Munyiri v Republic (Criminal Appeal 32 of 2022)
[2023] KECA 1274 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1274 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 32 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

ROBERT MWANGI MUNYIRI ..... APPELLANT

AND

REPUBLIC ..... REPUBLIC

(An appeal from the Judgment of the High Court of Kenya at Mombasa (P. Nyamweya, J.) delivered on 7th September 2018 in High Court Criminal Appeal No. 6 of 2017) Originally Mombasa Chief Magistrates Criminal Case SO 2124 of 2013.)

JUDGMENT

1. Robert Mwangi Munyiri, the Appellant herein, has challenged the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* (hereinafter SOA), and the sentence of twenty (20) years imprisonment imposed by the Chief Magistrates Court at Mombasa (hereinafter 'the trial Court'). The particulars of the offence were that on the 6th September 2013 in Changamwe within Mombasa County, the Appellant unlawfully and intentionally caused his penis to penetrate the vagina of JAO (name withheld) a girl of 10 years. He was charged with an alternative count of Committing an indecent act contrary to Section 11(1) of the *SOA*. The Appellant entered a plea of not guilty whereupon the prosecution called four witnesses, while the Appellant gave a sworn defence and called no witness.

2. The facts of the case in brief were that the complainant, PW1, was 15½ years old at the time of the incident. After voire dire examination, PW1 testified on oath that at 7 p.m. on the material evening, the Appellant, who was her neighbour, requested her to make him dinner of ugali and eggs, which she did in his house. She said that the Appellant locked her in his house and defiled her until the next day. She then told her mother, PW3, MA, that she slept at the Appellant's place. PW3 confirmed that the complainant left home at 7 p.m. on the material night but did not return. She found her in the

Appellant's house the next day. She took her daughter to hospital where it confirmed that she had been defilement. She then reported the matter to the police, and later caused the Appellant's arrest.

3. PW2, Dr. Lawrence Njue saw PW1 on 8th September 2013. On examination, PW1 had lacerations on vaginal opening and perforated hymen, whose degree of injury he assessed as maim. The age of the injuries were consistent with the injuries having been suffered on 6th September 2013, two days before the date of examination. He did not find any spermatozoa. He signed the P3 form and the PRC form, identified as P. exhibits 1 and 2. He assessed her age as 15½ years. PW4, Anne Chemutai was the investigating officer, who received PW1 and her mother PW3 on 8th September 2013, after the Appellant's arrest. She processed the police file and charged the Appellant.

4. The Appellant gave a sworn defence in which he said that he was severely beaten upon arrest, until he lost consciousness. He was charged with the offence of defilement, which he denied any knowledge of. He testified that the doctor confirmed that he did not find any sperms in the child.

5. The trial Magistrate, (Hon. V. Yator) delivered her judgment on 22nd September 2014, where she found that the prosecution had proved the offence of defilement. She invoked Section 179 of the Criminal Procedure Code (herein after CPC), and substituted the charge facing the Appellant from defilement contrary to Section 8(1) as read with Section 8(2) of the SOA, to defilement contrary to Section 8(1) as read with Section 8(3) of the SOA, and sentenced him to 20 years' imprisonment. The Appellant was aggrieved with the conviction and sentence and so lodged his appeal before the High Court. He faulted the trial Court of erring in facts and the law: for convicting him in reliance to a fatally defective charge; for convicting him without the evidence of the arresting officer; for failing to consider the discrepancies and the uncorroborated evidence of the complainant; and for failing to consider his defence.

6. The appeal was heard in Court on the 27th August 2018 in which the Appellant relied on his written submissions dated 31st July 2018. The State made oral submissions. In a judgment dated 5th September 2018, the High Court Judge (Hon. P. Nyamweya, J. as she then was) found that the Appellant was convicted on the basis of overwhelming evidence adduced by the prosecution. The learned High Court Judge found that the learned trial Magistrate made an error by invoking Section 179 of the *CPC*to substitute the punishment Section under which the Appellant was charged Section 8(2) of the SOA Section 8(3) of the *SOA*. She found that Section 179 of the *CPC* could only be invoked to substitute a charge from a major offence to a lesser cognate offence. That the charge under 8(1) and 8 (3) could not be argued to be a lesser cognate offence to that defilement under 8(1) and 8(2) of the *SOA*. The learned Judge opined that defilement under the latter provision was not a lesser offence merely because it provided for a lesser sentence, since the ingredients for either offence were the same. The learned Judge found that the error committed by the learned trial Magistrate of invoking the wrong provision of the law was curable under Section 382 of the *CPC*, as no prejudice was occasioned to the Appellant.

7. The Appellant was dissatisfied with the judgment of the High Court and proffered this appeal. He relied on the supplementary grounds of appeal in which he faulted both the Magistrate's Court and the High Court of being in error in law for:

    i. Failing to note that voire dire examination was not unequivocal;

    ii. Failing to see that he was not issued with witness statements contrary to Article 50(2) (c) of *the Constitution*;

    iii. By construing the relevant penal law to be mandatory in nature.

    The High Court was faulted:

    iv. For failing to note that the trail Magistrate failed to take into consideration his mitigation.

8. We heard the appeal on the 20th June 2023 through this Court's virtual platform. The Appellant, who was present in person from Shimo la Tewa Prison, informed the Court that he had filed written submissions on 3rd March 2023 and that he was relying on them entirely. Learned Prosecution Counsel Mr. Alex Gituma held brief for Prosecution Counsel Ms. Nyawinda for the State. He relied on the filed written submissions dated 18th June 2023.

9. In summary the Appellant's case is: Firstly, the Appellant faults the trial Court of conducting a scanty voire dire examination, urging that it was incapable of assisting the Court determine the capability of PW1 to testify. He urged that under the *Children Act*, a child is any person below 18 years. That under Section 19 of the *Oaths and Statutory Declarations Act*, it was necessary to carry out the voire dire examination to establish if the child understood the nature of an oath, and if she was possessed of sufficient knowledge to testify. He urged that the Court omitted to conduct to the required standard the requisite examination, and that consequently, the evidence of PW1 should have been treated as unsworn evidence, and should have been found unsafe to found a conviction. For that proposition, the Appellant relied on the case of Johnson Muiruri vs. Republic 1983 KLR 447.

10. Secondly, that he was denied a fair trial in that he was not supplied with witness statements despite making repeated requests for the same. He relied on Article 50(2) (c) of *the Constitution*, and the cases of *Thomas Patick Gilbert Chomondely vs. Republic* [2008] and *Joseph Amos Owino vs. Republic* Court of Appeal Criminal Appeal no 450 of 2007. He urged that it was the duty of the Court to ensure an accused person is supplied with witness statements, especially where he is not represented by counsel.

11. Thirdly, on the sentence, his complaint was that he was charged under Section 8(3) of the *SOA*, which provided for a sentence of 20 years but the same was not coached in mandatory terms as the term used was 'is liable upon conviction to imprisonment for not less than 20 years' imprisonment.' The Appellant relied on several cases including *Opoya vs. Uganda [1967] EA 752* and DWM vs. Republic [2016] eKLR, for the proposition that the words 'liable to' should be interpreted in its proper construction, which is that the penalty following those words is not mandatory, but a mere expression of the stated penalty, which may be imposed at the discretion of the Court.

12. The submissions by the State responded to the initial grounds of appeal relied upon by the Appellant, which the Appellant abandoned for the supplementary grounds. The grounds urged of whether the prosecution had proved the charge and whether the charge was defective, are not grounds taken up by the Appellant before us. The only one which had some similarity to what the Appellant urged was on the issue whether the Appellant was accorded a fair trial based on his constitutional right to counsel, which is not the point taken by the Appellant. The Appellant's concern was regarding his constitutional right to be supplied with witness statements.

13. We have considered the appeal together with the filed submissions. The role of the second appellate court was succinctly set out in *Karani vs. R* [2010] 1 KLR 73 wherein this Court expressed itself as follows: -

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

14. We will start by making an observation which is that the two grounds raised by the Appellant firstly, challenging the failure of the trial Court to conduct voire dire as required by law and secondly, that he was denied his constitutional right to be supplied with witness statements, were both not issues that were raised before the Courts below. The question that follows is how then the learned first appellate Court Judge can be faulted for having failed to address issues that were never placed before her. This Court when faced with a similar issue in *Alfayo Gombe Okello vs. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

15. That said, we are inclined to address both these issues as they relate to the record before us. On the issue of voire dire examination, the case law has settled this issue by showing that the requirement is to administer the examination on children of tender years. Subjecting a witness of tender age to voire dire examination is founded under Section 125 (1) of the *Evidence Act*, which states;

> "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.)"

16. Also Section 19(1) of the *Oaths and Statutory Declarations Act* has something to do with receiving evidence of a child as follows:

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

17. The Court of Appeal sitting in Nyeri in the case of *Samuel Warui Karimi vs. Republic* [2016] eKLR examined several cases of the Court of Appeal and the High Court in an attempt to answer the question 'who is a child of tender age' for purposes of Section 19 of the *Oaths and Statutory Declarations Act*. The Court expressed itself thus:

> "[14] In the leading case of; *Kibangeny Arap Korir v Republic*, [1959] EA 92; the Court of Appeal for Eastern Africa while dealing with a determination of the issue, held that tender years means a child under the age of 14 years. In a more recent decision of the Court of Appeal sitting in Malindi in the case of; *M K v Republic* [2015] eKLR; the court termed as "unnecessary" voire dire examination conducted on a child aged 15 years by the trial court. It was held that voire dire examination is done where a witness is a child of tender years...

18. In a recent decision of the Court of Appeal sitting in Nyeri the case of; *Patrick Kathurima vs Republic*, [2015] eKLR; it was held:

> "We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates

the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of Section 19 of Cap

19. We are aware that Section 2 of the *Children's Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declaration Act*, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes."

20. The above decision supported the definition of a child of tender years to be 14 years and below and contextualized that definition within the Oaths and Statutory Act and under the Children's Act. On our part, we have no good reason to depart from this well-trodden path, as we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic."

21. This Court in the above cited case [differently constituted] found no good reason to depart from the conclusion that a child of tender age for the purposes of Section 19 of the *Oaths and Statutory Declarations Act* is a child of the age of 14 years and below. That finding too persuades us that the age of 14 years is a good guide of determining which age should be regarded as that of a child of tender age for the purposes of receiving evidence of children for purposes of a criminal trial. The critical issue being according the accused person a fair trial, ensuring the competence of the witness to give the evidence and the preservation of the integrity of the trial proceedings. In this case, the complainant, PW1 was 15½ years. She was not a child of tender age. It was not necessary for a voire dire examination to be conducted in this case. We agree that the learned trial Magistrate did not conduct the examination properly. However, in view of our finding on the age of tender years, no prejudice was occasioned to the Appellant in that regard.

22. On the issue of supply of witness statements, the Appellant's complaint was he requested for statements on 24th October 2013, before trial commenced, and thereafter after commencement, without success. The right to a fair trial is anchored under Article 50 of *the Constitution*. Article 50(2)(j) of *the Constitution* provides:

> "(2) Every accused person has the right to a fair trial, which includes the right-
>
> (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

23. The record shows that on 9th September 2013, the Appellant pleaded not guilty, and the trial thereafter commenced on 9th December 2013, with the evidence of PW1. On the 8th April 2014, the Appellant requested for the supply of the charge sheet and the P3 form. The case was heard on the 14th May 2014 when the evidence of PW2 taken. The record does not indicate that the Appellant made any further request or objection regarding witness statements or documents. Therefore, contrary to the Appellant's assertions, the record shows that the prosecution indicated that they would avail the witnessed statements and that there is evidence it was done as the Appellant thereafter did not raise any concerns in that regard. He also participated in the trial and cross-examined the prosecution witnesses without expressing any difficulties in so doing. We also note that the issue of failure by the prosecution to supply statements and documents was not raised in his first appeal to the High Court. Nothing turns on this.

24. The substantive ground raised in this appeal concerns the sentence meted out by the learned trial Magistrate and the failure of the High Court, in interpretation of the words 'liable to' in the penal

provision in their correct construction. It was the Appellant's position that the sentence was manifestly harsh and excessive.

25. On the sentence, the general principle is that an appellate Court should not interfere with the exercise of discretion by the trial, subject to certain principles that guide the process of determining if the exercise of discretion should be interfered with are met. In *Shadrack Kipkoech Kogo vs. R. Eldoret* Criminal Appeal No. 253 of 2003 this Court set the applicable principles thus:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)."

26. The circumstances under which this Court, and any appellate court for that matter, interferes with the exercise of the discretion by the trial court in imposing a sentence were restated by this Court in *Bernard Kimani Gacheru vs. R.* [2002] eKLR as follows:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

27. The Appellant was convicted of defilement contrary to section 8(1) as read with Section 8(3) of the *SOA*. Section 8(3) is the penal provision and prescribes the sentence for the offence thereunder as follows:

> " 8. Defilement
>
> (1) ...
>
> (2) ...
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

28. The learned trial Magistrate in the made the following ruling in sentencing:

> Sentence
>
> I have considered the mitigation of the accused, he is remorseful however (sic) however the *sexual offences Act* gives a minimum of not less than 20 years as per section 8(1) and 8(3). The accused is hereby sentenced to serve 20 years imprisonment. Right of appeal in 14 days."

29. The learned Judge of the High Court 'affirmed the sentence of 20 years imprisonment meted against the Appellant for this conviction.'

30. In order to justify the interference with the exercise of discretion in sentencing, the Appellant needed to show; either that the sentence is manifestly excessive in the circumstances of the case; or that the trial Court overlooked some material factor; or took into account, some wrong material, or acted on a wrong principle. Apart from alleging that the sentence imposed against him was manifestly harsh and excessive, the Appellant has not pointed out in what manner it was harsh or excessive. It was not enough for the Appellant to complain generally about the sentence. He needed to show what circumstances of the case are proof of the excessiveness or harshness in the sentence. None have been identified to us, and unless there was an apparent error or mistake in the sentence, it is the duty of the Appellant to satisfy the Court that indeed circumstances existed.

31. The operative words in Section 8(3) of the *SOA* are 'is liable, upon conviction to imprisonment for a term of not less than twenty years' they have to be read together in order to understand the intention of the Legislature. The provision in its plain language is simple and clear enough. It provides a minimum sentence for the offence '...of not less than 20 years imprisonment..' The learned trial Magistrate correctly interpreted the law and passed a sentence that was compliant with the law. We find no justifiable reason to disagree with the two Courts below on the sentence.

32. The result of this appeal is that it has no merit in its entirety and is accordingly dismissed.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR