Kimatu v Republic (Criminal Appeal 34 of 2017)
[2023] KECA 1054 (KLR) (24 August 2023) (Judgment)

Neutral citation: [2023] KECA 1054 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 34 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

AUGUST 24, 2023

BETWEEN

PAUL MULI KIMATU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Embu (F. Muchemi, J.) dated 29th October 2015 in Criminal Appeal No. 21 of 2014)

JUDGMENT

1. The appellant, Paul Muli Kimatu, was convicted by the Chief Magistrate's Court at Embu of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* whose particulars were that on 27th June 2013 at Kithimu Location within Embu County he intentionally and unlawfully caused his penis to penetrate the vagina of MMG a girl aged 6 years. He was sentenced to 20 years' imprisonment. His appeal to the High Court at Embu against the conviction and sentence was unsuccessful, and instead his sentence was enhanced to life imprisonment.

2. Still aggrieved by the judgment of the appellate court (F. Muchemi, J.), the appellant came before this Court to complain against the conviction and sentence. His eight (8) grounds of appeal were as follows:-

> " 1) That I pleaded not guilty before the lower magistrate plea.
>
> 2) That, the 1st appellate judge erred in law and fact when she failed to consider that the prosecution evidence was full of inconsistencies and corroborations.
>
> 3) That the learned 1st appellate judge erred in law and fact when she failed to consider that the trial magistrate relied on insufficient evidence.

4) That the learned 1st appellate judge erred in law and fact when she failed to consider the used language was not understandable to the appellant contrary to section 214 of *CPC*.

5) That the learned 1st appellate judge erred in law and fact by substituting my sentence of 20 years to life imprisonment disregarding that "shall" can be read as "may".

6) That the learned 1st appellate judge erred in law and fact when she upheld conviction relying on a defective charge sheet.

7) That the learned 1st appellate judge erred in law and fact when she failed to consider that the prosecution proceeded with hearing without pursuing appellant the prosecution evidence contrary to section 50(2) (j).

8) That the learned 1st appellate judge erred in law and fact when she rejected my defence on weak reasons."

When he filed his written submissions he indicated that the following were going to be his grounds:-

" 1) The Hon. 1st appellate judge erred in law by enhancing the appellant's sentence without warning him of the consequences of appealing against the trial court's sentence of 20 years' imprisonment.

2. That the Hon. 1st appellate judge erred in law by failing to note that the appellant doesn't know how to read and write hence did not know what was contained in his 1st appeal submissions.

3). That the Hon. 1st appellate judge erred in law by enhancing the sentence without taking into account the appellant's dignity.

4) That the 1st appellate judge erred in law and facts by imposing an indefinite life sentence without considering the same was harsh and excessive."

In the submissions, he asked that his appeal be allowed, the life imprisonment be substituted with a lesser proportionate sentence and that this Court does consider that the period he has already served, that is 9 years, be deemed to be sufficient sentence for the offence. He pleaded that he had since reformed.

3. Mr. Naulikha, learned counsel for the State, opposed the appeal. His contention was that the appellant had been convicted on sufficient evidence, the two courts having concurrently found that the prosecution evidence was consistent, truthful, direct and corroborative. Learned counsel submitted that the first appellate court was entitled under section 365 of the *Criminal Procedure Code* as read with section 8(2) of the *Sexual Offences Act*, to enhance the appellant's sentence to life imprisonment.

4. On the appellant's complaint that he did not understand the court's language, learned counsel submitted that the record was clear that the appellant had fully participated in the trial and had cross-examined the witnesses called by the prosecution.

5. The evidence upon which the appellant was convicted, and which evidence the first appellate court accepted to have proved his guilt beyond doubt, was that the child had on this day visited her grandmother. At about 1.00 pm she accompanied her sister MW to go and fetch water from the neighbor's home. This was the home of *Mama*[particulars withheld]. In the home, she found

Mama [particulars withheld] employee who was the appellant. She knew the appellant by name. The appellant held her by the neck and led her into the maize plantation, the shamba of *Mama* [particulars withheld] . He removed his trousers upto the knee, after removing her trouser, biker and pant. He inserted his penis into her vagina. She cried in pain as she bled. When he was done he carried her back to the road where she found her sister. She told her sister what had happened. They returned to their grandmother's home where the incident was reported to their uncle JMN and then their mother CM. The village elder was alerted and the appellant was arrested in the neighbor's home where he was employed. The child was later taken to Embu Provincial Hospital where she was treated and her P3 completed by Dr. S.S. who found that her vagina had been penetrated and her hymen was not intact. The appellant was charged at Itabua Police Station.

6. The child's birth certificate indicated that she was 6 years and 6 months old.

7. The appellant's defence was that he indeed worked in the neighbor's shamba. He went to the shamba for normal work when he heard a child's voice. He was with his employer who asked that he goes to check if children were stealing his employer's fruits. He went but did not see anyone. But while on the road he saw the child, her sister and another. When they saw him they ran away from the shamba. He did not know what they had been doing there. When he returned home four people came and arrested him and took him to Itabua Police Station where he was charged with the offence the he knew nothing about.

8. Both the trial court and the 1st appellate court, after considering and reviewing the entire evidence, accepted the prosecution's version and on it found the guilt of the appellant established beyond doubt. The trial court had found that the complainant was truthful and credible. The learned judge was alive to the fact that sexual offences need not be corroborated in such circumstances. Indeed section 124 of the *Evidence Act* provides as follows:-

> " 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."

9. This Court in *Stephen Nguli Mulili v Republic* [2014] eKLR reiterated that section 124 was clear that the court may convict on the evidence of the victim alone provided the court is satisfied that the alleged victim was truthful. In the instant case both courts found that the complainant was a truthful witness. We observe that her evidence found confirmation in the medical evidence as contained in the P3.

10. Our role on second appeal is limited to matters of law as provided in section 361 of the *Criminal Procedure Code*. In *David Njoroge Macharia v Republic* [2011] eKLR, this Court reiterated its jurisdiction under section 361, and went on to state as follows:-

> " 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."

11. On our own review of the record, we find no reason to depart from the concurrent findings of fact by the two lower courts.

12. The appellant did not complain before the first appellate court that the charge sheet was defective, to enable a finding to be made on the issue. He cannot raise the issue here. On the whole therefore, we find that the appellant was convicted on sound and sufficient evidence.

13. The appellant complained that the first appellate court enhanced his sentence to life imprisonment without any warning to him. Although the learned counsel for the State supported the enhancement, we are of a different view. Section 8(2) of the *Sexual Offences Act* provides for life imprisonment where the conviction in respect of a victim who is a child of less than 11 years. The appellant was ordered to serve 20 years for the offence which was less than what the law provided. Section 354(3) of the *Criminal Procedure Code* empowers the first appellate court to enhance sentence or to alter the nature of the sentence. However, it is now trite that before the court enhances the sentence of an appellant there has to be a cross-appeal by the prosecution seeking such enhancement or the court has, at the beginning of the hearing of the appeal, to warn the appellant that the sentence meted could be enhanced. This Court has held this in various of its decisions, including those in *Sammy Omboke & Another v Republic* [2019] eKLR, *Gushashi Lelesit v Republic* [2016] eKLR, *J.J.W. v Republic* [2013] eKLR.

14. In the instant case, there was neither a cross appeal to enhance the sentence nor was there a warning to the appellant that the court could consider enhancing the sentence. The appellant had derived the benefit of being sentenced to 20 years. Such benefit could not be taken away from him without being afforded a warning and a hearing on the same. We find that the first appellate court erred when it enhanced the sentence.

    It had no jurisdiction to do so. The appellant is entitled to the correction of that error.

15. Consequently, the appeal against the conviction is not merited. It is dismissed. The appeal against sentence succeeds to the extent that the sentence of life imprisonment is set aside and the sentence of 20 years in jail is reinstated.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF AUGUST 2023.

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR