PSM v Republic (Criminal Appeal 203 of 2018)
[2023] KECA 429 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 429 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 203 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

PSM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction, judgement, and sentence of the High Court of Kenya at Eldoret (Omondi. J) dated 2nd July, 2018 In Criminal Appeal No. 91 of 2015)

JUDGMENT

1. This is the second attempt by PSM the appellant herein, to appeal his way out of a conviction for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*, and the attendant life imprisonment handed him by the magistrate's court at Eldoret. The first appeal was to the High Court at Eldoret before Omondi J (as she then was) and it was unsuccessful

2. The particulars of the offence were that on diverse dates between August 1, 2013 and October 27, 2013, at (Withheld)area (Withheld) District within Uasin Gishu County, the appellant willfully and intentionally caused his genital organ (Penis) to penetrate the genital organ (vagina) of SM a girl aged 6 years, who was to his knowledge his daughter.

3. The prosecution's case as tendered through the evidence of the minor was that PW1 (SM) the complainant, lived alone with her father the appellant in a one bedroomed house. At night they slept together on a mattress and many a night, the appellant would remove her clothes and insert what the minor described as the organ he used for urinating into the organ she used for urinating.

4. CKC who testified as PW2, was a neighbour who had known the appellant and the minor for about two months when her child and the minor became friends. She stated that on October 19, 2013, the minor came to her house at around 7pm, and spent the night. The following morning PW2 saw the

appellant at her gate having come to fetch the minor but her daughter told her that the minor had run away to the shamba boy's house.

5. PW2 took the appellant to where the minor was, but the minor completely refused to go back home with the appellant. PW2 asked the appellant what he had done to make the minor refuse to go home with him and he answered that he had disciplined her. PW2 then prevailed upon the appellant to go back home and return later for the minor. Come Sunday evening and her daughter told her that the minor had confided in her that the appellant was doing what she referred to as "bad manners" to her and would then give her Panadol and admonish her not to tell anyone what he had done.

6. The appellant did not come back to fetch the minor. Consequently, on Monday morning PW2 took the minor to her school at (Withheld) Primary School and told her teacher, PW4 SY, that the minor had something to tell her. The minor told PW4 that the appellant was doing "bad manners" to her every day and had threatened to kill her if she disclosed this to anyone.

7. PW4 immediately took the minor to the police station to report the matter. PW5, Police Officer Peter Wangwe, who was on duty booked the report received from the complainant, took the minor to Moi Teaching and Referral Hospital and thereafter, to a Rescue Centre through the Children's Department.

8. PW3 the Medical Officer, Jane Yatich attended to the minor on October 28, 2013 and upon examining her private parts, she found that her hymen was torn and had healed and she had redness on her private parts. The Medical Officer concluded that there was penetration. She produced the P3 form and the minor's Age Assessment Report which was prepared by Dr Kimutai and which showed that the minor was aged between 6 and 7 years.

9. At the close of the prosecution case the appellant was put on his defence and in his unsworn statement, he confirmed that the minor was his daughter with whom he lived alone since the mother deserted their home year earlier. He confirmed that as stated by PW2 he went to the home of PW2 to fetch his child who had visited her friend and did not return home the previous day and PW2 informed him that they were preparing to go to church. The next thing he learnt was that the minor was no longer at the home she had visited. Fearing that PW2 had stolen his daughter, he went to look for her at the Child Rescue Centre where he narrated his plight. He was thus surprised to see the police arrive shortly thereafter and arrest him. He denied that he defiled the minor. He did not call any witnesses.

10. Upon consideration of the evidence before her, Hon PW Mbulikah the Resident Magistrate (as she then was), convicted the appellant as charged. She considered his mitigation, and sentenced him to life imprisonment as provided under section 20 (1) of the *SOA*.

11. In his first attempt to appeal that judgment he approached the High Court on grounds that: the case was not proved beyond reasonable doubt; the complainant's age was not proved; the investigation was shoddy and that the appellant's defence was not considered. The appeal was canvassed by way of written submissions which the learned Judge considered and found that the conviction was safe and that the sentence meted was well deserved.

12. The learned Judge upheld the conviction and confirmed the sentence, provoking this second appeal on the grounds that the learned appellate Judge failed; to appreciate that the appellant was not accorded an opportunity to cross-examine PW1; that the language used by the prosecution witnesses was not indicated and that the appellant's rights as provided under Article 50 (2)(g)–(h) of the *Constitution* were violated. The appellant was also aggrieved that he was sentenced to a mandatory minimum sentence of life imprisonment as provided by the statute which he alleges has since been declared unconstitutional by the Supreme Court.

13. This appeal was canvased by way of written submissions that were orally highlighted in the plenary hearing.

14. The appellant who was in person submitted first, that he was not given an opportunity to cross-examine the complainant as evinced by the proceedings on record, so as to test the veracity of her evidence. Secondly, he urged that on November 1, 2013 the record indicates that he informed the trial court that he understood Kiswahili language. However, the proceedings do not reflect the language which was used from PW3 to PW5, nor does the record indicate whether there was any interpreter during the proceedings. He urged this Court to find that failure by the trial court to avail an interpreter for him violated his right to fair trial and it also meant that he could not adduce evidence, or challenge the evidence adduced against him and neither could he prepare for his defence adequately. Hence, his rights under Article 50 (2)(c) and (k), of the *Constitution* were violated.

15. It was also submitted that the appellant was not informed that he had a right to legal representation at the State's expense.

16. On sentence, the appellant urged that section 8 (2) provides for a mandatory minimum sentence of life imprisonment. As such, the trial court is denied the opportunity to consider the appellant's mitigation and employ its discretion in sentencing. He relied on paragraph 53 of *Francis Karioko Muruatetu & Another vs Republic*, Petition No 15 of 2015 where it was held that:

> "....if a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability ... consequently, failure to individualize the circumstances of the offence or offender may result in the undesirable effect of over punishing convict."

17. The appellant further relied on this Court's decisions in *Evans Wanjala Wanyonyi vs Republic* (2019) eKLR, and *Paul Ngei vs Republic* (2019) eKLR, where this Court held that *Muruatetu* (*supra*) can also be applied with equal measure to mandatory minimum sentences.

18. The State was represented by Prosecution Counsel, Ms Patricia Kirui who conceded that the complainant was not subjected to cross-examination by the appellant and therefore, the appellant's right to fair trial was violated. However, Counsel urged this Court to consider the circumstances of the case and in the interest of justice order a retrial, in the event the appeal succeeds. She opposed ground 2,3 and 4 of the appeal.

19. As stated elsewhere in this judgment this is the second appeal in this case. Our duty as the second appellate Court is limited to consideration of matters of law only. We will not interfere with concurrent findings of fact arrived at in the two courts below unless they are based on no evidence. In this respect, section 361 of the *Criminal Procedure Code* provides that:

> "361.
>
> (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

20. In this regard, this Court held in *Karingo v Republic* (1982) KLR 213 as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless they are 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 Karori S/O Karanja versus Republic (1956 17 EALA 146)."

21. We have considered the record of appeal, the rival arguments of the parties and the law and distilled the following issues for our consideration:

a. Whether this Court can vitiate a superior court decision on the basis of issues that were not raised at the superior court; and

b. Whether the mandatory sentence meted on the appellant is unconstitutional

22. The appellant was charged with incest contrary to section 20 (1) of the *Sexual Offences Act*. The section provides that:

> "20(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of a female persons."

23. The appellant has raised three grounds of appeal being firstly, that he was not accorded an opportunity to cross- examine PW1, secondly, that the language used by the prosecution witnesses was not indicated and therefore his rights as provided under Article 50 (2)(g)–(h) of the *Constitution* were violated and lastly, that he was sentenced to a mandatory minimum sentence of life imprisonment as provided by the statute, which has since been declared unconstitutional by the Supreme Court.

24. None of these grounds were issues brought to the attention of the trial court, nor were they raised as grounds of appeal before the superior court. The fourth issue that the appellant was not informed that he had a right to legal representation at the State's expense was not a ground of appeal before the superior court neither is it a ground before us. It was mentioned in passing in the submissions. The three grounds have therefore, only sprung up in this second appeal hence, no determination was made on any of them by the courts below.

25. The practice of springing new grounds on a second appeal is not a novel. This Court has had occasion to pronounce itself on it before. In *John Kariuki Gikonyo v Republic* [2019] eKLR, the Court stated thus:

> "(17) ....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v Republic [2010] eKLR Criminal Appeal No 203 of 2009; held as follows:
>
> "…. the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."
>
> (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

26. On the same issue, this Court in *Katana & another v Republic* (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) (21 October 2022) (Judgment) held as follows:

> "The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court's decision."

27. We note that the appellant referred to the fact that he did not cross-examine PW1 in his submissions in the first appeal, although he did not file it as a ground of appeal and the court did not pronounce itself on it. We however, cannot fault the superior court on issues that were not before the court, nor can they be the basis for vitiating the decision of the High court.

28. Be that as it may, the three grounds raised are matters of law and we have gone ahead to consider them. The appellant's first argument was that he was not given an opportunity to cross-examine the complainant, and therefore his rights under Article 50 (2) (k) of the *Constitution* were infringed. The respondent conceded but urged this Court to consider the circumstances of the case and order a retrial in the event the appeal succeeds based on this ground.

29. Article 50 (2) (k) of the *Constitution* provides that: every accused person has the right to adduce and challenge evidence. Further, section 302 of the *Criminal Procedure Code* stipulates that:

> "The witnesses called for the prosecution shall be subjected to cross examination by the accused person or his advocate and to re-examination by the advocate for the prosecution"

30. We are guided by this Court's decision in *Nicholas Mutula Wambua vs Republic*, MSA CRA No 373 of 2006 where the Court cited with approval, the decision of the Supreme Court of Uganda in *Sula vs Uganda* (2001) 2 EA 556 thus:

> " The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".

31. Also, in *Paul Kinyanjui Kimauku vs Republic* [2016] eKLR, this Court considering the same issue, held as follows:

> " ...the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the Constitution, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross- examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the Criminal Procedure Code to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."

32. Therefore, it is clear that the appellant has the right to cross-examine the prosecution witnesses whether they testify on oath or without oath, regardless of their age. In the instant case it is evident from the record that the appellant was not afforded the opportunity to cross- examine the minor.

33. Flowing from the foregoing the Court is faced with two options. The first is to declare a mistrial and acquit the appellant altogether or in the alternative, remit the case back to the trial court for re-hearing. The second is to consider the evidence of the rest of the witnesses as assessed by the two courts below, to determine whether the prosecution's case can still stand.

34. On the first option which is to declare a mistrial we note that the appellant faced a serious charge of incest with a child who was of tender age. From the evidence on record, the offence was perpetrated repeatedly over a period of time so traumatizing the minor that she was willing to run away from home to stay with strangers such as PW2 or her shamba boy, rather than live with her father. Therefore, considering the circumstances of the case, an outright acquittal without exploring other options would not serve the interest of justice.

35. On the alternative which is to remit the case back to the trial court for re-hearing, section 354(1) of the *Criminal Procedure Code* under which a retrial may be ordered appears to give the first appellate court in its appellate jurisdiction, unlimited discretion as to what is and what is not proper exercise of

that discretion. In *Mathea & another v Republic* (1989) eKLR the court set out when a retrial can be ordered as follows:

> "2. A retrial could take place where it is in the interest of justice and no injustice is likely to be caused to the appellant. However, each case must depend on its own facts.
>
> 3. Cases of injustice have usually involved a consideration of whether an appellant has served an appreciable term of imprisonment. This had not happened in this case as the appellants had been released on bail after 22 days.
>
> 3. A retrial should not be ordered unless the appellate court is of the opinion that a conviction might result."

36. In *Makupe v Republic* (1989) eKLR this Court reiterated the requirements necessary for a re-trial as follows:

> " In general, a retrial will be ordered when the original trial was illegal or defective, it will not be ordered where the conviction is set aside because of insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps at the first trial even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the appellant (or accused)."

37. For a retrial to be ordered therefore, it should be demonstrated that there was an illegality or defect in the trial; that the interests of justice require a re-trial; that it is not likely to cause an injustice to the appellant and that the appellate court is of the opinion that a conviction might result. Each case however, depends on its particular facts and circumstances. In the case before us it is clear that there was a defect in the trial by the failure of the trial court to accord the appellant a chance to cross- examine the complainant. The prosecution did not however, demonstrate that the witnesses and the evidence are still available in view of the lapse of ten years from the time of conviction to date, for this Court to form an opinion that a conviction is likely to result.

38. We therefore move to consider the second option whether the rest of the evidence as assessed by the two courts below, to determine whether the prosecution's case can stand without the testimony that the minor gave in court.

39. PW2 CKC, is the neighbor in whose house the minor first took refuge when she left home. She testified that the minor fled and took cover in the shamba boy's house when the appellant showed up next day to take her home. The minor completely refused to return home with the appellant. When PW2 received the report of the minor's defilement and took her to her teacher PW4, SY, the teacher questioned her, heard her narrative first hand and took her to the police. The appellant is therefore identified as the person who caused the minor the trauma she was fleeing from.

40. PW5, Police Officer Peter Wangwe, received the minor with the report of defilement from PW4, took the minor to hospital for examination and later on to a Children's Rescue Center. Finally, there was the evidence of PW3 the Medical Officer, Jane Yatich who produced the report on her finding upon examining the minor which confirmed that she had been defiled. She also produced a second report compiled by Dr Kimutai which confirmed that the minor was aged between 6 and 7 years.

41. We are satisfied that there is a thread of consistency in the evidence of the witnesses who were subjected to cross examination by the appellant to prove the age of the victim, the fact of penetration and the identity of the perpetrator. The evidence was therefore, cogent and sufficient to sustain the conviction.

42. On the second ground the appellant urged that the language used by the prosecution witnesses was not indicated and therefore his rights as provided under Article 50 (2)(g)– (h) of the *Constitution* were violated. The appellant himself submits that on November 1, 2013 the record indicates that he informed the trial court that he understood Kiswahili language. His only umbrage is that the proceedings do not reflect the language which was used from PW3 to PW5, or whether there was any interpreter during the proceedings. We are of the view that the record indicates his preferred language and the appellant went on to participate in the proceedings and to cross-examine witnesses, which would have been a mean feat to achieve if he did not understand the language or follow the proceedings.

43. Turning to the sentence, on this ground the appellant argued that the sentence meted upon him was unconstitutional, as section 20 (1) of the *SOA* provides for a mandatory minimum sentence of life imprisonment. We have considered that the trial court did hear the appellant's mitigation which was as follows;

> "I did not commit the alleged offence. This is a fabricated case. I pray for pardon because I am the sole breadwinner of my family. Let the Court note that I am an orphan; and that justice is two-way traffic."

Thereafter the trial court held as follows:

> "I shall consider the nature of the offence. It is in the light of the above stated premises that I hereby sentence the accused person to serve a life imprisonment term, as per law provided under section 20 (1) of the Sexual Offences Act No 3 of 2006."

On appeal the High Court held that the sentence meted against the appellant was well deserved and confirmed it.

44. In *S vs Toms* 1990 (2) SA 802 (A) at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held that:

> "the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

45. Further, the approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S vs Malgas* 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

46. In our jurisdiction, this Court has grappled with this issue in a plethora of decisions. In *Dismas Wafula Kilwake vs Republic* [2019] eKLR this Court had this to say:

> " In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing"

47. It is clear therefore, that the mandatory nature of the sentence is what is unconstitutional. In the instant appeal the victim was a child who was barely a few years out of her toddler age and the appellant who is the father was the one person she depended on for protection and provision, her mother having deserted them one year prior to the incident. Instead, the appellant was the very person who did the unthinkable and preyed on a little helpless child over and over again. He must have noticed the pain he inflicted from the fact that he administered Panadol to her each time.

48. From the foregoing we hold the view that this is one of those instances that the sentence meted was commensurate with the offence for which the appellant was convicted. As a result, the appeal is found to have no merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED IN ELDORET THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR