TOO v Republic (Criminal Appeal 144 of 2016)
[2022] KECA 472 (KLR) (11 March 2022) (Judgment)

Neutral citation: [2022] KECA 472 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 144 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MARCH 11, 2022

BETWEEN

TOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (D. S. Majanja, J) dated 31st August, 2016 in Kisumu HCCRA No. 11 of 2016)

JUDGMENT

1. TOO (the appellant) is currently serving a life sentence after conviction of an offence of defilement contrary to section 8(2) of the *Sexual Offences Act*. His first appeal to the High Court against both conviction and sentence failed and hence this second appeal.

2. At trial, the prosecution put together a case of four witnesses. At the time of testifying WTA told the court that she was 5 years old and a pupil in Standard 1 at [Particulars Withheld]. On 30th of September 2011 as she came from school she met the appellant who took her to his mother's house, and offered her chapati and porridge. She ate the chapati. He then took her to his bedroom and while there he removed her skirt and pants, and also his trousers.

3. It was the evidence of the minor that the appellant then removed his

> "dudu" and put it into hers. In a word,that he defiled her. She was in pain and screamed in distress. However, no one came to her rescue notwithstanding that she thought the appellant's mother, who was in the sitting room,must have heard her scream.

4. She then left for home, where she reached at about 7.00 pm. There she found her aunt, M, who helped her bathe. That she was in pain and while she did not tell her mother of the incident, she confided in her

grandmother about it. She explained that she did not tell her mother as the appellant had threatened her if she did.

5. Her grandmother, EO (PW 1), testified that the girl's mother, D, informed her that the minor had complained about pain in her private parts. She questioned the victim who told her that she had been defiled by TOO (the appellant). She took the child to Marie Stopes, a medical facility, where a doctor told her that the minor's private parts "were tampered with." Later the child was taken to Kisumu District Hospital for further treatment and for preparation of a medical report.

6. PC Faith Muthoni (PW3) was at the material time attached to Kondele Police Station. She investigated the complaint by the victim and recorded the statements of witnesses. She also escorted the victim and the complainant to the hospital for medical examination. There, George Mwita (PW4) a Clinical Officer, examined them. His finding in respect to the victim was that she had a torn labia minora, lacerations on the vagina walls, the hymen was not intact and she had a whitish smelly discharge. He concluded that there had been sexual penetration. As for the appellant his findings were that he had suffered no bruises on his penis.

7. Satisfied that the prosecution had established a prima facie case against the appellant, the trial court put him on his defence. His evidence is that at the time the offence is said to have been committed, he was undergoing a course in mechanics. That he would leave home in the morning and return at 6.00 pm and that it was therefore not possible for him to be at home at 5.30 pm, the time of the alleged offence. His evidence was that the father and mother of the victim together with the brother to the complainant and two others boys visited him at his home on 4th October 2011 at about 10.00 pm when they accused him of defiling the girl. They forced him into a vehicle and after making some rounds in the vehicle which included driving him to their homestead, drove him to the police station. All this while the two boys assaulted him. The next day, he was taken for medical examination and arraigned in court a day later.

8. Although he knew the complainant as a neighbour he denied defiling her. He stated that it would not be possible to defile her in the bedroom of their house while his own mother was in the sitting room and his two brothers in another part of the house.

9. The appellant's mother, Elizabeth Aoko Odalo (DW2), told court that she was at home on the date of the alleged offence. At 4.00 pm her other children namely David, F and R returned home from school. As for the appellant, he came home from his place of work at about 6.00 pm. She did not see the complainant in her house on that day. The home of the complainant is 100 metres from hers, with two houses in between.

10. Regarding her house, her testimony was that it has a sitting room and one bedroom. She uses the bedroom, while the appellant sleeps in the sitting room. She was vehement that as a woman and a mother she could not allow such an act to happen under her watch. She talked of a disagreement between her and the complaint's mother over the price of water. She, the witness, was a water vendor and this happened in 2007.

11. F (DW3) was 11 years old at the time he testified. After returning home from school at lunch hour on 30th September 2011, he remained home. His sibling David returned home from school at about 5.30 pm and the appellant at 6.00pm. He knows the complainant; she is a neighbour living about 70 metres from their house. He was emphatic that he did not see her at their home on that day. The evidence of David (DW4) was not dissimilar. David, who was 19 years old at the time he testified, is older than F. David returned home from school at 5.30pm and found his mother and brother F there. The appellant came home at 6.00pm. He too did not see the complainant at his house.

12. It was on the basis of this evidence, sketched out by us, that the trial court convicted the appellant and the High Court upheld his conviction.

13. In the appeal before us, the appellant raises four grounds;

    (i) That the trial and 1st appellate court erred in fact and law by failing to notice that the essential ingredient/elements of the offence as charged were not proved beyond reasonable doubt.

    (ii) The 1st appellate court erred in law by failing to consider/subject the evidence to fresh scrutiny, re-evaluate the same and analyse as required of it.

    (iii) The 1st appellate court erred in law by failing to notice that the prosecution's case had not been proved beyond reasonable doubt as there were glaring inconsistencies and incomplete medical evidence rendered in support of their case.

    (iv) The trial court and the 1st appellate court erred in fact and law by failing to order or conduct an assessment of the case of the appellate during trial and sentencing thereby occasioning his current sentence.

14. We sit as a second appellate court in this matter and our role is circumscribed by the provisions of section 361(1)(a) of the *Criminal Procedure Code*. Of that role, this Court has, in *Njoroge –vs- Republic* [1982] KLR 388 stated as follows:

> " On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence..' See M'Riungu -vs- Republic (1983) KLR 455."

15. Let us begin with the last ground which need not detain us at all. Counsel for the appellant asks us to find that the trial court and the first appellate court erred in law by failing to ascertain the age of the appellant during the trial and sentencing as the P3 form filled after he was examined puts his age at 17 years. We think that submission to be insincere. We say so because unlike what counsel states, the P3 form clearly indicates, not once, but twice that the age of the appellant at the time of examination on 5th October, 2021 was 18 years. This was 5 days after the date of the alleged offence. Again, the issue of the age of the appellant was not raised at trial. This ground fails without much ado.

16. The appellant faced and was convicted with an offence under section 8 (2) of the *Sexual Offences Act* which reads;

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

17. The ingredients of the offence of defilement are proof of age of the complainant, proof of penetration and proof that the accused committed the offence. The appellant submits that there was failure to prove these essentials of the crime beyond reasonable doubt.

18. It is argued for the appellant that no evidence was tendered to prove the minor's age nor did the trial court make an assessment of age. The appellant seeks to rely on the following passage in the case of *GOO –vs-Republic* [2016] eKLR;

> " No birth Certificate or Baptismal card or any document was produced to confirm the age of the complainant. It is significant to note sentences in defilement cases under The *Sexual*

Offences Act No. 3 of 2001, are pegged on the age of the minor and as such age of a victim should be proved to enable court mete the proper sentence. "

19. Suggested as an answer to this criticism by the Respondent's counsel, is the wording of section 2 of the *Children Act* which reads;

> " Where actual age is not known means apparent age."

20. In *Moses Nalo Raphael –vs- Republic* [2015] eKLR this Court restated the place of section 2 of the *Children Act* in defilement proceedings. The Court held:

> " On the challenge posed by the uncertainty in the complainant's age, this Court had occasion to deal with a similar issue in Tumaini Maasai Mwanya v. R, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing. The contradictions in respect of the child's age cannot therefore assist the appellant to avoid criminal culpability."

21. At trial, the evidence of the age of the complainant came from herself and the Medical Officer who examined her. In her testimony, the complainant said that she was 5 years old. The Clinical Officer estimated her age to be 6 years. See section C of the P3 form in which information of an alleged sexual offence must be completed in addition to other information. This estimation supports the evidence of the minor and we have to agree with counsel for the respondent that whether the age is taken to be 5 years or 6 years, it still is the age of below 11 years for purposes of the penalty under section 8 (2) of the Sexual Offence Act, the section under which the appellant was charged.

22. The appellant does not question that the element of penetration of the minor was proved. On our part we see no reason to disturb the concurrent finding of the trial court and first appellate court that this essential was sufficiently proved.

23. What has caused us some anxiety is whether the evidence at trial that it was in fact the appellant who committed the despicable act passed the threshold of beyond reasonable doubt for a safe conviction to be returned. Let us examine the arguments raised around this question.

24. The appellant does not contest the fact that the appellant was known to the minor and such a contestation would have been on quicksand given that the two were neighbours and their respective families are known to each other. What we are asked to consider, and to give benefit to the appellant, is that the two courts below solely relied on the testimony of the minor without other evidence to corroborate her claims. That argument, taken alone, faces an obvious difficulty because the evidence of a victim of defilement need not be corroborated. This has statutory backing of section 124 of the *Evidence Act* which reads;

> 124. Corroboration required in criminal cases Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

25. The rationale for this is easy to see. Rarely will sexual offences be committed in the open and in the full glare of a third party or parties.

They would be done in hiding and may sometimes be insidious. It would therefore be an injustice to the victim to require that another set of eyes will always be available to corroborate her or his story.

26. That aside, the appellant raises three other issues;that the prosecution failed to call two other witnesses who would have corroborated the evidence of the minor; that there was no medical evidence connecting the crime to the appellant; and that sufficient weight was not given to the evidence of the defence witnesses.

27. The prosecution evidence is that immediately after the alleged offence, the victim returned home and her aunt, one M, helped her bath. She then went to sleep. Later, she was woken up by her mother D and taken to hospital as she had pain in her private parts. Neither M nor D testified.

28. Before us, the DPP did not make any comments about the absence of these witnesses at trial, confining his argument on what he saw as the quality of the prosecution evidence.

29. When this issue was raised before the High Court, the Court held;

> " 18. Under section 143 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), the prosecution is not required to call all or any particular witnesses to prove a fact. From the testimony and recorded statement of PW 1, which was produced by the defence, the incident took place on 30th September 2011 and it is only on 4th October 2011 that PW 2 disclosed to PW 1 what had happened to her. When cross-examined by counsel for the appellant, PW 2 stated that, "Tony told me not to reveal it to my mother. That I would be beaten. I did not tell my mum about it. I told my grandmother." On her part PW 1 stated in cross-examination that PW 2 told her that the appellant had threatened to beat her if she told her mother. In light of this evidence, I am unable to draw any adverse inference. It is clear that the child was threatened and was only able to disclose what happened to her in the safety of her grandmother, PW 1 hence it would be unnecessary to call the child's mother, father or aunt."

30. The complainant told the trial court that the appellant had threatened to beat her if she told her mother about the incident. It may not, therefore, be surprising that the minor did not therefore tell her mother or aunt about the incident. She chose to confide in her grandmother. And even then it required the grandmother to prod for the information. In her evidence, her grandmother, PW1, stated;

> " I interrogated the child. She told me that TOO defiled here."

The appellant, then unrepresented, did not cross-examine this witness at all.

31. In her statement to the police, PW1 stated;

> " She was treated at Marie Stops. We proceeded home. I took my grandchild at home at Kibos. We stayed with her until 4th October, 2011 when she informed me what had happened. She

told me that when she was coming from school after she had left her bag at their door step, TOO called her and took her to his place. She further told me that TOO gave her chapatti and porridge and later removed her pants and also removed his pants and started inserting her vagina severally and later he told her to go home."

32. Emerging from this evidence is that the first person the minor informed about the assault was the grandmother. It was not her mother or aunt. Considering that these two did not witness the alleged defilement and further, considering that although they may have noticed something unusual about the private parts of the minor, penetration is not an issue in contention, the two, to our minds were not crucial witnesses.

33. We turn to another issue. The minor gave fairly clear and consistent evidence as to how the appellant took her to the house, took her to the bedroom and defiled her. Her evidence of what happened after the incident was equally unbroken and we are unable to fault the following assessment by the High Court of that testimony;

> " 19. I have weighed the prosecution case against that of the defence and I am satisfied that PW2 was sexually assaulted by the appellant whom she knew. PW2's testimony was credible and consistent and was corroborated by the medical evidence. The fact that she told PW1 at the earliest opportunity lends credit to her testimony. There was no ulterior reason for a 5 year old child, who suffered injuries in her genitalia to implicate the appellant."

34. What must nevertheless engage us is whether the evidence of the defence witnesses was strong enough as to create a reasonable doubt on behalf of the appellant. That evidence came from the appellant, his brothers (DW3 and DW4), and his mother (DW2).

35. The evidence of the appellant was one of alibi. From the proceedings and material before the trial court, it is unclear whether or not this defence was set up at the earliest opportunity or for the first time when the appellant was put to his defence. We give this benefit of doubt to the appellant and proceed on the principle that the burden of proving the falsity of the alibi lay with the prosecution. See *Victor Mwendwa Mulinge –v- R* [2014] eKLR.

36. The appellant told court that he was away from home at the material time. He said he returned home at 6.00 p.m. and could not have committed the offence which allegedly took place at 5.30 p.m. This was supported by the evidence of DW2 who says that she never saw the complainant come to her house on that date. DW3 and DW4 gave similar evidence.

37. There is however some troubling aspects about the defence case. The evidence of the mother of the appellant as to who was at home at what time is as follows;

> "On that date I was in the house i.e. 30th September, 2011. I was with the children in the house. About 4.00 p.m. there were children who had gone to school were returning. My child (sic) namely David and F and R had come from School and were in the house with them. I told them to get water so that they can shower. David told me his bicycle had gotten spoilt and had wanted to take it for repairs and I told him I did not have the money he wanted Kshs. 50 so he did not leave the house. At about 6.00 p.m., the said TOO (accused) came from town where he was doing his Jua Kali"

38. That evidence has to be contrasted with what F (DW3) said;

> " I stay with R my young brother and David and TOO. David was at school on the said day i.e. Kisumu Day. He came back from school at 5.30 p.m."

39. There is therefore disparity between the evidence of DW2 on the one hand and DW3 and DW4 on the other as to when DW4 returned home. Was it at 4.00 p.m or at 5.30 p.m?

40. In regard to what the appellant did when he returned home, DW3;

> " On that day I saw TOO at 6.00 p.m. When TOO came back home my mother asked him to help her sell the bread and he did so."

41. Note what DW4 said;

> " At 6.00 p.m. my brother came back from town and found my mother and my younger brother. He was doing Jua Kali as a mechanic. He came and rested after that."

42. There is evidence that the appellant's mother was a business lady and sold bread for a Mrs. Ogendi. As to whether she sold some bread on the fateful evening, DW3 sated;

> She took water from 1.00 p.m. to 5.00p.m. After that she came back home and had another job of selling bread."

43. This must be compared with what DW4 said;

> " In the evening my mother did not sell bread. Her routine is carrying/drawing water to the construction site."

44. Taken separately these inconsistencies may count for nothing but put together they have a consequence on the credibility of the alibi theory. They dent it. We therefore reach a similar conclusion as that of the two courts below that the defence case did not debunk the evidence of the prosecution.The concurrent findings thereon were well-founded and safe. We are inclined, as we hereby do, to disallow the appeal on conviction.

45. The victim's age at the time of the offence was 6 years. For this age the mandatory sentence prescribed by section 8 (2) of the *Sexual Offences Act* is a life sentence. While we understood the rationale of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, to be that judicial discretion in sentencing can never be constricted or inhibited by prescription of a mandatory sentence and therefore, to our minds and by parity of reasoning, by a minimum sentence, we nevertheless defer to the Directions issued by that Court following the decision in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR . In those Directions the Supreme Court clarified that the decision of *Muruatetu* applied only in respect to sentences under sections 203 as read with 204 of the *Penal code*. In the result the trial court in this matter cannot be faulted for imposing the life sentence nor can the High Court for affirming it. And there is nothing before us that would persuade us that it was not merited. We will not interfere with it.

46. This second appeal fails on all limbs and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR