CWK v Republic (Criminal Appeal 105 of 2017)
[2024] KECA 1082 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1082 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 105 OF 2017

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

AUGUST 21, 2024

BETWEEN

CWK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (L.A. ACHODE, J.) delivered on 17th December 2017 ` in HCCA No 27 of 2013)

JUDGMENT

Background

1. The appellant, CWK, was charged before the Chief Magistrate's Court in Nyeri for 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 were that on diverse dates between 9th August, 2012 and 17th September, 2012 in Nyeri County he intentionally caused his penis to penetrate the vagina of RWK (name withheld), a child aged ten (10) years.

2. During the trial, the prosecution called six (6) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted and sentenced to life imprisonment.

3. Aggrieved, the appellant appealed against conviction and sentence before the High Court at Nyeri (L.A. Achode, J.- as she then was). His first appeal to the High Court was unsuccessful, prompting this second appeal against conviction and sentence.

4. The jurisdiction of this Court on a second appeal is well settled.

In Karani v Republic [2010] 1 KLR 73, this Court expressed itself as follows: -

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

5. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.

6. Dr. Anne Kabuthi (PW1) testified that after a medical examination on RWK (PW3) there was evidence of penetration, her labia majora was inflamed slightly and the hymen was broken. SKM (PW2) testified that he is PW3's father and that on 18th September, 2012 he went to the home of JM (PW5) who informed him that her children, who included JRWN (PW4), had informed her that someone had promised to buy PW3 underpants and a brassiere, had given her 80/= and had informed her that when she completed school, she would bear him a child. It was PW2's evidence that he, PW5 and PW4 proceeded to his home where PW3 was interrogated and identified the appellant as the perpetrator. It was PW2's further evidence that PW3 stated that the appellant had threatened to beat and kill her if she disclosed that he had defiled her, a total of about 10 times. PW2 testified that the appellant was arrested the following day.

7. RWK (PW3) testified that on 9th August, 2012 while in the company of her brother, one ZM, and JR (PW4) they went to herd cattle where they found the appellant who was also herding cattle. It was PW3's testimony that the appellant gave her and PW4 sweets and sent PW4 to herd the cattle while he remained with PW3. It was her evidence that the appellant took her to the bush and defiled her. It was her evidence that the appellant promised her that once she completes class 8, she would get a child named Wahome and that he would give her 50/= and later buy her a brassier, underpants and body oil. PW3 further testified that she informed PW4 that the appellant had defiled her. It was her testimony that the appellant had defiled her about 10 times in the bush, did not give her what he had promised and that PW4 informed her mother (PW5) who informed PW2 and she was taken to the hospital. In cross-examination PW3 stated that she knew the appellant very well as the person who "did bad manners" to her.

8. JRWN (PW4) was a minor who testified that in August when schools were closed, she and PW3 used to herd cattle together with their brothers. It was her evidence that the appellant used to also graze cattle at the same place and that he used to give them sweets. It was her further evidence that on the material day the appellant sent her to go and herd the cattle while he remained with PW3. It was her testimony that upon her return to where she had left the appellant and PW3 she did not find them and that this had happened on several occasions. It was her further testimony that PW3 complained of having a stomach ache which she (PW4) informed her mother, PW5.

9. JM (PW5) testified that on 18th September 2012 she overheard her children talking and on enquiry they informed her that the appellant had promised to buy oil for PW3. It was her further evidence that she explained to PW2 what had transpired and that PW3 subsequently narrated to him (PW2) what the appellant had done to her.

PC Bethel Kibet No. 678204 (PW6) the Investigating Officer testified that a report was made on 19th September, 2012 at Mweiga Police Station and on the following day, the appellant was arrested. PW6 produced PW3's birth certificate.

10. The appellant was put on his defence and gave unsworn evidence denied committing the offence. It was his testimony that he was doing casual work of herding cattle and that he was framed by PW2 who had refused to pay him 2 months' pay after herding his cattle.

11. The trial court dismissed the appellant's defence and found as follows;

> "Based on the above I find that the case before me has been proved to the required standard. The defence of the accused I find it an after thought therefore I reject it. I therefore find the accused person guilty of the offence charged and is convicted under Section 215 of the Criminal Procedure Code."
>
> The trial court sentenced the appellant to life imprisonment.

12. Aggrieved by the conviction and sentence, the appellant appealed to High Court. The High Court after re-evaluating and analyzing the evidence on record, found as follows:-

> "In my analysis of the evidence on record I found that this is a straight forward case in which the complainant, an intelligent 10 year old child as assessed by the court following VOIRE DIRE examination, narrated in detail what happened to her. She then went ahead to identify the Appellant, a man with whom they used to graze animals in the same forest together, as the person who inflicted these ignoble deeds upon her. I agree with the observation of learned state counsel M/s. Muyeku that that there is no evidence of the existence of a grudge between the minor and the appellant and that from the Voire Dire examination the minor understood the need to tell the truth. I accept the minor's evidence as did the trial court... After a careful re- assessment, of the evidence on record, I am in agreement with the findings of the trial court. I am satisfied that the conviction entered against the appellant was based on sound evidence and the sentence imposed by the learned trial magistrate was in accordance with the law. I therefore uphold both the conviction and the sentence. There being no merit in the appeal it is hereby dismissed."

13. Undeterred, the appellant has now filed this second appeal. The appellant filed a memorandum of appeal raising four grounds claiming that the 1st appellate court had erred in law and fact: while supporting his conviction in reliance of the evidence adduced by the complainant and PW3 and PW4 without considering that the same was not satisfactory; in upholding that the act of penetration was proved without considering that the words "bad manners" does not mean that there was penetration; that the Medical Doctor who examined PW3 was not the same one who testified which was in contravention of Section 33 as read with Section 77 of the *Evidence Act*; and that the 1st appellate court erred in law in finding that his defence was properly rejected while the same was not challenged by the prosecution.

14. The appellant filed amended grounds of appeal raising four (4) issues:

whether the mandatory minimum sentence of life imprisonment prescribed by Section 8(2) of the *Sexual Offences Act* is constitutional; whether the mandatory minimum sentence of life imprisonment prescribed by Section 8(2) of the *Sexual Offences Act* jettisons the discretion of the trial court; whether the mandatory minimum sentence of life imprisonment prescribed by Section 8(2) of the *Sexual Offences Act* impeaches fair trial guaranteed by Article 50(2) and 25 (c) of *the Constitution*; and whether the sentence of life imprisonment imposed on the appellant is harsh and excessive.

Submissions

15. During the hearing of the appeal, the appellant was acting in person and relied on the written submissions that he had filed with brief oral highlights. The respondent was represented by Mr. Naulikha Prosecution Counsel who relied on the written submissions that had been filed with brief oral highlights.

16. The appellant confirmed that his appeal was against both conviction and sentence and submitted that the punishment provided by the provisions of Section 8(2) of the *Sexual Offences Act* is a mandatory maximum sentence. Further, that the mandatory nature of the sentence of life imprisonment denied him the right of a less severe punishment despite the fact that he was a first offender. The appellant further submitted that the provisions of Section 8(2) of the *Sexual Offences Act* offend the provisions of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) as the word "shall" confines Judges and magistrates to sentences pre-determined by the Legislature which offends the doctrine of separation of powers.

17. The appellant further submitted that the mandatory sentence of life imprisonment deprives the judicial power of discretion. Further, that the mandatory sentence of life imprisonment offends the power of discretion bestowed on Magistrates by Sections 216 and 329 of the Criminal Procedure Code. The appellant further submitted that the mandatory sentence of life imprisonment denies courts the opportunity to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by the particular circumstances. Further, that the sentence of life imprisonment offends his rights to life provided by Article 26(1) of *the Constitution*. It was the appellant's further submission that life imprisonment offends his rights to freedom, and the right not to be subjected to torture in any manner whether physical or psychological and or punished in a cruel, inhuman or degrading manner as provided by Article 29(d) and (f) of the Constitution.

18. The appellant further submitted that he was not medically tested to prove that he was the perpetrator. The appellant urged us to allow his appeal and impose a sentence that gives him an opportunity to be re-integrated back into the society.

19. The respondent opposed the appeal. Learned Prosecution Counsel, Mr. Naulikha submitted that the three key ingredients that are required for the offence of defilement to be proved were all present. Counsel submitted that there was proof that PW3 was a minor at the time of the commission of the offence. Counsel submitted that the prosecution through PW6 produced PW3's birth certificate which indicated that she was born on 18th November, 2002 and that she was therefore 10 years old when the offence was committed. Further, medical evidence produced by PW1 placed PW3's age at 10 years.

20. On penetration, counsel submitted that PW3 testified that she was defiled by the appellant. Further, medical evidence revealed that PW3's hymen was broken and that she had injuries consistent with a history of defilement. Regarding the identity of the perpetrator, counsel submitted that PW3 testified that the appellant joined her, PW4 and their brothers in grazing their cows. PW3 testified that she knew the appellant well by name and the offence happened in broad daylight. Counsel asserted that in the circumstances, it was not a case of identification but one of recognition. Counsel further submitted that PW3 maintained that she knew the appellant very well and confirmed that he defiled her on about 10 occasions and that it was only he who committed the offence. Counsel further submitted that the evidence of PW5 was that PW3 informed her that it was the appellant who defiled her. Counsel further submitted that in his defence the appellant did not dispute that he was known to PW3.

21. On the complaint that the P3 form was not admissible in view of the fact that it was not adduced by the maker, counsel submitted that the Section 77 (3) of the *Evidence Act* is not coached in mandatory terms.

In the circumstances, the learned Judge did not err in finding that the evidence on record was properly taken and failure to call the maker of the P3 form did not prejudice the appellant.

22. On the ground that the prosecution did not challenge the appellant's defence as per Section 212 of the Criminal Procedure Code, counsel submitted that the appellant raised an issue regarding a grudge between him and PW3's father (PW2). It was counsel's further submission that PW2 was not cross-examined on the issue of the existence of the said grudge and that it was therefore an afterthought. Counsel submitted that the 1st appellate court was right to have rejected the appellant's defence. Counsel urged this Court to dismiss the appeal on conviction and uphold the sentence meted out by the trial court and upheld by the 1st appellate court.

Determination

23. We have considered the record of appeal, the submissions, the authorities cited and the law. We discern four (4) main issues for consideration: whether the prosecution proved its case beyond all reasonable doubt; whether Section 33 as read with Section 77 of the *Evidence Act* was complied with; whether the defence was properly rejected; and whether the sentence meted out on the appellant by the trial court and upheld by the 1st appellate court was harsh and excessive.

24. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three key ingredients: the age of the victim, that there was penetration and the positive identification of the perpetrator. In the instant appeal, PW3 testified that she was ten years old. The P3 form indicated that she was 10 years old. Further, PW6 produced PW3's birth certificate which indicated that she was born on 18th November, 2002 and was therefore 10 years old at the time of the commission of the offence. We therefore find that the prosecution proved that PW3 was a minor aged 10 years old at the time of the commission of the offence.

25. On penetration, PW3 testified that the appellant defiled her on several occasions. Medical evidence produced by PW1 proved that upon examination of PW3 there was evidence of penetration. On the identity of the perpetrator, PW3 testified that the appellant defiled her on several occasions. It is notable that PW3 identified the appellant by name when she reported the matter to PW5. PW4 also testified that on several occasions, she and PW3 went to herd cattle together and on several occasions the appellant was present and sent her (PW2) away to graze cattle leaving him and PW3 alone together. It was her testimony that upon her return, she did not find them where she had left them. It is notable that the incident happened in broad daylight on the material days. It is also notable that the appellant did not dispute that he was known to PW3 and her family.

26. On the ground whether Section 33 as read with Section 77 of the *Evidence Act* was complied with, from the record the P3 form was produced by PW1 on behalf of her colleague, Dr. Machira who had examined PW3 and filled the P3 form.

27. Section 77(1) and (2) of the *Evidence Act* envisage such a situation and provide as follows:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistic expert, document examiner or geologist upon any purpose, matter or thing submitted to him for examination or analysis may be used in evidence.

(2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."

28. Dr. Anne Kabuthi (PW1), testified on behalf of her colleague, Dr. Machira who was unavailable to testify. PW1's evidence was that she was acquainted with Dr. Machira's handwriting which made it easy for her to recognize a document like the P3 form in issue. This Court in Joseph Mahende v Republic [2019] eKLR stated that:

> "Our interpretation of section 33 (d) of the *Evidence Act* as read with section 77(1) & (2) of the *Evidence Act*, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under section 48 of the *Evidence Act*. However, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under section 33 (d) of the *Evidence Act* and which evidence by dint of Section 77 (1) & (2)of the *Evidence Act*, is admissible and presumed as genuine and authentic."

29. It is notable that the appellant cross-examined PW1 who responded to all his questions. The appellant did not object to PW1 producing the medical report into evidence on behalf of her colleague. PW1 therefore ably discharged the task of ascertaining the contents of the P3 form. No prejudice was occasioned to the appellant by virtue of PW1 testifying on behalf of the maker of the P3 form. This ground of appeal therefore has no merit.

30. On the ground that the prosecution did not challenge the appellant's defence as per Section 212 of the Criminal Procedure Code, the appellant raised the issue that there was in existence a grudge between him and PW3's father who testified as PW2. It is notable that the appellant did not cross-examine PW2 on the alleged grudge which issue arose at the defence stage. From the voire dire examination, PW3 understood the need to tell the truth. We find that the defence did not raise an issue which necessitated the prosecution to adduce evidence in reply to rebut the appellant's defence. We therefore find that the 1st appellate court did not err in rejecting the appellant's defence. The appellant's appeal against conviction therefore fails.

31. On the sentence, the appellant submitted that the sentence of life imprisonment imposed by the trial court and upheld by the 1st appellate court was harsh and excessive and urged us to reduce it. We have considered the appellant's mitigation which was that:

> " I do not have parents. I fund (sic) for myself. I have a blind grandmother who depends on me. I pray for a non-custodial sentence to enable me assist the government while undertaking the sentence outside."

32. The appellant has urged us to reduce the life imprisonment imposed by the trial court and upheld by the 1st appellate court. The sentence of life imprisonment imposed on the appellant by the trial court and upheld by the 1st appellate court was lawful and in accordance with Section 8(2) of the *Sexual Offences Act*. From the record, the appellant preyed on a 10- year-old girl and defiled her no less than on 10 occasions. In our view the appellant does not deserve clemency from us.

33. In the circumstances, we find that the sentence imposed on the appellant cannot be said to be excessive, and was in our considered view, justified. We find that the learned Judge did not err in upholding both conviction and sentence.

34. Accordingly, we find this appeal devoid of merit and the same is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF AUGUST, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR