Momanyi v Republic (Criminal Appeal 21 of 2018)
[2023] KECA 1254 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1254 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 21 OF 2018

M NGUGI, F TUIYOTT & JM NGUGI, JJA

OCTOBER 6, 2023

BETWEEN

EVANS ONYANGO MOMANYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisumu (Majanja, J.) dated 7th February, 2018 in HCCRA No. 9B of 2017)

JUDGMENT

1. The appellant, Evans Onyango Momanyi, was the accused person in the trial before the Senior Resident Magistrate's Court in Tamu in Criminal Case No. 10 of 2015. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that between the 27th and 28th day of April, 2015 in Muhoroni District within Kisumu County, the appellant caused his penis to penetrate the vagina of JAO, a child aged 14 years. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to serve twenty (20) years imprisonment.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (D.S. Majanja, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 7th February, 2018.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised four (4) grounds in his Memorandum of Appeal, which are that:

    1. The appellate and trial court erred by convicting the appellant while failing to prove the requisite element of identification as required under section 8(1) of the *Sexual Offences Act* as the prosecution failed to prove that it was the appellant who was the culprit.

    2. The appellate and trial court erred by convicting the appellant while misapplying section 124 of the *Evidence Act*, and failed to appreciate that the evidence of PW1 was obtained through coercion.

    3. The appellate and trial court erred by convicting the appellant while misapprehending the facts of the case and relied on evidence which was riddled with material contradictions.

    4. The appellate court erred by convicting the appellant while dismissing his defense and shifting the burden of proof on the appellant.

6. A summary of the evidence that emerged at the trial through five

    (5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

7. At the material time of the incident, PW1, the survivor of the charged sexual assault, was a form one student at [Particulars Wthheld] Secondary School, whereas PW2 was a standard seven pupil at [Particulars Withheld] Muhoroni Primary School. The family of PW1 lived at [Particulars Withheld] Church Parish grounds as her father, PW4, served as a catechist in the church. PW2 lived with them.

8. On 27th April 2015, PW2 was not feeling well. At about 11.00am, PW1 took PW2 to Muhoroni Hospital, with the consent of her father. At the hospital, the appellant, a trained clinical officer, attended to PW2 and admitted her. He then told PW1 that there was need for her to stay overnight with PW2 in the ward. PW1 went back home and informed her father, PW4, about PW2's admission and the treating medic's suggestion that she spend the night with her. PW4, perhaps driven by a father's intuition, denied PW1 permission to go back to the hospital. They had dinner and PW4 went to sleep. Unbeknownst to PW4, PW1 left for the hospital shortly thereafter.

9. At the hospital gate, PW1 met the appellant. He persuaded her to follow him to the staff quarters where he resided. On reaching the house, the appellant showed her around the house. When they got to the bedroom, PW1 testified that the appellant pushed her onto the bed, locked the door and told her not to scream. He then removed her skirt and panties, removed his penis, put on a condom and inserted his penis in her vagina. At that time, she said, she was on her monthly period; and, she said, it was the first time she had sex.

10. After the incident, the appellant slept and PW1 jumped onto another bed and put on her clothes. She was, she said, in a lot of pain and could not walk. Time went by and she fell asleep, only to be woken up later by the appellant who warned her not to tell anyone what had happened as he would be fired from his job. Thereafter, he told her to leave his house and go to the ward where PW2 was.

11. Upon returning to the ward, PW1 found PW2 fast asleep. When PW2 woke up in the morning, PW1 left and returned home. On arrival home, PW4 asked her where she went, but she lied that she had spent the night with PW2 in the ward. PW4 beat her up leading to the true rendering, by PW1, about what had transpired.

12. On her part, PW2 confirmed that she was, indeed, sick and was admitted to the hospital. PW2 had promised to return to be with her in the ward but by midnight she had not done so. However, later that night, she saw PW1 beside her on the bed. Upon inquiry, PW1 narrated to her what transpired.

13. PW4, Francis Odongo Ogutu, confirmed that he lived with PW2 and that he had sent PW1 to take her to the hospital for treatment. He basically corroborated PW1's narrative on what happened on that day; stating that he went to bed at 9:40pm after explicitly forbidding PW1 from going back to the hospital. To his dismay, however, PW1's younger brother woke him up in the night and informed him that PW1 had left the house and had not come back. PW4 looked for her outside but did not find her. He thought to himself that she must have gone back to the hospital.

14. When PW1 returned in the morning, PW4 said, he threatened to cane her and PW1 volunteered the information about what happened. Afterwards, PW4 took her to the hospital to confront the appellant. The appellant expressly denied that he knew PW1 or that he was with her the previous night. At this juncture, PW4 went and reported the matter to the priest who, in turn, advised him to take PW1 to hospital for examination and treatment. Thereafter, they reported the incident at the police station.

15. PW3, Edna Koech, a clinical officer at the Muhoroni Sub-District Hospital, attended to PW1 when she was taken to the hospital. She testified that she examined PW1 and concluded that she was sexually assaulted as her hymen was freshly torn, the vaginal wall was stained with blood and the labia majora and mons pubis had lacerations. Additionally, the outer part of her labia and the area between her vaginal opening and anus had a tear.

16. PW5, CPL Pascal Marama, was the investigating officer in the case. He gave formal testimony about the report made and his investigations leading to the arrest and charging of the appellant.

17. When he was placed on his defence, the appellant gave sworn testimony and denied the charges against him. He testified that on the material day, he left the hospital at 5.00pm and went to a local pub where he had drinks with his friends. He said that he only left the pub at around 10.00pm and headed home to his family. The following day, while at his office, PW4 paid him a visit and accused him of defiling his daughter. The next day, the police went to his office and arrested him.

18. The appellant's wife, DW2, testified that on the material night she was home and the appellant came back with a friend. She served them dinner and the friend left; afterwards, they went to bed.

19. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango appeared for the respondent. Both parties relied on their submissions and orally highlighted them.

20. First, the appellant contended that both the trial and appellate courts erred by convicting him, while misapprehending the facts and evidence of the prosecution witnesses which, he argued, were riddled with material contradictions. In this regard, the appellant argued that there were contradictions in the evidence of PW2 and PW1 as to whether PW1 disclosed her whereabouts to PW2. The appellant argued that whereas PW2 testified that PW1 told her where she had come from on the material night, PW1 categorically testified that she did not disclose the same to PW2.

21. The appellant further contended that the evidence of PW4 was riddled with doubts and inconsistencies. He argued that the fact that his application to admit the witness statements of PW4 as evidence hampered his preparations for this defence and showed that the trial court was already determined to convict him even before the case was concluded.

22. Additionally, the appellant questioned why PW5 did not investigate the report made by himself of having been accused of defiling PW1, and instead only investigated the report made by PW1, that she had been defiled by the appellant. According to the appellant, it was questionable that during his investigation, PW5 never interviewed witnesses, but instead proceeded to charge the appellant.

23. The appellant further questioned the fact that PW1 alleged that she met the appellant in hospital, whereas his shift had ended at 5.00pm, where after he went to have drinks with his friends and later went to his house at 10.00pm; which information, he said, was confirmed by his wife, DW2.

24. To buttress these contentions, the appellant relied on the decisions in *Kamkrishna Padya v Republic*, *John Mutua Musyoki v Republic*, Criminal Appeal No. 11 of 2016, *Elizabeth Waithiengi Gatimu vs. Republic* [2015] eKLR, and *Philip Nzaka Watu v Republic* [2016] eKLR; all of which addressed the issue of contradictions and inconsistencies in evidence and whether or not they could be substantial enough to affect the guilt of an accused person and overturn a conviction.

25. Second, the appellant argued that the trial and first appellate courts erred by convicting him, yet the prosecution failed to prove its case beyond reasonable doubt by virtue of not proving all the elements of defilement. He however conceded that he did not contest the evidence with regard to elements of proof of penetration and age of complainant. Rather, what he contested was the element of identification.

26. The appellant also argued that since PW1 lied to her father at the outset about her whereabouts on the material night, the trial court could not be assured that she indeed told the truth, as it was not clear where she had been the whole day, before the incident. As such, the appellant argued, the evidence of PW1 could not inexorably point to the appellant to the exclusion of any other person. The appellant made heavy weather of the fact that PW1 went out despite being forbidden to do so by her father, indicating that, the appellant argued, she probably went to meet someone else whose identity was not established at trial.

27. The appellant also contended that both PW1 and PW2 did not testify willingly but under the threat of being beaten and that, therefore, their testimonies cannot be taken as credible.

28. Third, the appellant argued that the trial and appellate courts erred by convicting him, while relying on the wrong principles provided for under section 124 of the *Evidence Act*. According to him, since the evidence of PW1 was obtained through coercion, it could not be considered as truthful. For this proposition, the appellant relied on the decisions in *Arthur Mshila Manga v Republic* [2016] eKLR, *Paul Kanja Gitari v Republic* [2016] eKLR, and *Paul Ndogo Mwangi v Republic* [2016] eKLR; all of which dealt with the issue of credibility of the evidence of a complainant. The appellant opined that if PW1 was capable of lying to PW4, then she was capable of lying to the court.

29. Fourth, the appellant argued that the trial and appellate courts erred by shifting the burden of proof to him, while dismissing his defence. In this regard, he submitted that even though he gave a clear account of his whereabouts, which account, he insists, was corroborated by that of DW2, the same was rejected and dismissed for no good reason. He relied on *Peter Wafula Juma & 2 Others v Republic* [2014] eKLR, *Arthur Mshila Manga vs. Republic* (*supra*), Abdalla Bin Wendo vs. Republic, and *Karanja v Republic* [1983] KLR 531. The courts in the stated cases held that defence evidence ought to be given due consideration, and the burden of proving false evidence of the accused lies on the prosecution.

30. Lastly, the appellant submitted that since the minimum mandatory sentence in sexual offence cases was declared unconstitutional, this Court ought to consider reviewing his sentence of 20 years imprisonment and give him a lesser sentence.

31. Opposing the appeal, Mr. Okango argued that the appellant was not a stranger to PW1 as he had previously treated her before the incident. This evidence was confirmed by PW4 who testified that the appellant had treated his children before. Additionally, on the material day, PW1 spent time with the appellant as he treated PW2 in her presence. Further, PW1 was very clear that the appellant was the person she met at the hospital gate and from there, he took her to his house. Counsel submitted that all this evidence pointed to the fact that the identity of the perpetrator was known.

32. As regards the issue of the application of section 124 of the *Evidence Act*, counsel argued that the provision allows the trial court to convict an accused person based on the evidence of the complainant, so long as the trial magistrate records the reasons for believing such evidence. Counsel stated that this condition was met as the trial magistrate clearly recorded in his judgment the reasons for believing the complainant, which was that he believed the evidence of both PW1 and PW2 and he did not see what they stood to benefit if at all they made up the story. The trial magistrate also held that in any event, there was nothing to show that PW1 could have made up the story, which evidence was given credence by PW2. As such, counsel argued that the contention that the evidence of PW1 was obtained by coercion does not hold water, since she admitted that at first she was afraid as she did not spend the night at home, but she later decided to tell the truth.

33. On the dismissal of the appellant's defence, counsel argued that the trial court rightly dismissed the same as it did not contradict the prosecution case. Further, the evidence of DW2 was intended to protect her husband (DW1) and was an afterthought since the appellant had not suggested this line of defence to any of the witnesses during the prosecution case.

34. As regards sentencing, Mr. Okango conceded that recent decisions have addressed the unconstitutionality of mandatory minimum sentences. In particular, he cited *Maingi & 5 Others v Director of Public Prosecutions & Another* KEHC 13118 (KLR) and *Joshua Gichuki Mwangi v Republic,* Nyeri Criminal Appeal No. 84 of 2015. While accepting that courts now have discretion to depart from the statutory minimums, counsel urged the Court to consider the seriousness of the offence considering the age of the victim and the peculiar circumstances. He submitted that the appellant was a person in a respectable position and instead of using it to protect the young girl, he unfortunately used it to perpetrate a heinous offence. According to counsel, the appellant should have been given a more severe and deterrent sentence. Ultimately, he opined that the sentence passed by the trial court was appropriate in the circumstances and urged the Court not to interfere with it.

35. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

> " This is a second appeal and 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 *Chemangong v R*, [1984] KLR 611."

36. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, four issues fall for determination on this second appeal:

    a. First, whether the identification of the appellant as the perpetrator of the crime was error-free.

b. Second, whether the evidence adduced at the trial court revealed such material contradictions and inconsistencies that should prevent, as a matter of law, the conclusion that the offence was proved beyond reasonable doubt.

c. Third, whether the alibi defence was properly analyzed and rejected.

d. Fourth, whether the sentence imposed was unconstitutional by dint of it being a statutorily prescribed mandatory minimum.

37. The first two issues are related and can be dealt with as a two- some: both the issue of positive identification and the ostensible material contradictions were explicitly considered by the two courts below. The two courts made concurrent factual findings that the appellant was well known to the victim, having treated her before and that, therefore, there was no possibility of error; and that the alleged contradictions were minor discrepancies which did not go to the credibility of the prosecution witnesses or otherwise impugn the central prosecution narrative.

38. We agree with the findings of the two lower courts. The appellant was not a stranger to PW1. He had treated her previously before the incident; they also attended the same church. Additionally, the appellant had treated PW2 in the presence of PW1, which meant that they spent a considerable amount of time together. There is simply no possibility of misidentification in this case. We equally endorse the concurrent findings of the two lower courts that PW1 was a credible witness and that any minor discrepancies in the prosecution narrative can be explained by normal errors of observation, loss of memory, mental disposition of the witness and the like. In this case, the discrepancies are not material so as to create a reasonable doubt about the credibility of the witnesses. This is especially so because the eye witness account by PW1 is corroborated by material particulars in the evidence of PW2 and PW4. This analysis also disposes of the appellant's complaint that the evidence of PW1 and PW2 was procured through threats and coercion: two concurrent courts tested the evidence and made findings of fact that the two witnesses were credible and reliable.

39. Turning to the alibi defence, we note that, first, it was belatedly raised. The legal position with regard to an alibi is that there is no onus on an accused to establish it, and the accused person is entitled to an acquittal if the alibi might reasonably be true.

However, it is important to recall that in applying this test, the alibi is not considered in isolation. The correct approach is to consider the alibi in light of the totality of the evidence, and the court's impression of the witnesses. A further factor is that the governing principle on alibi defence is that a failure to disclose it at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See, for example, *Kossam Ukiru v R*. [2014] eKLR where this Court (Azangala, Gatembu and Kantai, JJA.) held that the defence of alibi may be rejected as an afterthought when it is not raised at the earliest opportunity and when weighed against all the other evidence it is established that the appellant's guilt has been established. The court said -

> " We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same (see Karanja vs Republic [1983] KLR 501). In this case, however, the two courts below rejected the appellant's alibi defence on the basis first, that it had not been raised at the earliest opportunity in the proceedings and second, that weighing the defence with all the other evidence adduced, the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."

40. In the present case, the alibi defence was properly rejected, when weighed against the totality of evidence, for four cumulative reasons. First, it was belatedly raised. Second, the defence was not put to the witnesses in cross-examination, and was raised for the first time when the appellant was put on his defence. Third, the supposed corroborative evidence by the appellant's wife is quite sparse and parsimonious in detail that it attracts incredulity. It appears carefully curated to eschew cross-examination on specifics. Fourth, and most crucially, the testimony of DW2 materially contradicts the alibi defence of the appellant: DW2 claimed that on the material day the appellant came back from work, then went to Muhoroni and came back with a friend. Then, she claimed, she made dinner for them and the friend left and she and the appellant went to bed. On the other hand, the appellant claimed that after work he went to a nearby pub for drinks with friends and went home at 10:00pm – alone. Enough said.

41. The only ground of appeal with a sliver of hope for the appellant is his challenge on sentence. The State concedes that our emerging jurisprudence is that the statutorily mandated minimum sentences in the *Sexual Offences Act* are unconstitutional for the reason that they do not permit a trial court to consider the individual circumstances of a convict when sentencing. This was so held in a constitutional petition before the High Court in *Maingi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 1318 (KLR). That decision has been cited with approval by this Court in Joshua Gichuki Mwangi vs. Republic [2022] eKLR. The learned state counsel is, thus, right to make this concession. To the extent that the trial court felt hamstrung by the prescribed minimum and so expressed itself, we hereby set aside that sentence.

42. What, then, would be the appropriate sentence in this case? The respondent's counsel argues that the appellant abused his position as a trained clinical officer and used it to perpetrate a heinous offence on a girl aged 14 years. He suggests that the 20 years imprisonment imposed was, thus, an appropriate sentence. We agree that the appellant was in a position of trust and authority over the minor survivor of this crime. He took advantage of his position of authority to perpetrate the crime. This is an aggravating factor in the crime. He deserves a sentence that is proportionate with the objective seriousness of the crime. However, unshackled by the prescribed mandatory minimum, we are of the view that we should impose a sentence which communicates the objective seriousness of the crime after taking into consideration the fact that the appellant was a first offender; and his familial situation as mitigating factors. We also note that the appellant did not use gratuitous or depraved violence in the commission of the crime. In our view, the appropriate sentence, after balancing both the aggravating and extenuating circumstances, is fifteen (15) years imprisonment.

43. The upshot is that the appellant's appeal against conviction is dismissed. His appeal against sentence only succeeds to the limited extent that we hold that the minimum sentence imposed is unconstitutional for the reason that it was mandatory. We, after due consideration, review the sentence downward to fifteen

    (15) years imprisonment. The record shows that the appellant was out on bond during the pendency of the trial. Therefore, the sentence of fifteen (15) years imprisonment shall run from the time he was convicted which was on 1st February, 2017.

44. Orders accordingly.

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

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR