupils. Ms. Mwinzi notified Ms. Maithya, PW6, who in turn informed the Head Teacher. The minor was subsequently taken to hospital in the company of her mother, MP, PW2, who had gone to the school for a Parents' Day meeting.

3. Dr. Christopher Waihenya, a medical superindent at Migwani Hospital testified as PW3. He explained that the minor was first treated at the hospital on 21st October 2016, following a history of attempted defilement. He stated that upon examining the minor, he observed that the genitalia was tender to touch; the labia minora and majora were reddish with freshly torn hymen, and there was whitish discharge from the vaginal wall. PW3 concluded that there was penetration although he could not tell if it was caused by a finger or the male organ. He noted that the minor also had a urinary tract infection which could have been caused by an unsterilized finger. Eleven-year-old MJ, PW4, corroborated the minor's evidence to the effect that on 21st October 2016, the appellant, who was his teacher then, sent him to inform the minor to go to class 3. CPL Gregory Maingi, PW5, testified that upon carrying out investigations, he was satisfied that the appellant should be charged with the offence of indecent assault.

4. TM, PW6, a teacher at the school where the minor schooled, corroborated the minor's evidence to the effect that on the material day, her colleague, Ms. Mwinzi approached her in the company of a child who was crying and complaining that the appellant had defiled her. PW6 reported the incident to the Head Teacher who upon interrogating the appellant, directed that the minor be taken to hospital for medical examination.

5. The first four prosecution witnesses testified before K. Sambu, SPM, while the last two testified before M. Onkoba, PM, who heard the case to its conclusion. At the close of the prosecution case, the learned Magistrate found that the prosecution had established a prima facie case against the appellant and placed him on his defence.

6. The appellant gave sworn evidence and called no witness. While confirming that he was a teacher at [Particulars Withheld] Primary School during the period in issue, he denied committing the offence. The appellant explained that the material day was a Parents' Day at the school and the Head Teacher had instructed him to organise the place where the parents would sit. He stated that he went to class 5 where he found the minor seated in an inappropriate manner. She was apparently exposing her inner wear and the boys in the class were peeping at and making fun of her. The appellant decided to call the minor to class 3 in order to counsel and guide her on sitting properly without exposing herself. He claimed that he asked the minor if she had worn a 'biker' because he wanted to confirm whether she was safe. He denied asking her to lift her dress or touching her private parts.

7. The trial magistrate evaluated the evidence tendered and found the appellant guilty as charged. He sentenced him to serve 10 years' imprisonment.

8. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. R. K. Limo, J. re-evaluated the evidence on the record. He delivered judgment on 1st November 2022 in which he was of the view that the evidence tendered by the prosecution established beyond reasonable doubt all the necessary ingredients of defilement contrary to section 8(1) of the SOA, and not the lesser charge of an indecent act against which the trial court convicted the appellant. In the result, the learned Judge set aside the conviction on the offence of indecent act with a child and in its place, under section 354 of the Criminal Procedure Code, entered against the appellant a conviction on the offence of defilement contrary to section 8(1) of the SOA. He also enhanced the sentence of 10 years' imprisonment meted on the appellant to 20 years imprisonment as per section 8(3) of the SOA.

9. More aggrieved, the appellant preferred the instant appeal based on 10 lengthy grounds, drafted by his counsel, Omayio & Company Advocates. This kind of drafting is proscribed by Rule 66(2) of the Court of Appeal Rules which requires the grounds of objection to be set out concisely without narrative. In summary, however, the appellant's complaints which are all targeted at sentence only, are that the learned Judge erred by;

a. Convicting him for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act* when he was never charged with the said offence.

b. Disregarding provisions of section 179 of the Criminal Procedure Code which was applicable.

c. Enhancing the appellant's sentence in the absence of a cross-appeal by the State or a notice of possible enhancement of the sentence.

d. Convicting the appellant for a more serious offence and sentencing him without availing him an opportunity to mitigate.During the hearing of the appeal, learned counsel Mr. Omayio appeared for the appellant while Mr. Muriithi appeared for the State.

10 Mr. Muriithi partly conceded the appeal to the extent that prior to the High Court enhancing the appellant's sentence from 10 years to 20 years imprisonment, the appellant was not given a warning. In response, Mr. Omayio initially proffered arguments that were all revolving around the issue of sentence which the respondent had already conceded to. Upon our guidance, counsel agreed to proceed from the point that the appeal had been conceded on sentence. Indeed, looking at the grounds of appeal that are presented, they all border on the question of the legality of the sentence that was meted out. Counsel urged that we should look at the appellant with lenses of leniency and disturb the prescribed 10 year term of imprisonment, in view of the Supreme Court's decision in Francis Karioko Muruatetu & Another Vs. Republic [2017] eKLR(Muruatetu).

11. 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."

12. The appellant is aggrieved by the enhancement of the sentence by the first appellate court, an issue that we consider to be a matter of law and hence open for our analysis. As rightly admitted by counsel for the respondent, it is trite that enhancement of a sentence handed out should only be done when the appellant has been given adequate notice of that possibility, so that he is informed of the consequences of proceeding with the appeal. This Court has restated this principle in various decisions including in J.J.W Vs. REPUBLIC [2013] eKLR;

> "It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his

appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal." See also Francis Odingi Vs. Republic [2011] eKLR

13. Similarly, this Court in MGK Vs. Republic [2020] eKLR held as follows;

> "(20) Further, the case of Sammy Omboke & Another v Republic [2019] eKLR discussed the jurisdiction of the first appellate court on enhancement of sentences by holding thus;
>
> > "In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."
>
> (21) It was admitted before us by the respondent that the State had not filed any cross-appeal against sentence nor had they served any notice of enhancement on the appellant. In the circumstances, the trial court having properly exercised its discretion in sentencing the appellant, and imposed a sentence that was double the minimum of 10 years provided for the offence, it was not open to the learned Judge to review the sentence upwards."

14. In like manner, we find that the learned Judge erred in enhancing the sentence meted out to 20 years' imprisonment, without issuing a warning. We also note that during sentencing, the trial court was of the view that the Apex Court's decision in Muruatetu was not applicable in this case. However, that position has since changed subsequent to that determination and the follow- up thereto in which the 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 MWANGI Vs. REPUBLIC (Criminal Appeal 84 of 2015) [2022] KECA 1106 (KLR). In the circumstances, and in view of the Sentencing Policy Guidelines, we are inclined to interfere with the sentence imposed by the Principal Magistrate's Court and enhanced by the High Court. We do so considering both the aggravating factors and the appellant's mitigation.

15. In the result, this appeal partly succeeds to the extent that, we set aside the sentence of 20 years' imprisonment and substitute therefor a term of seven (7) years imprisonment to run from the date the appellant was first sentenced.

Order accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE, 2024.**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**ALI-ARONI**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**