Mutai v Republic (Criminal Appeal 113 of 2019)
[2023] KECA 488 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 488 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 113 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 12, 2023

BETWEEN

CHRISTOPHER KIPROTICH MUTAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Eldoret (S. M. Githinji, J.) dated 15th November, 2018 in HC.CR.A No. 172 of 2015)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Eldoret (SM Githinji, J) The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No 3 of 2006. At the conclusion of trial, the appellant was found guilty of the offence. He was convicted and sentenced to 15 years' imprisonment.

2. The particulars of the offence were that the appellant on April 11, 2011 at 5 pm at Cheptabach Sub-location in Nandi County, unlawfully and intentionally caused his penis to penetrate the vagina of JCC, a child aged 16 years.

3. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant denied the charges and soon thereafter his trial ensued.

4. The prosecution's case in brief was that the complainant was born on July 4, 1995 and was aged 16 years at the time of the incident. She was a form 1 student at [Particulars Withheld] Secondary School.

5. On the material day at around 5 pm, the complainant was walking home along an isolated path when she noticed the appellant stalking her. The appellant then grabbed the complainant by the waist and wrestled her to the ground. The books and unga the complainant was carrying dropped. The appellant

lifted her skirt to the chest and removed her underwear. The complainant tried to resist but was overpowered. The appellant lowered his trousers and inserted his penis into her vagina. She felt pain and screamed.

6. According to PW4, he was slashing grass within Koisagat camp when he saw the appellant and the complainant who were both well known to him. They used a shortcut that was near the stream. On his way to Chemondu Reserve he met PW3 and informed him that he had seen the appellant with a school girl. They took different routes. On reaching the tea weighing shade, the appellant saw him and started running away. The complainant was seated near where the appellant had stood. She was crying saying the appellant had sex with her.

7. He escorted the complainant to her home and informed the complainant's mother of the incident. At 10pm they went and reported the incident to PW3. The appellant was arrested on April 12, 2011 and taken to Nandi Hills Police station. The appellant claimed to have been in a consensual relationship with the complainant.

8. The P3 form showed that the complainant had slight supra pubic tenderness on her genitalia, perforated hymen with inflamed labia and blood stains on the androctus. The vaginal swab revealed numerous red blood cells, pus and no spermatozoa. The conclusion was that there was possibility of forceful penile penetration.

9. Put to his defence, the appellant in his unsworn statement stated that the prosecution witnesses were not truthful. On the material day he was at home planting tea leaves.

10. The trial Court having taken all relevant circumstances into consideration, found the appellant guilty of the offence in the main count.

11. Aggrieved, the appellant lodged an appeal before the High Court. He raised 11 grounds of appeal. The court held that all the ingredients of the offence were well established by the prosecution beyond reasonable doubt.

12. In making the determination, the court made the observation that; the age of the complainant was proved when the birth certificate was produced showing the complainant was born on July 4, 1995 and was 16 years at the time of the incident.

13. The court also found the complainant's narration of the events that took place as corroborated by PW4 to be truthful and that there was evidence of penetration.

14. The court further held that the identity of the appellant was not in doubt. The appellant had been seen by PW4 trailing the complainant. PW4 knew the appellant as Christopher and referred to him by that name throughout his evidence.

15. The court found the appellant's defence to be an afterthought. The court noted that the defence was never raised during cross-examination of witnesses. The court went on to hold that the said defence weighed against the prosecution's case projected insignificant value.

16. The court held that Section 200(3) of the *Criminal Procedure Code* had been complied with.

17. The court further held that the sentence was proper within the law and that there was no need to interfere with the conviction or sentence.

18. Dissatisfied, the appellant lodged the present appeal. Six grounds of appeal were raised; to wit that the learned Judge erred in law in failing to: find that the trial court had misdirected itself on the application of Section 200(3) of the CPC; exercise the duty of a first appellate court; find that the identity of the

perpetrator was not proved beyond reasonable doubt; find the alibi defence was not considered by the trial court; and in imposing a minimum sentence without considering the Judiciary Sentencing Guidelines and the Supreme Court decision in the Muruatetu case.

19. At the hearing of the appeal, Mr Kigamwa appeared for the appellant while the state was represented by Ms Kimaru. Counsel relied on their written submissions and briefly highlighted the same.

20. The appellant contended that the requirements of Section 200(3) of the CPC were not complied with. The court did not inform the appellant of his right to re-summon the victim who had already testified. Counsel submitted that the matter ought to have commenced de novo as only one witness had testified. (See: *Ndegwa v Republic [1985] KLR 534*). Counsel faulted the learned magistrates for failing to expressly inform the appellant of his right to re-summon witnesses and only indicated that directions under Section 200 had been taken.

21. Counsel submitted that the High Court failed in its duty as a first appellate court.

    There were material contradictions on where the appellant was arrested. The complainant seemed not to know the person who defiled her hence the identity of the appellant was in doubt. Relying on the case of Wamunge v Republic [1980] KLR 424 counsel submitted that the contradictions were a clear demonstration that the conditions were not favorable for identification.

22. Counsel submitted that the court ought to have found the alibi defence to be credible. Counsel faulted the court for failing to address its mind to Section 212 of the CPC by finding that the prosecution did not apply to adduce evidence to challenge the alibi.

23. Counsel contended that the conclusion of a possibility of forceful penile penetration was not conclusive evidence of penetration.

24. Counsel further submitted that the appellant ought to be granted an acquittal as opposed to a retrial for breach of Section 200(3).

25. Counsel faulted the learned Judge for failing to address the complaint of the sentence vis-à-vis the law in force. The learned Judge sentenced the appellant to a minimum sentence. The court should have invoked Section 216 and called for a pre-sentencing report.

26. Opposing the appeal, the respondent contended that the provisions of Section 200 of the CPC were never violated. The appellant elected to have the matter proceed from where it had reached on March 22, 2012. The only logical inference that could be drawn was that the appellant had been informed of his right under Section 200 of the CPC and given an opportunity to respond personally on how he wished the matter to proceed. Counsel submitted that it is not mandatory that every case taken over by a succeeding judicial officer should start de novo.

27. Counsel further submitted that raising the issue of Section 200(3) of the CPC on appeal when the appellant had an opportunity to address the same before the trial court amounts to an abuse of the judicial process.

28. The appellant had a second opportunity to have the matter start afresh on May 22, 2013 and he elected to proceed from where the case had reached. Relying on the decision in the case of *Abdi Adan Mohamed v Republic [2017] eKLR* counsel submitted that where only a handful of witnesses had testified as in the present case where only three witnesses had testified, the case need not start de novo. Counsel maintained that Section 200 of the CPC was fully complied with.

29. As regards the duty of the first appellate court, counsel submitted that the learned Judge considered and analyzed all the ingredients of the offence independently and the evidence in support and came to the conclusion that the prosecution case was proved beyond reasonable doubt.

30. Relying on the 2021 Supreme Court directives in the *Francis Karioko Muruatetu & Another v Republic, SC Petition No 16 of 2015*, counsel further submitted that the sentence was proper and lawful based on the evidence in support of the conviction. The sentence was not pegged on the minimum mandatory sentence alone; the appellant's mitigation was also factored in the sentence.

31. 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.'

32. We have carefully considered the record of appeal, the written submissions by both parties, authorities cited and the law. The issues for determination are whether Section 200 of the CPC was complied with; whether the High Court carried out its duty as a first appellate court; whether the offence of defilement was proved beyond reasonable doubt as is closely intertwined with whether the appellant's alibi defence was considered; and whether the court imposed a minimum mandatory sentence contrary to Judiciary Sentencing Guidelines.

33. The appellant contended that the requirements of Section 200(3) of the CPC were not complied with and that the matter ought to have started de novo. Section 200 provides:

> ' 200.
>
> (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
>
> a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b. Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
>
> (2) .
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be

re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) .'

34. It is the duty of the trial Court to inform the accused person of his right under Section 200 of the CPC. In *John Bell Kinengeni v Republic [2015] eKLR*, this Court addressed itself on the import of Section 200(3) as follows: at

> ' The duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate.'

35. In the present case, the trial Court complied with the requirement of Section 200(3) not once, but twice. On March 22, 2012 the trial court was informed that one witness had testified. The exchange that happened after that was not recorded and the evidence on record notes that the appellant elected to have the matter proceed from where it had reached.

36. Similarly, on May 25, 2013 the record notes that directions on Section 200 were taken and the appellant elected to proceed from where the matter had reached.

37. There is no evidence on record to show that the appellant at any given time during the trial demanded that the complainant be recalled or that the matter proceed de novo. In the case of *Joseph Kamara Maro v Republic [2014] eKLR* this Court held that:

> ' Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that 'this provision does not oblige the succeeding magistrate to start de novo' but what is mandatory is to inform an accused of his right under section 200(3) of the Criminal Procedure Code.'

38. Be that as it may, a succeeding Magistrate or Judge is not obliged by Section 200(3) of the CPC to start a trial de novo just because the accused person demands. In the case of *Joseph Kamau Gichuki v Republic [2013] eKLR* the Court stated that:

> ' This Court has previously held that Section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking Section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that

had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.'

39. However, we must bear in mind the decision in Ndegwa (supra), where the court emphasized that the court in applying the provisions of Section 200 must ensure the accused person is not prejudiced as follows:

> ' No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.'

40. Having considered the circumstances of this case, we find that at no given time did the appellant demand to have witnesses recalled or have the matter start afresh. We find no reason to fault the finding of the court that Section 200 was complied with.

41. The appellant contended that the High Court failed in its duty as a first appellate court. It is trite that a first appellate court must re-evaluate and re-analyze the evidence before the trial court afresh and reach its own conclusion bearing in mind that it neither saw nor heard any of the witnesses. In the case of *Okeno v Republic [1972] EA 32* this Court held thus:

> ' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala Vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424.'

42. A similar conclusion was drawn by this Court in the case of *Kiilu & Another v Republic [2005]1 KLR 174* where the court stated that:

> ' 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.'

43. The Supreme Court of India in *K Anbazhagan v State of Karnataka and Others, Criminal Appeal No 637 of 2015* held that:

> ' The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized

with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely.The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.'

44. In the present case, the High Court re-evaluated the evidence on the age of the complainant, the identity of the appellant through the evidence of PW4 and analysed the appellant's alibi defence. This to our minds constitutes carefully re- evaluated and re-analysed evidence on a first appeal. We find that the first appellate court properly carried out its duty.

45. 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.

46. The issue of the age of the complainant was dealt with extensively by both courts.

A birth certificate was adduced in evidence indicating that the complainant was born on July 4, 1995. This was sufficient proof that at the time the incident occurred on April 11, 2011 the complainant was 16 years.

47. The two courts below found that the evidence of the complainant as corroborated with the evidence of PW4 was found to be truthful. We therefore find that the evidence was sufficient by dint of Section 124 of the *Evidence Act*. It was on the strength of the complainant's evidence, that the appellant pulled up her skirt, removed her underwear before removing his trousers and inserting his penis in her vagina and PW4's evidence that he found the complainant crying while the appellant stood next to her and even ran on seeing him that the appellant was convicted. We find that penetration need not be complete or absolute; partial penetration will suffice and in the circumstances we hold that penetration was proved.

48. As regards the identity of the complainant. We note that the appellant was well known to the complainant and PW4. PW4 referred to him as Christopher throughout the trial having known him since childhood. The complainant was able to identify him. At some point the appellant claimed to have been in a consensual relationship with the complainant.

49. We have no doubt that the complainant and PW4 were 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.'

50. As regards the appellant's alibi defence, we find that by setting up an alibi defence the appellant did not assume the burden of proving its truth so as to set a doubt in the prosecution case as in the case of *Ssentale v Uganda [1968] EA 365*.

51. The burden to disprove the alibi and prove the appellant's guilt lay throughout on the prosecution as was held in Wang'ombe v Republic [1976-80) 1 KLR 1683. It is common ground that the appellant raised what he calls his alibi defence for the first time while giving his testimony on defence. Be as it may, the appellant merely stated that on the material day he was at home planting tea leaves. Given the implicit nature of an alibi defence, the appellant bore no burden to prove his alibi. He was entitled to the benefit of the doubt. We shall then take it that the appellant indeed raised an alibi defence.

52. The appellant's contention was that the Court failed to address itself on the issue.

In the case of *Ganzi & 2 Others v Republic [2005] 1 KLR 52* this Court stated that:

> ' Where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence.'

53. In the present appeal, we are satisfied that even though the Courts below failed to render a decision on the appellant's alibi, the said defence when weighed against the evidence on the record, it is completely displaced.

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

55. The appellant faulted the court for imposing a minimum sentence without considering the Judiciary Sentencing Guidelines and the Supreme Court decision in Muruatetu (supra). It is common knowledge that there are no universal rules in place to deal with minimum sentences.

56. In the present case, the appellant was convicted of the offence of defiling a child aged 16 years and was sentenced to serve 15 years' imprisonment. Under Section 8(4) of the *Sexual Offences Act* the minimum mandatory sentence is 15 years' imprisonment.

57. The question that begs to be answered then is whether the court was justified in passing the sentence. We are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in the cases of *Christopher Ochieng v Republic [2018] eKLR* and in *Jared Koita Injiri v Republic, Criminal Appeal No 93 of 2014* considered legality of minimum mandatory sentences under the *Sexual Offences Act*.

58. The Supreme Court in Muruatetu (supra) held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprived courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases; that a mandatory sentence failed to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the *Constitution*.

59. Guided by Supreme Court decision, this Court in Christopher Ochieng (supra) stated:

> ' 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.'

60. In our view, what renders a sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.

61. In the instant appeal, having considered the evidence on record and the circumstances of this case on its own merit. We note that the appellant was accorded an opportunity for mitigation. Thereafter, the learned trial Magistrate took into account factors such as the character of the appellant, and the prevalence of the offences of defilement. It was on that basis that the court handed down the sentence of 15 years imprisonment. In other words, the sentence was not just imposed because it was the minimum prescribed sentence. The trial court was convinced that the appellant deserved a deterrent sentence.

62. We have taken into account the fact that the appellant took advantage of the victim; stalked her and then forcibly defiled her. In the circumstances, we find that the sentence handed down was appropriate, and we are not inclined to intervene. We hereby uphold the 15 year term of imprisonment meted upon the appellant.

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

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR