KENYA LAW
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Muthoni v Republic (Criminal Appeal 19 of 2019)
[2024] KECA 1860 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1860 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 19 OF 2019

MA WARSAME, JM MATIVO & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

DANIEL NJUGUNA MUTHONI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (C. Meoili, J.) dated 18th October 2018 in HCCRA No. 545 of 2013)

JUDGMENT

1. The appellant, Daniel Njuguna Muthoni, was charged, tried, and convicted for the offence of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 14th September 2013 at (Particulars withheld) in Nyandarua County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of G.N., a girl aged 5 years. Upon conviction, the appellant was sentenced to life imprisonment.

2. In a nutshell, the appellant was employed as a farm hand at the home of the complainant's grandmother, H.N. (PW3). On 14th September 2013, the complainant's mother, L.N. (PW2) dropped her 5-year-old daughter at the home of PW3 and proceeded to work. The grandmother then proceeded with the little girl to the farm where the appellant was working. While at the farm, the grandmother left the appellant and the complainant for a few minutes and rushed to the shop to buy soap. She returned and later went back home with the girl (G.N. (PW1)). That evening, as PW2 was bathing G.N., the child complained of itchiness and pain in her private part. She examined the child and saw blood clots in the vagina. The child disclosed to her that it was Njuguna wa shosho who had done the "tabia mbaya" to her. She alerted her father-in-law. The appellant, who at the time had taken a stroll, was arrested by a group of people at the shopping centre. Medical examination of the complainant by Dr. Kamau Joseph, as per the testimony of Dr. Maingi Muchiri (PW4), confirmed that the child had been defiled.

3. The appellant's appeal against the conviction and sentence was dismissed by the High Court. In the appeal before us, the appellant faulted the first appellate court on the grounds that the complainant's age was not proved; penetration was not proved; the medical evidence was doubtful; and the burden of proof was shifted to him. Through supplementary grounds of appeal dated 27th June 2024 and filed together with his submissions, the appellant directed and confined his firepower to the sentence of life imprisonment as passed by the trial court and affirmed by the first appellate court.

4. This appeal was placed before us for a hearing on 3rd July 2024. The appellant appeared in person while the respondent was represented by learned counsel, Mr. Ometelema. Both parties had filed submissions and opted to entirely rely on those submissions.

5. For the appellant, the submissions were dated 27th June 2024. The appellant submitted that his right to fair hearing and to the least severe punishment under Article 50 (2) (p) of *the Constitution* was trampled upon when he was sentenced to life imprisonment. The appellant referred to the case of Julius Kitsao Manyeso vs. Republic [2023] KECA 827 (KLR), in support of the proposition that life imprisonment is unconstitutional. He argued that his mitigation was not considered and urged us to take his mitigation into account and impose on him a determinate sentence. The appellant also submitted that he had made tremendous efforts in his rehabilitation journey. He urged us to consider his rehabilitation, his mitigation and the period already served and hand him a lenient sentence. The appellant further submitted that he is remorseful and has since reconciled with the complainant and that he was merely 21 years old when the offence occurred. His concluding plea was that the sentence of life imprisonment be set aside in favour of a more lenient sentence.

6. For the respondent, Mr. Omutelema relied on the undated submissions prepared and signed by prosecution counsel, Mr. Kiarie Eric Waweru. Therein, counsel restated the evidence and submitted that the prosecution proved all the elements of the offence. Regarding the sentence, it was the respondent's position that the sentence of life imprisonment was legal and appropriate in the circumstances of the case. Mr. Omutelema urged us not to interfere with the sentence.

7. The appellant having failed to file any submissions in respect to his appeal against conviction, we are at a loss as to the reasons for his challenge against conviction. Be that as it may, his grounds of appeal against conviction as highlighted hereinbefore boils down to the assertion that he was convicted based on insufficient evidence. On his claim that two of the three elements of defilement were not proved, the record shows otherwise. The age of the complainant was proved through the certificate of birth which was produced as an exhibit by PW6 Corporal Mathew Parkishon Lekada. The certificate showed that the complainant was born on 28th April 2008 meaning that she was six years at the time of the commission of the offence on 14th September 2013. That is not far from the complainant's testimony that she was five years old. What is clear from the evidence on record is that the complainant was less than eleven years old at the time of the commission of the offence. As for penetration, the record is awash with evidence showing that the complainant was indeed penetrated. The complainant herself was clear on what was done to her. PW2, the mother of the complainant saw blood clots in the child's sexual organ. The examining medical officer observed a broken hymen, bleeding and discharge. The complainant was also in pain. The evidence adduced by the prosecution witnesses confirmed penetration. There is therefore no merit in the appellant's assertion that the age of the complainant and penetration were not proved.

8. Another ground upon which the appellant sought to upset his conviction is that the onus of proving the offence was shifted to him. We do not understand how, for as we have demonstrated, the prosecution proved each and every element of the offence including the fact that it was the appellant and no one else who defiled the child. We thus find no merit in the appeal against conviction.

9. On the appeal against sentence, we commence by observing that under section 361 (1) (b) of the CPC, we are barred from entertaining appeals against sentence unless the sentence passed is one which the trial court had no power to pass or the sentence was enhanced by the High Court. The provision is also clear that severity of sentence is a matter of fact, which does not fall within the jurisdiction of this Court on a second appeal. In Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR), the Supreme Court reiterated the jurisdiction of this Court on second appeals as follows:

> "Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

10. Section 8(2) of the *Sexual Offences Act* under which the appellant was sentenced states 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."

11. The appellant has challenged the sentence of life imprisonment arguing that the same is unconstitutional and violates his right under Article 50 (2) (p) of *the Constitution*. However, in Republic vs. Mwangi (supra), the Supreme Court affirmed the legality of the minimum sentences under the *Sexual Offences Act* by holding that:

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed…
>
> Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

We are bound by the decision of the Supreme Court.

12. Returning to this case, the record reveals that when accorded an opportunity to mitigate, the appellant asked for a retrial. The learned magistrate in the sentence ruling duly noted and addressed this mitigation before imposing the sentence of life imprisonment. The said sentence being one found in our statutes, was lawful. In any case, the circumstances under which the offence was committed attracted the sentence imposed by the trial court. The appellant abused the position of trust bestowed upon him by his employer and abused her grandchild.

13. Additionally, we also note that despite extensively submitting on the unconstitutionality of life imprisonment, the appellant never raised the arguments before the first appellate court or even challenged the sentence. The issue which he is raising for the first time before us does not therefore fall for our determination.

14. From the foregoing, this appeal must fail. Consequently, this appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF DECEMBER 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR