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Mwavughanga v Republic (Criminal Appeal 111 of 2022) [2023] KECA 1489 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1489 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 111 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

DECEMBER 8, 2023

BETWEEN

HERMAN MWERO MWAVUGHANGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Voi (J. Kamau J.) delivered on 17th December 2015 in Criminal Appeal No. 163 of 2014 Original Wundanyi SRM Criminal Case SO 317 of 2013)

JUDGMENT

1. Herman Mwero Mwavughanga, 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(2) of the *Sexual Offences Act* (hereinafter SOA), and the sentence of life imprisonment imposed by the Chief Magistrates Court at Mombasa (hereinafter 'the trial Court'). The particulars of the charge were that the Appellant, on the 23rd day of August 2013, at [Particulars Withheld] village, Taita Taveta County, intentionally and unlawfully caused his penis to penetrate the vagina of CM (name withheld) aged 9 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 five witnesses, while the Appellant gave an unsworn defence. He called no witness.

Background

2. The relevant facts of the case were that at 7 a.m. on 23rd August 2023, the complainant was lying in bed with her 5 year old sister waiting for her mother to return home from night work when the Appellant, who was their immediate neighbour barged into their home. The complainant described what the Appellant did. That he walked over to her bed, removed her panty and his clothes, and inserted his

penis into her vagina. She said that she felt pain, and that after he finished, she saw that he produced a lot of whitish discharge. She identified her panty in court, which still had a yellow spot. She said that the Appellant threatened her with death if she told anyone what had happened.

3. Complainant's mother, MW, PW2 testified that on the material day she returned home from night duty at 9 a.m., and found the complained lying down and complaining of pain on the thigh. PW2 told her sister, CM, PW3 who took the complainant to hospital same morning, after finding a discharge on her panty. Restituta Mghoi, PW4, a Clinician, examined the complainant. Her findings were that the vagina was red, which was evidence of penetration by use of force, which in turn was proof the complainant had been defiled. She also saw a yellowish discharge. PW4 interviewed the complainant who informed her that her immediate neighbour that was well known to her had defiled her, and that he had done it twice before the incident in issue. PW4 took a swab of the discharge to the laboratory for analysis. The results revealed it was a sexually transmitted bacterial infection. The test for HIV was negative. These findings were documented in a P3 form produced in evidence as P. Exh. 2. The complainant's birth certificate produced by her mother as P. Exh. 3 evidenced that the complainant was born on 30th June 2004, which meant she was 9 years and four months at the time of the incident.

4. The day after the incident PW2 took her daughter to her grandmother where she disclosed to her that the Appellant was the culprit. The incident was then reported at Mwatate Police Station where PW5, Joseph Mukunzu, started investigations into the matter. The Appellant was arrested on 24th August 2013 and PW5 charged him with the offence. In his unsworn statement, the Appellant said that he ran a boda boda business. He stated that on 24th August 2013, while at Kamtonga, he met people who arrested him and took him to the AP Camp. He was then taken to the Police Station and charged with the offence. In his submissions, he urged that the victim did not scream and therefore she was lying. He urged that it was not possible that PW4 and PW5 saw sperms more than 24 hours after the incident.

5. The trial Magistrate delivered her judgment on the 14th October 2013 and convicted the Appellant in the main count of the offence of defilement, being satisfied that the case against the Appellant was proved beyond reasonable doubt. She was satisfied that PW2 and PW3 corroborated the evidence of the complainant. That PW4 confirmed penetration had taken place, and found the yellow substance the complainant discharged was a sexually transmitted infection. She was satisfied that it was proved the victim's age was 9 years and 4 months. The trial Court sentenced the Appellant to life imprisonment.

6. The appellant was dissatisfied with the decision of the learned trial Magistrate and therefore appealed to the High Court at Voi, [J. Kamau, J.]. The Appellant challenged the prosecution evidence urging that PW5's evidence did not conform to the charge sheet. He challenged the trial Court of failure to consider variance and contradiction both in the date of the offence in the charge sheet and in the doctor's evidence. He challenged the failure by the trial Court to consider the contradiction between the evidence of PW1 who said the matter was reported on the same day, while PW2 said the report was made the next day. He challenged the trial Court of failure to conduct voire dire examination of the complainant in the expected manner. He also lamented that no medical evidence was produced in court; that the arresting officer was not called as a witness and that the case was not proved. He also challenged his conviction yet his alibi defence was unrebutted.

7. The learned High Court Judge delivered her judgment on the 17th December 2017 in which she dismissed the Appellant's appeal being satisfied that the conviction was safe. The High Court Judge upheld the sentence of life imprisonment.

8. The Appellant was dissatisfied and so filed his second appeal to this Court. He raised four grounds of appeal in written submissions dated 12th June 2023, filed by Kakai Mugalo & Company Advocates who are on record for him. The grounds of this second appeal are failure of the prosecution to disclose

evidence in advance and failure to inform the Appellant of his right to legal representation. Further, contradictions in the prosecution case that went to the root of the prosecution case; failure to conduct voir dire; and excessive sentence that did not take into account Section 333(2) of the [CPC](#).

9. The appeal was heard through this Court's virtual platform on the 21st June 2023. The Appellant was present virtually from Manyani Prison. Mr. Chacha Mwita, learned counsel, represented the appellant. There was no appearance for the State despite service of the notice upon learned Prosecution Counsel Mr. Yami Yamina on 22nd May 2023. He however filed submissions in the appeal on the same day the appeal was heard.

10. Mr. Mwita for the Appellant relied on the written submissions that he highlighted. He urged that the Appellant did not get a fair trial because disclosure of the prosecution evidence was not served in good time, and further that he was not informed of the right to legal representation. Counsel urged that the Appellant was not informed promptly of his right to legal representation nor did the trial Court carry out an inquiry to find out if he stood to be prejudiced for lack of legal representation. He urged that this was fundamental as the Appellant was facing a possible life imprisonment, which he was eventually sentenced to serve.

11. Relying on the case of *Samson Oginga Ayieyo vs. Republic [2006*] eKLR Mr. Mwita urged that voire dire was not intensive enough to make a determination to the effect that PW1 understood the significance of an oath and the consequences of not telling the truth. He urged that voire dire examination of a child witness was intended to aid the court determine whether she is possessed of sufficient intelligence for her evidence to be received at all. He urged that no proper voire dire examination was conducted, thus denying the Appellant a fair trial.

12. On the contradictions in the prosecution evidence, counsel urged that PW4 the Clinician talked of the complainant having informed her that the Appellant defiled her on three different days, evidence that was not supported by the evidence of the complainant herself. Counsel urged that the prosecution failed to place the previous claims into perspective vis-a-vis the time they occurred. That if at all it was true that there were other defilement moments, what is it that was unique about the defilement of the 23rd August 2013 compared to the previous one's which were never noticed by any other person, especially PW2. He submitted that PW4 did not do any justice in the examination conducted on PWI, as PW4 did not determine whether the age of the injuries were old scar or a fresh wound.

13. Mr. Mwita urged that the Appellant was sentenced to serve Iife imprisonment on the premise that the law did not provide room for the court to exercise discretion. He urged the Court's below ignored the confirmation the Appellant was a first time offender, and mitigation tendered seeking leniency. Counsel urged that to date, the Appellant has been in both police and prison custody from the 24th August 2013, which has accumulated to around ten (10) years. He urged that the 10 years incarceration has served as a corrective measure.

14. Mr. Yamina for the State in his written submissions, in response to the issue of failure by the prosecution to disclose its evidence in good time urged that the Appellant requested for witness statements on 9th September 2013 and that the same was granted. He urged that when asked if he was ready for the hearing on 11th September 2013, the Appellant said that he was ready then, and in all the other days when the case was heard.

15. Regarding inconsistency in the prosecution evidence, Mr. Yamina submitted that variance on the date the offence was committed between the evidence of PW4 and PW2, PW3 and PW5 was an error that was curable under section 382 of the [CPC](#).

16. Regarding voire dire examination, counsel urged that the trial Court carried out sufficient examination of the complainant sufficient for the Court to satisfy itself of the competence of the child to testify.

17. Regarding sentence, Mr. Yamina urged that the complainant's certificate of birth showed that she was 9 years old, which fitted the sentence of life imprisonment as prescribed under section 8(2) of the *SOA*. He urged that the sentence was legal.

18. 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 C*riminal 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."

19. We will deal with the issues on this appeal in the order that they were raised. The first issue had to do with failure to supply the Appellant with witness statements, in violation of Article 50(2) of *the Constitution*. 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;"

20. The learned High Court Judge considered the record of the trial Court proceedings and the submissions by the Appellant and the Prosecution Counsel. The learned Judge observed that the Appellant sought the witness statements on 9th September 2013, and that on the date set for hearing of the case on the 11th September 2013 the Appellant answered in the positive when asked if he was ready to proceed with the hearing of the case. The learned Judge noted that the appellant's argument that the prosecution did not provide him with witness statements was an afterthought, as it was not raised at the trial. The learned Judge concluded that he could not raise the issue on appeal. We find no fault in the learned Judge's conclusion on this issue. Nothing turns on this issue.

21. The Appellant claims that his right to legal representation was also violated. Article 50(2) (g) and (h) of *the Constitution* in this respect provides that the right to a fair trial includes the right :

> "(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

22. This Court (Kairu, Mbogholi-Msagha & Nyamweya, JJ. A.) held in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs. Republic (Criminal Appeal 49 of 2020) [2022] KECA 23 KLR) that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness

of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The Court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the Appellant did not raise the issue of legal representation either in the trial Court and the High Court, and the record of the trial Court shows that the Appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, we do not find any merit in the Appellant's argument that his right to a fair trial under Articles 50(2) (g) and 50(2)(h) of *the Constitution* were violated. Nothing turns on this point.

23. On the issue of whether voire dire examination of the complainant was properly conducted. The appellant's complaint was that the trial Court failed to conduct voire dire examination of the complainant, and faulted the High Court of failing to carry out a thorough inquiry on the capacity of the complainant to testify in the case. In Boniface Kamande & 2 Others vs. R (Criminal Appeal No. 166 of 24), this Court stated as follows regarding concurrent finding of the courts below:

> "On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it."

24. The learned Judge of the High Court found that the trial Court put questions to PW1 and that from the answers the complainant gave, which were recorded, the trial Court was satisfied that she possessed the required intelligence to testify on oath. The learned Judge found that even though the questions put to the Complainant were not recorded in the question and answer format, she was satisfied that from the answers that the Complainant gave, the answers were sufficient for the learned trial Magistrate to establish that the complainant understood the consequences of lying and she was thus sufficiently intelligent to testify on oath.

25. We examined the records of trial Court and as the record bears us witness, the trial Court conducted an examination of the complainant before determining that she was sufficiently intelligent to testify on oath. The High Court's finding that the examination conducted by the trial Court, even though not in the format of question and answer, was sufficient to meet the requirement intended, cannot be faulted. Contrary to the Appellant's contention, the High Court conducted a thorough analysis of the record and the evidence adduced before the trial Court to conclude that the complainant was indeed intelligent and competent to testify. We are unable to agree with the Appellant that there was failure to conduct voire dire examination in this case. Nothing turns on this ground.

26. The other issue was of contradictions in the prosecution case. This is a point of fact and not of law. By dint of section 361 of the CPC, an appeal on a point of fact cannot be raised on second appeal and 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 Karani vs. Republic [2010] 1KLR 73.

27. It has not been alleged or demonstrated that the learned trial Magistrate and the learned Judge of the High Court considered matters they ought not to have considered or failed to consider what they ought

to have considered. The confines of the Court's jurisdiction was aptly set out by this Court in Karingo vs. R [1982] KLR 213 that:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/O Karanja - vs- R (1956) 17 EACA 146)."

28. We have applied the test to determine whether there was any evidence upon which the trial Court and the first appellate Court could find as they did. We are satisfied that there was sufficient evidence to justify the conclusions reached by both Courts below that the Appellant defiled PW1. We find no reasons to depart from the concurrent findings of the two Courts below.

29. The last issue raised is concerning the sentence. The Appellant urges that it was excessive. The Appellant was sentenced to life imprisonment and the High Court up held that sentence. This Court, (Nyamweya, Lesiit & Odunga, JJ.A.) in Julius Kitsao Manyeso vs. Republic Malindi Criminal Appeal No. 12 of 2021, considering the issue of indeterminate sentences, particularly life imprisonment, delivered itself thus:

> "We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi vs Rep [2019] eKLR and Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation, which is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

30. The Court continued to state as follows:

> " The Supreme Court, in recommending that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; further noted and found as follows:
>
> "[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
>
> "Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.

93. In addition, and in accordance with Article 2(6) of *the Constitution*, "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along

established parameters of criminal responsibility, retribution, rehabilitation and recidivism."

We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence."

31. We have considered the record of the trial Court and of the High Court. The learned trial Magistrate stated in part:

> " Considering the nature of the offence and mitigation by the accused, the Courts no option but to sentence the accused to the mandatory sentence provided by the ..."

32. The High Court delivered itself thus:

> " This Court's hands were tied as the law provides one (1) sentence that was correctly elucidated by the learned trial Magistrate."

33. It is clear that both Courts below did not consider the Appellant's mitigation, and considered their hands tied by the law. As we have stated, in line with the decision of this Court in Julius Kitsao Manyeso vs. Republic, (supra), indeterminate sentences are unconstitutional, we have the discretion to interfere with the sentence imposed against the Appellant. We set aside the sentence of life imprisonment meted against the Appellant and in substitution, sentence the Appellant to 35 years imprisonment from the date of arraignment in court on 26th of August 2013

34. In the result, the appeal against conviction has no merit and is dismissed. The appeal against the sentence succeeds as set out herein above.

35. This judgment is delivered under Rule 34(3) of the Court of Appeal Rules, 2022 as Gatembu, JA refused to sign.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF DECEMBER, 2023.

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR