



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OUKO (P), MUSINGA, J. MOHAMMED, JJ.A.)

CRIMINAL APPEAL NO. 83 OF 2015

BETWEEN

HARUN WAWERU WANJIRU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nyeri

(J. M. Mativo, J.) dated 27th November, 2015

in

CR. APP NO. 66 of 2012.)

JUDGMENT OF THE COURT

1. **Harun Waweru Wanjiru**, the appellant herein, was convicted by the Chief Magistrates' Court at Nyeri for the offence of defilement of a girl aged 10 years contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act No. 3 of 2006** and sentenced to life imprisonment. His first appeal to the High Court was unsuccessful hence this second appeal before us.
2. In a second appeal, our jurisdiction is limited to a consideration of issues of law as prescribed under **section 361** of the **Criminal Procedure Code**. See ***M'Riungu v Republic [1983] KLR 455***.
3. A brief recount of the facts that led to this appeal is necessary.
4. The prosecution's case was that on 1st October 2011 at [particulars withheld] Village in Nyeri District, the appellant caused his penis to penetrate the vagina of M.N.M, a child of 10 years. The complainant testified that prior to the said defilement the appellant had attempted to kiss her a number of times; that on the material day at about 7 p.m., she was sent to her grandmother's house that was not far from their home; that as she headed there she met the appellant, who was her grandmother's worker, outside the kitchen; that the appellant forcefully pushed her to the ground and proceeded to defile her.
5. After the sad incident, she reported her ordeal to her mother, PW2, who took her to Nyeri Provincial General Hospital where she was examined by **Dr. Sarah Wangui, PW5**, who ascertained that she had been sexually defiled. The incident was also reported to Nyeri Police Station and the appellant was arrested and arraigned before the court. In his defence, the appellant simply denied having committed the said offence.
6. In his appeal before this Court, the appellant faults the learned judge for relying on the evidence of the complainant and PW2 to convict him, saying that it was riddled with doubts. He also faulted the learned judge for upholding his conviction without considering that PW5 gave evidence without complying with **section 77** of the **Evidence Act**; that the examination of the complainant did not show the presence of spermatozoa in her vagina; for upholding the conviction when the trial magistrate had not warned himself of the danger of convicting him on the evidence of a single eye witness; and for failing to find that there were irregularities in that PW1, PW5 and PW6 testified in the English language, which he did not understand, and that amounted to a violation of **Article 50(m)** of the **Constitution of Kenya 2010**.

7. Both the appellant and the respondent filed written submissions before this Court. The appeal was heard virtually, and the appellant entirely relied on his written submissions that amplified the aforesaid grounds of appeal. He urged the court to allow the appeal in its entirety, although he made an alternative prayer, urging us to reduce the sentence in the event that we do not allow the appeal against conviction.

8. **Mr. Ondimu**, Principal Prosecution Counsel, opposed the appeal. Relying on his written submissions, he urged us to find that the appellant was convicted on sound evidence and the sentence that was passed was mandatory, given the age of the complainant.

9. We have carefully considered the entire record of appeal and the submissions on record. In our view the salient grounds of appeal that fall for our determination are whether the evidence of PW1 and PW2 was at variance; whether there was sufficient evidence of defilement; and whether the appellant's trial amounted to a violation of his constitutional rights.

10. Starting with the first ground that alleges variance between the evidence of PW1 and PW2, the complainant narrated before the trial court how the appellant, who was employed as a farm worker by her grandmother, had severely made unwelcome advances at her. He had kissed her on the left cheek, and she had reported that to her mother and grandmother. Earlier, the appellant had also attempted to defile her, but she successfully resisted. Eventually, the appellant succeeded in executing his evil plans. Her mother, PW2, told the court that the complainant had reported to her about the appellant's unwelcome advances at her, and she had raised the issue with the complainant's grandmother. However, on the material day when she was defiled, the complainant did not disclose to her what had transpired, instead she told her grandmother. It was the grandmother who broke the sad news to PW2.

11. In our view, there was no material discrepancy between the evidence of PW1 and PW2 that could vitiate the conviction. Each of them testified under oath and were cross examined by the appellant. The appellant was well known to the complainant and there was no suggestion of any mistaken identity.

12. Regarding sufficiency of the evidence, the complainant testified as to how the offence was committed and the trial court believed her, PW1 produced a copy of the complainant's birth certificate and there was no dispute that the child was less than 11 years old. The complainant's evidence was also corroborated by the evidence of PW5, Dr. Sarah Wangui, who produced the complainant's medical report. The findings were that the complainant's hymen was broken and the labia minora was swollen. The report further indicated that no spermatozoa was found in the complainant's vagina.

13. Although the appellant argued that the trial court erred in law in convicting him when the medical report showed absence of spermatozoa in the complainant's genital organ, this Court has severally held that the presence or absence of spermatozoa in the vagina of a complainant is not one of the ingredients required to prove the offence of defilement. See Mwangi v Republic [1984] KLR 595. We are satisfied that the appellant's conviction was well founded.

14. We now turn to consider whether there was any violation of the appellant's constitutional right to a fair trial. Although the appellant cited **Article 50(m)** of the **Constitution**, we believe the correct citation is **Article 50(2) (m)** of the **Constitution** which states as follows:

“Every accused person has the right to a fair trial which includes the right- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

15. The record shows that at the beginning of the trial the court indicated that there was interpretation of English and Kiswahili languages into Gikuyu. The appellant is a Kikuyu and speaks the Gikuyu language. It is evident that the appellant fully participated in the trial because he was able to cross examine all the relevant witnesses and tender his defence. He never complained to the trial magistrate about his inability to follow the proceedings. We find no merit in this ground and dismiss it.

16. We now turn to the issue of sentence. **Section 8(2)** of the **Sexual Offences Act** states as follows:

“A person who commits an offence of defilement with a child of 11 years or less shall upon conviction be sentenced to imprisonment for life.”

17. It is therefore evident that the trial court passed the mandatory sentence as prescribed by law and the sentence was upheld by the first appellate court.

18. The issue of mandatory sentences was comprehensively discussed by the Supreme Court in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, where the appellants contested the mandatory death sentence that had been passed against them upon conviction for murder. The Supreme Court expressed itself thus:

“47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50

(1) and (2)(q) of the Constitution.”

19. Applying the above principles to mandatory sentences as provided for in the Sexual Offences Act, this Court had occasion to express itself in *Jared Koita Injiri v Republic [2019] eKLR* as follows:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case of *Muruatetu* was applied to this provision, it too should be considered unconstitutional on the same basis.”

20. In that case, the Court substituted the life imprisonment imposed by the trial court with a sentence to 30 years’ imprisonment from the date of sentence by the trial court. Likewise, in *Evans Wanjala Wanyonyi v Republic [2019] eKLR*, this Court set aside the sentence to life imprisonment and substituted therefor a sentence to 30 years’ imprisonment.

21. We have previously held that the decision in *Muruatetu case* applies *mutatis mutandi* to the provisions of section 8(2) of the *Sexual Offences Act*. Taking into account the age of the appellant, though not disclosed in the record but from his looks he is a young man; the fact that he is a first offender and was remorseful, but bearing in mind the seriousness of the offence committed, we are inclined to interfere with the sentence that was passed by the trial court and affirmed by the first appellate court. We hereby set aside the sentence to life imprisonment and substitute therefor sentence to 30 years’ imprisonment from the 27th March 2012, when the initial sentence was passed by the trial court.

Dated and delivered at Nairobi this 19th day of February, 2021.

W. OUKO (P)

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR