Muhito v Republic (Criminal Appeal 8 of 2018)
[2024] KECA 917 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 917 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 8 OF 2018

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

STEPHEN NJOMO MUHITO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court at Nyahururu (Wendoh, J.) dated 9th March 2017) in Nyahururu HCRA No. 134 of 2017 (Formerly Nakuru HCRA No. 22 of 2015)

JUDGMENT

1. This is a second appeal from the judgement of R. Wendoh, J. dated and delivered on 9th March 2017 in Nyahururu Criminal Appeal No. 134 of 2017 (Formerly Nakuru HCRA No. 22 of 2015). The learned Judge upheld the decision of the Senior Principal Magistrate's Court at Nyahururu (Hon. V. Ochanda, RM) in Criminal Case No. 418 of 2014 on both conviction and sentence, imposed on Stephen Njomo Muhito, the appellant.

2. The appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 16th day of February 2014, within Nyandarua County the appellant intentionally caused his penis to penetrate the anus of FMK, a child aged 9 years.

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* in that on the same date and place the appellant caused his penis to intentionally touch the buttocks of FMK a boy, aged 9 years.

4. The appellant pleaded not guilty to both charges.

5. In a bid to advance its case and secure a conviction, the prosecution lined up 6 witnesses. As this appeal is on both conviction and sentence, as is required of us, we shall briefly set out the case before the trial court.

6. PW1, the complainant testified that on 16th February 2014, the appellant found him at his aunt's kitchen, he picked him up and took him to his house. The appellant then pulled down his trousers and asked him to kneel down. PW1 stated that the appellant spit on his hands and smeared the saliva on his anus before inserting his penis. The appellant then defiled him many times before enticing him with gifts in the form of a watch and money. PW1 testified that one Mbugua came and found the appellant and asked him what he was doing with a child. PW1's uncle, one N whom PW1 reported to, brought the area Chief and later they took PW1 to Olkalou Hospital for examination and treatment before the matter was reported to Olkalou Police Station.

7. PW2, RMN, a neighbour to the appellant, testified that he heard someone talking in the appellant's home which was next to his. He stated that when he went to the appellant's house, he saw a boy kneeling down facing the wall and the appellant was close to him. He later on left but he heard a boy crying and then asked him from his house what it is that he was doing with a child. He stated that he later met PW1 with his aunt who was holding his hand and they said they were going to report the incident, and that is when he heard people saying that the appellant had defiled PW1.

8. According to PW3, JNM, he met PW1 together with his aunt, one ZW. He testified that PW1 told him what the appellant had done to him. He then headed to the appellant's home and he locked the door from outside. They waited for police to arrive and thereafter they took PW1 to hospital before going to the police station.

9. PW4, ZW, PW1's aunt testified that on 16th February 2014 at 6 p.m., she was in the house together with her children and her sister. PW1 said that he was feeling cold and he left to go to the kitchen. PW1 did not go back as anticipated and to her mind, he had gone to buy milk together with her son. She then went to look for PW1 whom she found at the gate coming. When she asked him to accompany her, he escaped through the gate. Together with her sister they followed PW1 until they caught up with him. Thereafter, they met PW3 and they all confronted him (PW1) upon which he told them what had transpired between him and the appellant. They took him to hospital before reporting the matter to the police.

10. PW5, Peter Nginyo is the Clinical Officer who examined both PW1 and the appellant at J.M. Kariuki District Hospital. His testimony was that an examination of PW1 revealed that he had laceration with tenderness around the anal region which was evidence of forceful penetration. As regards the appellant, he found that he had injuries on his penis; that he had a mental condition which was exacerbated by substance abuse; that he had been admitted in hospital twice in 2001 and 2008, and that he was still attending outpatient clinics. He produced a P3 Form and a medical report by Dr. Njau, a psychiatrist in this regard. He also adduced in evidence a P3 Form in respect of PW1.On the appellant's request, PW5 was recalled and he testified that he did not trace any spermatozoa on him (the appellant) when he examined him.

11. PW6, PC John Njoka, the investigating office attached to Olkalou Police Station basically summarised the prosecution's case. In addition, he testified that he went to the appellant's home and broke into the house since he had refused to open the door. He arrested him and escorted him to the police station. He also adduced in evidence PW1' s immunization card to prove his age.

12. When the appellant was put on his defence, he gave an unsworn testimony. He stated that on the material day, he woke up and left for work; that it was in the evening while at home he was told that he committed the offence; and that he did not know what he was being accused of.

13. After a full trial, the appellant was found guilty of the main charge, he was convicted accordingly and sentenced to life imprisonment.

14. Dissatisfied with both the conviction and sentence, the appellant lodged an appeal at the High Court at Nakuru vide Criminal Appeal No. 22 of 2015 which was later transferred to Nyahururu High Court and allocated Criminal Appeal No. 134 of 2017. In her judgement (R. Wendoh, J.) dated and delivered on 9th March 2017, the learned Judge found no merit in the appellant's appeal which she dismissed both on conviction and sentence.

15. Being further aggrieved by the decision of the High Court, the appellant lodged the instant and perhaps the last appeal before this Court. He has raised 8 grounds of appeal in both a memorandum of appeal and supplementary grounds of appeal. In summary, he faults the learned Judge for: failing to find that the offence was committed at a time when the appellant was temporarily insane; failing to appreciate that penetration of PW1's genitalia was not proved and; imposing a sentence that was harsh and excessive in the circumstances.

16. During the hearing of the appeal on 11th March 2024, the appellant appearing in person, wholly relied on his undated submissions. Mr. Omutelema, learned Senior Assistant Director of Public Prosecutions for the respondent similarly relied on his written submissions dated 7th March 2024.

17. We sought to know from Mr. Omutelema what his views were on the fact that the appellant pleaded that he was of unsound mind at the time when the offence was committed. Learned counsel submitted that although the appellant had a history of mental illness, he was, at the time of the commission of the offence, of sound mind and capable of understanding that what he was doing was wrong. Counsel urged that although he had mental illness between the year 2001 and 2008, it was caused by abuse of substances that interfered with his mental state, but the condition was under control as at the time of the incident. Thus, the appellant was not mentally ill at the time he committed the offence and throughout the period of the trial.

18. Our mandate as a second appellate court is to confine ourselves to matters of law only as encapsulated under section 361 (1) (a) of the Criminal Procedure Code. In Kaingo vs. Republic (1982) KLR 213, this Court stated: -

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

19. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law. The appellant is challenging both his conviction and sentence. The issues arising for determination are: whether the ingredients of the offence of defilement were proved beyond reasonable doubt; whether the appellant was of sound mind at the time of the commission of the offence; and whether we should interfere with the sentence meted against the appellant.

20. In order to prove the offence of defilement under the *Sexual Offences Act*, the following elements must be established, namely the age of the victim, penetration and the identity of the perpetrator.

21. In this appeal, the only aspect of the ingredients of the offence charged which the appellant is challenging is the issue of penetration. The appellant submitted that at the time of arrest, the medical examination did not show the presence of spermatozoa which was an indication that there was no

penetration. He faulted the finding that the laceration around the anal region was as a result of penetration whereas it may as well have been occasioned by constipation.

22. While the appellant may want to justify other ways in which PW1 may have gotten the lacerations, we cannot wish away the testimony of PW2, which squarely placed the appellant at the scene of crime in circumstances that suggested that he was committing the offence. At the time, PW2, the appellant's neighbour testified that he heard a commotion in the appellant's house and he went to investigate it. He saw the appellant standing close to PW1 who had knelt down facing the wall with no clothes on the lower part of his body. The appellant did not seem to challenge this testimony in his defence. In addition, the appellant was well known to PW1 who then was 9 years old, and he was candid that he defiled him.

23. We also note that PW1 testified that it was not the first time that the appellant had defiled him; he had done this several times. If indeed the appellant did not defile the complainant, there was no reason why he locked up himself in his house when he was confronted with the allegations. The police officers had to force their way into his home. Both the learned Magistrate and Judge agreed that the evidence of PW1 was corroborated by that of PW2 and there was sufficient reason to believe that the appellant defiled the complainant.

24. Under section 2 of the *Sexual Offences Act*, penetration may be either partial or complete insertion of one's genital organs into the genital organ of another person. There is no requirement that there must be presence of spermatozoa. The evidence of PW1 sufficiently proved that there was penetration which was not challenged, and the medical report was merely corroborative.

25. In view of the foregoing, we find no reason to fault the concurrent findings of the two courts below that indeed the appellant committed the offence of defilement. We add that both courts below adequately analysed the evidence before them and arrived at the right conclusion that the appellant was culpable.

26. As regards the mental state of the appellant, he alleged that he was of unsound mind at the time when he committed the offence. Section 11 of the Penal Code provides that:

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

27. Section 12 of the Penal Code on the other hand provides for the application of the defence of insanity as follows:

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is, through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

28. Section 162 (1) and (2) of the Criminal Procedure Code further specifies that:

> " (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence defence, it shall inquire into the fact of unsoundness.

(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case."

29. In Leonard Mwangemi Munyasia vs. Republic (2015) eKLR this Court observed:

> "...it is the duty of trial courts, where the defence of insanity is raised or where it becomes apparent to the court from the accused person's history or antecedent, to inquire specifically into the question."

30. While there is evidence that the appellant was admitted twice in the year 2001 and 2008 on account of his mental state, as and when he was committing the offence in the year 2014, no evidence was led that he had a relapse of the condition. The doctor's report showed that his mental illness was often exacerbated by substance abuse. Overall, the evidence on record shows that he knew what he was doing. This is further discerned from the fact that it was not the first time that he was defiling PW1. Furthermore, he enticed and carried PW1 to his house, pulled down his trousers and committed the heinous act on him. These cannot be acts of a person who did not know what he was doing.

31. Moreover, throughout the proceedings, the appellant demonstrated that he well understood the charges as they were read to him and he pleaded not guilty. He also ably participated in the proceedings by cross examining all the prosecution witnesses and even asking that the medical officer be recalled for him to further cross examine him. In his defence, he recounted how he woke up on the material date and went to work. We do not perceive that these are symptoms or an indication that the appellant was having bouts of mental illness at the time of commission of the offence. Indeed, the chronology of what transpired during the trial attests to a person who was in charge of his mental faculties, not only during the trial, but also as at the time of the incident. In any case, he (the appellant) did not plead mental incapacitation when he was brought to court; and the court record too does not at any point indicate that he exhibited behaviour of a person who had a mental illness.

32. Indeed, the learned trial Magistrate in her judgment had this to say:

> "PW6 produced a psychiatric evaluation which revealed the accused had been taken ill in 2001 and 2008. He did state that the accused was regularly taking his medication and his mental illness was under control. However, the accused was engaging in substance abuse which was not conducive for his treatment. Throughout the trial the court observed the accused was able to follow the proceedings and comprehend the charges he was facing. His cross- examination questions were concise and clear. There was absolutely no indication that the accused was unfit to stand trial whether through a medical report or his demeanour in court hence the court proceeded with the trial."

33. Similarly, the learned Judge observed that:

> "As regards his state of mind the trial court did consider that issue and its judgement, the court noted that it had observed the appellant and he followed and comprehended the proceedings by cross examining the witnesses and even testified in his defence. There was no evidence of mental illness and this court cannot arrive at a different finding."

34. We further underscore that the defence of insanity or the issue of the appellant's mental state was not a live issue before the trial court. We do not think that the defence of insanity that was raised by the appellant at the appellate stage came to his aid, since as correctly observed by the learned Judge, no

evidence was adduced as to his mental unfitness. Consequently, we have no reason to interfere with the concurrent finding of the two courts below that the appellant was not, at the time of the incident, suffering from a mental illness. We find that his conviction was safe and we have no reason to upset it.

35. As regards the sentence, section 8 (2) of the *Sexual Offences Act* provides as follows:

> " 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."

36. Sentencing is a discretionary exercise by the trial court. An appellate court such as this one, will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in Bernard Kimani Gacheru vs. Republic (2002) eKLR stated thus:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

37. As recent as 12th July 2024, the Supreme Court in R vs. *Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) (2024) KESC 34 (KLR) (12th July 2024) (Judgment) affirmed mandatory minimum sentences provided for under the *Sexual Offences Act*. The Court held that imposing the mandatory minimum sentences does not, of itself, deprive the sentencing court power to exercise judicial discretion. In the present case, the appellant at first appeal did not challenge the constitutionality of the sentence meted by the trial court. Although he pleaded for leniency stating that he has two children he is taking care of, our hands are tied by the law. We then arrive at the inescapable conclusion that the life sentence imposed was lawful, and we thus uphold it.

38. In the end, we find that the appeal lacks merit and is hereby dismissed in its entirety.

39. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024.

F. OCHIENG

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR