Mwanjahi v Republic (Criminal Appeal 77 of 2022) [2023] KECA 1271 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1271 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 77 OF 2022

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

SOSPETER MWAMACHI MWANJAHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Mombasa (D.S. Majanja J.) dated and delivered on 7th September 2018 in High Court Criminal Appeal No. 102 of 2017arising from the original trial in Shanzu Criminal Case No. 1234 of 2015)

JUDGMENT

1. Sospeter Mwamachi Mwanjahi, the Appellant herein, has challenged the dismissal of his first appeal by the High Court at Mombasa (Majanja J.). The said appeal had been lodged against his conviction for the offence of defilement and sentence of life imprisonment that had been imposed by the Senior Principal Magistrate's Court at Shanzu (Hon. D. Mochache, SPM as she then was) (hereinafter 'the trial Court'). The particulars of the offence were that on diverse dates in the month of August 2015 at Leisure area in Kisauni Sub County within Mombasa County, the Appellant intentionally caused his penis to penetrate the vagina of MW, a child aged 9 years. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The prosecution called four (4) witnesses to testify in support of their case in the trial Court while the Appellant gave sworn testimony and called one (1) witness. The summary of facts as narrated by the prosecution witnesses was that the complainant, MW, who testified as PW1 after a *voire dire* examination, was born on 27th February 2006 and lived with her grandmother, LW and elder sister, FW. PW1 testified that in the month of August 2015 the Appellant, who was known to her as Peter and their landlord's nephew, told her to go to her house, undressed her, lay her on the bed and 'halafu akafanya tabia mbaya.' ("he did bad manners"). The Appellant then gave PW1 Kshs 5/- and told her not to tell anyone. PW1 testified that she could recall three such incidences with the Appellant, and that

one day at night, she wanted to go for a long call and by the time her mother came she had diarrhoea on herself. She then told her mother that the Appellant had defiled her, and her mother bathed her and, in the morning, took her to Makadara Hospital where she was tested for HIV. She also stated that one Kababa and one Muema who were her friends and were tenants in the same and neighbouring plots respectively, used to play kalongolongo (sex) with her.

3. The complainant's mother, SW, who testified as PW2, stated that on 22nd October 2015 she noticed that the complainant's clothes were wet and that the complainant could not control her stool. When she inquired what the problem was, the complainant told her that the Appellant had defiled her repeatedly and told her that if she said anything, he would tell his father who would kill her. The Appellant was known to PW2 because his father was her landlord. PW2 testified that she reported the matter at Nyali Police Station and recorded a statement, and the complainant was examined at Coast Hospital and the doctor confirmed the defilement.

4. Dr. Gillian Njambi Muiruri, a medical doctor at Coast General Hospital, testified as PW 3 and stated that the P3 form was prepared by Dr. Mirfat, whom she had worked with for 4 months and had taken over from when Dr. Mirfat moved another department. She produced the PRC form which was filled on 22nd October 2015 and a P3 form dated 27th October 2015 with respect to M, a ten-year old. She stated that the complainant was taken to hospital on 30th October 2015 and that upon examination, it was observed that the genital had a healing abrasion, the hymen was partly broken with an old scar, the injuries were approximately nine (9) days and the probable type of weapon was blunt. Further, that PW1 had a urinary tract infection; and the conclusion was that that she had been defiled.

5. Sgt. Rosette Kusimba (PW4) investigated the offence after seeing the PRC form for PW1, and she sent PWI for an age assessment where it was established that she was 10 years old. PW4 produced the age assessment report as an exhibit, and testified that the investigations revealed that the Appellant defiled PW1 and he was arrested. After the prosecution closed its case and the trial Court was satisfied that there was a prima facie case against the Appellant and he was placed on his defence.

6. The Appellant in his defence denied commission of the offence and testified that, he lived in Kisauni and installed decoders. He told the Court that it was alleged that in August 2015, he defiled a nine (9) year old girl and stated that the complainant's landlord is his uncle and he got to know the complainant's family when the complainant's mother approached his mother searching for a rental house. That on the material day he was arrested at his parents' home and was not told anything and was locked up at Nyali police station without being informed of what he had done for one week before his parents were informed of the charges. He stated that upon being brought to court, he did not know why he had been arrested, his father was asked to give Kshs 300,000/- so that the charges are dropped. He denied committing the offence and told the Court that if his father had paid Kshs 300,000/- he would not have been charged. Further, that there were other men who lived in his uncle's compound as tenants but the complainant picked on him.

7. OMM testified as DW2 that he was a resident of Leisure Village at Kisauni and worked as a village elder and the father of the Appellant. DW2 stated that he knew the complainant and her mother, who were his tenants. He stated that the complainant was naughty and used to play with boys only. He testified that as a village elder, he did not like her association with boys and he warned her not to play with the boys but she never stopped though he never told her mother because she knew of her child's behaviour.

8. The learned trial Magistrate delivered a judgement on 13th May 2017 and found that PW3 was proved to be a minor of 10 years by the age assessment report tendered by PW4; that penetration was proven by the evidence of PW1 as corroborated by PW2 and the medical evidence tendered by PW3. On the identity of the perpetrator, it was found that PW1 recognized the Appellant, given that they were

known to each other as neighbors. The trial court considered section 124 of the *Evidence Act* and found PW1 to be a candid witness despite her tender age. The Appellant's defence was found as having no probative value as it did not absolve him of the offence. The Appellant was accordingly found guilty of the offence of defilement and convicted, and after considering his mitigation, the trial Court sentenced him to serve life imprisonment.

9. The Appellant was dissatisfied with the decision of the learned trial magistrate and appealed to the High Court at Mombasa on the grounds that the charge sheet was defective; that the prosecution did not prove its case; that the prosecution evidence was contradictory; that his defence was not considered; and that the sentence was manifestly harsh. The High Court (Majanja J.) dismissed the appeal in a judgement rendered on 4th September 2018 and found that the evidence was sufficient to support a conviction. The learned Judge found that there was proof of penetration from the testimony of PW1 which was corroborated by her mother and the medical examination evidence. It was also found that the Appellant was well known to PW1 and her family. On the age of the victim, the court was convinced that the victim was a child below eleven years of age at the time of commission of the offence, and concluded that the sentence of life imprisonment was mandatorily provided for by the law.

10. The Appellant being dissatisfied with the decision of the High Court has filed this second appeal, on the grounds that the High Court failed in its duty as the first appellate court to evaluate the evidence; that the evidence tendered was at variance with the charge against the Appellant; and that the life sentence was manifestly excessive. We heard the appeal virtually on 16th May 2023, and the Appellant was present and was represented by Learned Counsel, Mr. J. Asige while the Respondent was represented by learned Principal Prosecution Counsel, Ms. Nyawinda. Both Counsels while highlighting their respective submissions dated 28th April 2023 and 22nd February 2023, they reiterated the said submissions.

11. Mr. Asige pointed out findings by the High Court which he claimed were at variance with the evidence, including that the court did not consider that PW1 testified that the alleged defilement took place in her home and not in the Appellant's house, and that she did not indicate that the assault took place in August 2015. On the sentence, counsel cited the case of *Dismas Wafula Kilwake v R* (2019) eKLR for the unconstitutionality of a mandatory minimum sentence.

12. Ms. Nyawinda in opposition urged that the variance in age as indicated in the charge sheet as against the evidence as well as the failure to indicate the date of the offence were not material infractions which were fatal to the prosecution case, and cited the case of *John Irungu vs Republic* [2016] eKLR and section 382 of the *Criminal Procedure Code* in support. On the issue of proof of the case, counsel urged that the age assessment report proved PW1's age; penetration was proven vide medical evidence; and the Appellant was recognized as PW1's neighbour. Lastly, on the issue of the sentence, Ms. Nyawinda urged that the meted sentence is within the law and is safe and cited the decision in the case of *David Muai vs Republic* (2021) eKLR .

13. 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. On the first issue as to whether the findings of the High Court were at variance with the evidence, the High Court in this regard summarised and evaluated the evidence as follows:

> " 13. As regards the issue of penetration, the child clearly testified how the appellant sexually assaulted her in graphic terms as I have set out elsewhere in this judgment. She was firm in cross-examination, that the appellant had in fact sexually assaulted her three times. The appellant was a person known to her, a fact admitted by the appellant himself and DW 2.
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> 14. PW 1 gave sworn testimony which was sufficient to support a conviction under the provision to section 124 of the *Evidence Act* ....
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> 15. The trial magistrate held that having conducted a voire dire, PW 1 was intelligent and her evidence was consistent, as such I am also satisfied that the testimony of PW 1 was sufficient to support a conviction. However, there is additional corroborative evidence. First, PW 2 saw PW 1 in a state of distress before she told her what the appellant had done to her. Secondly, the medical examination revealed injuries to PW 1's private parts that were consistent with penetration..."

15. On the proof of age of the complainant:

> " 22. In this case there was no contention that PW 1 was not below the age of 18 years hence the offence of defilement was proved. The real or apparent age of the child is a question of fact to be proved by oral testimony of the parents, the child, the medical age assessment by doctors or public documents evidencing the child's birth. At the end of the day, the child was aged below the age of 11 years which under section 8(2) of the *Act* provides for a mandatory death sentence..."

16. In this respect PW2 testified that the complainant who was her daughter was ten years old, and the age assessment report produced by PW4 also confirmed this fact. It is notable that a considerable part of the judgment of the High Court (paragraphs 16 to 21 thereof) was dedicated to an analysis of the variance between the charge sheet and evidence as regards the date of commission of the offence as being August 2015 as opposed to October 2015, and as regards the age of the child, and the High Court found that the variance was not material to the charge in light of the totality of the evidence and that the error of failing to properly frame the charge was one that was curable under section 382 of the *Criminal Procedure Code*. It is therefore evident that the evidence was considered and evaluated by the High Court, and we find that the upholding of the Appellant's conviction was not in error as it was supported by the evidence.

17. As regards the legality of the sentence, the sentence of life imprisonment is provided for in section 8(2) of the *Sexual Offences Act* as the mandatory sentence for the offence of defilement of a child aged eleven years and less, and PW1 was proved to be ten years old. However, we are persuaded by the reasoning of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR that mandatory sentences take away the discretion of the Court in taking into account the mitigating or aggravating

factors and imposing a sentence demanded by the circumstances of the case. In the present appeal it is notable that the trial Court noted as follows after considering the Appellant's mitigation:

> " I have noted the mitigating factors carefully and the fact that the accused is a first offender and has a good record as per the pre-sentence report. It should, however, be noted that the offense is very serious and the complainant was only 9 years old. As much as the accused is said to be of good conduct, the law does not grant me any discretion as the sentence is mandatory. I therefore, as per the *Sexual Offenses Act*, sentence the accused person to life imprisonment."

18. In *Manyeso vs Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) this Court (Nyamweya, Lesiit &Odunga JJA) also advanced the constitutional reasons for determinate sentences, in finding a sentence of life imprisonment without any prospect of release unconstitutional.

19. We therefore uphold the conviction of the Appellant for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, and only allow the appeal against the sentence by setting aside the sentence of life imprisonment, and substituting it with a sentence of fifteen (15) years imprisonment, which shall run from the date of sentence by the trial Court on 4th July 2017.

20. This judgment is delivered in accordance with Rule 34(3) of the *Court of Appeal Rules* of 2022, as Gatembu J.A. had reservations on the reduction of the sentence and declined to sign.

15. It is so ordered.

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

GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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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