Katu v Republic (Criminal Appeal 37 of 2017)
[2021] KECA 337 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 337 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 37 OF 2017

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

DECEMBER 17, 2021

BETWEEN

EZEKIEL MJOMBA KATU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Voi (Kamau J.) delivered on 9th February 2016 in High Court Criminal Appeal No 52 of 2014 arising from the original trial in Wundanyi SRM Criminal Case 381 of 2012)

JUDGMENT

1. This a second appeal that was lodged herein by the Appellant against the judgement rendered by the Voi High Court at Voi (hereinafter “the High Court”), which upheld the conviction of the Appellant for the offence of defilement and sentence of life imprisonment that had been imposed by the Senior Resident Magistrate’s court at Wundanyi (hereinafter “the trial court”). The High Court however set aside the order issued by the trial court that the Appellant compensates the complainant (PW1) through her mother and guardian (PW2) Kshs 100,000/= to be recovered from the cash bail he had deposited in Court.

2. The Appellant had been charged on 16th October 2014 before the trial court with one count of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. He faced the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The Appellant pleaded not guilty to the charges, and the prosecution called four witnesses to testify in the ensuing trial, while the Appellant gave unsworn testimony and called one witness in his defence.

3. The Appellant was dissatisfied with the decision of the trial court and appealed to the High Court on the grounds that the prosecution case was not proven beyond reasonable doubt; that his defence of

alibi was ignored and that the sentence meted on him was manifestly excessive severe. The High Court in its judgement rendered on 9th February 2016 held that the complainant's evidence was sufficiently corroborated and was sufficient to secure a conviction, that the disparity in the evidence adduced on the day of the week the offence occurred did not weaken the prosecution's case; and that the Appellant did not provide evidence of an alibi.

4. When this appeal came up for hearing on 28th September 2021, the Appellant was in person while the Respondent was represented by Mr Jami Yamina, learned Senior Prosecution counsel. The Appellant relied on submissions he had filed dated 4th May 2021, while Mr. Yamina also relied on submissions the Respondent filed dated 5th November 2019, and pointed out that the Respondent conceded the appeal on the sentence.

5. The role of this Court as a 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."

6. The Appellant in his grounds of appeal contends that the High Court erred in law by not realizing that the reasons reached by the trial court in believing the prosecution evidence were unsatisfactory; that there were no investigations done; and that the trial Court was biased. Further that the High Court erred by not considering his alibi evidence. The Appellant also raised supplementary grounds of appeal in his submissions, where he additionally faulted the High Court for not finding that the intention of the voir dire examination was not met as required by law; and for failing to re-examine and re-assess the entire evidence on record.

7. Two issues therefore arise for determination from these grounds, namely, whether the Appellant's conviction was upheld on the basis of a sound legal analysis and assessment of the evidence, and whether the sentence imposed on the Appellant is legal.

8. On the evidence adduced, the Appellant submitted that the intention of the voir dire examination as stated in the case of *Opicho v R [2009] eKLR*. was not met, since there was no indication of a voir dire examination having been undertaken in the proceedings of the trial Court, and the questions and answers to the question concerning whether or not PW1 understood the meaning of an oath for her evidence to be justified to be received upon oath were not evident. Further, and to illustrate the unsatisfactory reasons by the trial court in believing that the prosecution's evidence, the Appellant analysed and challenged the complainant's testimony; the corroboration of the said testimony; and the medical evidence and injuries said to have been suffered by the complainant.

9. He in this respect submitted that there was no evidence on record that the complainant was bleeding, and her evidence of pain and of the date of the offence was not corroborated; that if there were injuries to the complainant and the hymen was broken as a result of sexual intercourse there would be some healing wounds since she was examined when the injuries were old; that there was disparity of evidence if the material date fell on Saturday; that DW 2 confirmed the Appellant was absent on the material day; that the police failed to launch investigations, and he was not given time to record a statement to

state what happened, and that the Prosecution having mentioned the Appellant's sister ought to have produced her as a witness.

10. The Appellant further submitted that the High Court's judgment was based on the written submissions of the parties, and the court ought to have re-assessed and re-evaluated the entire evidence on record.

11. The learned counsel for the Respondent on his part submitted that the ingredients that constitute the offence of defilement were proved beyond reasonable doubt. On the requirement of the age of the complainant, reliance was place on the decision in the case of *Basil Okaroni vs Republic [2016] eKLR* that medical evidence can be used to determine the age of a victim in the absence of documents showing the date of birth. It was submitted that there was an age assessment conducted in the present case, which placed the age of the minor to be approximately 9 years of age.

12. On proof of penetration, the Respondent made reference to the evidence of PW 3 who examined the minor, while identification was by way of recognition which was more secure and sound. The prosecution drew the Court's attention to section 124 of the *Evidence Act* that corroboration is not mandatory in sexual cases. The Respondent urged that in defilement cases it was improbable that there would be eye witnesses. The Respondent further submitted that the Appellant's defence, was considered but it was watered down by DW2 who confirmed that he did not know where the Appellant was on the material day and did not find him at his house.

13. The High Court in its judgement set out the evidence by the complainant (PW1) in its consideration of the issue whether the said evidence was corroborated, and did find that it was corroborated by the evidence of PW2, PW3 and PW4 on their physical observations of PW1 and the injuries she sustained, which evidence was also set out in the judgment.

14. The evidence by the complainant (PW1) during the trial was that she was herding goats on 25th August 2012 at 5 pm, when she saw the Appellant, who told her to get a doughnut from him. However, that when she went for the doughnut the Appellant instead removed her panty as well as his trouser, and inserted his penis in the place where she urinates. PW1 narrated that she felt pain and started bleeding, and the Appellant put his hand over her mouth when she screamed. The Appellant thereafter warned PW1 that if she told her mother he would beat and throw her in the forest, and as a result, PW1 did not tell her mother what had happened when she went back home. PW1 stated that the Appellant was their neighbor and lived near them, and she had known him for a long time.

15. The complainant's mother, AMM, (PW2) found their goats on their own on 25th August 2012 at 5pm, and called out for PW1 for about 1 hour and did not see her. The following day she noticed that PW1 could not walk or take care of the younger child as she normally did, and after exerting some pressure on her, PW1 narrated what had happened. PW2 then took PW 1 to AP Bura Station and was referred to Sisal police post where she was given a P3 form. PW2 went to the Appellant's home on 26th August 2012 and was told that he had gone to Mwatate, and the Appellant was later arrested on 1st September 2012.

16. Resituta Mghoi (PW3), the Clinical officer at Mwatate Sub district Hospital testified that PW1 was brought to the hospital for examination, and she filled the P3 form for PW1 on 30th August 2012. She produced the said PW3 form as an exhibit, and stated that the child's vagina was red and painful when touched, and the hymen was broken.PW3 also produced an age assessment form which showed PW 1 was a minor aged 9 years old.

17. Sergeant Sebastian Wambua (PW4) on his part testified that on 1st September 2012, while in Bura Police Station, he was called by members of the public who had detained a suspect for defilement.

He arrested the suspect and took him to the police station, and that the complainant came to the police station the next day with her mother. His observation was that the complainant was not walking properly with her legs apart, and he stated that charges were preferred against the Appellant after the P3 form was filled.

18. As the High Court correctly pointed out, under section 124 of the *Evidence Act*, the evidence of PW1 was sufficient on its own to secure a conviction, and did not require corroboration. It is notable in this regard that the Appellant is introducing for the first time, the issue of the reliability of PW1's evidence due to alleged irregularity in the voir dire examination, and therefore the need for its corroboration under section 124 of the *Evidence Act*. This issue was not raised in his first appeal for consideration by the High Court.

19. This observation notwithstanding, since a voir dire examination is a matter of law, we will briefly address the arguments raised by the Appellant. Under section 19 of the *Oaths and Statutory Declaration Act*, if in the opinion of the court a child of tender years who is called as a witness understands the nature of an oath, they may give sworn testimony. If the child does not understand the nature of an oath, his or her unsworn evidence may still be received if the Court is of the opinion that the child possesses sufficient intelligence to receive evidence and understands the importance of telling the truth. A voir dire examination is conducted by the trial Court to ascertain and enable it form the opinion as to the child's understanding and intelligence in this regard.

20. The record of the trial Court shows that on 10th October 2102, when the trial commenced, the following transpired:

> FM aged 9 years unsworn and states in Kiswahili
>
> I was born in 2003. I attend [Particulars Withheld] primary school. I am in standard 3. I go to church. attend a Catholic church. I live at [Particulars Withheld]. I have come to court to give evidence in a case of rape. I know the truth. I learnt to tell the truth from the pastor. He said that if you tell lies, your name will be written against it. I will testify to the truth alone.
>
> Court: Minor understands the nature of evidence to be given and can therefore proceed to give evidence on oath.
>
> M. Chesang (Mrs.) - Resident Magistrate
>
> 10/10/12

21. It is evident from the record that despite the absence of a title or use of the words "voir dire examination", there was an examination conducted of the complainant, and that the trial Court thereafter formed an opinion that the complainant could give evidence on oath. It is also manifest in section 19 of the Oaths and Statutory Declaration Act that there is no particular format for conducting and recording a voir dire examination that is set by law.

22. The trial court may in this regard record the questions and answers verbatim, or record the answers only verbatim, as held by this Court in *Maripett Loonkomok vs R (2016) e KLR*:

> "We reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R (1983) KLR 447. The courts today accept both the question and answer format and the

recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record."

23. The trial Court did not record the questions the complainant was asked, and only recorded the answers thereto, and the record to this extent demonstrates the basis of the trial court's opinion that the complainant was intelligent enough to receive evidence is not evident. In any event, any irregularity in the conduct or recording of a voir dire examination does not vitiate the entire prosecution's case, and the only effect is that the evidence of the child of tender years will in such circumstances require to be corroborated by other material evidence. It was held in this regard by this Court in *AAM vs R (2016) eKLR* that in an appropriate case where a voir dire examination is not conducted, but there is sufficient independent evidence to support the charge , the court may still be able to uphold the conviction.

24. In the present appeal, the evidence of PW1 as to identification of the perpetrator of the offence was collaborated by PW2, as the Appellant was their neighbor and well known to them. The evidence of penetration was corroborated by the medical evidence of PW3 who examined PW1, while the age assessment by PW3 was not contested by the Appellant. time. Therefore, the ingredients of the offence of defilement were corroborated and proved to the required standard by the investigations and resultant witnesses called by the prosecution, as correctly found by the High Court.

25. The Appellant also sought to discredit the prosecution's evidence on account of the discrepancies as to the date and day of the offence. The High Court observed that all the prosecution witnesses testified that the offence occurred on 25th August 2012, which was a Saturday, and that the error made by PW3 in the P3 form that the complainant was defiled on 28th August 2012 was corrected and countersigned by the said witness. In addition, that the disparity in the evidence of PW1 and PW2 as to 25th August 2012 being a Thursday and Friday respectively, was not material and did not weaken the prosecution's case.

26. The effect of any discrepancies in evidence adduced in a trial was stated by this Court in *Phillip Nzaka Watu vs. R (2016) e KLR*, as follows;

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed it has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and couching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

27. The charge sheet before the trial court indicated that the offence was committed on 25th August 2012, which was confirmed by the prosecution witnesses. There was therefore no discrepancy between the charge sheet and evidence adduced by the prosecution as regards the date the offence occurred. The only discrepancy was as regards what day of the week this date was, and as the trial was conducted two months later, it is to be expected that the recollection of what day it was would not be as clear. In any event, the discrepancy in the evidence as to whether the day was Thursday, Friday, or Saturday, did not in any way moderate the proof of the elements of defilement, which were still demonstrated to the required standard as illustrated hereinabove. There was thus no error committed by the High Court in finding that the offence of defilement was proved beyond reasonable doubt.

28. Lastly, on the Appellant's alibi evidence, the High Court observed that the Appellant did not bring evidence as to where he was on 25th August 2012, nor did any witness to confirm his location on that

date. This finding by the High Court is borne out by the evidence called by the Appellant on his alibi. The Appellant in this regard gave unsworn testimony after the trial court found that he had a case to answer and stated that he was not in Alia on 25th August 2012. He also called a witness, one Jefferson Kadenge Mwakozi (DW2), who stated that from 23rd August 2012 until 24th August 2012, he was with the Appellant who had called him to help with his animals, and that on 25th August 2012 he went to the Appellant's home and did not find him, and later saw him on 27th August 2012.

29. We can only reiterate that the defence of alibi required the Appellant to adduce cogent evidence which was sufficient to raise reasonable doubt that he was not at the scene of the crime at the material time, as held in *Karanja vs Republic (1983) KLR 501*. Once such a reasonable doubt was created, the burden would then have shifted to the prosecution to prove the falsity of the alibi. See in this regard the decisions of this Court in *Kiarie vs Republic (1984) KLR*, *Victor Mwendwa Mulinge vs R, (2014) eKLR*, and *Erick Otieno Meda vs Republic [2019] eKLR*. In the present appeal, the Appellant failed to bring evidence of his whereabouts on the date of the commission of the offence, namely 25th August 2012, to create such a reasonable doubt, and the evidence of PW1 that placed him at the scene of the crime was thereby not dislodged. We shall therefore not disturb the High Court's decision in this regard.

30. The second issue in this appeal is the legality of the sentence imposed on the Appellant. It is notable in this respect that it is only the sentence of life imprisonment that was upheld by the High Court. The Appellant submitted that the mandatory nature of the life sentence death was declared unconstitutional by the Supreme Court of Kenya.

31. The learned counsel for the Respondent urged that at the time of conviction, life imprisonment was the minimum sentence for the offence that the Appellant was convicted of. Further, that the challenge presented by the decision of the Supreme Court in *Francis Karioko Muruatetu & Another vs Republic [2017] e KLR* is that if Courts were to continue being bound by prescriptive nature of minimum sentence, mitigation would be rendered superfluous. Further, that mitigating factors constitute an element of fair trial as enshrined under Article 25 and 50 of the *Constitution*. The Respondent therefore urged the Court to look at the aggravating factors in the matter, and mete out the appropriate sentence.

32. The Supreme Court of Kenya in Francis Karioko Muruatetu & Another v. Republic, (2016) e KLR held that the mandatory sentence of death in section 203 and 204 of the Penal Code deprive courts of their unfettered jurisdiction to exercise discretion and impose appropriate sentence on a case-to-case basis. The Court however also held that its decision in the Muruatetu Case did not invalidate mandatory or minimum sentences set out in the Penal Code, the *Sexual Offences Act*, or any other statute. On 6th July 2021 the Supreme Court subsequently issued guidelines to be followed in resentencing of offenders in cases where the death sentence had been imposed, and again clarified that the decision in the Muruatetu Case and the said guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.

33. While it may be argued and indeed it is the case that mandatory and minimum sentences in general do limit a Court's discretion in sentencing, it was noted in both in the Muruatetu Case and in the Kenyan Judiciary's Sentencing Policy Guidelines that with respect to minimum sentences, this situation will still obtain in spite of the undue injustice caused in light of the individual circumstances. Therefore, the only recourse in the circumstances is law reform that permits some discretion for the courts to impose a lesser sentence. The Sentencing Policy Guidelines further direct that where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed nor can a fine substitute a term of imprisonment where a minimum sentence is provided.

34. We are in this regard also mindful of the policy considerations in favor of minimum sentences which include their impact on crime through deterrence and incapacitation of serious offenders, and their impact on sentencing disparity, plea bargaining, and respect for the law. These reasons in our view are still valid in the cases of proven sexual offences involving children of tender years, as in the present appeal. Therefore, unless and until we are granted the discretion by law to reduce the minimum sentence of life imprisonment imposed by section 8(2) of the *Sexual Offences Act*, we cannot interfere with the same.

35. We accordingly find that this appeal has no merit and the same is dismissed in its entirety.

36. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL P. NYAMWEYA

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JUDGE OF APPEAL

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

Signed

(DEPUTY REGISTRAR)