Gachuha v Republic (Criminal Appeal 39 of 2018)
[2024] KECA 1901 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1901 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 39 OF 2018

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

OCTOBER 25, 2024

BETWEEN

JOHN KAMAU GACHUHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Naivasha (Meoli J.) delivered on 25th April 2023 in Naivasha Criminal Appeal No. 156 of 2015 Arising from the original trial in Naivasha Criminal Case No. 24 of 2014)

JUDGMENT

1. John Kamau Gachuha, the Appellant herein, has challenged the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement and sentence of twenty (20) years imprisonment imposed by the Senior Resident Magistrate at Naivasha (hereinafter 'the trial Court'). The particulars of the offence were that between 7th September 2014 to 15th September 2014 in Naivasha sub- county within Nakuru County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of MWM, a girl aged 15 years old. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The prosecution called four (4) witnesses to testify in the ensuing trial, while the Appellant gave unsworn testimony. The victim, MWM, (PW2) first testified on 31st October 2014, when she was stood down since she was "turning to be a hostile witness" and that before she was declared so "she needed guidance and counselling". PW 2 was recalled on 29th May 2015 when she testified that she was 15 years old, was born on 13th October 1999 and was in class 7. She narrated that on 7th September 2014, while she was at her sister's house at Kabati, she met the Appellant and they became friends. Further, that the Appellant promised to marry her though, he knew she was going to school. She thereupon stayed

in the Appellant's house for one week from 7th September 2014 and they had sex two times without protection. She testified that the Appellant had married her.

3. PW2 further stated that on 15th September 2014, she went to her sister's house since she was having a headache, and that her sister walked out and came back with Administration Police officers who arrested her. Her sister then went to where the Appellant worked with the Administration Police officers and the Appellant was brought to the police station, where PW2 identified him as the person she was married to for one week. During cross-examination, PW2 stated that she was afraid at first to testify because she had been threatened by the Appellant not to tell the truth since he would be taken to prison, but reiterated that she had sex with the Appellant twice, and that the Appellant inserted his penis inside her vagina and penetrated her vagina without protection.

4. MNM, the victim's sister, testified as PW 3 and recalled that on 7th September 2014 she sent PW 2, whom she was living with, to the shops and that PW2 never came back. After inquiring from her sister and mother as to PW2' whereabouts, she reported her disappearance at the Administration Police offices at Kabati on 8th September 2014. On 15th September 2014, in the morning while going to work, she was told that her sister was living with someone at a house in Kabati, and went to the house in the company of two (2) AP officers where they found PW2 alone. PW 2 informed them that she was living with her husband one Kamau, but did not know where he worked. PW 2 was taken to the AP offices and then to Naivasha District Hospital, where she was examined and found to have been defiled and contracted an infection. PW3 later met a lady who stated that she was the former of wife of Kamau, and pointed out the butchery where he was working. The Appellant was thereafter arrested and he admitted the house where PW 2 was found was his house.

5. Dorcas Wandaje Osoro (PW1), a Clinical Officer attached at Naivasha District Hospital produced the P3 form for PW2, who she examined on 16th September 2014 and she noted that PW2 had a broken hymen, a healing laceration at the left labia minora and a whitish foul-smelling discharge from vulva. PW 1 testified that her findings were consistent with recent sexual act. CPL Audrey Cherono (PW 4), who was based in Naivasha Police Station was the investigating officer, and she testified that on the evening of 15th September 2014, she was called by the Officer Commanding Station (OCS) about a case that had been reported of defilement where the suspect and victim had been arrested at Kabati estate. She then interrogated PW2 and the Appellant and established that PW2 left her sister's house for the Appellant's house, where the two were living as husband and wife from 7th September 2015 to 15th September 2015. In addition, that PW2 had been promised marriage by the Appellant and was defiled without protection. PW 2 was taken to hospital together with the Appellant, and on examination, PW2 was found to have been infected with a sexually transmitted disease, and her sister bought her medicine. PW 2 was locked in the cells as she was a child in need of protection. PW 4 produced PW 2's immunization card which showed PW 2 was 15 years old.

6. The Appellant in his defence gave unsworn evidence as DW 1, that he worked in a butchery, had a wife who was expectant, with whom he had a disagreement in September 2013 and she left the Appellant's house. He then started a relationship with PW3 and after some time, they could not continue with the relationship. PW3 then told him that her father wanted to see him, and when he got to her house he was arrested and escorted to Kabati police station. At the police station, he found PW3's younger sister and was charged with the offence, which he denied since the charges were not true. He told the Court that PW3 asked him to refund Kshs 6,000/- she gave the police to arrest him, and claimed the offence was "planted" on him.

7. The trial Magistrate (Hon. E. K. Kimilu SRM) delivered a judgment on 30th September 2015, and in convicting the Appellant for the offence of defilement found that the prosecution had proved the age of

the complainant from the medical certificate to be 15 years, and the medical records tendered in Court showed clearly that the complainant had been defiled. In addition, that the complainant's testimony of penetration by the Appellant was corroborated by the fact that she was found inside the Appellant's house, and after he was arrested, the complainant positively identified him as the perpetrator. The Appellant was aggrieved by the findings of the trial Court and proffered an appeal to the High Court being Naivasha Criminal Appeal No. 156 of 2015.

8. The High Court (C. Meoli J) delivered its judgment on 16th March 2018, and found the prosecution evidence to be reliable and credible, and that the trial Magistrate properly considered the evidence and defence in finding that the Appellant penetrated the complainant. The first appellate Court nevertheless found that the trial Magistrate did not follow the correct procedure by not seeking the Appellant's reaction or requiring him to plead afresh after two amendments were made to the charge sheet on 31st October 2014 and on 10th November 2014, changing the age of the complainant from 13 to 15 years and the date of offence to state that the same occurred between 7th and 15th September 2014 respectively. However, that the omissions were minor and could not vitiate an otherwise regular trial, and there was no evidence that the omissions occasioned prejudice against the Appellant as he clearly understood the charges facing him. The first appeal was accordingly found to be devoid of merit and dismissed.

9. The Appellant being dissatisfied with the decision of the High Court, has proffered the instant appeal, in which he urged three grounds of appeal set out in submissions dated 15th February 2024 which he relied on during the hearing of the appeal, namely:

    1. The learned appellate Judge erred in law by upholding the Appellant's conviction and sentence of 20 years' imprisonment but failed to note that the age of the complainant and penetration were not proved in evidence.

    2. The learned appellate Judge erred in law by upholding the Appellant's conviction and sentence of 20 years' imprisonment but failed to note that, this evidence was obtained under duress, through inducement and threats thus her evidence remained questionable therefore inadmissible.

    3. The learned appellate Judge erred in law by upholding the provided mandatory sentence of 20 years' imprisonment but failed to note that the Appellant was a first offender, was a young man thus the Court could have awarded a lesser sentence in consideration of the provisions of section 216 and 329 of the *Criminal Procedure Code* and Article 50 (1)(2)(p) of *the Constitution* and the policy sentencing guidelines (2016) and the circumstances of this case.

10. We heard the appeal on this Court's virtual platform on 29th April 2024, and the Appellant, John Kamau, who was present in person appearing virtually from Naivasha Maximum Prison, informed the Court that he had filed written submissions dated 15th February 2024 which he would rely on. Learned prosecution counsel, Mr. Omutelema, appeared for the Respondent and relied on his written submissions dated 12th April 2024.

11. This is a second appeal. The role of this Court as a second appellate Court was set out in Karani vs R (2010) 1 KLR 73 as follows:

> "...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 decision of the superior Court on fact unless it is demonstrated that the Trial Court and the first appellate Court consider 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 decision, in which case such omission or commission would be treated as a matter of law."

12. The first legal issue raised by the Appellant was that of proof of the offence of defilement to the required legal standard. This issue was urged by the Appellant from two perspectives. The first was that the prosecution stood down PW2 and therefore this Court has a duty to take the evidence of PW2 with caution, and in addition, that her evidence was obtained through duress, inducements, and threats. The second was that absent the evidence of PW2, the totality of the evidence on age and penetration did not prove the offence of defilement beyond any reasonable doubt.

13. On the first aspect, the Appellant submitted that from the beginning, the victim was not willing to testify against him as demonstrated from her testimony, and her evidence was therefore not admissible under Article 50 (4) of *the Constitution*, under which it was clear that the evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded, if the admission of that evidence renders the trial unfair or would otherwise be detrimental to the administration of justice. It was the Appellant's submission that the victim's evidence, taken under duress, after she was forced to sleep in police cells and forced to record the statements against her will was not admissible, and should be excluded.

14. Mr. Omutelema on his part submitted that both the trial Court and first appellate Courts were satisfied that PW2 was a credible witness and was telling the truth. Therefore, both Courts could therefore safely act on her evidence of identification of the perpetrator and the defilement. In addition, PW2's evidence was corroborated in material particulars by the evidence of PW3, PW1 and PW4 and reliance was placed on the decision by this Court in the case of Karanja & Another vs Republic (1990) KLR that where there is additional evidence rendering it probable that the story of the witness is true it is reasonably safe to act upon it, and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of the accused's connection with the crime.

15. Mr. Omutelema further submitted that PW2 was at first reticent about testifying against the Appellant and was stood down, and that when she resumed testifying she gave reasons for her reticence. In addition, that the evidence of a refractory witness may be relied upon as corroborative of other evidence as held in Daniel Odhiambo Koyo vs Republic [2011] eKLR. Lastly, that PW2 was never declared a hostile witness and her evidence was corroborated in material particular thus making the same reliable.

16. We note that the Appellant has relied on Article 50 (4) of *the Constitution* to exclude the evidence tendered by PW2. The said sub- Article provides that evidence that is obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. There are three requirements to be established for evidence to be excluded under Article 50(4). The first is that the evidence was obtained as a consequence of a constitutional violation. Such evidence can be procured by a private person or the state. Secondly, that the state intends to use it in the prosecution of an accused person. Thirdly, that the admission of the evidence would render the trial unfair or be otherwise detrimental to the administration of justice.

17. The considerations that the Court takes into account in the admission of such evidence were explained by Lord Cooper in the Scottish case of Lawrie v Muir (1950) JC 19 at 26 as follows:

> "... the law must strive to reconcile two highly important interests which are liable to come into conflict— (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence

> bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground"

18. Lord Cooper concluded that an irregularity in the collection of evidence did not necessarily render the evidence inadmissible but it did need to be 'excused' before the evidence could be admitted. Further, that whether an irregularity could be excused or not depended upon its nature, the circumstances and 'in particular, the discretionary principle of fairness to the accused'.

19. Similarly, the Canadian Supreme Court opined as follows in R. v. Collins, [1987] 1 S.C.R. 265, as regards the test as to whether the admission of such evidence at trial would bring the administration of justice into disrepute:

> "Since the concept of disrepute involves some element of community views, the test should be put figuratively in terms of the reasonable person: would the admission of the evidence bring the administration of justice into disrepute in the eyes of the reasonable person, dispassionate and fully apprised of the circumstances of the case. A judge's discretion under this test is thus not untrammelled, for he should not render a decision that would be unacceptable to the community, provided the community is not being wrought with passion or otherwise under passing stress due to current events."

20. In the present appeal, the Appellant submits that PW2 gave her evidence under duress, inducements and threats. It is not clear what fundamental rights of PW2 are alleged to have been breached in the process, since the law clearly provides for the procedures to be followed when a witness becomes difficult during a criminal trial. In this respect, a witness is declared hostile when he or she contradicts their statement, and the party who has called the witness may apply to cross examine the witness so as to demonstrate that the witness is not reliable. The evidence of a hostile witness is treated with caution and a conviction cannot be supported solely by such evidence. See in this respect the decision by this court in Abel Monari Nyanamba and Another vs. Republic, [1996] eKLR.

21. A refractory witness on the other hand, is an uncooperative witness who either refuses to be sworn, or having been sworn refuses to answer questions or produce evidence required of him or her. Under section 152 of the *Criminal Procedure Code*, where a witness refuses to cooperate, a court may adjourn the proceedings for a period not exceeding eight days during which the witness may be committed to prison, unless the witness consents to do what is required. The Court should also take into consideration a refractory witnesses refusal to cooperate when evaluating the probability and reliability of the witness as held in Daniel Odhiambo Koyo vs Republic [supra].

22. It is notable in this respect that when PW2 eventually testified, she explained her reluctance to initially testify as resulting from the Appellant's intimidation. The record in this respect therefore indicates that while PW2 was initially a refractory witness, she later voluntarily testified, and that she was never declared to be a hostile witness. Nevertheless, PW2's evidence was in this respect corroborated in the material particulars by the evidence of PW1 and PW3.

23. The second aspect of proof of the offence challenged by the Appellant was that the evidence of the victim was contradictory, and could not be used to convict him. Instances given were that she stated that she was 17 years old, when the P3 form, the charge sheet and the medical reports showed that she was 15 years. Furthermore, that her evidence on penetration was untruthful and should not be relied upon. Additionally, and while citing various decisions including Francis Omroni vs Uganda, Criminal Appeal No. 2 of 2000 and Kaingu Elias Kasomo vs Republic, Malindi Criminal Appeal No. 504 of 2010, that the prosecution did not prove the age of the victim to the required standard, and no birth certificate was produced to prove age.

24. The Appellant further submitted that PW2 was no longer in school and could have as well attained the age of maturity, and her character portrayed her as a person well versed and who knew what she wanted. He made reference to the case of Eliud Waweru Wambui vs Rep [2019] eKLR in this regard. Lastly, the Appellant submitted that neither PW 2 nor PW1 nor any other witness including the medical evidence supported the "theory" that PW 2 was defiled by the Appellant, and that from the evidence of PW1, the victim did not have any bruises on her genitalia, and there was no reason recorded in the proceedings to show why the Court was satisfied that PW2 was truthful. Therefore, in the absence of any other evidence, the broken hymen was not conclusive proof of penetrative sexual intercourse.

25. While making reference to the evidence of PW1, PW2 and PW3, Mr. Omutelema on his part submitted that both the trial court and the first appellate Court examined and evaluated the evidence and rightly concluded that there was overwhelming evidence of penetration. Counsel opined that the first appellate Court also re-examined and re- evaluated the identification evidence and found that the Appellant was well known to the complainant and PW3, and that the Appellant was with the complainant for one week, during which period he alleged she was his wife and had sexual intercourse with her twice.

26. Furthermore, that the age of the victim was proved to be fifteen (15) years old at the time of the incident since PW2 told the court she was 15 years old and that she was born on 13th October 1999; PW3, the victim's sister, confirmed this testimony and produced the PW2's child immunization card as Exhibit 2 in the trial Court, which indicated that the child was born on 13th October 1999; and on 15th September 2014, PW2 was also taken for age assessment at Naivasha District Hospital and found to be 15 years old and the report produced as Exhibit l(c).

    Therefore, that the totality of the above evidence was sufficient to prove PW2 was a child aged 15 years, which evidence was also re- evaluated by the first appellate Court and the same finding made. Mr. Omutelema submitted that both the trial and first appellate court was satisfied that PW2 was a credible witness, and both Courts could therefore safely act on her evidence of identification of the perpetrator and the defilement. Counsel reiterated that PW2's evidence was also corroborated in material particulars by the evidence of PW3, PW1 and PW4.

27. This Court (Makhandia, Ouko & Murgor JJ.A) held in John Mutua Munyoki vs Republic [2017] eKLR that under the *Sexual Offences Act*, the main elements of the offense of defilement are as follows:

    i. The victim must be a minor, and

    ii. There must be penetration of the genital Organ and such penetration need not be complete or absolute. Partial penetration will suffice.

    PW2's age was in this respect proved by the child immunization card produced by PW3 that showed that PW2 was born on 13th October 1999, and corroborated by the age assessment report that confirmed that she was 15 years of age, PW2's evidence of penetration was corroborated by the evidence of PW1 who examined her, while the identification of the Appellant as the perpetrator was corroborated by the evidence of PW3 who found PW2 in the Appellant's house. It is thus our finding that the offence of defilement was proved to the required standard in the circumstances of this appeal.

28. The last legal issue of law raised by the Appellant was on the legality of the sentence imposed on him of 20 years' imprisonment. The Appellant submitted that recent developments in the law have clearly shown that courts can divert from the mandatory minimum sentences enshrined in the *Sexual Offences Act* and extensively cited the decision by the High Court in Maingi & 5 others *v Director of Public Prosecutions & Another (Petition E017 of 2021*) [2022] KEHC 13118 (KLR) in this regard, which decision also cited the decisions of this Court in Dismas Wafula Kilwake vs Republic [2019] eKLR and

Eliud Waweru Wambui vs Republic [2019] eKLR. According to the Appellant, the *Sexual Offences Act* came into force earlier than *the Constitution*, and 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 Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu Case 1).

Therefore, that the construing of those provisions as tying the hands of the trial courts is unconstitutional.

29. Mr. Omutelema's response was that the Appellant was allowed to present his mitigation before being sentenced to serve 20 years' imprisonment as provided for under Section 8 (3) of the Sexual Offence Act, and the sentence was therefore legal and not manifestly harsh.

30. We have considered the arguments made on the legality of the sentence. Section 8(3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. The Supreme Court of Kenya in this respect clarified in Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 that its decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR was limited to the mandatory death sentence provided for the offence of murder, and did not extend to the minimum sentences found in the *Sexual Offences Act* or any other law for that matter. The Supreme Court accordingly found that minimum sentences for sexual offences remain legal unless and until declared unconstitutional.

31. The Supreme Court also recently held in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) that a blanket application of the ratio decidendi in the Muruatetu Case 1 conflated the concept of mandatory sentences with minimum sentences, and opined as follows in this regard:

> " 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."

32. We are bound by the decision of the Supreme Court. We also note that the Appellant was given an opportunity to mitigate, and his mitigation was considered by the trial Court. It is thus our conclusion that the Appellant's appeal against both conviction and sentence has no merit.

Consequently, this appeal is dismissed in its entirety.

33. Orders accordingly.

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

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR