Mose v Republic (Criminal Appeal 239 of 2019)
[2024] KECA 1489 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1489 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 239 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 25, 2024

BETWEEN

ANDREW KIANGA MOSE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Ougo, J.) dated 29th October, 2018 in HCCRA No. 23 of 2017)

JUDGMENT

1. The appellant, Andrew Kianga Mose, was the accused person in the trial before the Principal's Magistrate's Court at Ogembo in Criminal Case No. 1764 of 2012. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 13th day of November, 2012, at Kisii County, the appellant intentionally caused his penis to penetrate the vagina of A.B.O, a child aged 3 years.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant of the offence charged and sentenced him to life imprisonment as provided for by the law.

3. The appellant was aggrieved by the decision of the subordinate court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (R.E Ougo, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 29th October, 2018.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised four (4) grounds in his Supplementary Memorandum of Appeal. Reproduced verbatim, they are that the learned appellate judge erred in law by upholding:

1. The appellant's conviction and life sentence contrary to section 31 of the *Sexual Offences Act* which appreciates evidence through an intermediary. Thus causing the appellant great prejudice and violation of his fundamental rights under Article 50 of *the Constitution*.

2. The appellant's conviction and life sentence but failed to note that the elements of defilement were not proved by the prosecution. The appellant alleged that penetration could not be proved without corroboration of the evidence of the victim.

3. The appellant's life sentence but failed to note that his sentence goes against the spirit of Article 50(p) and (q) of *the Constitution* and does not serve the objectives of sentencing as listed on page 15 paragraph 4.1 of the Policy Guidelines and section 216 and 389 of the Criminal Procedure Code.

4. The appellant's life sentence but failed to note failure of the prosecution to call key witnesses during trial which was fatal to the prosecution case.

6 . A summary of the evidence that emerged at the trial through seven (7) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

7. According to her birth certificate that was produced before the trial court by her father, PW4, A.B.O., the survivor in the present case, was born on 16th July, 2009. This means that she was 3 years and 4 months old at the time of the incident. She did not testify during trial. However, F.R.O., who testified as PW5, gave unsworn testimony after voir doire examination.

8. According to the trial court record, PW5 told the court that on the material day, he was with his peers, A.B.O. and one Vio, when the appellant went to where they were and told A.B.O. to go with him so that he could take her to her father. In his words, PW5 informed the court that the appellant told A.B.O., "Kuja nikupeleke kwa baba" and gave her a guava. He then took her by her hand and went into the sugarcane plantation. PW5 returned home and told A.B.O.'s mother (PW1), who was in the company of Vio's mother, that the appellant had taken A.B.O. He further told the court that the appellant was known to him as he usually saw him heading towards the river. In addition, upon being questioned by the trial court, he said that when the appellant took A.B.O., he was wearing boots and black socks; and was carrying a big bag on his back.

9. PW1, DNS, is A.B.O.'s mother. She testified that on the material day, she went to the shamba and left her daughter with a neighbour's child, PW5, as her husband had gone to work and there was no one at home. When she came back in the afternoon, PW5 told her that the appellant had taken A.B.O. Alarmed, she started screaming and people came and immediately began looking for her daughter. She was so devastated that she was unable to participate in the search, but she later learnt that her daughter was found in a sugarcane plantation and taken to hospital. She was informed by the doctor that her daughter had been defiled.

10. PW2, SON, is A.B.O.'s father. He testified that when the incident occurred, he was at work. However, when A.B.O. was found, she was taken to hospital and the appellant was thereafter arrested by the area chief. He produced A.B.O.'s birth certificate. He explained that when his daughter was born, the hospital gave her the name "Immaculate", which appears in her birth certificate, as the hospital attendants did not know her name. But that her name was A.B.O.

11. PW3 was JNH, a neighbour to PW1 and PW2. She testified that on the material day at about 11.00am, she met the appellant on her way from the river as she headed home. Further, about 70 meters ahead, she met A.B.O. in the company of two other children, that is, PW5 and another. They were collecting firewood. However, two hours after reaching home, she heard screams and headed towards

the direction they were coming from. Upon reaching there, she found a group of people who had been informed that A.B.O. was missing. She joined the group and started looking for the child. Moments later, they found her standing alone in the sugarcane plantation. She had blood on her body including on her private parts.

12. EKO, a clan elder, was the fourth witness. He testified that on the material day at about 1.00pm, while at his home, he heard people screaming and went to where they were. On reaching there, he was informed that PW2's child had gone missing. He made inquiries about who the child had been with before she went missing and was told that he was with two other children. He summoned one of them, PW5 and asked him to show them the place where they had gone to fetch firewood. On reaching there, PW5 explained to them how the appellant had taken A.B.O. and told her that her father was calling her. They came across a sugar plantation and began their search. Moments later, they found the child and upon examination, noticed that she had blood and faeces on her body. He asked that the child be taken to hospital and remained with some people and deliberated about what had happened. Ultimately, PW4 called the assistant chief, one Edward Ouma, and informed him about the incident that had taken place. The assistant chief later arrested the appellant; after which he was re-arrested by the police.

13. PW6 was Daniel Nyamieino, a clinical officer at Kisii Level 5 Hospital. He testified that he examined A.B.O. on 29th November, 2012, and filled in her P3 form. She had been taken to the hospital with a history of being defiled on 13th November, 2012, by a person she could identify. He told the court that the doctor who examined the victim on 14th November, 2012 observed that she had normal external genitalia with perennial tear and lacerations. The tear was graded at 40% which meant that it extended from her vaginal opening to the perineum. The lab findings showed the presence of multiple blood and pus cells which was indicative of an STI (Sexually Transmitted Infection). No spermatozoa were seen; and VDRL syphilis and HIV tests were negative. PW6 also testified that A.B.O. was admitted from 13th November, 2012, to 19th November, 2012, during which time the tear was surgically repaired. Her injuries were assessed as grievous harm, consistent with penetrative sexual contact and transmission of STI. The report also indicated that she may develop tears or fistula during birth in future.

14. The last witness was Corporal Simon Wangombe, the investigating officer in the case. He testified that PW2 reported the incident on 14th November, 2012, at which time the victim was undergoing treatment at Kisii Level 5 Hospital. He was informed that the appellant had been arrested and was being held at Eburi Chief's Camp. He then went to the Chief's Camp in the company of other officers and re-arrested the appellant and charged him. He conducted investigations and also visited the scene of crime in the sugarcane plantation whereby he saw signs of struggle, blood and stool.

15. When he was placed on his defence, the appellant gave unsworn testimony and called no witnesses. He denied knowing anything about the charge against him and only said that he was arrested by the assistant chief on 14th November, 2012 while he was at his home and was later taken to Etago Police Station. Thereafter, he was arraigned in court and the charge was read to him.

16. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Kimanthi, appeared for the respondent. Both parties relied on their submissions.

17. The appellant raised several key arguments regarding his trial and conviction under the *Sexual Offences Act*.

18. First, the appellant complains that the failure to formally appoint A.B.O.s mother as an "intermediary" in the trial prejudiced him. He contended that the trial court failed to appoint an intermediary for a vulnerable victim, which he argued violated his right to a fair trial as per Article 50(2) of

the Constitution. He cited previous cases that emphasized the need for the court to assess witness vulnerability and appoint intermediaries to ensure fairness.

19. Second, the appellant laments that there was insufficient proof of penetration and identity. The appellant argued that the prosecution did not adequately prove the elements of penetration and the identity of the perpetrator. He noted that the victim did not testify directly against him, and the evidence provided by witnesses lacked corroboration. He emphasized the importance of careful examination of identification evidence, particularly given that the witnesses had not directly observed the incident.

20. Third, the appellant assailed the sentence imposed on him on account of it being mandatory minimum which, he argued, impermissibly constrained the discretion of the sentencing court.

    He referenced several recent cases for this proposition including Philip Mueke Maingi & 5 Others vs. Director of Public Prosecutions & the Attorney General (a decision by the High Court); Julius Kitsao Manyeso vs. Republic, Criminal Appeal No. 12 of 2021 (a decision by the Court of Appeal), and Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (a decision by the Supreme Court). Additionally, the appellant argued that international human rights standards call for consideration of individual circumstances in sentencing.

21. Finally, the appellant argued that the prosecution failed to call key witnesses. For instance, the appellant argued that the people who conducted the search and found the victim in the sugarcane plantation and consequently took her to hospital, were not called as witnesses. Equally, the assistant chief who was said to have arrested the appellant was not called as a witness; and neither did the victim also testify as a witness and the prosecution gave no reasons as to why she could not give evidence. Relying on the famous decision in of Bukenya vs. Uganda (1972) EA 549, the appellant argued that the omission to call these witnesses weakened the prosecution's case and suggested that such witnesses' testimony could have been unfavorable to it.

22. Overall, the appellant maintained that these factors collectively undermined the integrity of the trial and supported his appeal, and prayed to be acquitted.

23. Opposing the appeal, Mr. Kimanthi 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, as held in the case of John Kariuki Gikonyo vs. Republic (2019) eKLR.

24. First, counsel submitted that the prosecution proved all the ingredients of the offence of defilement as was stated in Kyalo Kioko vs. Republic (2016) eKLR. He insisted that the birth certificate that was produced in court proved that A.B.O. was aged 3 years and 4 months old at the time of the incident and therefore was a child below the age of 11 years as provided for under section 8(2) of the *Sexual Offences Act*. On penetration, counsel submitted that the evidence of PW6 proved that A.B.O. had been defiled and the findings showed that there was penetrative sexual contact and transmission of STI. In addition, he argued that PW1 testified that when she went to visit her daughter in hospital, the doctor informed her that she had been defiled.

25. As regards the identity of the appellant, counsel submitted that the evidence of PW3, although circumstantial, was as good as direct evidence and met the required threshold. Counsel relied on the case of Rex vs. Kipkering Arap Koskei (1949) 16 EACA 135, on the principles that attend to the application of circumstantial evidence.

26. Lastly, on sentence, counsel submitted that the penalty of the offence committed by the appellant is prescribed under section 8(2) of the *Sexual Offences Act*. On this note, he submitted that he took cognizance of the emerging and evolving jurisprudence by this Court on mandatory minimum and

maximum sentences in the case of Evans Nyamari *Ayako vs. Republic, Criminal Appeal No. 22 of 2018*, whereby life imprisonment was capped at 30 years in prison. However, counsel argued that the circumstance in the instant appeal called for the maximum mandatory sentence, considering the future possible dangers that the victim had been exposed to after the defilement.

27. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361 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, four issues fall for determination on this second appeal:

    a. First, whether the prosecution proved its case beyond reasonable doubt as required by the law.

    b. Second, whether the failure by the trial court to appoint an intermediary on behalf of the survivor of the crime was a fatal error that prejudiced the appellant.

    c. Third, whether the prosecution failed to call all the key witnesses.

    d. Fourth, whether any legal issues arise with regard to the appellant's sentence of life imprisonment, and if so whether this Court should interfere with the life sentence meted out to the appellant as being unconstitutional.

29. Turning to the first issue regarding whether the offence of defilement was established, the appellant was convicted and sentenced under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*.

30. The three ingredients of the offence of defilement are: proof that the victim is a minor; that there was penetration of the victim's genital organs; and that the accused person was the person who caused the penetration of the victim's genital organs.

31. For the purpose of the penal section under Section 8(2) of the *Sexual Offences Act*, there must be proof that the age of the victim was eleven years old or below.

32. In the present case, there is little doubt that A.O.B. was less than four years old. A birth certificate was produced. It showed A.O.B. was born on 16th July, 2009 while the incident happened on 13th November, 2012. As such, A.O.B. was three years and four months old at the time she was defiled. Additionally, there was the oral testimony of both parents: PW1 and PW2. Finally, the P3 form indicated the age as 4 years old.

33. Penetration was proved mainly through the medical evidence produced by PW6 at trial. He produced a P3 form and treatment notes. The results were categorical that A.O.B. had suffered traumatic and forceful penetration: there was a vaginal tear graded at 40% that had to be surgically repaired; and the lab findings showed the presence of multiple blood and pus cells which was indicative of an STI (Sexually Transmitted Infection).

34. The final issue is the identification of the appellant as the perpetrator. There was no direct evidence on the issue because A.O.B. did not testify at the trial; and none of the prosecution witnesses claimed

to have seen the appellant in the act of defiling A.O.B. Therefore, the prosecution relied entirely on circumstantial evidence to tie the appellant to the crime. The learned Judge assessed the evidence thus:

> "The appellant's conviction was based on circumstantial evidence. There was no direct evidence or evidence of an eye witness who saw the appellant commit the offence. The only evidence that linked the appellant to the offence was that of PW3 and PW5. PW5... testified that he was with the complainant at the time the appellant approached them and told the complainant that he was going to take her to her father. He saw the appellant give the complainant a guava and he left with her. He testified that he followed appellant and the complainant near the trees. The appellant was holding the hand of the baby. The appellant was a person known to him. He stated, "I usually see him heading towards the river." PW3 was from the river and she met the appellant standing alone. She also met the three children, the complainant being one of them, collecting firewood. The appellant was about 70 metres from where she met the children. The appellant was someone she knew.....The evidence of PW3 placed the appellant within the area the child was found. PW5 was a minor who testified that he saw the appellant leave with the child..... PW5 evidence is corroborated by that of PW3 whose evidence placed the appellant within the vicinity of the complainant was with the other children..."

35. We have reproduced the analysis by the learned Judge in extenso because it is readily obvious from that analysis that she properly applied the principles applicable to circumstantial evidence to reach the conclusion that the appellant was the person who caused the penetration. Unlike direct evidence, which proves a material element of a legal action, circumstantial evidence proves other facts from which one may infer the existence of material elements.

36. In Kenya, the Supreme Court has comprehensively restated the principles applicable in considering circumstantial evidence in criminal cases in Republic vs Ahmad Abdolfadhi Mohammed & Anor 2019 eKLR as follows:

> "(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence...." [.....

59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ..."

> "60. As was further stated in the case of *Musili v. Republic CR A No.30 of 2013* (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no

> one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co-existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

37. The principles to be gleaned from this decision, in short, are that for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.

38. The question in the present appeal is whether this threshold has been met. We have concluded that it has for two reasons. First, as demonstrated in the learned Judge's reasoning excerpted above, the appellant was properly identified by PW5, by recognition, in broad daylight in circumstances which would ordinarily minimize the possibility of mistake, PW5 told the court that he saw the appellant call and walk away with A.B.O. In other words, the appellant was the last person to be seen walking away with A.O.B. Second, PW3, who equally knew the appellant before, saw the appellant in the vicinity of the place where PW5 said the appellant had called A.O.B. and walked away with her. The two pieces of evidence are mutually reinforcing; and demonstrate without doubt that it was the appellant who took away A.O.B.; and that A.O.B. was found shortly thereafter dazed and having suffered traumatic sexual assault. The circumstances "taken cumulatively... form a chain so complete that there is no escape from the conclusion that within all human probability ....the [appellant]" was one of the persons who committed the heinous crime." See Joan Chebichi Sawe versus Republic [2003] eKLR.

39. Consequently, on the issue identification, we concur with the findings of the two lower courts: the appellant was properly identified by use of circumstantial evidence as the perpetrator.

40. The next issue is whether it was an error for the trial court to have proceeded as it did without formally appointing PW1 as an intermediary for A.O.B. The appellant is clearly misguided on this point. PW1 did not testify as an intermediary for A.O.B. Instead, she testified as a witness in her own right. She was in court to give direct and independent evidence as the mother of A.O.B. PW1 was not in court to communicate to the A.O.B. the questions put to her and to communicate to the court the answers from A.O.B. Consequently, there was no need for PW1 to be appointed as an intermediary before testifying.

41. As regards the issue of failure by the prosecution to call all key witnesses, it is our considered opinion that the witnesses the appellant alleged were not called, were not key witnesses as they were not present when the appellant committed the offence. The only person who was present when the incident occurred was A.O.B. and she did not testify as we have already stated. Further, the two lower courts held that this case was based on circumstantial evidence and they both found that the evidence adduced pointed to the appellant as the person who committed the offence to the exclusion of any other person. Having looked at the evidence on record, we reiterate the same position.

42. The rule in criminal law is that the prosecution is required to call witnesses who will give evidence of sufficient probative value to establish its case beyond reasonable doubt. There is no requirement to call a multiplicity of witnesses in criminal trials. The rule is the opposite: the prosecution is only required

to call a sufficient number of witnesses to establish a pertinent fact. The complementary rule is one stated in the famous Bukenya (supra) where the Court of Appeal for Eastern Africa held that:

> "The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

43. The Bukenya exception (where the court will draw an adverse inference when a witness is absent) is only applicable where that witness was an essential one; and where the extant evidence is barely adequate to establish a particular fact. Neither of these conditions is present here: neither the Assistant Chief who arrested the appellant nor the multitude of people who helped search for A.B.O. were essential to establish the case against the appellant.

44. Lastly, on the life sentence imposed on the appellant, we note that, in a fairly recent decision, the Supreme Court in Republic vs. Joshua Gichuki Mwangi and 4 Others, Petition No. E018 of 2023, concluded that the mandatory minimum sentences in the *Sexual Offences Act* – including life imprisonment for offences under section 8(2) of the Act – are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences. The apex 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.
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> 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."

45. This decision is binding on us under the doctrine of stare decisis. In the present case, the appellant was convicted under section 8(2) of the *Sexual Offences Act* since the victim of the defilement was under four years old. The statutory minimum sentence under that sub-section is life imprisonment. That was the sentence imposed on the appellant. Following the above decision by the Supreme Court, we cannot lawfully interfere with that sentence.

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

47. 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR