Karanja v Republic (Criminal Appeal 54A of 2018)
[2022] KECA 1371 (KLR) (15 December 2022) (Judgment)

Neutral citation: [2022] KECA 1371 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 54A OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

DECEMBER 15, 2022

BETWEEN

JOHN MAINA KARANJA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against conviction and sentence in the High Court of Kenya at Narok (J.M Bwonwonga. J) dated 01/08/18 in Narok Criminal Appeal No.136 of 2018)

JUDGMENT

1. On November 3, 2017 John Maina Karanja the appellant herein, was convicted on two counts of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to serve life imprisonment in the Chief Magistrate's Court at Narok.

   The particulars of the first count were that on May 2, 2016 at [particulars withheld] estate in Narok North sub-county within Narok county, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of NW a child aged 9 years.

2. The particulars of the second count were that on diverse dates of December 2015 at [particulars withheld] estate in Narok the appellant unlawfully and intentionally caused his penis to penetrate the vagina of AN (name reducted because of her age) a child aged 11 years.

3. In the alternative to the two counts, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the respective dates in the two counts, the appellant unlawfully touched the vagina of NW a child aged 9 years in the first alternative count and that of AN a child aged 11 years in the second alternative count, respectively.

4. Seven witnesses testified for the prosecution. They included PW1, AN and PW2, NW who were the minor complainants and who knew the appellant as a neighbour who lived in the same plot with them.

5. PW1 testified that sometime in December 2015, the appellant called her to his house to fetch his shoes from under his bed for him. Immediately she entered the appellant's house, he locked the door, blindfolded and gagged her and put her on the bed. He then inserted what the minor described as his "urinating thing" into her genitalia. Later at some point, he went out and bought her chips which she ate. She got a chance to escape as the appellant prepared to repeat the act of defilement, but not before he warned her not to tell anybody what he had done or he would kill her.

6. The testimony of PW2 followed the same script as that of PW1. The appellant called her to his house on May 2, 2016 and when she went in, he gagged her, threw her on the bed, removed his jeans trouser and inserted what she too referred to as his "urinating thing" in to her genitalia. She bled and felt pain. The appellant doused her innerwear with kerosene and burnt it in a dust bin. He then gave her kshs 5/- to go and buy chewing gum threatening to kill her if she told anybody about what had happened.

   On May 25, 2016 PW1 reported both incidents to her teacher, who in turn reported the matter to the deputy head teacher. The parents of the minors were called to school and told what had happened. The matter was reported to the police and subsequently, the appellant was arrested on May 28, 2016.

   PW5, Isaack Kenyanya, the medical witness stated that upon examination he found no lacerations on the minors' genitalia, they tested negative for infections and no spermatozoa were detected in them. However, he found that the hymens in both girls were broken. On the basis of the broken hymens the witness formed the opinion that both girls were defiled, although he could not tell when the defilement took place.

7. When placed on his defence at the close of the prosecution case, the appellant admitted that he had free interactions with all children generally in their plot and that they were free to come and go at his house. That the children would baby-sit for him and do other chores and in return, he would buy them goodies and sweets. He asserted that despite his friendship with the children in the estate, he did not engage in any sexual activity with them, or give them money or disagree with them.

8. Upon considering all the evidence tendered, the trial court found that it was sufficient to sustain a conviction on each of the main charges. The appellant was accordingly convicted on the two counts of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment.

   Dissatisfied and aggrieved the appellant lodged the first appeal in the High Court against both conviction and sentence. He advanced several grounds of appeal which in sum, alleged that his conviction was based on insufficient evidence of identification, penetration was not proved, the medical evidence was inconclusive and his defence was not rebutted.

9. Upon hearing the appeal, Bwonwonga J made several findings to wit; that the appellant was known to the minors and as such, the identification was safe; that the medical evidence proved that there was penetration in respect of both minors; that the appellant's defence was considered and rightly rejected by the trial court; that the appellant was convicted on ample evidence and lastly, that the sentence imposed upon the appellant is permitted by both the *Constitution* and the *Sexual Offences Act*. He dismissed the appeal in its entirety.

10. Undeterred, the appellant filed the second appeal to this court raising several grounds that;

    i. the ingredients of the charge of defilement were not proved,

ii. the testimony of PW1 and PW2 was not credible,

iii. the medical evidence was insufficient

iv. It was an error in law for the sentence of life imprisonment to be applied in mandatory form,

v. The issues raised by the appellant and his submissions were not considered.

11. The appeal was disposed of by way of written submissions. The appellant highlighted his undated submissions in person and citing the case of *PKW v Republic* 2012 eKLR, contended that a broken hymen is not proof of sexual assault, hence penetration was not proved in this case. He also argued that his defence was not considered and that the magistrate sentenced him to life imprisonment without considering his mitigation, nature and circumstances of the offence and whether there were aggravating circumstances. He relied on the case of *Stanley Wanderi Kugotha* Criminal Appeal 17 of 2018 to urge the court to reduce the life sentence imposed upon him which he argued was excessive.

12. On behalf of the respondent, learned state counsel Ms Kathambi, filed submissions dated September 15, 2022 in opposition. She argued that the elements of defilement were proved to the satisfaction of the trial court as confirmed by the High Court. Further, that the evidence of the victims who were minors concerning penetration, was duly corroborated by a medical officer. Counsel also relied on section 124 of the *Evidence Act*, thus;

> 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

13. Counsel also cited this court's decision in *Stephen Nguli Mulili v Republic* (2014) eKLR to the effect that the appellant's defence was duly considered by the lower and superior courts alongside that of the prosecution.

14. Counsel urged the court not to interfere with the sentence imposed on the appellant since the penalties stipulated under section 8 of the act are not disproportionate, or inhumane and neither do they amount to degrading punishment. She relied on a comparative decision of the Court of Appeal of Botswana in the case of *Badisa Moatshe vs the state* (Criminal Appeal No 26 of 2001) (consolidated with Aupa Motshwari & 2 others v The State (Criminal Appeal No 2 of 2002) in support of her argument.

15. We have considered the record of appeal as well as the submissions made by both parties, the authorities cited and the applicable law. We appreciate our role as the second appellate court. Our jurisdiction is limited to matters of law as defined in section 361 of the *Criminal Procedure Code* and was reiterated by this court in the case of *David Njoroge Macharia v Republic* [2011] eKLR as follows;

> "That being so, only matters of law fall for consideration -see section 361 of Criminal Procedure Code. As 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 Chemagong v R (1984) KLR 611."

16. Being cognizant of the principles set out above, the issues that fall for determination are;

    a. Whether the ingredients of the offence were established.

    b. Whether the appellant's defence was considered by the two courts.

    c. Whether the mandatory nature of the appellant's sentencing is constitutional

17. This court in *John Mutua Munyoki v Republic* [2017] eKLR held that for the offence of defilement to be proved to have been committed, the prosecution must prove each of the following ingredients:

    1. The victim must be a minor, and

    2. There must be penetration of the genital organ

    3. by the accused and such penetration need not be complete or absolute. Partial penetration will suffice.

18. On the ingredient of penetration in the case before us both the trial court and the superior court, believed the testimonies of the minors and rejected that of the appellant. The evidence of the minors and that of the medical witness formed the basis for their finding that penetration had been proved.

19. Penetration is defined under section 2 of the *Sexual Offences Act* as:

> " the partial or complete insertion of the genital organs of a person in to the genital organs of another person.

20. We have perused the record bearing in mind what the Supreme Court of Uganda held in *Bassita v Uganda* S C Criminal Appeal No 35 of 1995, quoted with approval in MK V Republic (2017) eKLR, that:

> " the act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt"

We are satisfied that in the instant case the medical evidence corroborated the evidence of each minor on the act of penetration and we find no reasons to interfere with the conclusion arrived at by the two courts.

21. Turning to identification, this court in *Cleophas Otieno Wamunga v Republic* (1989) e KLR rendered itself thus:

> " it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error it can safely make it the basis of conviction"

22. We note that it was not in dispute that the appellant and the minors were neighbours who lived in the same plot and were thus well known to each other prior to the incidents. Identification was therefore by recognition. The two courts below believed the minors' evidence that the appellant defiled them in broad day light and concluded that the possibility of mistaken identity did not arise. We found no basis to interfere with this finding.

The last ingredient that must be proved is the age of each of the minor. In the offence which the appellant faced where the age of the victim determines the nature of the offence and the consequent sentence upon conviction, it is imperative that such age be proved beyond reasonable doubt. How the age of the minor may be proved was captured in this court's decision in *Edwin Nyambogo Onsongo v Republic* (2016) e KLR thus:

> ".. the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral
>
> evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

23. From the record PW1's mother produced a birth certificate as evidence that PW1 was aged 11years at the time of the incident. As for PW2, the medical officer testified that she was 9 years of age at the time she was presented for examination in relation to this offence. The appellant did not challenge the evidence and we therefore find no reason to interfere with the concurrent findings of the two courts on the ages of the two minors.

24. The appellant then complained that his defence was not considered by the trial court and although he raised this issue in his first appeal, the superior court also did not consider it. Upon examination of the record of appeal, it was evident that both courts considered the appellant's defence at length. On appeal the judge observed in paragraph 17 of his judgment as follows:

> "In ground 4 and 5, the appellant has faulted the trial court that the medical evidence was not conclusive proof of defilement and that his defence was not rebutted. The unsworn evidence of the appellant was that he was very friendly to the two complainants and that he liked them. He also stated that PW1 and PW2 used to assist him with his work in his house. After doing so, he could buy them some sweets but he never gave them money. He denied engaging in any sexual activity with the complainants. He concluded his evidence that he was never involved in any quarrel with them. After considering the evidence of the two complainants and that of the appellant, I find that the appellant was on good terms with the two complainants. I find no reason as to why the two complainants would tell lies against the appellant. In the circumstances, I find that the defence of the appellant was considered and rightly rejected by the trial court. I therefore find that grounds four and five are lacking in merit and are hereby dismissed."

After carefully analysing the record of appeal we are satisfied that the appellant's defence was properly considered by both courts below.

25. From the foregoing we are satisfied first, that the two courts below safely concluded that all the ingredients required to prove the charges of defilement in the two counts in which the appellant was convicted were demonstrated. Second, that his defence was properly considered and was found not to

have displaced or cast any doubt on the evidence adduced by the prosecution on any of the ingredients adverted to above.

26. Lastly, the appellant contended that the magistrate sentenced him to life imprisonment without considering his mitigation, the nature and circumstances of the offence and whether there were aggravating circumstances. This court has pronounced itself on the question of the unconstitutionality of the mandatory nature of life sentences imposed upon persons convicted under the *Sexual Offence Act*, times without number. In *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015, for example, the court observed thus:

> " We emphasise that this court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in Athanus Lijodi v Republic [2021] eKLR;
>
> "on the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance Evans Wanjala Wanyonyi v Republic (2019) e KLR. Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited"

27. The question that begs an answer in the instant case is whether the appellant was deserving of a life sentence. It may be argued that he was treated as a first offender and therefore deserved mercy from the court. We note however that the appellant chose to pleasure himself at the expense of the minors without extending them the mercy he now seeks from this court. The act the appellant subjected the two minors to was heinous indeed, in view of the fact that they were children of tender years and he was a person who, in ordinary circumstances, was trusted as a neighbour and was expected to protect them.

28. This is more so when, from his own testimony, the minors did chores for him and helped baby sit his child. In the nature and circumstances of the offence therefore, no aggravating circumstances have been demonstrated that can operate in favour of the appellant. We are therefore, of the view that the life sentence meted upon him in the trial court and affirmed in the High Court was deserved.

29. It is to be noted however, that these were two separate offences perpetrated against two different complainants. The trial court should have therefore, imposed a separate sentence for each count and stated whether the sentences should run concurrently or consecutively, in line with section 14 (1) of the *Criminal Procedure Code*, which provides for sentences in cases of conviction for several offences at one trial, as follows:

    1. Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

30. In *Ngibuini v Republic* (1987) KLR the appellant was tried in respect of counts where the complainants were neither the same, nor did the offences arise out of the same transactions. The trial court sentenced the appellant to death for the four counts. The Court of Appeal however, stated that death comes

only once and ordered that the sentence be applied to one of the counts whereas the other sentences to remain in abeyance.

31. Since the appellant herein has only one life to live, we deemed it fit to order the sentences to run concurrently.

Ultimately, our conclusion is that this appeal is devoid of merit and we dismiss it save to order that the appellant is sentenced to life imprisonment on each of the two counts. The sentences shall run concurrently.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2022.

F. SICHALE

....

JUDGE OF APPEAL

F. OCHIENG

....

JUDGE OF APPEAL

L. ACHODE

....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR