Mutwiri v Republic (Criminal Appeal 150 of 2017)
[2023] KECA 1049 (KLR) (23 August 2023) (Judgment)

Neutral citation: [2023] KECA 1049 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 150 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

AUGUST 23, 2023

BETWEEN

HARON MUTWIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Meru (F. Gikonyo, J) dated 28th November 2013 in Criminal Appeal No. 106 of 2010)

JUDGMENT

1. The appellant, Haron Mutwiri, was convicted by the Senior Principal Magistrate at Maua of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that on November 5, 2007 at Igembe Division in Eastern Province he unlawfully and intentionally penetrated MK a girl under the age of 11 years. He was sentenced to 20 years imprisonment. He was aggrieved by the conviction and sentence and appealed to the High Court at Meru. During the hearing of the appeal by the learned F. Gikonyo, J. the appellant indicated that he was abandoning the appeal against conviction but wanted the sentence reduced. On the other hand, the state indicated that it was asking for the enhancement of the sentence from 20 years imprisonment to life imprisonment as provided by section 8(2) of the *Sexual Offences Act*, given that the child was aged 5 years. In the judgment that was delivered on November 28, 2013, the learned Judge enhanced the appellant's sentence to life imprisonment.

2. This is the appellant's second appeal. He has asked for a retrial before another competent court, complaining that the learned judge failed to evaluate the evidence as a whole and as a result reached a decision that was unsupportable having regard to the circumstances of the case; that despite the fact that he had been served with a notice of enhancement of the sentence, he had not been given an opportunity to address the court; and that section 364(2) of the *Criminal Procedure Code* had been violated, as were his rights under articles 20(3), 27 and 50(2) of the *Constitution*.

3. Ms. Nandwa, learned counsel for the State opposed the appeal, and submitted that the appellant had been convicted on clear, concise and consistent evidence that had established his guilt beyond doubt. On sentence, the learned counsel submitted that the appropriate sentence had been meted out to the appellant given the child's age of 5 years, the fact that the appellant had been served with a notice to enhance the sentence and he had been given time to respond to the notice.

4. The evidence on which the appellant was convicted was that, the child was aged 5 years and was living with her grandmother MK. Her mother was a student in a secondary school. On 5th November 2007 at about 7.00 pm, MK returned home to find the child was not there. She looked for her in the entire neighborhood and homes without getting her. At about 10.00 pm the appellant who is a neighbor came carrying the child, saying she had been sleeping in his house. MK wondered why the appellant had kept the child and why he had not heard her asking about the missing child. She (MK) made supper which the appellant ate but the child refused to eat. It was not until the following day that it was discovered that the child's vagina had injuries and had pus. The child confided to a neighbor GK that the appellant had lured her to his kiosk with soda and biscuits and had defiled her. The incident was reported to Maua Police Station and the girl treated at Maua General Hospital where her P3 was filed showing that she had broken her hymen, the vagina was tender and red and there were pus cells in the urine. The appellant denied that he had defiled the child, and claimed in unsworn defence that he had been framed by the girl's grandmother owing to a grudge over unpaid debt. The trial court considered the entire evidence and accepted the prosecution version which he found to have established the appellant's guilt beyond doubt.

5. Our mandate on second appeal is under section 361(1)(a) of the *Criminal Procedure Code* confined to matters of law only. This court in *Karingo v R* [1982]KLR 213 aptly confirmed this mandate 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 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 Karari c/o Karanja v R* [1956] 17 EACA 146)"

6. Although the appellant has come before us challenging the conviction, he informed the superior court that he had abandoned his appeal on conviction. The superior court, consequently, did not address his appeal on conviction. This Court cannot therefore deal with his challenge to conviction, as there were no findings on the same that could form the basis of his appeal. Secondly, it is clear from the appellant's written submissions that his appeal related to sentence only. This is because he submitted that the superior court did not give him the opportunity to address it after he was issued with a notice to have the sentence enhanced. He submitted that he was illiterate and vulnerable, and had not, therefore, followed the proceedings to know what to do or say. However, the record shows that even during the trial the appellant had cross examined the witnesses and himself given a statement in defence to deny the charge. That was not the conduct of a person who did not follow the proceedings, or did not know what the trial was all about.

7. The complainant was aged 5 years. The charge that the appellant faced, and on which he was convicted, was under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The sections provide as follows:-

> " 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

2. 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."

8. The sentence of 20 years that the trial court meted out was less than what section 8(2) of the Act provided for the offence that the appellant was found to have committed. The first appellate court had power under section 354(3) (ii) and (iii) of the *Criminal Procedure Code* to enhance the appellant's sentence from 20 yeas imprisonment to life imprisonment. In *JJW v Republic* [2013] eKLR, this court reiterated that:-

> "The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

9. In the instant appeal, the appellant concedes that the prosecution served him with a notice of enhancement of the sentence. According to the judgment by the learned Judge:-

> "3. The appellant was notified that the prosecution will be applying for enhancement of sentence. That prompted him to make an almost about- turn on the appeal; he informed the court that he did not wish to argue the appeal. Instead, he would ask for the sentence to be reduced. He submitted that he has been in jail for a long time now. He promised to become a good citizen, for he has reformed."

Indeed, before us in his written submissions the appellant repeated that he had been in jail for a long time, and that he had since reformed and therefore was entitled to a lighter sentence.

10. We observe that, from the record before the superior court, it is clear that the appellant was heard on the notice by the prosecution to have his sentence enhanced. The complaint that he was not heard before the sentence was enhanced is, therefore, without any merit.

11. Secondly, the enhanced sentence of life imprisonment was an action by the superior court to correct the error that the trial court had made in sentencing the appellant to 20 years' imprisonment which was lower than the mandatory minimum sentence provided under section 8(2) of the *Sexual Offences Act*.

12. Thirdly, given the gravity of the offence, the circumstances under which it was committed and the mitigation by the appellant, we are unable to find that he deserved any lesser punishment. We reiterate that what the superior court awarded was the minimum penalty that the law prescribed for the offence.

13. The result is that, we find the appeal to be without any substance and dismiss it.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF AUGUST 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR