Apiyo v Republic (Criminal Appeal 248 of 2018)
[2024] KECA 1422 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1422 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 248 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 11, 2024

BETWEEN

JOSHUA OMANGA APIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu, F.A. Ochieng, J.) dated 25th June 2018 in Criminal Appeal No. 44 of 2017)

JUDGMENT

1. Joshua Omanga Apiyo, the appellant herein, was convicted in Nyando Senior Principal Magistrate's Court for the offence of defilement contrary to section 8(1) and 8(2) of the *Sexual Offences Act*, the particulars being that on 7th November in Nyando sub county within Kisumu County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GSA[1], a child aged 4 years. The appellant [1] Initials used to protect the minor's privacy was tried and convicted of the offence of defilement and sentenced to life imprisonment.

2. The appellant, dissatisfied and aggrieved with both conviction and sentence, appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the sentence, the appellant has now filed this appeal.

3. This being a second appeal, we are mindful that this Court must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below, unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others v Republic [1982] eKLR.

4. The grounds of appeal as set out in the memorandum of appeal, are that the learned Judge: erroneously failed to evaluate the evidence as a whole and to observe that the prosecution never proved their case

beyond reasonable doubt; failed to consider that the mitigating factors were down played; meted cruel, harsh and arbitrary mandatory sentence; erred on a point of law in basing the reason for conviction on the sufficiency of the evidence adduced without considering the element of grudge that ensued between the victim's', father and the appellant over debt; failed to plausibly evaluate the element of investigation tendered; failed to find that the forensic evidence was wanting, and the evidence generally did not prove the case beyond reasonable doubt.

5. To put matters in perspective, a brief background on the genesis of this matter will be useful. JOO, PW1, the minor's father, had gone on a church mission, accompanied by his mother, the appellant's mother, and another church member, leaving the minor at home. Apparently, GSA, who testified as PW2 had gone to church (confirmed by PW1's testimony, that she frequently followed him, whenever he left for church), and when she did not find anyone, she headed home. On the way, she met the appellant's son, Ochal, with whom she played until they reached near the appellant's house. The appellant (whom she referred to as Baba Hussein) sent Ochal out; then called GSA to join him for lunch; and on entering the house, he took her to his bed, removed her panties and his trousers, lay on her; inserted something in her private parts; and she saw blood from where he hurt her.

6. Meanwhile, on their way back, just as they were going past the appellant's home, PW1 and his companions saw GSA standing at the appellant's door, crying and trembling, unable to walk; with clots of blood on her legs; and bleeding from her private parts. She narrated what had happened, and mentioned the culprit as the appellant, who PW1 knew as a neighbour.

7. Moses Otieno Onono, PW3 who learnt about the incident, proceeded to the appellant's home, where he found stains of blood on the mattress, on the floor and outside his door. The appellant who was hiding in a certain home, was ultimately apprehended.

8. A medical examination by Josephena Moraa Gatwere, PW4, noted the minor's inability to walk, a second-degree vaginal tear and blood oozing profusely from the vagina orifice; and cuts in the vaginal area showing forceful entry vagina; leading to the conclusion that the minor had been defiled; the medical treatment involved being taken to theatre where the lacerations were repaired, and the clots expelled.

9. The appellant's defence was that the case was a frame-up, fueled by a long-standing grudge between him and the survivor's father, to make his life difficult.

10. The trial court, having considered both the prosecution and appellant's case, was satisfied that the ingredients of the offence of defilement had been proved by the prosecution. On appeal to the High Court, the learned Judge (Ochieng, J) identified 5 issues raised by the appellant, namely that: the medical evidence did not link him to the offence; the blood stains were not proved to be from the survivor; the case was a frame-up, that the victim's shoe purported to have been recovered from the scene was not produced as evidence; and the alibi defence was solid enough to warrant an acquittal.

11. The learned judge held that failure by a trial court to direct an accused person to give appropriate samples for forensic or other scientific testing, would not in itself be a basis for setting aside a conviction, as the law only gives the court the authority to make such directions, but it is not a mandatory requirement; that although no evidence was led to prove that the blood stains on the mattress belonged to the survivor, there was sufficient nexus from her evidence that she was defiled on the bed, her presence at the appellant's door in a most telling bleeding state, as to make it reasonable to believe that she was the source of the blood; that the claim of a frame up was completely demolished by PW1's conduct as he did not try to do anything malicious against the appellant, and even if there existed a grudge, it did not deflate the fact that the minor had been defiled; that failure to produce the shoe that was recovered from the scene was not fatal, as it was not the only source of evidence that the

prosecution relied on to link the survivor to being present at the appellant's home; and the claims of an existing grudge between the appellant and the minor's father (PW1), was a red herring, observing that even when PW1 was recalled for cross examination, he reiterated that the only thing that existed between him and the appellant was the incident regarding defilement of his daughter; and the appellant did not suggest that there was any pre-existing grudge, nor even specify the nature of the issue leading to the alleged grudge; and his alibi defence was dealt a fatal blow by the prosecution witnesses placed the appellant at the scene; as PW1 confirmed meeting the appellant's child Ochal, who told him the appellant had sent him; and which corroborated the evidence of the minor; and PW1 infact saw the appellant emerging from his house.

12. In contesting the learned Judge's findings, it is the appellant's contention that this entire case has "a myriad of glaring gaps that left a lot to be desired as the evidence that PW1 was defiled without plausible explanation had no nexus to the charge"; and the evidence adduced was by single identifying evidence that was not corroborated; and this was a case where the benefit of doubt ought to have swung in his favour.

13. The respondent, through the State Counsel, Mr. Okoth, opposes the appeal, arguing that all the three ingredients necessary in proving the offence were well proved. In his written submissions, he points out that the minor's age was proved through production of the birth certificate, the outpatient treatment notes, and the physical observation made by the trial court; evidence of penetration was well demonstrated through the evidence of PW1 who physically saw the child bleeding from the genitalia, unable to walk, with a lot of pain, that, this was further fortified by the medical examination; and the identity was by recognition, as the appellant was well known to both the minor and PW1.

14. On sentencing the appellant argues that the sentence was excessive, harsh, unconstitutional and unlawful. Drawing from Article 28 of the of *the Constitution* regarding every person's inherent dignity and the right to have the dignity protected, he argues that failing to allow a Judge discretion to take into account and considerations on the appellant's mitigation circumstances of the crime but instead subjecting them to undifferentiated mass, violates his right to dignity. In support of this proposition, we are referred to the case of Joseph Kaberia Kahiga & 11 Others v the AG. [2016] eKLR that mitigation has a place in the trial process with regards to convicted persons.

15. The respondent urges us not to interfere with the sentence, arguing that the appellant has not shown any illegality or extent of illegality in the sentence.

16. The issues of law that we discern for our consideration in this appeal, are, whether the learned Judge properly discharged his duty as a first appellate court, of re-considering and re-analysing the evidence that was adduced in the trial court, whether the appellants' identification was safe to rely on; whether there was sufficient evidence to support the finding that the charge against the appellant was proved to the required standard, and whether the mandatory life imprisonment sentence imposed was harsh and unconstitutional.

17. We note from the judgment, that the learned Judge in keeping with the principles set out in the case of Okeno v Republic [1977] EA 32; regarding the duty of a first appellate Court considered, re-analysed and re-evaluated the evidence, and arrived at his own conclusion regarding critical issues such as proof of the charge, making reference to the evidence relating to the ingredients of the offence – indeed each of the ingredients was considered in detail, and the evidence found to meet the threshold; the question of identification taking into consideration the opportunity, thus coming to the conclusion that identification was by recognition; the allegation regarding frame up due to an existing grudge; and the alibi defence, clearly pointing out why such allegations had no leg on which to stand. We are thus

unable to find any error in principle or application of the law, as to warrant our interference; and we hold that the conviction was safe.

18. With regard to the severity of sentence, Section 379(1)(a) &(b) of the Criminal Procedure Code provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court. The sentence imposed on the appellant of life imprisonment was the mandatory sentence as provided in section 8(2) of the *Sexual Offences Act*. The issue regarding the curtailing of the discretion of the two courts below on the basis of requiring a maximum mandatory sentence is no longer open to debate, as Section 361(1) of the Criminal Procedure Code, is clear that the severity of sentence is a matter of fact that is not open for our consideration. This position has now been made clear in the Supreme Court decision Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae) [2024] KESC 34 (KLR)

19. The learned Judge of the High Court considered the appellant's appeal against sentence and concluded that the sentence was both legal and appropriate. The injuries suffered by the minor were major causing her to have surgery to repair the vaginal tear as well as to expel the clots suffered by the complainant. The complainant also had to undergo post trauma counselling speaking to the nature of the trauma the child of 4 years went through.

20. There is, however, another limb as regards, the constitutionality of the life sentence. We note that although the appellant was sentenced to an indeterminate life sentence, he did not raise any issue regarding the constitutionality of the indeterminate life sentence at the High Court. He has nonetheless raised the issue in his written submissions. We have pointed out in the case of Joel Matekhwa Isiakho Kisumu CA. CRA No. 204 of 2018, that the constitutionality of the indeterminate sentence of life imprisonment under Articles 28 and 29(f) of *the Constitution*, is different from challenging the constitutionality of minimum sentences under the *Sexual Offences Act*, for fettering the discretion of the sentencing court. In accordance with the Supreme Court's decision in Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curio) [2024] 34 KLR, the issue of the constitutionality of the indeterminate sentence is not open to us for consideration at this stage as it was neither raised in the High Court, thus not preserved as an issue that could be argued before us. Consequently, we have no basis to interfere with the sentence; thus, the appeal both on conviction and sentence fails, and is dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT 11TH THIS DAY OF OCTOBER, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR