JMM; Republic (Respondent) (Criminal Appeal 161 of 2017)
[2023] KECA 1252 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1252 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 161 OF 2017

PO KIAGE, F TUIYOTT & WK KORIR, JJA

OCTOBER 6, 2023

IN THE MATTER OF

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from a conviction and sentence from the judgment of the High Court of Kenya at Kakamega,(D.S. Majanja, J.) dated 31st August, 2017 in HCCRA No. 175 of 2014)

JUDGMENT

1. JMM is serving life imprisonment upon his conviction for the offence of defiling a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. At trial it was alleged that on 12th September, 2010 in Mushiangubu sub-location, Mulwanda Location of Khwisero District, he unlawfully caused his penis to penetrate the anus of VA, a child aged 3 years.

2. At the outset, the prosecutor informed the trial court (D.O. Ogembo, PM) that because of her very tender age of 3 years, the complainant was unable to give evidence in court. In the end, however, the trial court believed the following case put forward by the prosecution.

3. key eye witness was JA (PW4) a pupil at [Particulars Withheld] School, who was in nursery school at the time she testified. On the material day, 12th September, 2010 in the evening, she was at home with VA and another child whom she went to put to sleep. On returning, she realized VA was missing. She remembered the appellant had earlier been at their home asking for water. The appellant was known to her as she had seen him many times at their home. She then heard VA screaming and went to check on her only to find the appellant lying on top of her. The appellant ran away upon being discovered. HM (PW3) also came to the scene and they took VA home and when her mother EAO (PW1) came home, she was told what the appellant had done.

4. At the material time, PW3 was aged 18 years and a pupil at [Particulars Withheld] Primary School. On 12th September, 2010 as she made her way back from school at about 5.00pm, she heard a child cry from a bush by the side of the path. She recognized the cry to be that of VA, her cousin. When she went to check, she saw the appellant running away from the same bush. The appellant was known to her because he is her uncle. She took VA into her hands. VA told her that the appellant had "held her".PW3 noticed that the young girl had a discharge from the anus. PW3 took the child to the child's home and she later told EAO (PW1), the mother of the victim, what she had seen.

5. On examining her child, PW1 noticed bruises to her anus and some discharge. It was painful to touch. The mother, accompanied by her distraught child reported the crime to Khumusalaba Police post where they were advised that the child should first seek medical attention. The child was treated at Butere District Hospital, a day later, on 13th September, 2010. At the Hospital, John Isindae (PW2), a clinical officer, attended to the victim. On examination he found her to have bruises on the anal region with noticeable feaces. He noted that she had two cuts in the anal opening which were 24 hours old. He formed the opinion that she had been sodomized.

6. In his defence, the appellant denied the charges. He stated that he was charged because the complainant's family had differences with his family.

7. The appellant's first appeal to the High Court was unsuccessful. In this second attempt, the appellant argues that the trial court convicted on uncorroborated evidence; essential witnesses like the Chief, Assistant Chief or village elder ought to have been called to testify in support of the alleged offence; the evidence of PW3 contradicted that of PW4 and this should therefore have benefited him and; the medical report did not establish defilement and the findings therein were entered at the instance of the mother of the complainant.

8. As is apparent, the appellant's grievance regarding the contradiction in the evidence of PW3 and PW4 is a matter of fact beyond the scope of a second appeal unless its effect is to lead to such a perverse outcome that goes to the root of the conviction, the remit of the Court in a second appeal being circumscribed by section 361 of the *Criminal Procedure Code*. See the decision of this Court in *Karani -vs- R* [2010] 1 KLR 73 which stated:

> " 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." See also *Karingo –vs- R* (1982) KLR 213.

9. The arguments made by the appellant regarding the apparent contradictions do not impeach the material aspects of the evidence. There is an eye witness account of the appellant lying on top of the young helpless victim and another of him leaving the scene in a hurry. We defer to the material factual findings of the two courts below and fully endorse the findings of the High Court that:

> " I have reviewed the evidence and I am satisfied that the prosecution proved its case. Although the child was not called as a witness, the circumstantial evidence against the appellant was watertight. PW4 witnessed him sexually assaulting the child. Shortly thereafter PW2 arrived and she saw the appellant run away. The appellant was not a stranger to the witnesses and

was very well known to them. That the child was injured is confirmed by the examination by PW1 and the Clinical Officer, PW3, who both noted that the child's anus was injured."

10. The appellant who appeared before us in person submitted the Chief, Assistant Chief, village elder or any member of the public were not availed to testify and that a negative inference should be drawn against the prosecution for this failure (*Bukenya v. Uganda* [1972] EACA 549). What we are not told by the appellant is why the persons named would be essential witnesses when the eye witnesses who caught the appellant red handed and literally pants down, and the Doctor who confirmed that there had been penetration into the anus of the victim gave strong evidence incriminating the appellant. The evidence on record was not barely adequate but quite overwhelming.

11. What does the appellant say of the medical report? The appellant submits that it was the evidence of PW2 that the child denied having been sexually assaulted and that no discharge or faeces were seen. The clinical officer is said to have prepared the report at the instance and directions of PW1, the mother of the victim.

12. This, we think, is an attempt to misrepresent the evidence of this critical witnesses. PW2's evidence was:

> " The child first denied she had been sexually assaulted."

The initial denial can be understood given the traumatic effect that this despicable assault had on the victim. It would be an assault she would want to forget. Regarding the medical report, while it may be true that the doctor found no discharge on or in the anus it is also true that this was an examination carried out about 24 hours after the assault. What is of significance, however, is that on examining the victim the clinical officer found that she had bruises on her anal region and 2 cuts in the anal opening which were 24 hours old. Nothing turns on this ground and the entire appeal on conviction fails.

13. We turn our attention to the sentence. The punishment of life imprisonment was imposed way before the landmark decision of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. The Muruatetu jurisprudence has since been applied by this Court in respect to sentences under the *Sexual Offences Act*. Just like others who have committed offences under this statute, the appellant too will get a respite from this development of the law. Yet his conduct against the 3-year-old victim was abhorrent and we agree with Mr. Okango, learned counsel for the respondent that he deserves no less than a jail term of 30 years.

14. In the result the appeal on conviction fails. It succeeds on sentence to the extent that the life imprisonment is set aside and in its place, the appellant is sentenced to 30 years imprisonment to be counted from the date of sentence by the trial court.

DATED AND DELIVERED AT KISUMU THIS 6TH DAY OF OCTOBER, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR