Jefwa; Republic (Respondent) (Criminal Appeal 7 of 2020) [2022] KECA 1105 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1105 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 7 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 7, 2022

IN THE MATTER OF

MICHAEL KATANA JEFWA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court at Malindi delivered by Nyakundi, J. on 29th day of October 2019 in Criminal Appeal No. 29 of 2018)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offence Act* No. 3 of 2006 (hereafter SOA). The particulars of the offence were that on the 2nd day of March 2010 at [Particulrs Withheld] Village the appellant unlawfully defiled HU a child aged 10 years.

2. The summary of the case is that the complainant was aged 10 years and was in [Particulrs Withheld] Primary School. She said that she was going home on the material day when she met the appellant seated beside the road. She said that he called her but she declined and started running away. That the appellant caught up with her and she started screaming when he pulled her towards the bushes and undressed her. She told court that the appellant was not able to do anything to her as members of the public rescued her from the appellant's hands. The complainant told court that she knew the appellant by name before the incident because they came from the same village.

3. PW2 the aunt to the complainant told the court that on the material day she was called by a young man from her place of work and informed that a person had been caught in a shamba with her niece. PW2 said that she rushed to the scene where she found her niece and the appellant both naked. She said that she saw blood on the ground near the complainant. The village chairman, PW4 was called to the scene where he found the complainant naked and coiled on the ground, with discharge on her

thighs and private parts, while the appellant was also naked and had discharge on his genitals. He said that he concluded that the appellant had just had sex with the complainant. PW4 called the police and the OCS, Kijipwe Police Station came to the scene. He was PW5. PW5 said that he calmed the crowd which he found at the scene wanting to harm the appellant. He then arrested the appellant, and carried the complainant and her parents to the station.

4. The complainant was examined at Kilifi District Hospital by Dr. Kerubo who filled the P3 form confirming that she had been defiled. PW3, Dr Malik produced the P3 form on behalf of his colleague, Dr. Kerubo.

   According to his report the complainant had inflammation on her genitalia, her hymen was broken and there was discharge noted on the vulva. The examination was done two days after the incident.

5. The appellant in his defence denied the offence. He said that he was arrested on the road by some people he did not know who told him that he looked like one John Kazungu that they were looking for and that he was forced to accompany them to the police station.

6. The appellant was convicted by Kilifi Magistrates Court (Hon. Obura) and sentenced to life imprisonment. Being aggrieved by the conviction and sentence, the appellant lodged his first appeal to the High Court at Malindi. In that appeal, the appellant challenged the trial magistrate's judgement for failing to consider that the prosecution case was not proved beyond reasonable doubt, that the complainant's evidence was unreliable and that his defence was not considered.

7. The appeal was heard by Nyakundi, J who upheld the conviction, being satisfied that the charge was proved given the entire evidence adduced by the prosecution. On the sentence the learned High Court Judge invoked the Supreme Court decision of *Francis K. Muruatetu and another vs. Republic Petition No. 15 and 16 of 2015* (Muruatetu 1) and other factors, and set aside the life imprisonment, and to quote him verbatim, 'to the extent that a definitive custodial sentence of 30 years imprisonment is hereby imposed against the appellant with effect from the date of his arrest.'.

8. The appellant was aggrieved with the judgement of the learned High Court Judge and lodged a second appeal to this court. He listed two grounds in his grounds of appeal, one, that the complainant confirmed before the trial court that the appellant did not do anything to her, and two, the high court erred in relying on the evidence of the doctor who did not even examine the victim, neither did he examine the appellant.

9. On 28th June 2022 when this appeal was called out for virtual hearing, the appellant stated that he was relying entirely on submissions that were to be filed within one week. The appellants submission were finally received and in it were two grounds of appeal raised challenging the judgement of the High Court for upholding conviction for defilement, which offence it was urged, had not been proved beyond reasonable doubt in that the complainant's age, the identification of the appellant and penetration were not proved; secondly, on sentence, that the High Court failed to take into consideration the time that the appellant had already spent in remand custody as provided in Section 333(2) of the Civil Procedure Code.

10. The learned Prosecution Counsel informed Court that he was relying on his filed submission dated 25th May, 2022. In the submissions he responded to the appellant's two grounds of appeal urging that, looking at the totality of the evidence, penetration was proved firstly by medical evidence produced by Dr. Malik PW3, and secondly through the circumstantial evidence of PW2 and PW4 who found the appellant and complainant naked and with the complainant having a discharge in her private parts. On sentence the learned Prosecution Counsel urged that the court relied on Muratetu 1 and imposed

30 years imprisonment. He urged that that action was an error and in contravention of Section 8(2) of SOA, and urged us to reverse the sentence.

11. This is a second appeal. 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."

12. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *SOA*, and it was therefore imperative that the prosecution proves the particulars of the charge. Section 8(1) and (2) of the *SOA* of which the appellant was convicted states:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) 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."

13. The ingredients that must be proved are one, that it was the appellant who caused penetration of his genital organ into the complainant's genital organ; two, as defined under section 2 of the *SOA*, the prosecution needed to prove that there was partial or complete insertion of the appellant's genital organ into the complainant's genital organ; and three, that the complainant was a child of 11 years or less at the time of the incident.

14. There is no doubt that in an offence such as the one faced by the appellant, indeed in most of the offences under the SOA where the age of the victim determines the nature of the offence and the consequences that flow from it, it is a matter of the greatest importance that such age be proved to the required standard, which is beyond reasonable doubt. That has been the consistent holding of this Court and we are content to adopt what the Court sitting at Mombasa stated in *Hadson Ali Mwachongovs. Republic*[2016] eKLR;

> "The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009 (Kisumu). This Court stated as follows;
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> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1) .?"

15. The evidence on the complainant's age was given by her aunt, PW2, as 11 years, while the complainant herself said she was 10 years. The doctor who examined the complainant assessed her age as 10 years.The learned trial Magistrate, who had an opportunity to see the complainant, after considering the evidence on her age, found that from his own assessment her apparent age was 10 years. The first appellate court

did not vary that finding. We find that the inconsistency as to the complainant's age is not a material contradiction. The trial court and the first appellate court accepted the complainant's age as 10 years, which was consistent with the age given in the charge sheet, and the doctor's assessment, who was in a better place to assess her age.

16. On the first appeal, the appellant raised issue with the complainant's evidence urging it was unreliable. The complainant had said that the appellant did not manage to do anything to her as people went to her rescue before it happened. The learned judge of the High Court considered that issue and found that the complainant's testimony that no defilement had taken place was contradicted by the evidence of the doctor who examined her after the incident, and the evidence of PW2 and 4 who went to the scene soon after the incident, and the compromising state in which they found the two. We are satisfied that the appellant was well known to the appellant, that the appellant and complainant were found naked, with complainant having discharges on her body. The doctor's finding was that the complainant was defiled. We are satisfied that the appellant was therefore properly convicted of the offence. We therefore uphold the concurrent findings of the two courts below on the conviction of the appellant.

17. The appellant has raised an issue with the sentence, urging that section 333 (2) of the *Criminal Procedure Code* was not considered. The learned Prosecution Counsel has urged us to find the High Court's interference with the sentence of life imprisonment imposed by the trial Court, and reducing it to 30 years contravened Section 8 (2) of the *SOA* and should be reversed.

18. As regards the sentence, under section 362(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal. However, the appellant is not just complaining about the severity of sentence but he is complaining that at the time the first appellate court considered an alternative sentence to the one imposed by the trial court, the judge did not consider the period he had spent in custody.

19. We note that the appellant had not raised any issue regarding sentence in his appeal before the High Court. He could not therefore raise it on a second appeal. We note further that the effect of what the learned Judge did was to reduce the sentence to the appellant's advantage, from a life sentence to 30 years imprisonment. At the time the learned Judge handled the appeal, the Supreme Court decision, now popularly known as *Muruatetu 2* had not been decided, it was *Francis Muruatetu and another vs. Republic 2017 eKLR* [Muruatetu 1] which was operational at the time. In the latter decision the Supreme held:

> "(112) Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:
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> a. The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution*.
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> b. This matter is hereby remitted to the High Court for re- hearing on sentence only, on a priority basis, and in conformity with this judgment..."

20. That decision was interpreted by many courts in this country to mean that all mandatory sentences were unconstitutional. What followed were numerous applications for review of sentences, both before the high court and the magistrates' courts. The Supreme Court in *Muruatetu & another vs. Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC*

[31 (KLR) (6 July, 2021) (Directions) [Muruatetu 2]], in directions dated 6th July, 2021 clarified the application of Muruatetu 1 in cases as follows:

> " The ratio decidendi in the decision was summarized as follows;
>
> "69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment". We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

21. The learned High Court Judge stated as follows regarding sentence:

> " On sentence in the case of Francis K. Muruatetu vs. R, the Supreme Court declared mandatory death penalty under section 204of the Penal Code unconstitutional. The court stated that in passing sentences, it is the duty of the judge to exercise discretion in a manner that is both fair and just with a view to come up with a proportionate sentence that fits the crime.
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> nature of the life imprisonment in sexual offences under section 8 (1) & (2) with regard to defilement
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> has been found to be unconstitutional. At the moment the court's follow the emerging jurisprudence in the Muruatetu case (supra) in allowing some measure of discretion aas the justice of the case will demand."

22. Considering *Muruatetu 2* it is clear that the learned Judge of the High Court misapprehended Muruatetu 1, exercised discretion resulting in the impugned substitution. The Prosecution Counsel has raised issue with the High Court's substitution of the life sentence with 30 years' imprisonment and has urged us to reverse the substitution to revert back to the original sentence imposed by the learned trial court. This Court in *George Morara Achoki v Republic* [2014] eKLR discussed several cases and the applicable principles to enhancement of sentence on a first and second appeal as follows:

> " In the case of JJW v Republic (Kisumu) Criminal Appeal No. 11 of 2011 (ur) where the appellant had been sentenced to seven years imprisonment but which sentence was enhanced on appeal to a sentence of ten years without notice we held that:
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> "It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on

sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

In another case of Stanley Nkunja v Republic Criminal Appeal No. 280 of 2012 this court observed that:

> " While it is prudent, and fair, to warn the appellant and give him a notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347 (2) of the Criminal Procedure Code, appeals to the High Court may be on matters of facts and law. Illegality to a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment."

In Kingsley Chukwu v Republic Criminal Appeal No. 257 of 2007 this court on a second appeal enhanced sentence despite the fact that no notice of enhancement of sentence had been given and there was no cross – appeal.

In the case of Hosea Otieno Wetete v Republic (Kisumu) Criminal Appeal No. 326 of 2010 (ur) we faulted the High Court for enhancing sentence when there had been no warning of any sort to the appellant. We said:

> " "Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning. All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice."

As will therefore be seen although there is no legal requirement for the State to file a cross – appeal an appellant must be informed at the earliest opportunity, at the commencement of hearing of his appeal, that there is a real danger that should the appeal be heard and fail a lesser sentence could be enhanced by the High Court in terms of the said Section 354 of the Criminal Procedure Code.

23. We note that the State did not file a cross appeal on sentence, nor did it give notice that it would apply for enhancement of sentence before the appeal was heard. Such notice would have served to warn the appellant that the state was going to challenge the sentence in this appeal, and it could have helped the appellant make an election whether he still wanted to pursue that line. The other difficulty we have in dealing with this issue is the fact that the learned High Court Judge invoked *Muruatetu 1* before substituting the sentence. It would, in the circumstances be necessary for this court to determine whether the learned Judge erred in exercising discretion to substitute the sentence, which would require to be urged fully before any action on sentence is undertaken, It is our view that the having failed to make sentence a substantive issue for determination in this appeal, we are unable to disturb the sentence.

24. The result of this appeal is that the same has no merit and is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF OCTOBER,2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR