Wamalwa v Republic (Criminal Appeal 276 of 2019)
[2024] KECA 1201 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1201 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 276 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

SEPTEMBER 20, 2024

BETWEEN

ELIUD NYONGESA WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 16th November, 2017 in HCCRA No. 20 of 2015)

JUDGMENT

1. The appellant was charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Kimilili Senior Resident Magistrate's Court Criminal Case No. 736 of 2011. It was alleged that on 10th June, 2011, he unlawfully and intentionally caused his penis to penetrate the vagina of MNW, a child of 7 years.

2. After pleading not guilty to the charge, the case proceeded to full trial in which the prosecution called six witnesses; and the appellant gave sworn evidence and called one witness. At the conclusion of the trial, the trial court found the charges proved, convicted the appellant and sentenced him to life imprisonment.

3. The appellant, who was dissatisfied with the conviction and sentence, appealed to the High Court. In a judgment dated 16th November, 2017, the High Court (Aroni, J., as she then was) dismissed his appeal and affirmed the conviction and sentence.

4. Still dissatisfied, the appellant has filed this second appeal before this Court. Before setting out the standard of review and applying it to the appeal, we set below, for context, the brief facts as they emerged in the two courts below.

5. Evidence was led in the trial court that on 10th June, 2011, the complainant, who testified as PW2, left school for lunch at 1 pm. On the way home, she met the appellant who took her to his house with the promise of a mandazi. The appellant kept her in his house the whole night, during which he defiled her and defiled her again the following morning. In both occasions, the complainant said she felt a lot of pain. He then went with her to Kimilili town where PW3, the complainant's elder sister, saw them. PW3 Inquired where her sister had slept the previous night. The complainant told her that she had slept at the appellant's house and that she had been defiled while there.

6. PW3 had been looking for her sister since the previous night when she did not come back home. Alarmed by the new information she was getting from the younger sister, PW3 took the complainant to their elder sister (PW4) and eventually to their mother who examined her and noted that the complainant had injuries and was walking with difficulty. She took her to hospital. PW1 reported the matter to the police but did not follow up the matter till 20th June, 2011. On the witness stand, PW3 explained that she delayed to follow up because the appellant had disappeared.

7. PW6, a Clinical Officer examined the complainant and filled the P3 form. He noted that the vaginal area had pus cells though there was no hymen, no bruises and no tears and concluded that the minor had been defiled.

8. The Appellant denied the charges and alleged that he had been framed. He called one witness. However, on the witness stand, the witness said she did not know anything about the charges the appellant was facing. She was, therefore, of no benefit to the appellant or his case.

9. Both the trial court and the High Court were persuaded that the charge was proved. Before us, the appellant has raised four substantive grounds of appeal:

    1. That the first appellate court erred in points of law by failing to note that the medical evidence adduced at trial was questionable and insufficient to rely on as the basis of a conviction.

    2. That the learned trial Judge erred in points of law by failing to hold that the important elements of age and penetration were not conclusively proved.

    3. That my Lords, the voir dire examination conducted by the trial court did not meet the threshold required by law to make it reliable.

    4. That sentence was excessive and harsh.

10. The appeal before us were argued by way of written submissions and brief oral highlights. The appellant appeared in person for the plenary hearing while Mr. Oyiembo, a Senior Prosecuting Counsel, represented the respondent.

11. This is a second appeal. As a second appellate court, our remit is circumscribed. We are limited to consideration of matters of law only by dint of section 361 of the *Criminal Procedure Code*. We are 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. (See *Chemogong v R* [1984] KLR 61; *Ogeto v R* [2004] KLR 14 and *Koingo - v - R* (1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See *Reuben Karari S/o Karanja v R* [1956] 1 E.A.C.A. 146).

12. We begin by noting, true to one of the appellant's complaints, that although the trial court conducted a voire dire respecting the complainant, who was, evidently, a child of tender years, after concluding that she did not understand the meaning of oath and could only give an unsworn statement, it was incumbent upon the trial court to permit the appellant to cross-examine the witness. As this did not

happen, the testimony of the minor cannot be considered. The question remains whether there was sufficient evidence sans the testimony of the complainant to sustain a conviction.

13. The appellant complains that the medical evidence was insufficient to prove penetration. We simply do not think so. The Clinical Officer, who examined the child, testified that he found pus cells in the child's private parts and formed the opinion that she had been recently defiled. The Clinical Officer produced both the P3 form and the treatment notes. This evidence was circumstantially corroborated by the testimonies of PW1 (the mother of the complainant) and PW3 and PW4 (the sisters of the complainant) who both saw the complainant immediately after her ordeal and noted that she had difficulties walking. There was, thus, sufficient evidence upon which the two courts below could rationally conclude that penetration had been proved beyond reasonable doubt.

14. Turning to the issue of age, we simply note that while it is true no birth certificate or age assessment report was produced in evidence, there is no requirement that they be produced in order to prove the age of a minor in defilement cases. Just like any other fact in criminal trials, age can be proved by any credible evidence which is admissible. This Court in *Edwin Nyambogo Onsongo v Republic* [2016] eKLR stated as follows on the proof of age:

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

15. In the present case, the P3 form identified the approximate age of the complainant as 7 years old. PW5, the Clinical Officer who examined the complainant also testified that he approximated her age as 7 years old. Similarly, the complainant's adult sister (PW4) testified, without contestation, that the complainant was 7 years old. Similarly, her other sister, PW3, testified that she (PW4) was 14 years old and in standard 7 while the complainant was her younger sister and in standard 2. The cumulative effect of all these pieces of evidence is that the age of the minor was established as 7 years old or at least below twelve years old – which is the cut off age for charges under section 8(2) of the *Sexual Offences Act*.

16. The final grievance by the appellant is that the sentence imposed - life imprisonment – is excessively harsh, and, unconstitutional by virtue of being a mandatory minimum sentence. The appellant was correct that at the time this appeal was argued our jurisprudence on mandatory minimum sentences and indeterminate life sentences had taken a new trajectory where this Court had issued a series of decisions impugning the constitutionality of both. The trend was attributable, if only indirectly, to the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 (Muruatetu 1) and found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases such as *Maingi & 5 others v Director of Public Prosecutions & Another* (*supra*) (Odunga J. as he then was) and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was). However, in a recent decision, to wit, *Republic v Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), the Supreme Court has held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional. Following the doctrine of stare decisis, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

17. However, there is a second aspect of the sentence which the appellant complained against and which, the *Joshua Gichuki Mwangi* Case at the Supreme Court did not expressly address. This is the question whether a sentence of life imprisonment is unconstitutional due to its indeterminate nature. This

Court has so held in *Julius Kitsao Manyeso v Republic Malindi* (*supra*) and *Evans Nyamari Ayako v Republic*, Criminal Appeal No. 22 of 2018. In both cases the Court held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person. In the latter case, the Court translated life imprisonment to a term sentence of thirty (30) years.

18. This aspect of the case – challenging the constitutionality of the indeterminate sentence of life imprisonment under Articles 28 (on human dignity) and 29(f) (on inhuman and degrading treatment or punishment) of the *Constitution* - is different from challenging the sentence imposed as unconstitutional for fettering the discretion of the sentencing court on separation of powers grounds. However, the appellant has raised the matter for the first time on second appeal. As the Supreme Court reiterated in the self-same *Joshua Gichuki Mwangi* Case, this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court. Differently put, while this Court may consider the constitutionality of the indeterminate sentence of life imprisonment in a properly presented case, it can only do so where the constitutional question has been preserved for determination by this Court by first raising it in the High Court. The constitutional argument cannot be raised for the first time on second appeal.

19. The upshot is that the appellant's appeal fails in entirety and we must dismiss it. We hereby do so.

20. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR