Omukuti v Republic (Criminal Appeal 243 of 2019)
[2023] KECA 491 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 491 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 243 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

MAY 12, 2023

BETWEEN

TOBIAS LUKOYE OMUKUTI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against High Court judgement delivered at High Court of Kenya at Kitale (H.K. Chemitei. J) dated 9th March, 2017 In Criminal Appeal No. 115 of 2015)

JUDGMENT

1. Tobias Lukoye Omukuti, the appellant in this second appeal was charged in the magistrate's court at Kitale for the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on diverse dates between March 1, 2014 and November 13, 2014 within Trans Nzoia County the appellant intentionally caused his penis to penetrate the vagina of RWW a child aged 10 years.

2. The appellant pleaded not guilty which led the prosecution to present six witnesses to prove their case. RWW (PW1), the complainant told the court that the appellant was their neighbour and that he had defiled her at least 5 times in his two-roomed house. She stated that the first time that the appellant called her to his house, she was playing with other children outside her home. When she went in to the appellant's house, he carried her to the bedroom and laid her on a mattress that was on the floor. He told her to remove her clothes, he then removed his 'dudu' (penis) from his trouser and inserted it into her 'dudu' (vagina). She stated that she felt pain when he did 'tabia mbaya' (defiled) to her, but she did not scream as the appellant told her to persevere and not cry. When the appellant finished the act, he gave her Kshs 50 and some Vaseline to apply on herself.

3. She testified further that each time the appellant would do "bad manners" to her, he gave her Kshs 50 or at times Kshs 100, which she used to buy dolls and sweets. The appellant warned her not to tell

anyone, and she kept the secret and continued to receive money from the appellant. In addition, that although she felt pain when the appellant was defiling her, she persevered as he would give her money at the end of the ordeal. It was in November 2014 when her mother found Kshs150 on her and wanted to know where she got it from, that she divulged that it was the appellant who gave it to her and why.

4. CN (PW2), the complainant's mother, stated that she stayed and did business in Uganda while her husband stayed with the children in Kitale. She told the court that the complainant was 10 years old and that it was the complainant's elder sister who told her that the complainant had a lot of money, that is Kshs 150. Upon inquiry, the complainant told her that the appellant gave it to her. She immediately went to the appellant's house with the complainant and upon asking, the appellant admitted that he had given the complainant the money to buy a skirt.

5. PW2 asked the complainant in the presence of the appellant and his wife, why she was taking money from the appellant and the complainant answered that the appellant gave her the money after doing bad manners to her. The appellant denied the allegation. PW2 took the complainant to Kitale District Hospital where, upon examination, it was confirmed that she had been defiled. PW2 reported the matter to the police and the village elder, John Wangila (PW3).

6. PW3 interrogated the appellant and the complainant at the chief's office and thereafter he called the police officers from Kitale Police Station who escorted the appellant to the police station. Pharis Silali (PW4) did a dental age assessment on the complainant and concluded that she was aged 10 years old. Gabriel Gichuki (PW6) clinical officer, examined the complainant and found that her hymen membrane had tears that were old looking. He concluded that it was a probable sign that the complainant had engaged in sexual activity. Michael Michira (PW5), issued a P3 form to PW1, investigated the matter and later charged the appellant with the offence as stated above.

7. At the close of the prosecution's case the appellant was put on his defence whereupon he denied the offence in his unsworn testimony. He raised an alibi defence stating that between February 26, 2014 and May 16, 2014 he worked at Mandarara Primary school and Lodwar, where he stayed up to November 2014. He produced bus tickets and letters from the said school as evidence. On cross examination he confirmed that the complainant was his neighbour.

8. AC (DW2) a treasurer at [Particulars Withheld] Primary School produced documents which showed that the appellant was a mason at the said school having built and completed a toilet. That the appellant was at the school between February 26, 2014 and May 16, 2014. Sarah Mwanga (DW3) a business woman, confirmed that her husband called the appellant to Lodwar for work in the year 2014, though she could not recall the month that he worked for them.

9. Upon considering the evidence before him, the magistrate, C.N. Mugo (RM) found the accused guilty as charged and convicted him accordingly. The appellant did not offer any mitigation. The court sentenced him to life imprisonment.

10. Dissatisfied by the judgement of the magistrate's court he approached the High Court in his first appeal, on the grounds mainly, that the evidence was insufficient to warrant a conviction and that the sentence was harsh and excessive. After considering the appeal, Chemitei J on March 9, 2017, held that the appeal had no merit and the sentence was lawful as that is what is provided by the law. He accordingly dismissed the appeal.

11. Still dissatisfied, the appellant is before this Court on his second appeal. In the second appeal the appellant faults the learned Judge for upholding the conviction and sentence against him without subjecting the entire evidence tendered in court to a fresh re-assessment and re-evaluation as required of the first appellate court. He asserts that had the learned Judge done so, he would have noted

several things, to wit; that the trial court did not establish the charge of defilement against him before convicting him, that the prosecution witnesses were incredible and unreliable, that section 124 of the *Evidence Act* was wrongly applied by the trial magistrate, that the charge sheet was defective, that his defence was not considered yet it had not been rebutted by the prosecution and lastly, that the mandatory nature of the life sentence imposed upon him is unconstitutional.

12. In his written submissions, the appellant who was in person urged that the first appellate court failed in its duty of exhaustively re-assessing, re-evaluating and analyzing the entire evidence tendered in court to arrive at its own conclusion, hence, it failed to note the conflicting evidence. He argued that the cause of hymen breakage was not established and cited the decision in *PKW v R* (2012) eKLR, where it was held that scientific and medical evidence has proved that some girls are not even born with a hymen, and those who are, there are times when the hymen is broken by factors other than sexual intercourse.

13. It was also his contention that the trial court did not adhere to section 124 of the *Evidence Act* as there was no record in the proceedings indicating that the alleged victim was truthful, instead there is on record evidence that she lied to her sister. The appellant urged that merely because there was no enmity between the appellant and the complainant's family did not make the complainant a truthful witness.

14. The appellant also submitted that the charge sheet was defective for referring to the victim in the main count, as RW, while in the second count she is referred to as RO. Secondly that the claim in the charge contradicts the evidence of the complainant on time in regard to when the offence was committed.

15. Further, the appellant submitted that he tendered an alibi defence and gave a well-documented record of the contract he was undertaking at the time in question; the time spent at the work place, the time he left the work place and where he went thereafter. That he called two witnesses to corroborate his defence and therefore the Judge erred in finding that the defence of the appellant was too general.

16. On sentence, he argued that the constitutionality of the mandatory minimum sentence is highly doubtful since it does not allow the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. That, whereas the court is given leeway to impose any sentence, the section prescribing for minimum sentence does not permit the court to exercise its discretion. To fortify his argument, he relied on a decision of the South Africa Court of Appeal in *S v Tom S* 1990 SA 802 (A) at 806 (h) -807(b).

17. Senior Assistant Director of Public Prosecution, Ms. Kiptoo appeared for the State, and filed written submissions dated November 22, 2022. Counsel urged that from the record, both courts below evaluated the evidence on record and found the prosecution case truthful and rejected the appellant's defence, and gave well founded reasons both on facts and the law. She also submitted that all the elements required to prove defilement were proved by the prosecution beyond reasonable doubt and that the appellant has not led any evidence to the conclusion that the witnesses were incredible and unreliable.

18. On Section 124 of the *Evidence Act*, counsel argued that corroboration is still required on evidence by minors, but it is not mandatory in sexual offences, as long as the witness was truthful and reasons are recorded. She submitted that the Judge correctly observed that the minor's evidence fell within the ambit of evidence that is acceptable under Section 124 of the *Evidence Act*

19. Counsel argued that the appellant was charged with an offence of defilement which is known in law. That the charge sheet contained particulars of the offence which the appellant understood and pleaded to. That the appellant properly cross examined the prosecution witnesses and was not prejudiced in any way. As such, it was her view that there was no miscarriage of justice as the appellant understood the charge he was facing and properly cross-examined the witnesses.

20. Counsel submitted that both the trial court and the 1st appellate court considered the appellant's defense and found that it did not dislodge the prosecution case.

21. Lastly, that *Francis Karioko Muruatetu & another v Republic* [2017] eKLR is not applicable to this case since this is not a murder case. That as observed in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), not all the provisions of law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* of Kenya.

22. We have perused the record of appeal, the arguments of both parties and the law. As stated earlier, this being a second appeal, our role is as provided under Section 361 of the *Criminal Penal Code* and stated in *David Njoroge Macharia v. Republic* [2011] eKLR as follows;

> "That being so only matters of law fall for consideration -see section 361 of 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."

23. From our analysis the issues that fall for determination are:

    a. Whether the High Court discharged its mandate as the first appellate court;

    b. Whether the charge sheet was defective;

    c. Whether the two courts below were correct to hold that the prosecution's case was proved to the required standard;

    d. Whether the High Court considered the appellant's defence; and

    e. Whether the sentence meted on the appellant was constitutional.

24. On the first issue, the appellant argued that the High Court Judge did not re-assess, re-evaluate and analyze the evidence before him and instead relied on the findings of the trial court to support his decision and therefore, did not draw his own conclusion. On the other hand, the respondent argued that the High Court played its role properly as the first appellate court.

25. The role of the first appellate court was captured in this Court's decision in Njoroge v Republic (1987) KLR 19 that:

> "As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R (1957) EA 336, Ruwalla V. R (1957) EA 570"

26. A glance at the impugned judgement, in paragraph 14 the Judge stated that:

> "I have perused the entire record and the proceedings. The issue for the determination was whether there was actual penetration and whether the perpetrator was identified and whether the penetration was unlawful"

The learned Judge went on and analyzed the evidence before him and arrived at his conclusions. We are therefore satisfied that the learned Judge discharged his mandates as required of the first appellate court.

27. On the second issue the appellant urged that the charge sheet was defective, since the name of the victim in the main count deferred from the name of the victim in the alternative count. The respondent urged that the victim's name on the second count was a typographical error which did not prejudice the appellant in any way since he was able to answer to the charge and cross examine the witnesses.

28. Section 134 of the *Criminal Procedure Code* provides for what constitutes a proper charge sheet as follows:

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

29. Defects in the charge sheet are considered material if they cause prejudice to the appellant as to occasion miscarriage of justice or violation of his fundamental right to a fair trial. It is therefore not every defect in the charge sheet that will result in the reversal of a finding of the court. Section 382 of the *Criminal Procedure Code* provides:

> "Subject to the provision hereinbefore contained, no finding, or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant charge proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings"

30. This Court pronounced itself on this issue in *Peter Sabem Leitu v Republic* [2013] eKLR, as follows:

> "The question therefore is, whether the aforesaid defect in the charge sheet caused any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial. We think not. Having pleaded to the charge, which contained a clear statement of a specific offence, we are satisfied he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence."

31. In our present case, the appellant understood and answered to the charges, he was able to challenge the evidence and also offer his defence. He also had all the time to point out the defect in the complainant's

name during the trial. As a result, we hold that the defect pointed out by the appellant did not occasion a miscarriage of justice or violation of his fundamental right to fair hearing.

32. The third issue is whether the two courts below were correct to hold that the prosecution's case was proved to the required standard. The appellant was charged with defilement contrary to Section 8 (1) as read with Section 8(2) of the *SOA*. Section 8 (1) of the *SOA* provides:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement"

In John Mutua Munyoki v Republic (2017) eKLR this Court held that:

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
>
> I. The victim must be a minor
>
> II. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

33. PW2, the complainant's mother, told the court that the complainant was 10 years old at the time of the offence. This was affirmed by the age assessment report from Kitale District Hospital produced at the trial by PW4. In *Edwin Nyambogo Onsongo v Republic* (2016) eKLR this Court held that:

> " ...the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

As such, we agree with the two courts below that the age of the complainant was proved to the required standard.

34. On penetration this is what the learned Judge held:

> " The evidence so far presented shows that there was no eye witness to the incident. The minor though young appeared to be truthful and categorical. Her evidence clearly described how the appellant lured her in to his house and proceeded to take her to the bedroom where there was only one mattress on the floor. He then proceeded to undress her and defiled her and gave her Kshs 50 with a Vaseline oil to alleviate her pain .....
>
> These descriptions including the fact that the appellant had a hairy chest in my view appear very vivid for a minor of 10 years"

35. The appellant argued that PW1 fabricated the whole story, as the learned magistrate did not confirm that he had a hairy chest as claimed by PW1. He also argued that the evidence of PW6, the clinical officer did not establish that PW1 was indeed defiled. Further, that PW1 was not a truthful witness as she lied to her sister on how she got the money. In response, the respondent contended that PW1 testified that the appellant "removed his "dudu" from the trouser and then told me to spread my legs and I remove my skirt and pant and he put his "dudu" in mine". That the appellant did "bad manners"

to her on five different occasions. Moreover, the evidence of PW6 the clinical officer corroborated that of PW1 that she had been defiled.

36. PW6, told the court that the tear in PW1's hymen membrane was old looking, and was a probable sign that PW1 had engaged in sexual activity. Contesting this, the appellant submitted that sexual activity is not the only cause of broken hymen.

37. We agree with the appellant that defilement is not necessarily the only cause of broken hymen in young girls as was observed by this Court in *PKW v R* [2012] eKLR, relied on by the appellant, thus:

> " Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences, we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons. Masturbation, injury and medical examinations can also rupture the hymen. When a girl engages in vigorous physical activity like horseback ride, bicycle riding and gymnastics, there can also be natural tearing of the hymen."

38. That notwithstanding, the complainant was categorical as to what the appellant had been doing to her. The findings of the clinical officer cannot be considered in isolation. It has to be taken together with the rest of the testimonies on record. The two courts below accepted the evidence of the complainant as truthful. Section 124 of the *Evidence Act* provides that evidence on sexual offences does not necessarily require corroboration. The section provides that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

39. The learned Judge gave reasons for accepting that PW1 was truthful. PW1 was very vivid when she gave evidence on penetration. She also gave reasons why she kept quiet over the incident. In our view that explains why she lied to her sister on how she got the money. In her little world, she believed, as the appellant would reassure her, that her silence was her gain. We hold that penetration was proved to the required standard. In Bassita v Uganda S.C Criminal Appeal No 35 of 1995, quoted with approval in *MK v Republic* (2017) eKLR, the Supreme Court of Uganda held:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution

may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt".

40. On identification, we note that this was a case of recognition, as the appellant was well known to PW1. They were her neighbours, and he confirmed as much at the trial. The offence occurred on several different occasions and in broad day light. As such, there was no question of mistaken identity and we find that the two courts below were correct to find that this limb was proved to the required standard.

41. The appellant also argued that his alibi defence was not considered by the two courts. In rebuttal, the respondent stated that the appellant's defence was considered. That the learned Judge was not persuaded that the appellant presented evidence to show that he did not go home during those specific dates. The learned Judge said:

> " The defence by the appellant although an alibi did not oust in my view the fact that he could have committed the offence. Though he may have worked at [Particulars Withheld] Primary school as well as in Lodwar there is nothing to suggest that he did not come home. In fact, there was no evidence to indicate that he resided at [Particulars Withheld] Primary School or Lodwar for that matter. The testimony by the defence witnesses were too general in the circumstances."

42. It is therefore clear from the foregoing that the learned Judge considered the appellant's evidence and found that it did not debunk the prosecution's case. We find no reason to depart from his finding since there is no evidence that the appellant's sojourn in Mandarara or Lodwar was continuous throughout the period in question.

43. Lastly, the appellant contended that the sentence imposed against him was unconstitutional as it was mandatory in nature. The respondent on the other hand, contended that the sentence is not unconstitutional as Muruatetu 2 clarified that only mandatory death sentences in regard to convicts of murder were the unconstitutional.

44. From the record, the appellant was sentenced in accordance with Section 8(2) of the *Sexual Offences Act* that provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

45. This Court in *Joshua Gichuki Mwangi v Republic*; Criminal Appeal No 84 of 2015, faced with a mandatory life sentence meted upon a sexual offence offender observed as follows:

> " We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in Athanus Lijodi v Republic [2021] eKLR;
>
> "on the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance Evans Wanjala Wanyonyi v Republic (2019) eKLR.) Having said that however, we must hasten to add that this Court will uphold a sentence

prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited"

46. We hold that the appellant perpetrated heinous acts against PW1, who was a very young child. He did defile her on more than one occasion, and made her believe that it was actually alright as she stood to gain from the pain. He normalized his behavior by rewarding her each time that he defiled her. We therefore hold that this is one of those instances that life imprisonment should be upheld and we therefore uphold the sentence.

47. Ultimately, this appeal is dismissed on both conviction and sentence.

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

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR