Kamaliny v Republic (Criminal Appeal 253 of 2018)
[2023] KECA 217 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 217 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 253 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MARCH 3, 2023

BETWEEN

SAMMY KAMALINY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Eldoret (G. K. Kimondo, J.) dated 24th September, 2015 in HC.CR.A. No. 220 of 2013)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Eldoret (G.K. Kimondo, J.). The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006.

2. The trialcourt wasinformed that the appellant on February 14, 2013 at [Particulars Withheld] in Kabarnet Division within Baringo County caused his penis to penetrate the vagina of RC, a child aged 17 years. The appellant denied the charges and soon thereafter his trial ensued.

3. The prosecution case in brief was that on the material date at about 10:00 pm the complainant had retired to bed in the dormitory when she felt someone enter her bed. The person covered her mouth with a pillow, removed her underwear and inserted his penis into her vagina. She struggled for about 30 minutes and managed to push-off the intruder who then tried to escape. The dormitory lights were on. She followed her assailant to the corridor and confronted him. She recognized him as the school watchman.

4. The matter was reported to a teacher, RK; the house master, BO; another teacher, ES and later to Kabarnet Police Station. The complainant was treated at Kabarnet District Hospital and found to have a broken hymen and reddish brown discharge which had been there for a week: but the clinical officer who examined her could not conclude whether there was any element of penetration.

5. Put to his defence, the appellant stated that he was on duty on the material night but denied committing the offence.

6. The trial court having taken all relevant circumstances into account rendered its verdict to the effect that the appellant was positively identified and penetration proved. Consequently, the appellant was convicted and sentenced to 15 years' imprisonment.

7. Aggrieved, the appellant appealed to the High Court. He raised four grounds of appeal. The learned Judge in his determination noted that mistakes can be made even in cases of recognition and that an honest witness may nonetheless be mistaken. He stated that the complainant and the appellant in this case knew each other. On the material night lights were on and there was sufficient light in the corridor where the complainant confronted the appellant. Having had a brief conversation and the appellant having pleaded for forgiveness, the court was convinced that there was recognition.

8. On whether there was penetration, the court noted that the complainant's evidence was not corroborated by medical evidence. However, relying on section 124 of the *Evidence Act*, the learned Judge found the evidence of the complainant to be sufficient. She was a truthful and consistent witness.

9. As regards the age of the complainant. The clinical officer stated that she was 17 years' old and produced a P3 form to that effect.

10. Subsequently, the appeal was held to be devoid of merit and dismissed.

11. Dissatisfied, the appellant lodged the present appeal. Three grounds were raised; to wit that the learned Judge erred in law by: upholding the conviction without considering that the element of penetration was not proved beyond reasonable doubt; directing himself that the age of the complainant was below 18 years without age assessment evidence; and rejecting the appellant's defense without giving any cogent reason as provided for under**section 169(1)** of the *CPC*.

12. At the hearing of the appeal, the appellant appeared in person while the state was represented by Ms. Okoth. Parties relied on their written submissions and the respondent counsel opted to briefly highlight her submissions.

13. In his written submissions, the appellant annexed a supplementary memorandum of appeal in which he raised seven grounds. The appellant faulted the High Court on its duty as a first appellate court. To buttress this submission, he relied on the case of *Kiilu & others v Republic* [2005] KLR 174. He stated that there were material contradictions on record which demonstrate that the complainant was not a credible witness. He stated that the identity of the appellant as the perpetrator was in doubt.

14. He submitted that the court should have considered his defence of alibi in light of the new issues which had been raised and granted the appellant leave to adduce the said evidence. He said that the court ought to have addressed its mind to section 212 of the *CPC* and noted that the prosecution did not apply to adduce evidence to challenge the alibi.

15. The appellant maintained that penetration was not proved beyond reasonable doubt as the medical evidence was not conclusive. The appellant further stated that he ought to be acquitted as his rights were violated when he was arraigned in court after 24 hours had passed.

16. On sentencing, the appellant faulted the trial court and the learned Judge for failing to address the Sentencing Policy Guidelines, 2016 in sentencing him to a minimum sentence of 15 years. He urged that the appeal be allowed, and for the conviction and sentence to be set aside.

17. Opposing the appeal, Ms. Okoth submitted that this was a case of recognition.

The appellant was well known to the complainant. He was a watchman who had been employed to guard the institution where the complainant was studying and even though the incident occurred at night, the complainant was clear that there was sufficient light in the dormitory where she was sleeping and in the corridor. The complainant managed to confront the appellant and was able to see him clearly and even the appellant asked for forgiveness that night. There was therefore no room for mistaken identity as the complainant had sufficient time to see the appellant and identify him.

18. On the issue of penetration, counsel conceded that the medical evidence produced by PW3 was inconclusive. However, she stated that this was not fatal to the prosecution case. Relying on the case of *Kasim Ali v Republic* she stated that the absence of medical evidence to support a fact of rape is not decisive as rape can be proved by the oral evidence of the victim or by circumstantial evidence. In this case, the complainant was clear that the appellant went into her bed, removed her underwear and inserted his penis into her genitals. The trial court noted that the complainant was truthful and that her evidence was consistent.

19. On alibi defence, counsel took note that this was a new issue that the appellant had only raised at this stage. That the issue was never raised during the trial and from the record, when put to his defence the appellant did not deny being at work that material night. He only denied committing the offence. This was therefore an afterthought and she urged thiscourt not to consider the same at this stage.

20. On whether section 200(3) of the *Criminal Procedure Code* was complied with, counsel submitted that from the record it was evident that the trial was conducted by one magistrate and there was therefore no need to comply with the provisions of section 200(3) of the *Criminal Procedure Code*.

21. With regard to the constitutionality of the minimum sentence as imposed by the trial court, counsel submitted that section 84 of the *Sexual Offences Act* provides for a minimum sentence of 15 years' imprisonment. That even though recent jurisprudence has emerged, looking at the circumstances of this case, the appellant was a watchman at the learning institution where the complainant was. He was given the responsibility of protecting these students at the institution. He betrayed the trust bestowed upon him by society to look after the children. He committed a heinous crime which occasioned severe trauma and suffering to the complainant. That the sentence imposed by the trial court was commensurate to the offence. She urged this court to confirm the same and dismiss the appeal in its entirety.

22. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In doing so we are alive to our duty as a second appellate court. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

> " 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."

23. We have carefully considered the record of appeal, the written submissions of the appellant, and of the respondent, authorities and the law. The issues for determination are whether the age of the complainant was ascertained, whether the issue of penetration was proved, and whether the appellant's defence was considered.

24. The *Sexual Offences Act* sets out the main elements of the offence of defilement as follows: the victim must be a minor; there must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients.

25. Though raised as a ground of appeal, neither party submitted on the issue of the age of the complainant. We find therefore that based of the P3 Form produced in evidence and the evidence of PW3, the complainant was a minor aged 17 years.

26. The appellant contended that the prosecution did not discharge its mandate to the required standard of proof on the element of penetration. The two courts below found that even though the medical proof of penetration was not conclusive, the complainant was found to be truthful, consistent and that therefore her evidence was sufficient by dint of section 124 of the *Evidence Act*. It was on the strength of the complainant's evidence, that someone crept into her bed, removed her underwear and inserted his penis in his vagina that the appellant was convicted. We find that penetration need not be complete or absolute; partial penetration will suffice.

27. As regards the identity of the complainant, we note that the appellant was well known to the complainant as the watchman of the institution in which she undertook her studies. The complainant was able to confront her assailant in the corridors where there was light. The two were able to exchange words having had a brief confrontational conversation. We have no doubt that the complainant was able to recognize the appellant. In the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR, this Court while dealing with the complexities of an identification of an assailant stated:

> " It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction." Emphasis ours.

28. Similarly, Madan J.A in Criminal Appeals Nos. 480, 208 and 209 of 1978, *Reuben Taabu Anjononi & 2 others v Republic* [1980] eKLR stated

that:

> " This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

29. As regards the appellant's alibi defence and violation of section 203 of the *Criminal Procedure Code*, we find that these are new issues being introduced before this court on a second appeal. We have no business delving into the said issues. Be that as it may, the record shows that the appellant admitted to have been on duty on the material night and that this matter was handled by a single Magistrate from beginning to the end.

30. From the foregoing, we find no reason to make a finding that is inconsistent with the first two courts on matters of facts. Notwithstanding the inconclusive medical evidence, we are satisfied that the appellant's conviction was safe.

31. The appellant contended that the Sentencing Policy Guidelines, 2016 were not considered in his sentence and that he was sentenced to a minimum sentence in contravention of the law. The

complainant was 17 years old. Undersection 8(4) of the *Sexual Offences Act* the minimum mandatory sentence is 15 years' imprisonment.

32. The appellant was sentenced to 15 years' imprisonment as provided for as the minimum sentence under the *Sexual Offences Act*. The trial court in passing the sentence in on April 25, 2013 considered the age of the appellant and the fact that he was a first offender. The appellant did not offer any mitigating factors. The first appellate court upheld the sentence in 2015.

33. The law on minimum mandatory sentences has since evolved.

    Notwithstanding the Supreme Court directions on July 6, 2021that the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR was only in respect to the offence of murder, emerging jurisprudence from this court points to the application of the rationale in offences other than murder. We note that the directions by the Supreme Court cannot be limited to the mandatory death sentence in murder cases which was the subject of litigation in that instance; that reasoning also applies to minimum sentences provided by other statutes.

34. This Court has in the cases of *Christopher Ochieng v R* [2018] eKLR and *Jared Koita Injiri v R*, Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the *Sexual Offences Act* and stated thus:

> " In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ... Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic* (*supra*), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

35. The principles underlying sentencing are set out in the judiciary sentencing policy guidelines to include: Proportionality; the sentence meted out must be proportionate to the offending behaviour. The punishment must not be more or less than is merited in view of the gravity of the offence.

    Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender; and Deterrence; prevent crime and reduce crime rate-based on the notion that everyone understands that certain conduct constitutes a crime which carries a severe penalty, and that because of this the public will desist from the targeted conduct.

36. In the present case although the learned Judge rightly considered the gravity of the offence and the fact that the appellant took advantage of the trust bestowed upon him as the watchman to guard the students and turned around and became predator, we are inclined to exercise our discretion and interfere with the sentence imposed on the appellant. In reviewing the sentence, we must take into consideration both the aggravating and mitigating factors. We note that the appellant's actions were heinous to the minor. We also note that he was a first offender. Nonetheless, he caused the complainant physical injuries and mental trauma that she may never recover from.

37. From the foregoing, we set aside the 15 years' imprisonment and substitute the same with 10 years' imprisonment to run from April 25, 2013 when he was first sentenced. This is in tandem with the proviso to section 333(2) of the *Criminal Procedure Code* which requires a court, in passing sentence, to consider the period a person has been held in custody prior to the sentencing.

38. The upshot is that the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence succeeds.

39. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF MARCH, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR