Mutangati v Republic (Criminal Appeal 59 of 2018) [2023] KECA 793 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KECA 793 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 59 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JUNE 30, 2023

BETWEEN

FRED MUTANGATI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Eldoret (Mativo, J) dated 5th July 2015 in HC CR No. 11 of 2013)

JUDGMENT

1. Fred Mutangati (the appellant), has filed a 2nd appeal against his conviction and sentence. He first appeared before the Chief Magistrate's Court at Iten, where he was charged and convicted for the offence of defilement, contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (SOA). The particulars of the offense were that on 6th August 2011 at about 00 pm, in Keiyo district within Rift Valley province, the appellant intentionally and unlawfully caused penetration by use of his genital organ (penis), into the genital organ (vagina) of S.N, a girl aged 15 years.

2. The evidence tendered against the appellant was that on 5th August 2011 at about 6.00 pm, S.N, (PW1) and her younger sister were on their way home from their uncle's house when they came upon the appellant. At that point PW1 separated from her sister. The appellant took PW1 to his house where he threatened her and proceeded to defile her. When he left the house, PW1 went out and took refuge in a nearby toilet where she stayed overnight. The next day at about 11.00 am, PW1 was arrested by some school boys who took her to her mother MN, (PW2) and informed her to escort PW1 to her teacher Mr. Barnabas (PW3).

3. The mother escorted PW1 to the market to meet PW3, where they found the appellant already being beaten by a mob. PW3 escorted the appellant, PW1, and PW2 to the police station to report the defilement. Thereafter, Philip Mutai Kipkoech, (PW4) escorted PW1 and the appellant to Iten District

Hospital where Willy Limo, (PW6) subjected them both to medical examination and confirmed that PW1 had been defiled.

4. The appellant was arrested and charged as set out above and was convicted at the end of a full trial. He was subsequently sentenced to 20 years imprisonment by Hon Ndombi, the then Senior Resident Magistrate. The appellant's appeal to the High Court was dismissed in a judgment dated 15th August 2015, in which Mativo J (as he then was) concurred with the trial court and confirmed both the conviction and sentence.

5. Aggrieved by the 1st appellate court's decision, the appellant appealed to this Court raising four grounds of appeal to wit that: his conviction and sentence in the trial court were erroneous, because the trial magistrate violated the provisions of section 200(3) of the Criminal Procedure Code; that the plea was not taken or read in a language that he understood; that the spermatozoa collected was not tested against him contrary to Section 122(a)(2) of the Criminal Procedure Code; and, that the prosecution did not prove its case beyond reasonable doubt. The appellant filed supplementary grounds of appeal repeating what was in his original grounds in different format. The only new ground being that the appellate court failed to consider his defence which was plausible.

6. This appeal was canvassed by way of written submissions. In his submissions the appellant relegated the other grounds on violation of his right under section 200(3), the manner in which the plea was taken and whether his defence was considered to the back banner. He dwelt only on the prosecution's failure to subject him to DNA testing and whether the prosecution proved its case beyond reasonable doubt.

7. The appellant submitted that the trial court and the High court failed to appreciate that the medical examiner failed to achieve the intended corroborative status, since the samples of spermatozoa found in the complainant were not tested against him and were therefore, not connected to him. He relied on the case of Onoka Mutoni & Another V Republic CA 92 of 1981, where the court stated that expert evidence is given by a person, skilled and experienced in a particular special sphere of knowledge of the conclusions reached, based on his knowledge, from the facts reported to him or discovered by him by test and measurements.

8. The appellant also contended that the prosecution case was made up of contradictory evidence from the complainant and PW2, and hearsay evidence from PW3. He pointed out that during cross-examination PW3 stated that he was informed by one of the students, that the appellant had locked a girl inside his house and that PW1 had been locked in there on Sunday. That he called other people, and they surrounded the appellant's house, whereupon the girl emerged from the house and ran off, pursued by schoolboys, while the remaining witnesses arrested the appellant.

9. He stated that the complainant on the other hand, testified that she left the appellant's house on Sunday night and spent that night in a neighbor's toilet. That the next day, while sitting by a bush she was accosted and chased by school boys. PW2 on her part did not observe anything unusual about her daughter and therefore, did not believe that she was defiled.

10. He contended that the prosecution also failed to call other witnesses to corroborate the testimony of PW3, further weakening the case. He relied on the case of Bukenya V Uganda (1972), to assert his position.

11. The appellant additionally submitted that his right to fair trial was violated, by the prosecution's failure to supply him with documentary evidence in a timely manner, hindering his preparation for the trial. More so, since he was unrepresented. He relied on the cases of *R V H and C* (2004) 24 AC 134 at 147, *Thomas Patrick Cholmondeley V R* (2008) eKLR and *R V Ward* (1993) 2 Al ER 557 in support.

12. The appellant therefore, asked this Court to allowed the appeal, quash the conviction, and set aside the sentence.

13. In opposition, the respondent relied on submissions dated 4th March 2021 to argue that the appellant's rights to a fair trial were upheld throughout the trial process. That the appellant was arraigned before the court within the stipulated 24 hours of arrest, where the charges against him were read to him in a language he understood and to which he responded. In addition, they pointed out that the trial began afresh, with the consent of the appellant, when a new magistrate took over the matter. Further, that the prosecution proved its case beyond reasonable doubt, having proved all the ingredients for the offense of defilement, as illustrated in the case of Charles Wamukoya Karani V Republic CA No. 72 of 2013.

14. It was the respondent's contention that the complainant's age was evinced by a clinical card (exhibit B), as required by law. That the fact of penetration was not disputed and that the appellant was implicated by the complainant whose evidence was corroborated by the P3 form produced by PW6. The prosecution contended that the appellant was well known to the complainant, who identified him as her assailant and the testimony of PW1 was sufficient to prove that the appellant was the assailant. They cited the case of Ogeto V Republic (2004) KLR 19, where the court noted that the evidence of a single witness is sufficient to prove a fact, if great care is taken in evaluating the evidence when conditions for identification are difficult.

15. As far as DNA testing goes, the respondent submitted that lack of DNA testing was not prejudicial to their case, because there was overwhelming evidence that the appellant was the perpetrator. Citing Section 124 of the *Evidence Act*, and relying on the case of *George Kioji V Republic* CR APP No. 270 of 2012, the prosecution asserted that the evidence of identification by the complainant was enough to implicate the appellant as the perpetrator.

16. The respondent urged this Court to dismiss the appeal.

17. Having duly considered the record, the judgments of the trial and superior courts, the appellant's grounds of appeal, and the submissions of both parties, we remind ourselves that this being a second appeal, we are restricted under section 361 of the Criminal Procedure Code to address only matters of law. This court will therefore, not interfere with the findings of fact by the two courts below, unless those findings are based on no evidence, or are based on a misapprehension of evidence, or the courts below acted on wrong principles in making their findings.

18. What constitutes matters of law determinable by this court, was characterized in the Supreme Court case of *Gatirau Peter Munya V Dickson Mwanda Kithinji and 3 others* (2014) eKLR as follows:

    a. "the technical element: involving the interpretation of a constitutional or statutory provision;

    b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and

    c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

19. We considered the record in light of the grounds put forward, the rival arguments in the submissions and the law applicable. The question as of failure to subject the appellant to DNA testing feeds into the main question as to whether the prosecution proved their case against him beyond reasonable doubt. The issue that arises in the main for determination therefore, is:

    i. Whether the appellant was positively identified as the person who defiled the complainant.

ii. Whether the contradictions in the prosecution evidence were material enough to cast reasonable doubt in the case.

20. For the prosecution to prove its case beyond reasonable doubt in a case of defilement, there are three elements that should be established. These are that the complainant was a minor, that she was defiled and that it was the appellant who defiled her. It was not controverted that the complainant was a minor, or that she was defiled. The only issue the appellant has raised in his appeal is whether it was proved that he was the perpetrator of the offence.

21. On the question of identification, it was not disputed that the appellant was a neighbour to PW1 and also worked in the school which PW1 attended. Identification was thus, by way of recognition. We therefore considered the record to establish whether the evidence of identification was sound even as it was based on recognition.

22. In *Rotich Kiosongo V R* (2008) eKLR, this Court dealt with the question of identification by recognition and held thus:

> " This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya Vs Republic Criminal Appeal No. 375 OF 2006 (Unreported) where it said,
>
> "On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger."

23. The appellant urged that the two lower courts failed to discharge their duty properly. That the expert evidence by the medical examiner did not connect him to the crime and identify him as the perpetrator, because no DNA evidence was produced. In this regard, the first appellate court held that although scientific DNA data was absent, there was other evidence which, together with the testimony of the complainant, was enough to satisfy the element of identification. The court further held that the complainant was 15 years of age, and was thus capable of offering credible evidence.

24. This Court in Martin Nyongesa Wanyonyi v Republic [2015] eKLR, cited with approval the decision in Geoffrey Kionji v Republic Cr. Appeal No. 270 of 2010, where it was held that:

> " Whereas available, medical evidence arising from examination of the accused linking him to the defilement is welcome. We, however, hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

25. The crux of what is stated in the decision above is that subjecting an accused person to medical examination to prove that he committed an offence is not mandatory in law. Therefore, to the extent that medical evidence is not the only evidence necessary to prove identification, we agree with the findings of the superior court. The lack of DNA evidence is not dispositive of the culpability of the appellant.

26. The appellant also contended that the prosecution failed to call other important witnesses who were present when the complainant was found in his house. That this evidence would have been important to corroborate the testimony of PW3. The respondent asserted that the evidence of the complainant was enough to prove the identification of the perpetrator.

27. The number of witnesses to be called to testify in a given case has been addressed time and time again. In the persuasive decision in Bukenya (supra), the court pronounced itself as follows;

> "It is well established that the Director has the discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though their evidence may be inconsistent.
>
> Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses if he calls evidence that is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

28. Flowing from the foregoing decision, it is clear that the discretion falls on the prosecution to produce the witnesses they consider to be crucial and sufficient to prove their case. The two courts below considered all the evidence on record and found that the evidence tendered by the prosecution witnesses was sufficient to sustain a conviction against the appellant. We have also carefully considered the record of appeal and find no reason to deviate from the finding of the two courts in this regard. This ground therefore fails.

29. The appellant also submitted that there was contradiction in the evidence of PW1 and PW3, regarding where PW1 was found. The two lower courts had a duty to examine the evidence, sift through the contradictions and make findings on the credibility of the said evidence. This court has the power to interfere with the findings of the two courts below, if there is material inconsistency or contradictions in the evidence.

30. The trial court herein found the testimonies of the prosecution witnesses to be sufficient and the difference in the details immaterial. The court dismissed the appellant's alibi defence and allegations of bad blood between him and PW3. The superior court on the other hand did not specifically allude to the contradictions, but assessed the evidence and found that the testimonies of the prosecution witnesses were credible.

31. The events surrounding where the minor went immediately she left the neighbour's toilet the next morning are not clear. The testimony of PW3 however, was that the complainant was seen to have been in the appellant's house the night before his arrest. This is in tandem with the complainant's own testimony that she was in the appellant's house on Sunday night and that she fled from the house sometime in the night, and spent the rest of the night in a neighbor's latrine.

32. Nowhere in his testimony did PW3 state that he found the complainant in the appellant's house. The only contradiction, which in our view is immaterial, is with regard to whether PW3 assaulted the complainant's mother and the appellant. Having so found, we have no reason to disturb the finding of the two prior courts and this ground too must fail.

33. Regarding the sentence, the appellant made a general sweeping statement alleging that his conviction and sentence were erroneous. None of the parties submitted on it. During the plenary hearing for

highlighting of the submissions however, the appellant abandoned the appeal altogether and only pleaded for the reduction of his sentence.

34. The appellant was sentenced to 20 years imprisonment as provided under Section 8(3) of the *SOA*. This Court in the case of Joshua Gichuki Mwango V Republic No 84 of 2015, expressed itself on minimum sentences as follows:

> " We emphasize 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... On the other hand, definitely, others were deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts... We acknowledge the power of the Legislature to enact laws as enshrined in *the Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence. This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of *the Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of *the Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of *the Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited. In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons. For these reasons we allow this appeal and we set aside the 20-year sentence and substitute it with a 15-year sentence to run from the time the trial court imposed its sentence."

35. This Court has stated on numerous occasions and as borne out in the above decision, that sentences prescribed under the *Sexual Offences Act* are not unconstitutional and are still imposed on a case-by-case basis. However, the court ought not to impose sentences simply because they are mandatory, but should consider the circumstances of each case individually and impose sentences based on the circumstances of the particular case.

36. In imposing the 20-year sentence in the present case, the trial magistrate noted as follows;

> " The law is clear under section 8(3) of the *Sexual Offences Act* that the penalty for anyone who commits such an offense is liable upon conviction to imprisonment for a term not less than 20 years which I do hereby order."

The high court also alluded to the 20 years being the mandatory minimum sentence and thus agreed with the trial court's finding on the sentence.

37. Mandatory sentences restrain courts from considering the particular prevailing circumstances, and using their discretion. We have thoroughly evaluated the record in its entirety and the circumstances of this case. We acknowledge the seriousness of this offence. However, we note the appellant's remorse

as expressed in his mitigation and that he was a youth aged 18 years at the time of the offence. He was also treated as a first offender.

38. All things considered therefore, we set aside the 20-year sentence and substitute it for a 15-year sentence and order that the sentence shall run from the date of the original conviction.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE, 2023

F. SICHALE

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JUDGE OF APPEAL

F OCHIENG

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JUDGE OF APPEAL

L.A. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR