Peter v Republic (Criminal Appeal 83 of 2017)
[2024] KECA 1124 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1124 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 83 OF 2017

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

KURIA WAITHANJI PETER ALIAS OSAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court at Nakuru (M. Odero, J.) dated on 6th October 2017) in HCRA No. 173 of 2014)

JUDGMENT

1. This is a second appeal from the judgement of M. Odero, J. dated and delivered on 6th October 2017 in Criminal Appeal No. 173 of 2014. The learned Judge upheld the decision of the Senior Principal Magistrate's Court (Hon. R. Amwayi, RM) in Criminal Case No. 200 of 2013 on both conviction and sentence, imposed on Kuria Waithanji Peter alias Osama, the appellant.

2. Before the Chief Magistrate's Court in Nakuru, 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 27th day of September 2013 at [Particulars withheld] Estate-Njoro in Nakuru County within the then Rift Valley Province, the appellant unlawfully and intentionally committed an act of inserting a male genital organ (penis) into a female genital organ (vagina) of GN, a child aged 6 years 7 months which caused penetration.

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 he unlawfully and intentionally committed an indecent act to a child named GN aged 6 years 7 months by touching her genital organ, namely vagina with his genital organ, namely penis.

4. The appellant entered a plea of 'not guilty' on both charges.

5. The prosecution lined up 4 witnesses in support of its case. As this appeal is on both conviction and the sentence, we shall briefly set out the testimonies of the witnesses.

6. PW1, the complainant, testified that on 25th February 2007 she was coming from school in the company of one W. They met the appellant at the gate who grabbed her and took her to his house. It is there that the appellant removed her trouser and underwear and defiled her. He then threatened that he would kill her if she told her mother what had happened. Due to the threat, PW1 did not tell her mother immediately but only did so after experiencing pain when passing urine. She was taken to hospital before the matter was reported to Njoro Police Station. It was her evidence that she knew the appellant as he had touched her vagina before, but that was the first time he had defiled her.

7. PW2, Jacob Chelimo, a Clinical Officer at Njoro Health Centre examined PW1 on 28th September 2013. The external genitalia showed that there was laceration of labia minora, swelling on the labia majora, freshly broken hymen, while vaginal swabs had whitish discharge. He concluded that there was penetration, probably caused by a male genitalia. He also examined the appellant who had no external genitalia injuries. He adduced in evidence outpatient treatment forms and P3 forms in this respect.

8. PW3, EW, the mother to PW1 regurgitated the evidence of PW1 whilst recalling the ordeal that PW1 experienced. In cross examination, she denied having a relationship with the appellant. PW4, PC Nelius Nyambura, the investigating officer, also basically rehashed the evidence of PW1. In addition, she adduced PW1' s Birth Certificate as an exhibit.

9. In his defence, the appellant gave a sworn testimony. He testified that he lived with PW1's mother as husband and wife for 1 ½ years. On 20th September 3013, a certain man came by that claiming that he was looking for his wife who was PW1's mother whom he had separated from when he was in prison. The following day, he went to work where he had opened business for PW3 and he took away his machines. After two weeks, PW3 came with her sister to inquire why he had taken the machines and they threatened him. On 28th September 2013, PW3 together with her sister came with two men. He was then arrested and taken to the Police Station before being charged with the offence in court.

10. In its judgement dated 24th July 2014, the trial court (Hon. Amwayi, RM) was satisfied that the prosecution had proved its case beyond reasonable doubt and found that the appellant was guilty of the offence of defilement. It convicted and sentenced him to life imprisonment.

11. Aggrieved by the trial court's decision, the appellant appealed to the High Court at Nakuru in HCCRA No. 173 of 2014 in which the learned Judge (M. Odero, J.) dismissed the appeal and upheld the trial court's conviction and sentence.

12. Dissatisfied with the learned Judge's decision, the appellant appealed to this Court on both his conviction and sentence on three grounds as set out in his undated memorandum of appeal and an additional four grounds in his subsequent undated supplementary memorandum grounds of appeal. In summary, he faulted the learned Judge for: upholding the conviction when the elements of the offence charged were not proved and the evidence was not sufficient and corroborative; and for upholding the life sentence which is in contravention of Article 50 (2) (p) (q) of the *Constitution*

13. In support of the appeal, the appellant filed undated written submissions contemporaneously with his supplementary memorandum grounds of appeal. He submitted under three heads, namely proof of the charge of defilement, lack of consideration of his defence and the propriety of the sentence. He also cited several judicial authorities which we shall highlight where necessary.

14. On the issue of proof of the offence, the appellant submitted that the appellant's age of 6 years was not proved as required, as there was no age assessment report. Amongst the cases he relied on was this

Court's case of Eliud Waweru Wambui v. Republic (2019) eKLR for the proposition that one cannot competently speak of their date of birth because they did not witness it. And that therefore, PW1's own evidence that she was 6 years old then was not credible and could not stand.

15. On penetration, he submitted that the trial court relied on the evidence of PW2 who noted that PW1 did not have bruises in her genitalia and no discharge was evident. Therefore, the assertion that PW1 was defiled was not at all supported by evidence. Further, he submitted that the medical evidence adduced did not prove that PW1 was defiled. In this regard, he asserted that although the hymen was broken, the same could have been raptured by other activities other than sexual intercourse, such as tapoons and medical examinations. For this proposition, he relied on the case of *PKW v. Republic* (2012) eKLR

16. The appellant also submitted that his defence was not considered. He asserted that the burden of proof of the case wholly rested with the prosecution to prove its case beyond reasonable doubt, which burden never shifts upon an accused person as was held by this Court in the cases of *Ouma v. Republic* (1986) KLR 619 and *Victor Mwendwa Mulinge v. Republic (*2014) eKLR.

17. On sentence, the appellant submitted that the first appellate court did not exercise its discretion and/or have regard to recent case law jurisprudence on sentencing as well as the provisions of Sections 216 and 329 of the *Criminal Procedure Code* read together with the *Judiciary Sentencing Policy Guidelines*. He cited the decisions of this Court, being *Regan Otieno Okello v. Republic* Criminal Appeal No. 189 of 2016 (2022) eKLR and *Joshua Gichuhi Mwangi v. Republic* Criminal Appeal No. 84 of 2015 (2022) eKLR for the position that appellate courts have the discretion to vary mandatory sentences. It is for this reason that he urged us not to shy away from interfering with the life sentence imposed by the trial court and upheld by the High Court.

18. Opposing the appeal, learned Senior Assistant Director of Public Prosecutions Mr. Omutelema, for the respondent, filed written submissions dated 8th March 2024 on which he wholly relied.

19. On proof of the offence of defilement, counsel submitted that all the ingredients of the offence of defilement, namely identification, penetration and age of the complainant were sufficiently established. On the identification of the perpetrator, it was submitted that PW1 knew the perpetrator very well, who was her neighbour; and that the appellant had previously indecently assaulted her. Learned counsel submitted that even on cross examination, PW1's evidence was not shaken. Counsel relied on the case of *Maitanyi v. Republic* (1986) eKLR to emphasize that a court can rely and convict an accused person on the strength of a single witness so long as that evidence is credible; and that in the instant case, the evidence of PW1 on identification was not only credible, but was corroborated by other material evidence.

20. As regards penetration, it was submitted that PW1 was candid that the appellant removed her pant and inserted his penis into her vagina. Thereafter, PW3, PW1's mother noticed that PW1's private parts were swollen which was affirmed by the medical examination report which revealed injuries on both the labia majora and minora and freshly broken hymen. The medical examination concluded that there was evidence of penetration.

21. On the issue of age, it was submitted that PW1's Birth Certificate adduced in evidence indicated that she was 6 years old as at the time of the incident.

22. On issue of severity of the sentence meted upon the appellant, counsel submitted that the circumstances of this case calls for a severe sentence for the reasons that PW1 was only 6 years old; that she was innocently walking home from school when the appellant forcefully took her into his house; that the appellant planned the defilement having previously sexually assaulted her; that the appellant

abused the trust that PW1 had in him as both were neighbours; and that he threatened to kill her (PW1) which left her not only traumatised but also with serious injuries to her genitals. It was further submitted that should this Court deem it fit to substitute the life sentence with a determinate one, then a severe sentence should be imposed. On the whole, we were urged to dismiss the appeal in its entirety and impose a severe determinate sentence.

23. 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* Cap 75. In *Kaingo v. 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."

24. We have considered the record of appeal, the respective rival submissions, authorities cited and the law. The appellant is challenging both his conviction and sentence. In this regard, we have deduced that the issues arising for our determination are: whether the ingredients of the offence of defilement were proved beyond reasonable doubt; and whether we should interfere with the life sentence meted against the appellant.

25. The three ingredients required for proof of the offence of defilement are; penetration, age of the victim and identification of the perpetrator. In this appeal, the appellant stated that the offence of defilement was not proved on two fronts, namely age of the victim and penetration.

26. On the issue of age, the appellant's position is that the same was not proved since there was no age assessment report produced. In rebuttal, the respondent submitted that a birth certificate was adduced in evidence which indicated that PW1 was born on 25th February 2007, and that therefore, she was 6 years old as at the time of the offence. This Court in *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR addressed the issue of proving age as follows:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

27. In the same vein, the Ugandan Court of Appeal in Criminal Appeal No. 2 of 2000 - *Francis Omuroni v. Republic*, 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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

28. From the foregoing, it remains settled that the age of the victim can be proved not only by way of documentary evidence such as birth certificate, baptism card or an age assessment report, but also by way of oral evidence of the child who is considered sufficiently intelligent or even the evidence of the parents or guardians.

29. We have considered the trial court's record. The complainant testified that she was 6 years old then. To further support this, her mother, PW3, identified her Birth Certificate which was later produced by PW4, the investigating officer, as 'PEXH2.' Our scrutiny of the Birth Certificate confirms that it

belongs to PW1, G.N. and her date of birth is indicated as 25th February 2007. The offence having been committed in the year 2013 ultimately lends credence to the conclusion that PW1 was 6 years old then.

30. There cannot be any better way to prove the age of PW1 than by the Birth Certificate, which is an official document issued by the Registrar of Births. The appellant did not challenge the authenticity of the Birth Certificate. To this end, we will not belabour much but conclude that PW1's age was proved beyond reasonable doubt.

31. Regarding penetration, the appellant took the position that the medical reports adduced were inconclusive proof that penetration did take place. He challenged the fact that upon examination of PW1, there were no bruises in her genitalia and no discharge was noted although the hymen was broken. Learned State Counsel submitted that the medical examination revealed that PW1 had a laceration of labia minora, swelling on the labia majora and freshly broken hymen with tenderness around the anal region; and that this was overwhelming evidence that indeed there was penetration.

32. The term 'penetration' is defined under Section 2 of the *Sexual Offences Act* as either 'partial or complete insertion of the genital organs of a person into the genital organs of another person.' PW1 testified accurately how the appellant lured her into his house because it was raining. The appellant put her on his bed and undressed her. He then removed his trouser and inserted his penis in his vagina.

33. The Supreme Court of Uganda in *Bassita v. Uganda* S.C. Criminal Appeal Number 35 of 1995 held:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence." (Emphasis added).

34. A reading of the appellant's defence reveals that he did not attempt in his defence to deny the allegations raised by the complainant on how he lured her to his house and defiled her. Instead, the appellant shifted the blame on his current predicament to a supposedly failed relationship and business venture between himself and PW1's mother.

35. It is undisputed that examination by PW4 revealed that there was laceration on the labia minora, swollen labia majora and a freshly perforated hymen. The conclusion of the probable cause of the injuries was male external genitalia. Thus, the indubitable conclusion which we make is that PW1's evidence was corroborated by the medical evidence.

36. Notably further is that the appellant does not challenge his identification. We thus reach the inescapable conclusion that the prosecution proved the three-fold test of proving the offence of defilement. The appellant's inference of guilt was cogent and firmly established both in the trial and the first appellate court. We have no reason to interfere with the concurrent findings of the two courts below that indeed the appellant is guilty of the offence of defilement. We thus uphold his conviction.

37. On sentencing, the appellant submitted that both the trial and first appellate courts did not exercise its discretion properly by imposing a mandatory sentence. The prosecution urged that if this Court is to be persuaded to interfere with the sentence, it should take into account the severity of the offence and the consequences thereof.

38. As regards the sentence meted out on the appellant, 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."

39. Sentencing is an exercise of discretion 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 v. 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."

40. The Supreme Court in *R v. 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, but only blames the two courts below for not exercising their discretion in meting the appropriate sentence. On our part, we underscore the fact that the issue of sentence is a matter of fact. The courts below properly exercised their discretion in upholding the mandatory minimum sentence provided for by the law. We have no reason to interfere with that sentence as it lawful and proper.

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

42. 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

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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