Nyantika v Republic (Criminal Appeal 137 of 2017)
[2023] KECA 402 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 402 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 137 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 31, 2023

BETWEEN

FRANCIS MOKUA NYANTIKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (Sitati, J.) dated 10th April, 2014 in HCCRA No. 77 of 2012)

JUDGMENT

1. The appellant was charged with defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence are that on the June 5, 2010, at [Particulars Withheld] Market in Kisii Central District within Nyanza Province, he intentionally and unlawfully caused his penis to penetrate the vagina and anus of LGA (minor) a girl aged 4 years and 9 months.

2. In another count, the appellant was charged with deliberately transmitting a life-threatening disease contrary to section 25(1) of the SOA, in that on the same date and place, having actual knowledge that he was infected with gonorrhoea, a life-threatening sexually transmitted disease, he had unprotected sexual intercourse with the minor, which infected her with the disease.

3. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the SOA.

4. The appellant denied the charges leading to a trial in which the prosecution called 7 witnesses in support of its case. It was adduced in evidence that on June 5, 2010, the appellant, who was a herbalist known to the family of the minor, visited them at their home. The minor's father (PW3) was outside doing carpentry. Her mother (PW1) was boiling water for her to bath, and her siblings had gone out to the shop when the appellant decided to take a rest in the children's bedroom. When the water was ready, PW1 called the minor so that she could take a bath but she did not respond. PW1 then asked

the appellant to call her, upon which the appellant stepped out to use the lavatory. In the meantime, the minor went to the bathroom, took a bath and washed the clothes she was wearing. When PW1 inquired why she was washing her clothes, she responded that the appellant had defiled her.

5. PW1 checked the minor and found that she had some whitish discharge on her genital area and at her anus. Her vaginal orifice was wider than usual and her anal orifice was bruised. PW1 called for her father and told him what had happened. When the appellant was confronted, he knelt twice and raised his hands asking for forgiveness. He claimed that he was possessed by demons. Upon examination at Kechauri District Hospital, the clinical officer (PW5) noted that the minor had been defiled and sodomised: her hymen was broken, her labia bruised and there was a whitish discharge which is not normal for a child her age. The minor also had a bruised anus. A physical examination of the appellant revealed that his penis was bruised, a condition that occurs when the penis is inserted in a vagina or anus forcefully.

6. At the end of the prosecution case, the trial magistrate found that a prima facie case had been made out and placed the appellant on his defence. The appellant testified on oath but called no witness. He denied the charges, claiming that on the material day he visited the minor's family, to follow up on a debt that the minor's father, PW3, owed him.

7. The trial magistrate evaluated the evidence found the appellant guilty as charged on the principal and alternative counts. She thus sentenced him to imprisonment for life on the first count, and 15 years imprisonment on the alternative charge, and ordered that the two sentences run concurrently.

8. Aggrieved by the conviction and sentence, the appellant appealed to the High Court and judgment was delivered by Sitati, J. on April 10, 2014 upholding the conviction and life imprisonment sentence meted on the appellant. The appellant was, however, acquitted on the alternative count.

9. Still aggrieved, he preferred the instant appeal based on 8 grounds, which we summarize as that the judge erred in law and fact by:

    a. Convicting the appellant without the clothes of the victim that had blood stains being produced.

    b. Not complying with section 36(1) of the *Sexual Offences Act* with regard to asking for DNA tests.

    c. Failing to consider the defence of the appellant.

    d. Not considering that the appellant had a sexually transmitted disease unlike the victim who was not infected.

    e. Convicting the appellant without receiving the medical book.

    f. Failing to find that the age of the victim was not ascertained.

    g. Failing to consider that the appellant had a grudge with the victim's parents.

    h. Imposing a harsh, arbitrary and an unconstitutional sentence on the appellant.

10. At the hearing of the appeal, the appellant appeared in person while Mr Okango, the learned Senior Principal Prosecution Counsel appeared for the respondent. Both had filed submissions which they relied on.

11. The appellant decried the prosecution's failure to produce the clothes of the minor as evidence of assault. He faulted the trial court for failing to consider section 36(1) of the SOA which provides that

the court may direct samples to be taken from an accused person in order to ascertain whether he committed the offence. The appellant contended that the prosecution did not prove its case beyond reasonable doubt, and neither did the trial court explain to him section 211 of the *Criminal Procedure Code* (CPC). He submitted that the case against him was fabricated by the minor's family to evade to paying him the money that they owed him for treating their son and mother. Further, the learned judge was faulted for failing to evaluate the entire case afresh and coming up with her own conclusions. In the end the appellant urged that his conviction be quashed, the sentence set aside and he be set at liberty.

12. For the respondent it was argued that the issue of production of the clothes of the minor was a point of fact not of law. Moreover, failure to produce such material was not fatal to the prosecution case in the face of other evidence that established to the appellant's guilt. It was urged that section 36(1) of the SOA was not mandatory, and in this case not necessary. In any event, if the appellant wanted a DNA test to be conducted in accordance with that section, he should have made that application at the trial court, it was argued. It was further submitted that the appellant's claim that his defence was not considered lacked merit as the court evaluated all the evidence on record before making its determination.

13. On the age of the minor, the prosecution submitted that the parents of the minor were best placed to know her age. The minor's mother, PW1, testified that she was aged 4 years and 9 months and the court affirmed that position. The appellant's complaint that the minor's parents held a grudge against him hence the accusation, was dismissed a matter of fact that was not raised at the first appeal stage and it should be ignored. In view of the new jurisprudence on mandatory minimum sentences for sexual offences, the prosecution proposed a reduction in sentence to 30 years imprisonment.

14. As this is a second appeal, the Court restricts itself to consideration of questions of law only by dint of Section 361(a) of the *Criminal Procedure Code*. As was held *David Njoroge Macharia vs Republic* [2011] eKLR;

> " That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As 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 *Chemagong v R* [1984] KLR 611."

15. We note that the learned judge evaluated the evidence on record extensively before concluding that the minor had been defiled by the appellant. The learned judge analysed the evidence of the minor and PW1, as corroborated by the clinical officer (PW5), as to whether there was penetration. PW1 testified that the minor told her that the appellant had done bad things to her and when she examined her genitalia and anus, she saw a whitish discharge. Her vaginal orifice was wider than normal and her anal orifice bruised. Similarly, PW5's evidence was that when he examined the minor, he noticed that she had been defiled and sodomised. Her hymen was broken, her labia bruised and there was a whitish discharge which is not normal for a child of her age. The clinical officer also observed that the minor had bruises in her anus and there were sperms in her anus and vagina. Based on the foregoing cogent evidence, the learned judge was convinced, as we are, that there was penetration. We further agree with the learned judge's finding that production of the clothing that the minor wore on the material day was not necessary to prove the case against him.

16. On the question of the identity of the appellant, it is common ground that he was well-known to the minor's family, having previously treated two of them. Concerning the age of the minor, on the basis of

various authorities, the learned judged found that the age of the minor was well proven by her mother to be 4 years and 9 months. We concur with the learned judge and find no reason to fault her findings.

17. The appellant further alleges that the trial court failed to comply with section 211 of the *Criminal Procedure Code* (CPC). We observe that the appellant is raising this issue for the first time at the second appellate Court. More, importantly however, is that it would seem that section 211 of the CPC was actually explained to the appellant. At the close of the prosecution case on September 30, 2010, the record reveals the following;

> " The court explains the 3 ways in which the Accused can make his defence and Mr Mongare replies:
>
> The Accused will give a sworn statement"

18. We are of the considered view that although it is desirable that the address to the accused in explaining the provisions of section 211 of the Criminal Procedure Code should be recorded by the trial court, where an accused is represented by counsel, as in the instant case, the omission of any such recording cannot be said to have occasioned prejudice.

19. Lastly, the appellant contended that the sentence meted out on him was harsh and unconstitutional under the circumstances. The trial magistrate sentenced the appellant under the provisions of Section 8 (2) of the *Sexual Offences Act* which provides for a minimum sentence of life imprisonment. The trial magistrate was therefore within the law in imposing the said minimum sentence. Equally, the learned judge who affirmed and upheld the sentence was bound by the law as at the time of the delivery of the judgment. The Supreme Court decision of *Francis Karioko Muruatetu & Another Vs. Republic & Another* [2017] eKLR had not been delivered and therefore she did not have the lee way to reduce the sentence, had she thought fit. The aforementioned case held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis.

20. In view of the Muruatetu (supra) case, and the fact that the appellant was aged 65 years as at the time of hearing this appeal, we are minded to interfere with the sentence meted out. We note, however, that the appellant did a cruel and despicable act to a little child. And we must bear that in mind.

21. For the reasons we have set out herein we dismiss the appeal against conviction. We allow it on sentence, to the extent that we set aside the imprisonment for life and substitute it with a 30-year sentence to run from January 21, 2011 when the trial court passed the initial sentence.

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

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR