GOO v Republic (Criminal Appeal 114 of 2018)
[2024] KECA 1814 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1814 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 114 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

GOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Siaya (Makau, J) dated 10th May, 2016 in HCRA No. 49 of 2015)

JUDGMENT

1. The appellant, GOO, was charged, tried and convicted by the Magistrate's Court at Siaya, for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence, alleged that on 1st May, 2013, within Siaya County, he intentionally caused his penis to penetrate the vagina of VAA (name withheld), a child aged nine years old.

2. During the trial, five witnesses testified in proof of the prosecution case. In a nutshell, the appellant sent VAA and her sister, MM, commonly referred to as Mum, to go to the shops to buy kerosene and mandazi for him. When the two came back with the kerosene and mandazi, the appellant gave MM one mandazi and told her to wait outside. He remained inside the house with VAA whom he had given the other mandazi. He then locked the door, removed VAA's panties and his trousers, and put his penis into VAA's vagina. Immediately thereafter, VAA's mother, EA (E), knocked the door. The appellant then pushed VAA under the bed as he opened the door telling Everlyn that VAA was not in the house. However, Everlyn went to the bed, and upon removing the blankets saw VAA under the bed. When E removed VAA from under the bed, she found that VAA. did not have any panties on. VAA. was taken to Yala Level IV hospital, and Sadik Mwita (Sadik), a Clinical Officer, prepared a P3 form which showed that she had a white discharge on the vulva, and bruises on the labia majora, though her hymen was intact. Sadik also examined the appellant, whom he found to be HIV positive. The appellant was, therefore, arrested and subsequently charged.

3. In his defence, the appellant gave sworn evidence denying having sexually assaulted VAA, and contending that the allegations against him were made in bad faith because of a shamba dispute between his employer and the father of the complainant.

4. The trial magistrate, upon convicting the appellant, sentenced him to life imprisonment. The appellant being dissatisfied, appealed to the High Court against his conviction and sentence. Upon hearing the first appeal, the High Court (J.A. Makau, J.) dismissed the appeal against both conviction and sentence. The appellant is now before us in a second appeal.

5. In his memorandum of appeal, the appellant listed five grounds, which were basically against the sentence. There was, however, a fifth ground, that asked the Court "to consider the conduct of the trial court's proceedings, weigh the evidence by a yardstick of probabilities, improbabilities, its intrinsic worth and animus of the witnesses."

6. The appellant also filed written submissions in which he urged the Court to analyze and evaluate the circumstances that eventually surrounded the veracity of the offence in question, in order to lower the degree of blame and to measure the entire evidence by the yardstick of probable circumstances and its improbabilities, because according to him the record pointed out clearly, that there was a land demarcation dispute between the appellant and the victim's family, that led to his conviction.

7. In regard to sentence, the appellant cited the decision of Odunga, J. (as he then was) in *Philip Maingi Mueke v R & 5 others* [2022] KEHC; and the decision of Mativo, J(as he then was) in *Edwin Wachira & others v R*, on mandatory sentences, and the discretion of the courts in sentencing. The appellant also referred to the Sentencing Policy Guidelines 2016, urging, that sentence should not be cruel or harsh, and that there must be a balance between the aggravating and mitigating circumstances. The appellant pleaded with the Court to allow the appeal and impose a sentence that is proportionate, lenient and less severe, as he is a first offender, is remorseful and is the sole breadwinner of his family.

8. The respondent was represented during the appeal by learned counsel, Mr. Onanda, who did not oppose the appeal in regard to sentence, but opted to leave the matter to the Court.

9. This being a second appeal, this Court's jurisdiction is limited under Section 361(1) of the *Criminal Procedure Code* to matters of law only. In *Karani v Republic* [2010] 1 KLR 73, this Court identified its jurisdiction under that section as follows:

> "This is a second appeal. 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 the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered 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 in their decision, in which case such omission or commission would be treated as matters of law."

10. We have carefully considered the record of appeal, the submissions made by the appellant and Mr. Onanda and the law. According to the memorandum of appeal, the appellant's main issue with the judgment, appears to be mainly the sentence that was imposed upon him. Before we address this issue, we find it appropriate to address the issue posited by the appellant that appears to question the propriety of his conviction.

11. From the concurrent findings of the two lower courts, the appellant and the minor were found locked inside the appellant's house; with VAA hidden under the bed and having no panties on. Young as she was, VAA impressively explained clearly to the trial court what the appellant had done to her, after

locking the door, which included putting his penis into her vagina. V.A.A.'s evidence was consistent with the evidence of Everlyn who found her inside the appellant's house under the bed without her panties. It was also consistent with the evidence of Sadik who noted bruises on her labia majora.

12. Under section 2 of the *Sexual Offences Act*, "Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person. Although V.A.A.'s hymen was intact, her evidence and that of Sadik confirms that there was partial penetration, and the appellant was only interrupted by Everlyn's persistent knocking at the door. Penetration was therefore established. So was the identity of the appellant as the person responsible for the penetration. The age of VAA was also established by the evidence of E who testified that she was born on 15th July, 2004, which confirms that she was nine years old at the time of the commission of the offence.

13. In the circumstances, all the ingredients of the offence of defilement were established and the appellant's defence was considered and properly rejected as an afterthought. In the circumstances, the appellant's conviction was properly anchored on the evidence and the law and the conviction is unassailable.

14. Section 8(2) of the *Sexual Offences Act* provides that:

> "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

15. Thus, section 8(2) of the *Sexual Offences Act* provides a mandatory sentence of life imprisonment and this was the sentence which was imposed on the appellant. Although there has been jurisprudence questioning the mandatory nature of sentences under the Sexual Offences Act, the two cases referred to by the appellant falling within this category, that wave has since died following the Supreme Court's decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR), wherein the Supreme Court was categorical that:

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law"

16. This means that neither the trial court nor the learned Judge of the first appellate court, nor this Court have any discretion to impose any sentence other than what is prescribed under section 8(2) of the *Sexual Offences Act*. The trial court having imposed on the appellant the mandatory sentence that is provided by the statute, that sentence is unassailable.

17. There is a second reason why this court cannot interfere with the sentence that was imposed upon the appellant. Sentencing is a discretion of the trial court, and an appellate court can only interfere in very limited circumstances. In *Bernard Kimani Gacheru v Republic* (2002) eKLR this Court rendered itself as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist."

18. We have not found any material factor, or principle, that was not taken into account, or wrongly taken into account, by the trial court, or any other factor upon which this Court can denigrate the exercise of the trial court's discretion in sentencing. Given the circumstances of this case in which the appellant, an adult person, who was HIV positive, defiled a 9-year-old girl, the sentence of life imprisonment was well deserved, and was not manifestly excessive as to justify the intervention of this Court.

19. The upshot of the above is that we uphold the appellant's conviction and sentence; and dismiss the appeal as lacking merit. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 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