Lovone v Republic (Criminal Appeal 388 of 2019)
[2023] KECA 352 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 352 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 388 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

SIMON LOVONE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against the judgment of the High Court of Kenya at Eldoret (G.K Kimondo. J) dated 22nd October, 2013 In Criminal No. 1261 of 2009)

JUDGMENT

1. This is the second attempt by the appellant Simon Lovone, to appeal against the judgment of the trial court that convicted him for the offence of defilement of a minor girl aged four years and handed him a term of 20 years imprisonment. He first appealed to the High Court and in a judgment dated 22nd October, 2013, GK Kimondo J not only affirmed the conviction, but also enhanced the sentence from 20 years to life imprisonment.

2. A synopsis of the case is that the appellant was charged in the Magistrate's court for defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 19th day of February 2009 at Milimani village, Sango sub- location in Lugari District within Western Province, the appellant unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of SM, a girl aged 4 years.

3. The prosecution's case was presented through six witnesses. Beginning with the complainant, SM as PW1. She testified that she was at her grandmother's home with another child called Caren at about 1.00 p.m. on the material day, when the appellant called her and took her to the bush. Once in the bush he removed her clothes and defiled her. Afterwards she went home and reported the incident to her grandmother and to her sister RB PW2. It was PW2 who reported the matter to their father, BW

(PW3) and he in turn took the complainant to Kogo Police Station to report the matter and thereafter, to Likuyani sub-district Hospital for medical attention.

4. On the 21st February, 2009, PW3 and PW4 Issa Mudavi the village elder, arrested the appellant and handed him over to police officer Shadrack Mwendwa PW6 at the patrol base. PW6 conducted the investigations in the matter.

5. PW5, Jane Lemakoko a clinical officer, examined the complainant on 23rd February, 2009 and observed that she had bruises around the vaginal orifice, the hymen was broken, and there were epithelial cells in her urine. She concluded that the complainant had been defiled. She also examined the appellant on the 24th February, 2009. The examination revealed a few pus cells and epithelial cells and due to the lapse of time, she did not detect much.

6. At the close of the prosecution case the appellant was put on his defence. He gave an unsworn statement in which he stated that on the material day he was at home working and nothing out of the ordinary happened. To his surprise he was arrested on the 21st February, 2009 on the allegation that he had defiled the complainant and his attempt to explain his side of the story to the police fell on deaf ears.

7. Upon considering the evidence before him, Hon. N. Shiundu then SRM Eldorent Law Courts held that the evidence by the prosecution's witnesses was consistent and corroborative. Further, that the prosecution had proved its case against the appellant beyond reasonable doubt in respect of the principal count. He proceeded to convict the appellant as charged.

8. On sentencing, the appellant did not offer any mitigation. As such, the court held that the appellant perpetrated a heinous offence against the complainant, which requires a deterrent sentence and he was not remorseful. The learned magistrate sentenced the appellant to serve 20 years imprisonment.

9. Aggrieved by the above decision the appellant filed his first appeal in the High Court on grounds which in sum, were that; the charge was not proved beyond reasonable doubt, the evidence of the minor was not corroborated, his alibi defence was not considered, there was no clear medical evidence connecting him to the offence, and that the sentence was too harsh in the circumstances.

10. The learned Judge considered the appeal and agreed with the findings of the trial magistrate that the offence was proved beyond reasonable doubt and upheld the conviction. The learned Judge further held that the trial magistrate fell in error on the sentence imposed upon the appellant, since section 8 (2) of the *SOA* provides for imprisonment for life upon conviction. The appellant having been given a warning that the State would seek enhancement of the sentence should his appeal not succeed, the Judge set aside the sentence of the lower court, and substituted it with life imprisonment.

11. The foregoing decision precipitated the instant appeal which was brought on the grounds that the learned Judge erred in law:

> " a) By enhancing the sentence of 20 years awarded by trial magistrate without the Prosecutor filing a cross appeal, serving the appellant with a written notice of enhancement, and granting the appellant time to respond and think over the same.
>
> b. By enhancing the sentence of 20 years to life imprisonment but failed to note that the court had followed the supreme court's decision in *Francis Karioko Muruatetu & Another v Republic & 5 Others* (2017) eKLR which allows courts to use their discretion on sentencing; the appellant therefore seeks for a resentencing to correct the vice.

c. By failing to note that the age and penetration were not proved in evidence."

12. Both the appellant who was in person and the Senior Assistant Director of Public Prosecution, Mr Jalson Makori appearing for the State, filed undated written submissions and the appeal was disposed of by way of written submissions.

13. The appellant submitted that the learned Judge was wrong in enhancing a sentence of 20 years to life imprisonment, without the State filing a cross-appeal on the sentence, and without the State serving the appellant with a notice of enhancement. The appellant asserted the notice of enhancement must be in writing and must be served in advance before the hearing date. To buttress this fact, he relied on this Court's decision in *Mark Oiruri Mose v Republic* (2013) eKLR, Criminal Appeal No. 295 of 2012. Where it was held that:

> " failure of the state counsel to file a cross appeal against the acquittal of the appellant who was acquitted on the main charge and convicted on the alternative charge rendered a latter enhancement a nullity when the appellant had not been served with a written notice of enhancement and given time to think over it"

14. The appellant argued that the charge of defilement was not proved.

15. Firstly, because the age of the complainant was not proved since the complainant and her father stated that she was four years old without producing any certificate to prove her age and the medical officer, who also stated that she was four years old did not conduct age assessment to ascertain the age.

16. Secondly, that penetration was not proved, since the complainant's testimony was that "He took me to the bush. He removed my clothes and defiled me" and in his view, a four-year-old could not possibly understand the meaning of the word defilement. He questioned whether it was possible for a four-year-old to walk home freely, after she has been defiled by a grown man. Further, that the complainant did not mention that there was penetration or that she felt pain in her genitalia. He added that the learned Judge relied on the evidence of a broken hymen which cannot be taken as a basis for penetration.

17. In rebuttal, Mr. Makori argued that the complainant testified that she was four years old, her father stated that she was four years old and the clinical officer who produced the P3 form indicated that she was 4 years old. He added, that section 8(2) of the *SOA* provides that a person who commits an offence with a child aged 11 years or less shall upon conviction be sentenced to imprisonment. It was his argument that the age of the complainant was in any event less than 11 years, therefore, there was no prejudice caused to the appellant if the age was not accurate. He relied on the decision in *Fappyton Mutuku Ngui v Republic* (2012) eKLR where the Court held:

> " .... that "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean a certificate. Such documents might be necessary in borderline cases but other modes of proof of age are available and can be used in other cases"

18. On penetration counsel relied on this Court's decisions in *Mark Oiruri Mose v R* (2013) eKLR and *Erick Onyango Ondeng v Republic* (2014) eKLR, where the Court held that penetration does not necessarily end in release of sperms in to the victim, and the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It was submitted that the complainant was examined and it was observed that there were epithelial cells in her urine which was evidence of penetration.

19. On sentence, Mr. Makori urged that the offence attracts a sentence of life imprisonment for a child below the age of eleven years. Therefore, the decision of the High Court to enhance was proper and lawful, even as counsel is alive to the recent developments on the mandatory nature of the sentences. Counsel argued that the appellant took an unfair advantage to secure and satisfy his sexual desires on a child of only four years. That the penalties enacted in the SOA reflect deliberate intention by the legislature to protect the rights of children and to signify the seriousness of the offence of defilement.

20. Counsel submitted poignantly that, the assault leaves the innocent victim with eternal and time-explosive dent on the integrity and honour of the person and urged the Court not to disturb the findings of the superior Court on conviction and sentence. However, that should the Court be minded to disturb the sentence, it should give a sentence that is commensurate to the offence.

21. We have considered the entire Record of Appeal, the rival submissions, the authorities cited and the law. The role of the Court on second appeal was succinctly captured in *Chemagong v Republic* (1984) KLR 213 thus:

> " a second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja v Republic 17 EACA 146)

22. Consequently, the issues that arise for determination before this Court are:

    a. Whether the evidence adduced proved beyond reasonable doubt that the complainant was four years old;

    b. Whether the evidence adduced proved beyond reasonable doubt that the complainant was defiled;

    c. If, (a) and (b) are satisfied, whether the appellant was properly warned of enhancement of his sentence in the Superior Court; and

    d. whether the sentence meted upon the appellant was constitutional in light of the new developments in relation to mandatory sentence.

23. This is a criminal trial and the duty lay without shifting, upon the prosecution to prove the guilt of the accused beyond reasonable doubt. To recap what the Court of Appeal stated in *Richard Munene v Republic* [2018] eKLR:

> " In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction."

24. The appellant in the present case faced a charge of defilement contrary to section 8 (1) as read with section 8(2) of the *SOA*. Section 8 (1) of the *SOA* provides that:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

In *John Mutua Munyoki v Republic* (2017) e KLR this Court distilled the ingredients of the offence of defilement as follows:

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> i. The victim must be a minor
>
> ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

25. It was the appellant's argument in the instant case that the age of the complainant was not proved to the required standard. He submitted that there was no documentary evidence or Age Assessment Report to prove it, apart from the oral evidence of the complainant and her father, and as indicated in the P3 form. On the contrary Mr. Makori contended that the evidence of PW1, PW3 and PW5 proved that the complainant was four years of age. He added that in any event the complainant was less than 11 years old and therefore, there was no prejudice caused to the appellant if the age was not accurate.

26. This Court in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR while grappling with a similar issue held as follows:

> " ...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable" (emphasis added)

27. As such, we find no basis to fault the findings of the two courts below, that the age of the complainant was proved beyond reasonable doubt.

28. On penetration, the appellant argued that the minor did not explain penetration to the court. That she only stated that she was defiled. He questioned whether a 4-year-old would understand the meaning of defilement. He further contended that the report and testimony of the medical officer did not prove that there was penetration and urged this Court to find that there was no penetration.

29. In rebuttal, the respondent argued that the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. Further, that upon examination of the complainant, the presence of epithelial cells was observed in her urine, which was evidence of penetration.

30. The learned Judge at paragraph 11 of his judgment pronounced himself on this issue as follows:

> " The injury to the minor's private parts were consistent with penetration. Penetration is defined in section 2 of the *Sexual Offences Act* as follows:
>
> "penetration means the partial or complete insertion of the genital organs of a person in to the genital organs of another person"
>
> The complainant's hymen was broken. She had epithelial cells in her urinalysis. Her evidence was corroborated by PW5 and p3 examination report."

31. From the record the testimony of the complainant was as follows:

> "I do recall on 19-2-2009 at around 1.00 p.m. I was at my grandmother's house. I was with another child called Caren. Simon (the accused) called me and took me to the bush. He removed my clothes and defiled me. Afterwards I went home and reported to my grandmother"

32. As it can be seen above the complainant stated that she was defiled by the appellant. There is no clarification on record on what the complainant understood of the word "defile". In *Muganga Chilejo Saha v Republic* [2017] eKLR this Court had this to say:

> "Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (*IE V R, Kapenguria H.C Cr. Case No. 11 of 2016*), "he pricked me with a thorn from the front part of his body.", (*Samuel Mwangi Kinyati v R*, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing", (*David Otieno Alex v R*, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (*Joses Kaburu v R* , Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (*Thomas Alugha Ndegwa*, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See *A M V R Voi* H.C Cr. App. No. 35 of 2014, *EMM V R* Mombasa H.C Cr. Case No. 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her. (emphasis added)

33. PW5 who examined the complainant on 23rd February, 2009, four days after the alleged defilement, observed that she had bruises around the vaginal orifice, the hymen was broken, and there were epithelial cells in her urine. She concluded that the complainant had been defiled. In *Bassita v Uganda* S.C Criminal Appeal No. 35 of 1995, quoted with approval in *MK V Republic* (2017) eKLR, the Supreme Court of Uganda had this to say:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt"

34. In as much as the record does not show whether the complainant understood the word "defile", her evidence as to what the appellant did before that moment, that is, took her into the bush and removed her clothes, together with the corroborative evidence of PW5 leaves no doubt that the complainant was defiled. As such, we are satisfied that the two courts below did not misdirect themselves in arriving at the conclusion that penetration was proved beyond reasonable doubt.

35. Turning to sentence, the appellant argued that the respondent having not filed a cross appeal and/or served him with a notice warning him that the sentence may be enhanced the learned Judge erred in enhancing his sentence. The respondent did not submit on this argument.

36. In paragraph 15 of the impugned judgement the court held as follows:

> " Under section 8(2) of the *Sexual Offences Act*, defilement of a child below eleven years attracts imprisonment for life. I find that the learned trial magistrate erred in sentencing the appellant to 20 years imprisonment. The record shows that the accused did not even offer any mitigation in the lower court. This is a grave offence perpetrated against a defenseless child. She is a vulnerable person as defined in section 2 of the Act. She will carry the scars for life. The appellant was given a warning that the State would seek enhancement of the sentence. Section 8 (2) of the *Sexual Offences Act* provides for life imprisonment. I will set aside the sentence of the lower court. I hereby substitute it with life imprisonment"

37. Page 42 of the Record of Appeal contains the proceedings of the superior court dated 14th October, 2013 which reads as follows:

> " Appellant: I am ready to proceed. I need 15 minutes.
>
> Court: Appellant warned that the sentence may be enhanced.
>
> Mr. Munene: I am also ready. I give notice that I will seek enhancement of the sentence"

38. In our present case, as stated earlier, we note that there was no cross appeal filed by the prosecution, however the court warned the appellant that the sentence may be enhanced. This Court in *I.J.W. v Republic* [2013] eKLR, held as follows on enhancement of a sentence by the High Court;

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

39. Section 8(2) of the *SOA*. 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"

The lower court sentenced the appellant to 20 years imprisonment on 26th August, 2010, long before the decision in *Francis Karioko Muruatetu & Another v Republic & 5 Others* (2017) eKLR. The superior Court held that the lower court made an error in sentencing the appellant thus. We are guided

by this Court's decision in *Shadrack Kipkoech Kogo v R,* Eldoret Criminal No. 253 of 2003 where it was held thus:

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor, that the wrong principle was applied, or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with (See also *Sayaka –v - R* [1989] KLR 306)."

Accordingly, we agree with the Superior Court's decision that the lower court made an error while sentencing the appellant.

40. The appellant urged the court to find that the sentence that was meted upon him was not in line with the recent development in jurisprudence. The respondent conceded that they are alive to the developing law on mandatory sentence but urged this Court not to disturb the sentence by the Judge, substitute a sentence that is commensurate to the offence.

41. This Court has had occasion to grapple with the mandatory nature of life sentences meted upon offenders in sexual offences times without number. In *Joshua Gichuki Mwangi v Republic*; Criminal Appeal No. 84 of 2015 the Court observed as follows:

> " We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in *Athanus Lijodi V . Republic* [2021] eKLR;
>
> "on the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance *Evans Wanjala Wanyonyi v Republic* (2019) eKLR.) Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited"

42. The act perpetrated by the appellant against the complainant, who at the time was a child of the tender age of only four years was heinous indeed. It will forever taint her life. Moreover, we note that the appellant was not remorseful for his action. As a result, we are of the view that the sentence meted upon the appellant by the Superior Court is commensurate with the offence and as such we find no justification to interfere with the sentence.

43. We have anxiously considered the record of appeal, the rival submissions, the relevant case law and the applicable law. Ultimately, our conclusion is that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

F SICHALE

JUDGE OF APPEAL

.....

L ACHODE

JUDGE OF APPEAL

.....

W KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR