Musalano v Republic (Criminal Appeal 104 of 2017)
[2023] KECA 301 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 301 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 104 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MARCH 17, 2023

BETWEEN

AMOS MUSALANO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (Kariuki, J.) dated 5th April, 2017 in HCCRA No. 81 of 2014)

JUDGMENT

1. The appellant, Amos Musalano, was charged before the Resident Magistrate's Court at Kakamega with the offence of defilement 'contrary to section 8(1) (2)' of the *Sexual Offences Act*. The particulars of the offence were that on the 2nd day of October, 2013 in Kakamega East District within Kakamega County, he unlawfully caused his penis to penetrate the vagina of VK, a child aged 12 years. He denied the offence and was tried and convicted as charged. He was sentenced to imprisonment for life.

2. Aggrieved with his conviction and sentence, he filed an appeal before the High Court in Kakamega. In the judgment dated April 5, 2017, the first appellate court (Kariuki J) dismissed his appeal and upheld his conviction and sentence.

3. The appellant has now filed the present appeal to challenge the decision of the High Court. In his memorandum of appeal, the appellant faults the learned judge on the following grounds;

    i. That the learned judge erred in law by failing to appreciate that the conviction was based on fatally defective charge sheet.

    ii. That the learned judge erred in law by not appreciating that the appellant's constitutional rights under article 49 were violated so as to render the whole record a mistrial.

iii. That the learned judge erred in law failing to note that the prosecution evidence was inconsistent, contradictory, uncorroborated and insufficient to sustain a conviction.

iv. That the learned judge erred in law by failing to appreciate that crucial witnesses were not availed in court to support the prosecution case.

v. That the learned judge erred in law by upholding the maximum sentence imposed on the appellant.

4. The evidence of the complainant, PW1, aged 12, was that on the material day, she was at home with her father and the appellant, who had joined them for prayers. The appellant was sleeping in the sitting room, where the complainant was also sleeping. Her father was in a separate room. Later that night, the appellant removed his inner clothes and her pant and slept on her. She did not tell her father what happened but she told 'Mama Nuvi' who then told her grandmother. She further testified that the appellant had slept with her on two other occasions and that the first time the appellant slept with her, he gave her Kshs 30, and that he gave her Kshs 200 the second time.

5. The complainant was examined by Patrick Mambili (PW2) a clinical officer at Kakamega County Hospital. His testimony was that she had visited the hospital on October 5, 2013 in the company of her grandfather. He had examined the complainant and noted that she had no injuries on her vagina but her hymen was torn. Her urine revealed that there were epithelial cells which, in his assessment, meant that there was erosion of her vaginal lining wall which suggested that there was coitus in her recent past. There were also pus cells showing infection.

6. The father of the complainant, EI (PW3) confirmed that on October 2, 2013, the appellant came to pray with them. The appellant slept on a chair in the sitting room while the complainant slept on the floor, where she normally slept. He heard some commotion in the sitting room and when he went to the sitting room, the appellant ran away.

7. Michael Mwangi (PW4) a dentist at the Kakamega General Hospital, examined the complainant on February 20, 2014 to assess her age. He approximated it to be between 10-12 years.

8. In his sworn statement of defence, the appellant denied committing the offence. He alleged that he had been warned that there was a scheme by his neighbors to frame him for an offence as he had denied them an opportunity to do several things in the house he was working in. He had been arrested by village elders while working on the farm and escorted to the police station.

9. In his appeal to the High Court, the appellant challenged the decision of the trial court on the grounds that the sentence was excessive; his right to a fair trial was breached as the minor did not know why she was in court; that the investigating officer, being a crucial witness to the case, was not called to testify; that members of the public (neighbours) were never called to testify; and that the doctor did not medically examine the appellant to prove his involvement with the minor as no semen was found on the minor to link the appellant to her.

10. In its decision, the High Court found no merit in any of these grounds and upheld both the appellant's conviction and sentence, leading to the present appeal.

11. At the hearing of the appeal, the appellant appeared in person and indicated that he would rely on his written submissions which are undated but appear to have been filed in August 2020. He argues in these submissions that he was tried on a defective charge sheet as he was charged under section 8(1)(2)

of the *Sexual Offences Act*, which section does not exist. By being tried under a fatally defective charge sheet, his rights under the *Constitution* were infringed.

12. The appellant further submits that the trial court relied on contradictory evidence on where the complainant used to stay and with whom; that there was a contradiction in the dates of the alleged offence- the complainant having stated that she was defiled on October 2, 2013 while PW2 indicated that the complainant was defiled on October 5, 2012.

13. The appellant submits, further, that the prosecution failed to call the arresting officer together with the investigating officer to tender their evidence.

14. With regard to sentence, the appellant submits that the first appellate court erred in upholding the maximum sentence imposed upon him notwithstanding the Supreme court decision in *Francis Kariokor Muruatetu & another v Republic* [2017] eKLR (Muruatetu1) where the mandatory nature of the death sentence was declared unconstitutional.

15. The respondent opposed the appeal in submissions dated 5th July, 2022 which were highlighted by learned prosecution counsel, Mr Okang'o. It is submitted on behalf of the State that this being a second appeal, the appellant ought to raise only matters of law. The respondent submits that this court should not consider the matters of fact that the appellant raises.

16. Regarding the appellant's contention that the charge sheet against him was defective, the respondent submits that the defect was not material and did not prejudice the appellant. Support for this submission is sought in the case of *Amos Ipulo v Republic* [2016] eKLR. It is further submitted that even though there was a defect in the charge sheet, the defect did not go to the root of the charges the appellant faced to render it ambiguous. The trial court had noted the defect and a verdict was issued. In any event, according to the respondent, as this issue was not raised before the first appellate court, it cannot be raised before this court.

17. It is submitted, further, that similarly, the argument that the appellant's rights under article 49 of *the Constitution* were violated was being raised for the first time before this court. The respondent submits that the appellant was arrested on October 5, 2013, a saturday, and was charged on October 8, 2013

18. As for the appellant's submission that there were inconsistencies, contradictions, and uncorroborated and insufficient evidence, the respondent submits that this argument is also being raised for the first time in this court. There are concurrent findings of the two courts below that the evidence on record was sufficient and all the elements of the offence were proved. The respondent notes that both the trial and first appellate courts had discounted the evidence of PW3 after finding that he was mentally unstable. His evidence, therefore, could not be used as a basis for alleging that there were contradictions in the prosecution evidence.

19. Regarding the failure to call the investigating officer, the respondent submits that the first appellate court appreciated the reasons advanced, noting that there is no law on the particular number of witnesses to be called to prove a case.

20. The respondent submits, regarding sentence, that the first appellate court was right to uphold the trial court's conviction and sentence as the decision in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR was clear that Muruatetu 1 does not apply in the instance case as this case revolves around defilement. It is the respondent's submission that the sentence of life imprisonment meted out against the appellant and upheld by the first appellate court was lawful.

21. This being a second appeal, the remit of this court is circumscribed by the provisions of section 361(1) of the *Criminal Procedure Code* to matters of law. As this Court stated in *David Njoroge Macharia v 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."

22. The appellant has raised a number of issues which relate to matters of fact that were before the trial court. The argument relating to the evidence adduced, and whether or not there were inconsistencies and contradictions in such evidence, is not a matter for consideration before us.

23. We have considered the record of appeal and the respective submissions of the parties. We note that from the grounds of appeal raised by the appellant, the sole issue of law raised in this appeal is whether the charge sheet was fatally defective. The complaint raised in relation to the charge sheet is that the appellant was charged under section '8(1)(2)' of the *Sexual Offences Act*. Such a section, argues the appellant, does not exist.

24. We note that in its judgment, the trial court expressly addressed itself to the defect in the charge sheet. It observed, however, that the defect did not in any way prejudice the appellant. While we note that this issue was not raised before the first appellate court, we address it briefly by observing that we are in agreement with the trial court's finding that the defect in the charge sheet did not occasion any prejudice to the appellant. In *Benard Ombuna v Republic* [2019] eKLR this court cited its decision in *Isaac Nyoro Kimita & another v R* [2014] eKLR in which it stated:

> " In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?" [Emphasis added]

25. The Court in Bernard Ombuna v Republic (*supra*) went on to conclude that:

> 15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was
>
> > not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

26. The framing of the charge against the appellant by the prosecution was sloppy. The charge ought to have read '...contrary to section 8(1) as read with section 8(2)' of the *Sexual Offences Act*. The State should take note and ensure that charges under the *Sexual Offences Act*, which relate to serious offences, often against vulnerable children, are properly framed. However, as the trial court observed,

the appellant in the present matter fully understood what the charge against him was, and no prejudice was caused to him. This ground of appeal has no merit.

27. The appellant has also raised the question of his sentence, predicating his argument on the Muruatetu 1 decision. In *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) [Muruatetu 2], the Supreme Court clarified that Muruatetu 1 applied only to the sentence for murder under section 204 of the *Penal Code*. It stated as follows:

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

28. Pursuant to these directions, there have been several decisions from our courts regarding the application of minimum mandatory sentences upon conviction for sexual offences-see *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) and *Wachira & 12 others v Republic & 2 others* (Petition 97, 88, 90 & 57 of 2021 (Consolidated)) [2022] KEHC 12795 (KLR) (31 August 2022) (Judgment). In this latter decision, Mativo J (as he then was) stated as follows:

> " 26. The core value is to ensure that courts impose a 'just and appropriate' sentence. This requires a judge sentencing an offender to ensure that the 'aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.' The "just and appropriate sentence" arrived at considering the peculiar circumstances of the case can only be arrived (sic)if the sentence is fixed and pre-determined regardless of the peculiar circumstances. Some defilement cases are preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserve no mercy. Stiffer or even maximum sentences must be deployed in such cases. Other cases involve very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserve no mercy. Others cases involve persons who have been entrusted with young children, and they abuse the trust. Such persons deserve no mercy."

29. The reasoning of the court in the above matter was that in determining whether or not to impose the sentence under the *Sexual Offences Act*, the Court should consider the peculiar circumstances of the case- see also the decision of this Court in *Mwangi v Republic* (Criminal Appeal 84 of 2015) [2022] KECA 1106 (KLR) (7 October 2022) (Judgment).

30. The complainant in this case, a young girl of twelve, testified how the appellant had defiled her in her father's house, not once but twice, offering her money not to reveal those events to anyone. The appellant went to the complainant's house, at night, on at least two occasions, under the guise of 'praying' for the complainant and her father. From the evidence before the trial court, it would appear

that the complainant's father had a mental disability, an observation made by the clinical officer in the P3 form, together with a recommendation that the child should be taken away from her father.

31. It thus seems that the appellant took advantage of both the father and child to carry out his nefarious scheme against the child, under the guise of being their spiritual guide. He knew of PWs mental deficit, that he would unwittingly allow the appellant to spend the night in the room alone with his daughter, oblivious of the danger that the appellant posed to his child. To borrow the words of Mativo J, such an evil shepherd 'deserves no mercy.'

32. It is our finding, therefore, that the appeal against both conviction and sentence lacks merit, and it is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR