Mwangi v Republic (Criminal Appeal 28 of 2018)
[2024] KECA 897 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 897 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 28 OF 2018

S OLE KANTAI, FA OCHIENG & WK KORIR, JJA

JULY 26, 2024

BETWEEN

DAVID NGARU MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the conviction and sentence of the High Court at Nakuru (Maureen Odero, J.) on the 2nd day of March, 2018 in H. C. CRA NO. 120 of 2015)

JUDGMENT

1. This is a second appeal from the original conviction of the appellant, David Ngaru Mwangi, by the Chief Magistrate's Court, Nakuru, of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* particulars being that on the date and place stated in the charge sheet he intentionally and unlawfully committed an act by inserting a male genital organ (penis) into the female genital organ (vagina) of PK, a child aged 9 years which caused penetration. He was tried, convicted and sentenced to life imprisonment and his first appeal to the High Court of Kenya, Nakuru, was dismissed on both conviction and sentence. Being a second appeal our mandate is circumscribed by Section 361 (1)(a) *Criminal Procedure Code* to a consideration of issues of law only and we must avoid the temptation to consider matters of fact which have been determined by the trial court and re-analysed on first appeal - see the case of *Stephen M'Irungi & Another v Republic [*1982 – 88] 1 KAR 360 where it was held of that mandate:

> "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."

2. We visit the facts of the case briefly to establish whether the trial court and the High Court on first appeal carried out their mandate as required by law.

3. PK (PW1) who gave sworn evidence after a voire dire examination had established that she knew the nature of an oath and the value of telling the truth testified that she was 9 years old and a class 1 pupil. She went to school on 17th June, 2013 and was walking back home alone at about 3 p.m. when she met a man who she later identified as the appellant. The man gave her some cash and led her into the forest where he threatened that he would kill her and her mother if she told anyone of the events that were about to unfold. He ordered her to remove her clothes which she did because of the threat he had just made. He also undressed and proceeded to defile her in the anus four times. She described the clothes he wore as black trousers, brown shirt, black shoes and a white cap. When he was done he ordered her to dress up and go home. On getting home she did not report the incident to her mother EN (PW2) because she was scared for their lives. But she was in a lot of pain; she could not pass stool and on a later date (probably the next day) she revealed to her mother what had happened. A report was made at Mwariki Police Station; she was issued with P3 Form and was treated at a local hospital. On the issue of identification she said

> " ...I can identify the accused person if I saw him. When I met him we stayed for some time and I captured his face..."

4. She testified that she had experienced a lot of pain and:

> " ...From that date I have a fear for (sic) men and would not want anyone to experience what I went through..."

5. EN on receiving the report of defilement took her daughter to the police and hospital. She was given a description of the defiler by her daughter. On a later date EN accompanied her daughter and police to a construction site where the appellant was arrested after being identified by the child. EN testified that the child was born on 22nd April, 2004.

6. PC Sharon Maloi (PW4) of Bondeni Police Station was the Investigating Officer who was assigned the case on 20th June, 2013. When recording statements from PK and EN the former stated that she could identify the person who had defiled her. The child went with her mother and police officers to a construction site at Nakuru Pipeline ground where the child identified the appellant as the person who had defiled her and he was arrested. PC Maloi charged him with the offence and produced the child's birth certificate into the evidence. The witness visited the scene and found damaged crops indicating that there had been struggle.

7. Dr. Emmanuel Wekesa Wamalwa (PW3) of Provincial General Hospital Nakuru produced P3 Form which indicated that the patient (PK) had no injury in the vaginal area but examination of the anus indicated that it was very dirty with a lot of blood. The doctor concluded that the child had been defiled.

8. That was the case made out by the prosecution which the trial court found the appellant had to answer and in a sworn statement in defence the appellant stated that he worked at a construction site. Police, EN and PK visited the construction site where he was arrested. According to him he knew EN very well as he had constantly purchased beef from her and they were neighbours. He denied committing the offence and called two witnesses in his defence.

9. Samuel Maina (DW2), a foreman at the construction site where the appellant worked knew the appellant from August, 2013 where the appellant worked as a storekeeper. He was present when the appellant was arrested and, according to him, the appellant's job as storekeeper could not allow him to leave the site during working hours. He admitted in cross-examination that he had no knowledge of events that occurred before August, 2013.

10. Peter Njuguna Nganga, the owner of the construction site, testified that he employed the appellant as storekeeper in March, 2013 and gave him accommodation at the said site. Of what he knew of the events leading to the appellant's arrest he said:

> " ...I can't tell what happened on 17/6/13..."

11. He was present when the appellant was arrested.

12. That was the case made by both sides and as we have seen the appellant was convicted and his first appeal dismissed; orders which provoked this appeal.

13. There are 5 grounds of appeal in the homemade Memorandum of Appeal where the appellant faults the learned Judge on first appeal for not finding that evidence adduced during trial was contradictory and inconsistent; that the Judge was wrong not to find that medical evidence adduced did not corroborate the charge; that the Judge erred in law by not finding that crucial witnesses were not called to testify; that his identification was marked with errors and could not meet the threshold of positive identification. The last ground states that the appellant would file more grounds of appeal. We have seen 'Supplementary Memorandum (sic) Grounds of Appeal brought under rule 65 of the *Court of Appeal Rules*" which are part of written submissions filed by the appellant. These grounds are to the effect that the Judge erred in law by upholding a life sentence awarded by the trial court "...but failed to note that, this sentence was against the spirit of the *Constitution* of Kenya Articles 50 (p) (q) it does not serve the objectives of sentencing as listed on pages 15, paragraph 4:1 of the policy guidelines and other enabling law provisions section 216 and 389 of the *Criminal Procedure Code*s (sic)."That the Judge erred in law by upholding conviction when age of the victim and penetration had not been proved; that identification was not proved and that his defence was not considered.

14. When the appeal came up for hearing before us on a virtual platform on 8th April, 2024 the appellant appeared in person from Naivasha Prison while learned counsel Mr. Omutelema appeared for Office of Director of Public Prosecutions. Both sides had filed written submissions which they did not wish to highlight and they left the matter to us.

15. We have considered the record, submissions and the law.

16. The issues of law we recognize as calling for our attention are whether the age of the victim was proved; whether penetration was proved; whether the appellant was properly identified as the person who defiled PK; whether there were witnesses who were not called; whether the defence was considered and, lastly, the issue of sentence that was awarded.

17. On the age of the victim there was the evidence of PK herself. She said that she was 9 years old, a pupil in class 1. Her mother EN stated that PK was born on 22nd April, 2004 and produced a birth certificate to that effect. The Judge on first appeal re-analysed the evidence and quoting from the case of *Richard Wahome Chege v Republic* [2014] eKLR where it was observed:

> " What better evidence [of age] can one get than that of the mother who gave birth?"

18. We agree with the Judge that age of the victim was proved to the required standard.

19. On the issue of penetration there was the evidence of PK who testified in detail how she was enticed with money by the appellant who then led her to the forest and threatened to kill her and her mother if she revealed what was about to happen, ordered her to remove her clothes and proceeded to defile her through the anus. She then went home but did not tell her mother of what had happened because of the threat that had been issued by the appellant. Her mother later noted her discomfort and the girl told her mother about defilement a day or two later. This is evident from the P3 Form which shows that a report had been made to police on 20th June, 2013 where defilement had taken place 3 days earlier on 17th June, 2013. The investigating officer testified that a report was received at the police post on 20th June, 2013. Dr. Wamalwa confirmed that the girl had been defiled. All these facts went to prove that penetration had occurred.

20. On the issue of identification PK testified that she was confronted by the appellant at 3 p.m. while on her way home from school. She described his clothing in detail and stated that when he lay on her he did it four times. So they were together long enough for her to recognize her assailant. In her own words on the issue of identification:

> "...I can identify the accused person if I saw him. When I met him we stayed for some time and I captured his face. Accused is here in court..."

21. PK told police on making report that she could identify her assailant and she described clothes he wore including shoes. She later picked him out when they went to the construction site where the appellant worked. Identification of the appellant was proved to the required standard and there is no merit in the appellant's complaint in that regard.

22. The appellant says that crucial witnesses were not called. He does not say which witnesses were not called. We noted that the prosecution called the victim and her mother, the doctor who produced medical documents to prove defilement and the investigating officer who investigated the case. It is true that the prosecution has a duty to call all witnesses who have relevant evidence in support of the prosecution case but it is also true that there is no necessity to call a long line of witnesses where a case can be proved by calling relevant witnesses. It was held in *Bukenya v Uganda* [1972] EA 549, at page 550 that:

> "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."

23. The witnesses called by the prosecution proved the case to the required standard.

25. Then there is the complaint that defence was not considered.

26. The appellant in defence denied the charge and called 2 witnesses who however had no relevant evidence to give on events that occurred on 17th June, 2013. Samuel Maina (DW2) met the appellant in August, 2013 while Peter Njuguna Nganga (DW3), the appellant's employer, had no knowledge of

what may have happened on 17th March, 2013. He visited the construction site and left at 10 a.m. The Judge on first appeal re-analysed the defence and concluded:

> " ...Taken as a whole I find that the defence is not credible and does not in any way negate or weaken the prosecution case. The defence is therefore dismissed..."

27. We agree. The defence was totally misplaced by the strong prosecution case that showed how the appellant lured the child, threatened her and defiled her.

28. The last issue for our consideration is the sentence awarded to the appellant. He was convicted in the judgment dated 30th April, 2015 and sentenced to serve imprisonment for life and the first appeal was dismissed by Odero, J. in a judgment delivered on 2nd March, 2018.

27. The *Sexual Offences Act* prescribes life imprisonment for a person convicted of defiling a child aged 11 years and below. The trial court found itself bound by that mandatory provision and awarded that sentence which was confirmed on first appeal.

28. Jurisprudence in Kenya has since shifted from the regime where courts hands were tied by Parliament providing mandatory terms for persons convicted of criminal offences. It has been held that a trial court should be free to consider the circumstances of the particular case before court for an appropriate sentence to be awarded. This Court has held that the rationale of the Supreme Court decision in *Francis Karioko Muruatetu & Others v Republic* [2017] eKLR applies in equal measure to the minimum sentences prescribed in the *Sexual Offences Act*. For example, in Okello v 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:
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> > '[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
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> 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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> 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.
>
> 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 intergyral 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 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 Republi*c [2021] eKLR."

29. The position therefore is that the Court's hands are not tied; the court is free to consider the circumstances of each case and award an appropriate sentence.

30. There can be no doubt that the appellant committed a beastly act. He lured, threatened and defiled an innocent 9 year old girl who was walking back home from school still in her school uniform. According to her and her mother she suffered trauma that led them to relocate from Nakuru to Thika where she was undergoing counselling.

31. Upon conviction, and in mitigation, the appellant told the trial magistrate:

> I have children who are dependent on me and are in school."

32. We have considered the whole matter and the jurisprudence we have referred to and are of the opinion that we should award an appropriate sentence in this matter. The appeal on conviction is dismissed. The appeal on sentence succeeds partially to the extent that we set aside the sentence of life imprisonment imposed and substitute therefore a sentence of thirty (30) years imprisonment from the date of conviction (30th April, 2015). These are our orders.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 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