KENYA LAW
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DMO v Republic (Criminal Appeal 129 of 2017) [2023] KECA 1082 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1082 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 129 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 22, 2023

BETWEEN

DMO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Kisii (R.N. Sitati, J.) dated 5th June, 2014 in HCCRA No. 118 OF 2010)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence are that on 11th October, 2009 in Kisii Central District within the former Nyanza Province, he unlawfully and intentionally caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of C.B (minor), a girl aged 4 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The facts that were established by the prosecution were that, on 10th October 2009, at about 11 am, PW1, the minor's mother, wanted to feed the minor and her brother but when she called for them, only the minor's brother appeared. PW1 proceeded to look for the minor in the neighborhood and when she called her name, she heard her crying from inside the appellant's house. The appellant, a neighbor and cousin of PW1, then opened his door and threw the minor outside. PW1 raised her from the ground and noticed that she was bleeding from her genitalia. On asking the appellant what he had done to the minor, he retorted, 'I have done what you see I have done.' The appellant tried running away but PW1 took hold of him while calling for help. One Francis, a fellow congregant, was the first to arrive. Upon PW1 explaining what had happened, Francis carried the minor to Mosocho Mission hospital where they were referred to Kisii Level 5 Hospital for treatment.

4. PW2, the clinical officer who examined the minor and filled the P3 form, testified that the minor had a torn hymen, her genitalia was swollen and there was a tear. Further, at the time of treatment, blood was oozing from her vaginal canal and there was also blood on her thighs and legs. PW2 concluded that given those injuries, penetration had taken place. PW3, the investigating officer, testified to having received a report of the minor's defilement from her father. He observed that when he visited the minor in hospital, he found her unconscious and the bed where she lay was soaked with blood. PW3 retrieved the clothes which the minor wore on the material day and produced them in court. The clothes were blood stained.

5. At the close of the prosecution case, the trial magistrate (N. Thuku, RM) found that a prima facie case had been made out and placed the appellant on his defence. The appellant gave an unsworn statement and called no witness. He denied committing the offence, claiming that on a certain Sunday, as he was approaching his home, he met two of his cousins who accused him of stealing. The two allegedly arrested him and took him to the police station.

6. At the conclusion of the trial, the learned magistrate found the appellant guilty as charged and sentenced him to life imprisonment.

7. Aggrieved by the conviction and sentence, the appellant filed an appeal before the High Court at Kisii. The same was heard by R. N. Sitati, J. (as she then was) who, by a judgment dated 5th June 2014, dismissed it in its entirety, provoking the present appeal.

8. In a supplementary memorandum of appeal filed by the appellant in person, the appellant complains that the learned judge erred by:Failing to find that penetration which is a key ingredient in a defilement case was not proved.Failing to appreciate that evidence of the appellant's mental health status was not produced by the maker nor was the assessment done by an expert in mental health issues.Failing to appreciate that age assessment of the appellant was not credible.Upholding the appellant's conviction yet the same was founded on circumstantial evidence which was weak.Imposing a harsh and excessive mandatory sentence without considering the appellant's mitigation.

9. In support of the appeal, the appellant filed undated written submissions in which he expounded on the grounds of appeal. There were no written submissions on record for the respondent although Mr. Okango, the Senior Principal Prosecution Counsel, made oral submissions.

10. The appellant contended that the evidence on record did not establish that the minor's genitalia had been penetrated. He further contested his mental and age assessment reports for reasons that they were not produced in court by their maker and neither was the trial court informed of the qualifications of the persons who conducted the assessments. To the appellant, the age assessment report was not credible because it failed to reveal the criteria upon which the assessment was conducted. He asserted that during trial he was under the age of 18 years. In this respect, the appellant produced a copy of his birth certificate which indicates that he was born on 30th July 1995. He claimed that at the time of commission of the offence, he was aged 14 years.

11. The appellant further submitted that the sentence imposed on him was harsh and excessive. Being a mandatory minimum sentence under the *Sexual Offences Act*, he urged the Court to consider the peculiar circumstances of the case and prescribe an appropriate sentence. The appellant beseeched the Court to take into account the period he spent in remand in sentencing him, adding that he had transformed while in custody and had been awarded the title "trustee". In the end, he implored us to quash his conviction and set aside the sentence.

12. In reply, Mr. Okango pointed out that the question of the age of the appellant had not been raised in the first appellate court, noting, however, that two age assessments had been done on the appellant and they confirmed that he was above 18 years of age. Counsel opposed the birth certificate, arguing that the same was new evidence which the appellant had not obtained leave to have admitted, and that in any case it was issued on 20th April 2012, way after the appellant had been convicted on 28th May 2010. On sentencing, Mr. Okango conceded that following recent jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*, the respondent was agreeable to the life imprisonment sentence being set aside and a term sentence being imposed. He, however, reckoned that considering the gravity of the offence and the age of the victim, the Court should impose a term sentence of 30 years' imprisonment.

13. We interrogated Mr. Okango concerning the age assessment report on record. We were concerned that although the court had ordered for two assessments to be done, there was only one report on record. Moreover, the report was lacking in depth, contrary to the court's direction, that a thorough assessment be done. We were of the view that since the appellant had claimed during trial that he was 17 years of age, the age assessment report should have been more specific as to his age and not merely state that he was over 18 years old. Mr. Okango's response to this was that the practice in age assessment is that the specific age is normally not stated, instead the person is categorised in a certain age group.

14. As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of section 361(1)(a) of the Criminal Procedure Code. This has been restated in many decisions of the Court including *David Njoroge Macharia Vs. Republic* [2011] eKLR in which the Court stated: -

> "That being so only matters of law fall for consideration–see section 361 of the 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 Vs. R* [1984] KLR 611."

15. The issues of law can be narrowed down to two, namely; whether the prosecution proved its case beyond reasonable doubt and whether the sentence meted out was harsh and excessive in the circumstances.

16. Before we address the above issues of law, we note the appellant's contention that he was under the age of 18 years when the offence was committed and during trial. While it is apparent that the age assessment report on record does not give much detail, it is also evident that the appellant is raising this complaint for the first time at this second appeal stage. The copy of birth the certificate that he seeks to rely on does not also aid him much as it was issued almost two years after his conviction, suggesting that this complaint could be an afterthought. We are precluded from making any factual finding on this second appeal and on a matter being sprung on us so late on the day.

17. Turning to whether the prosecution proved the offence of defilement as against the appellant, the appellant argues that there was no evidence of penetration. We think that the evidence on record, on which the two courts below made concurrent findings, clearly showed that the offence had been proved, and the element of penetration clearly established. The learned judge indeed properly analysed and evaluated the evidence of PW1, as corroborated by PW2 and PW3, on the awful condition of the minor following the commission of the offence. PW1 narrated how, when she went out to look for the minor, calling out her name, she heard her crying from the appellant's house. The appellant was her cousin and neighbour. At that point, the appellant threw the minor out of his house, as one would an

object. PW1 observed then that the minor was bleeding from her genitalia. PW2 testified to the minor's condition when she was taken to hospital. She had a torn hymen, her genitalia was swollen and blood was oozing from her vaginal canal. PW3 stated that when she visited the minor in hospital, she found her unconscious and the bed was soaked with blood. The foregoing cogent and graphic evidence is a clear indication of the heinous act that was committed by the appellant against the minor, and we have no reason to interfere with the findings of fact by the two courts below. We consider the appellant's conviction safe and the appeal against the same is accordingly disallowed.

18. That leaves us with the question of sentence. The appellant objects to the sentence imposed, regarding it as harsh and excessive. Counsel for the respondent, though agreeable to the reduction of the mandatory life sentence to a term sentence, submits that in view of the gravity of the offence committed and the age of the minor, the appellant should be sentenced to 30 years imprisonment. We observe that emerging jurisprudence both at the High Court and this Court has determined that mandatory minimum sentences under the *SOA* are unconstitutional. (*See Maingi & 5 Others Vs. Director Of Public Prosecutions & Another* (petition E017 Of 2021) [2022] Kehc 13118 (klr) And *Joshua Gichuki Vs. Republic Criminal* Appeal No. 84 of 2015 (Unreported).

19. In the circumstances, while the appeal on conviction fails, it succeeds on sentence. We set aside the sentence if life imprisonment.

20. Given the grave injuries suffered by the minor and the impunity with which the offence was committed, we order that the appellant shall serve a sentence of 25 years in prison with effect from the date he was first sentenced.

21. Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR