Muturi v Republic (Criminal Appeal 12 of 2018)
[2024] KECA 958 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 958 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 12 OF 2018

M NGUGI, FA OCHIENG & WK KORIR, JJA

JULY 26, 2024

BETWEEN

GEORGE KARIUKI MUTURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (M.A. Odero, J.) dated 9th February 2018 in HC.CRA. No. 157 of 2014)

JUDGMENT

1. The appellant, George Kariuki Muturi, was at the trial charged in the main count with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence being that on 7th October 2013 at Njoro Sub-County of Nakuru County, the appellant unlawfully and intentionally inserted his penis into the vagina of M.W., a child aged 10 years. Arising from the particulars of the main charge, the appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. At the conclusion of the trial he was convicted on the main charge and sentenced to life imprisonment.

2. The appellant was dissatisfied with the judgment of the trial court and lodged an appeal at the High Court raising 10 grounds of appeal. Upon hearing the appeal, M.A. Odero, J. in a judgment delivered on 9th February 2018 affirmed the judgment of the trial court both on conviction and sentence. The appellant is now before us on a second appeal and through his amended grounds of appeal he faults the learned Judge on the grounds that she abdicated her duty to re-appraise the evidence on record; that the element of penetration was not proved; and that life imprisonment is unconstitutional, harsh and disproportionate.

3. The prosecution called M.W. (PW1) who testified that she was 11 years old and on 7th October 2013 at 3.00 pm while she was playing outside their home, she heeded the summon of the appellant who was

their Sunday school teacher and followed him to his house near the church. Once inside the house, the appellant sat on the chair and hugged her. The appellant then proceeded to remove his trousers and underpants before removing her clothes. Thereafter the appellant made her lie on him and defiled her. Once done, the appellant instructed her to go home, take a shower and not to tell anyone of the encounter. PW1 later told her friend of the ordeal and asked the friend to inform her mother. Word of the incident spread in the complainant's school and later that week, the appellant reported to the complainant's mother that the complainant was defaming him.

4. The complainant's mother, M.W. (PW2), gave her daughter's age as 11 years. She testified that on 18th October 2013, the appellant went to her home and informed her that he had been threatened for allegedly defiling the complainant. PW2 immediately summoned her daughter and interrogated her in front of the appellant. The complainant confirmed that the appellant had indeed defiled her. PW2 then informed the village elder. She also informed the headteacher of the complainant's school who referred her to Njoro Police Station. Later on, the appellant was arrested and escorted to Njoro Health Centre together with the complainant.

5. J.C. (PW3) examined the complainant on 19th October 2013 and noted that she had a freshly perforated hymen with a foul- smelling discharge from the vagina. He concluded that the complainant had been defiled. He produced the complainant's P3 form and treatment card as well as the appellant's laboratory request form as exhibits.

6. J.N.M. (PW4), the village elder and M.G.W. (PW5), PW1's teacher testified being asked by PW2 to go to her house on 21st October 2013 at about 7.00 pm to hear something. At the house they met the appellant who complained that the children at school were saying that he had defiled PW1. They heard PW1 confirm being defiled by the appellant and they left the matter at that.

7. Dr. Aisha Maina (PW6) produced the complainant's age assessment report prepared by Dr. Shah. It indicated that the complainant was between 11 and 12 years. PC Nelly Sintera (PW7) gave an account of how she investigated the matter before preferring the charges against the appellant. She produced the complainant's clinic card and birth certificate as exhibits.

8. In his defence, the appellant denied committing the offence and limited his testimony to how he was interrogated on 18th October 2013 by PW2 in the presence of PW4 and PW5.

9. When the appeal came up for hearing virtually, the appellant appeared in person while Mr. Omutelema appeared for the respondent. The parties had filed their respective written submissions which they sought to wholly rely upon.

10. Through his undated submissions, the appellant submitted that the first appellate court failed in its duty, as expressed in Erick Otieno Arum v. Republic [2006] eKLR, to independently and exhaustively analyse the evidence on record. The appellant asserted that as a result of that failure, the learned Judge of the first appellate court failed to appreciate that he was not accorded a fair trial.

11. Next, the appellant complained of the infringement of his right to legal representation that is guaranteed under Article 50(2)(g) of *the Constitution*. The appellant also alleged violation of his right to fair trial stating that the voir dire examination of PW1 was carried out in an unprocedural manner. According to the appellant, the trial court failed to ascertain whether the complainant appreciated the importance of an oath. The appellant additionally attacked the credibility of the complainant asserting that "the testimony of PW1 was riddled with vocabularies not consistent with the age of minors of 10 years." Maintaining that the appellant was not a credible witness, the appellant submitted that the trial court erred in invoking section 124 of the *Evidence Act* because that provision can only be invoked

where the court is convinced that the complainant is a truthful witness. The appellant placed reliance on Maina v. Republic [1970] EACA 370 in support of this argument.

12. It was also the appellant's contention that the prosecution failed to call a critical witness who could have corroborated the complainant's allegation. The appellant also argued that the element of penetration was not proved.

13. Regarding the sentence, the appellant submitted that life imprisonment was not only unconstitutional but harsh and excessive in the circumstances of his case. Ultimately, he urged that we allow his appeal.

14. For the respondent, Mr. Omutelema filed submissions dated 15th March 2024. Counsel rehashed the evidence on record and urged us to find that the offence of defilement was proved. Counsel also submitted that the reception of the evidence of PW1 was proper. Counsel accordingly persuaded us to uphold the concurrent findings of fact by both the trial court and the first appellate court. Turning to sentence, counsel despite appreciating the Court's stance on the indeterminate nature of life imprisonment urged that the circumstances of the offence called for the imposition of life imprisonment.

15. Our duty in this appeal is well cut out for us by section 361(1)(a) of the Criminal Procedure Code. It is limited to addressing matters of law with a few exceptions as expressed in Adan Muraguri Mungara v. Republic [2010] eKLR thus:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

16. Alive to our mandate, we have reviewed the record of appeal and the submissions and authorities cited by the parties. We isolate the issues for our determination as to whether the High Court discharged its mandate; whether the offence was proved; and whether the appellant has made out a case for our interference with his sentence.

17. The appellant in his first ground of appeal questions the manner in which the first appellate court discharged its mandate. It is worth noting that there is no specifically prescribed formula on how a first appellate court should discharge its mandate. In David Njuguna Wairimu v. Republic [2010] eKLR, the Court explained one of the methods of discharging the onus as follows:

> "In Okeno v. R [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."
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> [Emphasis ours]

18. Upon going through the record and the judgment of the first appellate court, we cannot fault the manner in which the learned Judge discharged her mandate. The learned Judge restated the evidence that was adduced at the trial and gave reasons for agreeing with the trial court that the victim had been defiled by the appellant. We thus find no merit in this particular ground of appeal.

19. We now turn to the appellant's contention that his constitutional right to a fair trial was violated. The argument advanced in support of this ground of appeal is that the appellant was not provided with legal representation at the State's expense. We, however, note that this issue was not raised before the learned Judge. The issue is being raised for the first time in this appeal and we cannot therefore address it because our role is limited to determining issues which have been raised through the provided appellate system. The decisions in Charles Maina Gitonga v. Republic [2020] eKLR and AT v. Republic [2023] KECA 1393 (KLR) speak to that point.

20. Another ground upon which the appellant anchors his appeal is that the charge of defilement was not proved against him. On this point, the appellant has raised two issues; that the voir dire examination of PW1 did not adhere to the prescribed procedure and that penetration was not proved. We will start by considering the question as to whether voir dire examination was properly conducted as an improper conduct of the examination or lack of it may result in the violation of the trial rights of an accused person. As regards this issue, we wish to reiterate the views of the Court in Maripett Loonkomok v. Republic [2016] eKLR that:

> "...we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006."

21. Upon our review of the record, specifically with regard to the evidence of PW1, we do not find merit in this ground of appeal. The record is clear that the trial magistrate conducted voir dire examination of the child before receiving her testimony.

    Furthermore, PW1 was subjected to cross-examination meaning that the appellant was given an opportunity to test the credibility and truthfulness of the witness. Additionally, the trial court and the first appellate court having held that the witness was truthful and credible, and there being nothing on record to make us conclude otherwise, we must defer to the concurrent finding of fact by the two courts. We therefore find no basis upon which to agree with the appellant that his right to fair trial was violated as a result of an imperfect voir dire examination.

22. As regards the question as to whether penetration was proved, the judgment of the High Court is explicit on this issue. Perhaps to reiterate, PW1 vividly recollected how the offence was committed. Despite being subjected to medical examination some days later, PW3 confirmed that PW1 had a freshly perforated hymen. The evidence of PW3 therefore corroborated the evidence of PW1 that she had been defiled. We have no doubt in this regard.

23. In his submissions, the appellant alluded to the fact that the prosecution failed to call a key witness. He mentions one Damaris as having been present during the commission of the offence. Indeed, PW2 testified that PW1 was playing with Damaris when the appellant called PW1. However, there is no mention of a playmate in the testimony of the complainant. In any event, it is not clear what missing link the evidence would have filled in order for us to say that the evidence of Damaris was so crucial and without it the case against the appellant was not proved. In this case, it was the appellant who went to PW2 to report his fears of a possible assault as word was out in PW1's school that he had defiled her. The appellant was present when PW2, PW4 and PW5 were questioning the complainant. He was also known to PW1, PW2, PW4 and PW5. PW2, PW4 and PW5 gave similar accounts about what PW1 told them in the presence of the appellant. Although PW1 had been threatened with death by the appellant, she had confided in a friend at her school and requested the friend to inform PW2. That is how the story leaked leading to the boys in the complainant's school threatening the appellant. We do not think that there is another version of the story that the alleged omitted witness would have told the court to warrant the formation of adverse inference on the prosecution case. From our analysis, it follows that the appellant's appeal against conviction is without merit.

24. The final issue for determination relates to appellant's assertion that the sentence of life imprisonment meted upon him is not only unconstitutional but also harsh and excessive. The respondent's counsel on the other hand submits that the sentence was merited considering the circumstances under which the offence was committed.

25. We start by appreciating that under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of law and we can only interfere with sentence where it was enhanced by the High Court or the subordinate court had no jurisdiction to pass it. The sentence passed by the trial court and confirmed by the first appellate court was legal as that is what the *Sexual Offences Act* provides. Additionally, we have looked at the appellant's grounds of appeal before the first appellate court and find that the issue of severity of sentence was never raised by the appellant and neither was it addressed by that court. In the circumstances, the issue of the sentence imposed upon the appellant does not fall for our determination. We thus, find no merit in the appeal against sentence and we dismiss it.

26. The upshot is that the appellant's appeal fails in its entirety and is dismissed.

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

MUMBI NGUGI

..... JUDGE OF APPEAL

F. OCHIENG

..... JUDGE OF APPEAL

W. KORIR

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR