Charles & another v Republic (Criminal Appeal 38 of 2019)
[2024] KECA 1902 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1902 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 38 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 25, 2024

BETWEEN

FRED MOSETI CHARLES ..... 1ST APPELLANT

DANIEL MANG'ENG'A MOSETI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Nyamira (Maina, J.) dated 8th November, 2018 in HCCRA No. 48 & 49 of 2017)

JUDGMENT

1. The 1st appellant, Fred Moseti Charles, and the 2nd appellant, Daniel Mang'eng'a Moseti, were the accused persons in the trial before the Senior Principal Magistrate's Court at Keroka in Criminal Case No. 1244 of 2015. They were charged with separate counts of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence with regard to the 1st appellant were that on the 7th day of September, 2015, at Nyamira County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of JSG (name withheld), a child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

2. The particulars of the offence with regard to the 2nd appellant were that on the 7th day of September, 2015, at Sub County within Nyamira County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of JSG , a child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*

No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

3. The appellants pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellants of the main charge and sentenced them to each serve twenty (20) imprisonment as provided for by the law.

4. The appellants were aggrieved by the decision of the lower court and filed two separate appeals, which were later consolidated, against the conviction and sentence before the High Court.

5. The High Court (Maina, J.) dismissed the consolidated appeal and upheld the conviction and sentence of each of the appellants in a judgment dated 8th November, 2018.

6. The appellants were, again, dissatisfied with the decision of the High Court and have lodged the present appeal. Acting pro se, both appellants have raised separate grounds in their Memorandum of Appeal. The 1st appellant has raised four (4) grounds which are that:

    1. The two courts erred in law in relying on unproduced/illegally procedurally produced document (birth certificate) to convict the appellant.

    2. The two courts erred in law in not making a finding that the age of the complainant was not proved beyond reasonable doubt.

    3. The two courts erred in law in charging the two accused persons with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. Yet the ingredients proved are for gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006, curtailing the appellant's absolute constitutional right pursuant to Article 50(2)(p), 24(1)(e), 29(f) of *the Constitution*. Hence unfair trial.

    4. The two courts erred in law in not making a finding that the mandatory nature of minimum mandatory sentences in the *Sexual Offences Act* No. 3 of 2006 is unconstitutional and not warranted on plea.

7. On the other hand, the 2nd appellant has equally raised four (4) grounds which are that:

    1. The sentence was harsh and excessive.

    2. The learned trial magistrate and the learned judge felt bound by the provision of the *Sexual Offences Act* on discretion.

    3. The mandatory minimum sentence the appellant is serving is unconstitutional in that it contravenes the principles of fair trial and is against sentencing policy guidelines.

    4. The appellant was a first offender and not one of the worst kind.

8. A summary of the evidence that emerged at the trial through four (4) prosecution witnesses, which evidence was subjected to a fresh review and scrutiny by the High Court, is as follows.

9. The survivor (complainant) in this case was 14 years old at the time of the incident, and a class seven (7) pupil at (name withheld) Primary School. She testified as PW1. She told the court that both appellants were her boyfriends and she used to have sexual intercourse with them. On the material day, the 1st appellant informed her that the 2nd appellant was looking for her and that she should go to his house. She did as she was told but did not find the 2nd appellant at his house. Instead, she found the 1st appellant who told her to go to the bedroom whereby they both removed their clothes and the 1st appellant used his penis to penetrate her vagina and they had sex. Later on, the 2nd appellant came and the 1st appellant

left and went to speak to him outside the house. After sometime, the 2nd appellant came from outside and got into the bedroom, removed his clothes, inserted his penis into her vagina and had sex with her. Thereafter, they bought her soda, mandazi and chips; and spent the night in the house. The following morning, they gave her kshs. 200/= and she left for her sister's house in Kisii. Upon arrival, her sister inquired about her whereabouts and she told her where she slept and what had happened. On hearing what had transpired, her sister went with her to the chief and reported the matter. The appellants were arrested and she was taken to Kijauri Level 4 Hospital for treatment. Afterwards, they went to Manga Police Station where she was issued with a P3 form.

10. AM, the complainant's mother, testified as PW2. She told the court that on 8th September, 2015, at 4.00pm, PW1 informed her that the appellants took her to their house and had sexual intercourse with her. She then took PW1 to Chepngombe Sub-District Hospital whereby it was found that she had been defiled and was referred to Borabu District Hospital for further treatment. She also testified that both appellants were her neighbours.

11. PW3 was Samson Gichaba, a clinical officer from Chepngombe Health Center. He testified that on 29th February, 2016, PW1 went to the Health Center to have her P3 form filled. She alleged that she had been defiled on 7th September, 2015, by two people who were well known to her; and was treated at Borabu Sub-County Hospital. PW3 confirmed that her treatment notes from Borabu Sub-County Hospital showed that her external genitalia and labia were normal and her hymen was not intact but was also not freshly broken. In addition, a high vaginal swab showed existence of pus cells and yeast cells; whereas the urinalysis showed the presence of pus cells. In the end, the conclusion made was that she had been defiled.

12. The last witness was Constable Samson Ole Tome, the investigation officer in the case. He testified that on 9th September, 2016, at 6.45pm, members of the public took the appellants to the police station on the allegation that they had defiled PW1. He re- arrested them and recorded the complainant's statement. Thereafter, he took her to Borabu Sub-District Hospital for examination and P3 form was also filled. Later, he charged the appellants.

13. When they were placed on their defence, the 1st appellant gave unsworn testimony and told the court that he had nothing to say in his defence. He called no witnesses. The 2nd appellant gave sworn testimony and denied the charge against him. Further, he informed the court that he would call two witnesses but on the day of the defence hearing, he told the court that the said witnesses had refused to come and testify. Thus, he closed his case.

14. The appeal before us was argued by way of written submissions by both parties. During the virtual plenary hearing, the appellants appeared in person, whereas learned prosecution counsel, Ms. Ogada, appeared for the respondent. All the parties relied on their submissions. During the plenary hearing, the 2nd appellant clarified that his appeal was only against sentence. The 1st appellant insisted on appealing against both conviction and sentence.

15. First, the 1st appellant contended that the record showed that PW1's birth certificate was not produced as an exhibit and that it was, therefore, an error for the two courts below to rely on it. Without the production of the birth certificate, the 1st appellant argues, the age of the complainant was not established beyond reasonable doubt. This argument, the 1st appellant argued, is fortified by the variations in the name of the alleged complainant which raise reasonable doubt about her identity. The 1st appellant pointed out that the charge sheet had the name as "JSG"; the un- produced birth certificate had the name as "JS"; while the complainant's mother, PW2, referred to her as "Dorcas" in her testimony.

16. Further, the 1st appellant argued that the clinical officer assessed the age of PW1 to be between 14-18 years but failed to explain to the court how he made that assessment. Thus, according to the appellant, that fact was not proved. To buttress his argument, the appellant contended that PW1 conceded that she used to enjoy having sex with the two appellants (who she also referred to as her boyfriends) on several occasions prior to the time of the incident with regard to this case. Thus, the appellant argued that PW1's statement was not consistent with a girl aged 14 years old. According to the appellant, PW1 was an adult who managed to enjoy sex with two men the whole night without injuries or even reddening of the labia minora as shown through the results of the medical examination.

17. Second, the 1st appellant contended that the P3 form indicated that "Job Ombuna" aged 18 years was the victim and he was examined on 19th December, 2015. The 1st appellant argued that this demonstrates that penetration was not proved beyond reasonable doubt.

18. Third, the 1st appellant contended that it was an error for both of them to be charged with defilement instead of gang rape, which attracted a lesser minimum mandatory sentence of fifteen (15) years. As such, he was entitled by law to a lesser punishment pursuant to Article 50(2)(p) and 25(c) of *the Constitution*; and which right could not be limited.

19. Lastly, the 1st appellant submitted that the mandatory nature of the sentence meted upon him was unconstitutional and not warranted. In this regard, he argued that he was 18 years old during the time of the incident and a first offender. He also argued that the sexual intercourse seemed to have been by "consent." He was also remorseful and has made exceptional progress towards rehabilitation from the time he was arrested, which was sufficient term to meet the requirement of deterrence and rehabilitation. If all these factors are considered, he argued, it would become obvious that the sentence imposed of twenty years imprisonment was unduly harsh and excessive. Accordingly, he prayed that if this Court dismisses his appeal, then it should mete out a lenient and less severe sentence; and also consider time already served.

20. As regards the 2nd appellant, the totality of his grounds of appeal was strictly on the sentence. It was his contention that the two lower courts failed to exercise their discretion in sentencing and felt bound by the provisions of the *Sexual Offences Act*. In the same breath, he contended that the two lower courts failed to consider his mitigation and the fact that he was a first offender and of extreme youthfulness since he was only twenty years old at the time of the offence. In any event, he argued that the sentence was harsh and excessive in the circumstances given his youthfulness; his expressed remorse; his capacity to reform; and the fact that he was a first offender. He also argued that the mandatory nature of the sentence was unconstitutional.

21. Opposing the appeal, Ms. Ogada reminded the Court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*.

22. First, counsel submitted that severity of sentence is a matter of fact and not of law; and that interference with regard to severity of sentence only applies where the same has been enhanced by the High Court or unless the subordinate court had no power to pass the sentence. Accordingly, counsel argued that both appellants should not be allowed to canvas this ground.

23. Second, counsel submitted that the two lower courts did not impose the sentences they did because they were bound by the Sexual Offence Act but because of the weight of the evidence before them and the mitigation received.

24. Third, counsel submitted that the age of the minor was proved beyond reasonable doubt through the complainant's birth certificate which is an official document; and its production by the complainant was not unprocedural.

25. Fourth, counsel contended that the appellants were charged with defilement and not gang rape, based on the facts given by the complainant, which was that the appellants defiled her at different times. That is to say, the 1st appellant defiled the complainant in the absence of the 2nd appellant and left the bedroom. Thereafter, the 2nd appellant went in the bedroom and also defiled the complainant. Thus, the charge preferred was not because it was excessive or because it had a severe punishment. Rather, it was because the prosecution could prove the facts in accordance with the offence.

26. Lastly, on the issue of the mandatory nature of the sentence meted out and its unconstitutionality, counsel submitted that the right of an accused person to a fair trial must be balanced with the victim's right to access justice and public interest. Accordingly, counsel prayed that the appeal be dismissed and the decision of the learned judge on conviction and sentence be upheld.

27. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

28. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, three issues fall for determination on this second appeal:

    a. First, whether the prosecution proved the age of the complainant as required by the law, and in particular, whether the two lower courts were entitled to rely on the birth certificate as proof of the age of the complainant.

    b. Second, whether penetration was proved in view of the "wrong" P3 form attached to the record of appeal;

    c. Third, whether charging the appellants with serial defilement charges as opposed to gang rape was an error on the part of the prosecution which prejudiced the appellants; and

    d. Fourth, whether the mandatory nature of the sentence meted out was unconstitutional; and whether the sentence was harsh and severe in the circumstances.

29. On the first issue, a perusal of the record bears out the complaint by the 1st appellant that the birth certificate was never produced as an exhibit. PW1, the Complainant, identified it and it was marked for production, but it was never produced. It is trite that a document that has been marked for production but not produced in evidence does not become evidence upon which a court can base its decision. See Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2015] eKLR. It was, therefore, an error for the two courts below to rely on the birth certificate in their analysis.

30. However, it is also true that the age of the complainant on a charge of defilement is not only proved by way of a birth certificate or age assessment report. The age of a victim of defilement may be proved in various ways as was stated by this Court in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR that:

> "... 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."

31. In the present case, the complainant was a clearly intelligent 14- year old who stated under oath her age. She was not cross- examined on it. Neither was her mother who confirmed her age as 14-years old. Finally, the medical expert who filled the P3 form also established the age as 14-years old. This mutual corroboration established beyond reasonable doubt, without the need to rely on the un-produced birth certificate, that the complainant was, indeed, fourteen years old.

32. This mutual corroboration also responds to the complaint by the 1st appellant that the varying formulations of the name of the complainant raises reasonable doubt about both the age and the identity of the complainant. In fact, it does not. It is common for Kenyans to use different permutations of their name especially depending on whether they choose to use their surname or not. It is also common for Kenyans to have nicknames which they use at home but which are not their official names. In this case, it seems fairly obvious that "JSG" and "JS" are one and the same person. Similarly, as PW2 explained without challenge, "Dorcas" was the name they used to refer to the complainant at home. Therefore, nothing turns on this creative complaint by the 1st appellant.

33. The second issue the 1st appellant raised is the curious case of the P3 form of one "Job Ombuna" appearing in the record of appeal. There are two responses to this odd complaint. The first one is that it is being raised for the first time on second appeal – which in itself could be an indication that at the first appellate level the correct P3 form was in the record of appeal. The second response is that we have perused the original file and confirmed that, in fact, the P3 form of the complainant is on file; and a copy of it was furnished on the appellant during trial. Needless to say, therefore, the latter- day complaint by the 1st appellant is a mischievous attempt to rely on an inadvertent mistake in compiling the record of appeal.

34. Thirdly, was it an error to charge the appellants with serial counts of defilement as opposed to gang rape/defilement under section 10 of the *Sexual Offences Act* which, curiously, carries a lower minimum sentence of fifteen (15) years? In short, the answer is in the negative. Two reasons recommend themselves. First, this ground of appeal is not properly before us. This is because it was not first raised at the High Court, and was, therefore, not preserved for our jurisdiction. Second, as the respondent submitted, the circumstances here as borne out by the trial record, did not establish the ingredients of gang defilement. This is because each of the two appellants individually defiled the complainant alone, and in the absence of the other. They did not jointly defile the complainant; rather, they serially did so.

35. We will now come to the final issue: sentence. The appellants complain against the mandatory nature of the minimum sentence terming it unconstitutional for not permitting individualized mitigation. In the circumstances of the case, they both complain that the minimum sentence was harsh and excessive since they were both of extreme youth; first offenders; and were remorseful. Additionally, they showed great capacity for reform and rehabilitation.

36. All these extenuating factors are true. It is also true that our jurisprudence had taken a turn to impugning the constitutionality of the minimum sentences prescribed in the *Sexual Offences Act*. Unfortunately for the appellants, that jurisprudential trajectory was halted by the recent decision by the Supreme Court in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024). In that case, the Supreme Court held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences.

37. The Supreme Court held:

> " 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
>
> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

38. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellants were convicted under section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is twenty (20) years imprisonment. That was the sentence imposed on the appellants. Given the Supreme Court's binding precedent, we cannot interfere with that sentence whatever our views on the extenuating circumstances.

39. The upshot is that the appeal herein must be dismissed in its entirety, and we hereby do so.

40. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR