JMK v Republic (Criminal Appeal E081 of 2023)
[2025] KEHC 9435 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9435 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E081 OF 2023

AK NDUNG'U, J

JUNE 25, 2025

BETWEEN

JMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E002 of 2023– V Masivo SRM)

JUDGMENT

1. The Appellant, JMK, was convicted after trial of defilement contrary to Section 8[1] as read with Section 8 [3] of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between June 2022 and 22/12/2022 in Kieni East Subcounty within Nyeri County, intentionally caused his penis to penetrate the vagina of EMG a child aged 12 years. On 09/10/2023, he was sentenced to twenty [20] years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 12/10/2023. The appeal is on the following grounds;

    i. The learned magistrate erred by failing to note that the evidence tendered by the prosecution was not enough to secure a conviction.

    ii. The learned magistrate erred convicting him without considering that the hymen was old broken according to medical evidence.

    iii. The learned magistrate erred convicting and sentencing him without considering that the sentence was harsh and excessive.

    iv The learned magistrate erred convicting him without considering that the birth certificate did not corroborate the age on the charge sheet.

v The learned magistrate erred convicting him without considering that he was not taken for medical examination.

vi. The learned magistrate erred quashing his defence without cogent reasons.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that a minor undergoes a lot of coaching, coercion and intimidation by guardians or parents before testifying hence the need to consider circumstantial aspect of the case as provided under Section 33 of the *Sexual Offences Act*. Additionally, sexual offences are used as a mean to settle vendetta or for other reasons. That though a trial court can convict without corroboration by dint of Section 124 of the *Evidence Act*, it is incumbent upon the trial court to be a neutral arbiter bearing in mind the burden placed on the prosecution as was held in Abdi Roba Jillo v Repubic [2020] eKLR. The other factor that need to be relooked at is that an unrepresented accused person is always at a disadvantage before a seasoned prosecutor.

4. He submitted that the evidence of PW1 left a lot to be desired due to the casual way she described her alleged first sexual encounter with him which showed that she was either coached or was imaginative as she testified that she experienced no pain, did not observe any blood or semen. That this was baffling for a virgin minor. That by dint of the findings in Bassit*a v Uganda S.C Criminal Appeal No. 35 of 1995*, circumstantial aspects of a case must be considered. Additionally, for evidence to be capable of being corroborated, it must be relevant and admissible, be credible and be independent, that is, emanating from a source other than the witness requiring to be corroborated. That one F was the connecting chain in the entire matter as it was PW1's evidence that she informed F who informed their mother. That if this was the case, she would have been a material witness for the prosecution to corroborate PW1. She would have been a key witness to clarify the matter. That the complainant testified how the Appellant had shown her his Mpesa statement with money enough to buy her a bicycle hence it behoved upon the investigating officer to obtain the Mpesa statement to verify whether he had such money to assist the prosecution's in proving their case to the required standard. That despite the fact that the medical evidence found no proof of penetration, the trial court went ahead and relied solely on the PW1's uncorroborated evidence.

5. With respect to sentence, he submitted that the sentence ignored his mitigation and the fact that he was a first-time offender was not considered and it is trite that a mandatory minimum sentence should not be met out to a first-time offender. Further mandatory minimum sentences have been frowned upon by superior courts. He urged the court to relook into the sentence with a bid of reducing it. He concluded by stating that the trial court relied on single witness evidence and ignored the medical evidence that stated that there was no evidence of penetration.

6. In rejoinder, the Respondent's counsel submitted that age was conclusively proved through the minor's birth certificate which was corroborated by the minor and her mother, PW2. As to penetration, she submitted that the complainant was examined 12 days after the incident. That PW3 testified and produced the P3 and PRC forms as Pexhibit 1a and 1b in line with Section 77 of the *Evidence Act*. That PW1 was examined days after the incident and the said incident occurred severally hence, unlikely that there would be visible injuries on her genetalia at the time of examination. That the fact of penetration was supported by her testimony. Additionally, the trial court gave tangible reasons why it chose to rely on the victim's evidence. For identification, she submitted that it was very clear as the same was through recognition as the Appellant was well known to PW1 and even referred to him as J adding that he shared a room with her mother and they had been living together. Further, identification was not challenged during cross examination.

7. She submitted that his defence was properly rejected as it was a mere denial as he did not give an account of the alleged material dates of the offence. With respect to sentence, she submitted that he was sentenced to 20 years as provided in law therefore, there is no discretion to reduce the sentence. Further, the supreme court in R v Joshua Gichuki Mwangi & Others Petition No E018 of 2023 clarified that Muruatetu case does not apply to minimum sentences under the *Sexual Offences Act*.

8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

9. It becomes necessary in that regard to have a summary of the evidence at the trial court.

10. PW1, the complainant, testified that on 22/12/2022, she was at home alone with J who summoned her to the room he shares with her mother. He gave her Kshs.300/- and asked her 'nilale na yeye. Tufanye maneno na yeye isio faa.' That he picked oil used to milk the cows and smeared on her private part and they slept together. He removed his clothes and laid on her and ejaculated in her private part. He inserted his private part into hers. He told her not to tell anybody and threatened to cut her head if she revealed what happened. She got her hair done. That they did the same thing on 15/06/2022 and he promised to buy her a bicycle. On 15/12/2022, they had sex again. She testified that on 29/12/2022, her sister F went home and she revealed to her what had been happening. She informed her that J made her like a wife. F promised not to reveal to their mother but she eventually did and her mother summoned her and she confirmed it. They reported at the police station and she was taken to hospital. She testified that J was her step-father.

11. On cross examination, she testified that her mother was her confidant but could not reveal to her and that her sister used to visit. That at the material time, J was at home and not Olkalau. That the case was not fabricated and that he showed her money in his Mpesa statement that was to be used to buy a bicycle. That it was untrue that her sister planned to falsely accuse him.

12. She testified on re-examination that the Appellant was living with them the entire period and not Olkalau.

13. PW2, the complainant's mother testified that on 29/12/2022, her daughter F visited them and she shared with her what the Appellant used to do in her absence as had been revealed by the complainant. She summoned PW1 who informed her that on 15/06/2022, 15/12/2022 and 22/12/2022, she made love with her father and when asked why she did not inform her, she cited death threats from him. She took her to police station and they were referred to hospital. The Appellant was the complainant's step-father.

14. On cross examination, she testified that she was not aware that her other daughter told him that he was not her biological father which angered him. She denied falsifying the evidence. That the Appellant did not have properties as alleged for them to steal. That she loved him and did not know why he did what he did to her daughter.

15. PW3, the clinician testified that on examination, the hymen was old broken and nothing abnormal was noted on her genital organs. The date of the incident was 12 days earlier. He produced the P3 and PRC forms as Pexhibit 2a and 2b respectively.

16. On cross examination, he testified that on examination and lab test, there was no evidence of defilement.

17. PW4, the investigating officer testified that she was assigned this matter and she interrogated the complainant who accused her father of defiling her severally on diverse dates. She took her to hospital

where she was examined. They took her to their house and the Appellant was arrested. She produced the complainant's birth certificate as Pexhibit1.

18. On cross examination, she testified that the Appellant had promised to buy her a bicycle hence the delay and that she did not investigate his disagreement with the girls' mother.

19. The Appellant in his unsworn testimony testified that he is a broker and that his wife bought him liquor and asked him to arrive early to take the alcohol. He got drunk and, in the morning, he was told that he was being called by police. He went out to meet them and they refused to explain the reason for his arrest. He was taken to police station and he was told that he had committed defilement. He denied the charges and testified that there was disparity on the evidence of the victim's age.

20. That was the totality of the evidence before the trial court. In accordance with this court's duty as a first appellate court, I have considered the evidence as recorded at the trial court. In doing so, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have considered the applicable law and submissions made as well as case law cited.

21. Of determination is whether the prosecution has proved its case to the required degree and if in the affirmative, whether the sentenced imposed is legal and appropriate in the circumstances of the case.

22. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim [must be a minor], that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8[1] of the *Sexual Offences Act* No. 3 2006.

23. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

24. Proof of age is important in a sexual offense. In Kaingu Kasomo v. Republic, Criminal Appeal No. 504 of 2010 [UR], the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

25. In the present appeal, the complainant's age is not disputed. Her birth certificate was produced by PW4, the investigating officer as Pexhibit 1. According to the birth certificate, she was born on 15/06/2010. The alleged offence was committed on June and December 2022 hence she was 12 years at the time thus a minor for the purpose of *Sexual Offences Act*.

26. With respect to penetration, the appellant contention is that the evidence on penetration was farfetched on account that the minor testified that she did not feel any pain, she did not observe any blood or semen despite the fact that she was a virgin. Additionally, the medical evidence exonerated him as the clinical officer testified that there was no evidence of penetration. Hence, the trial court erred relying on evidence of a single witness evidence. Further, F, complainant's sister whom the complainant told about the ordeal was a key witness but was not called to testify.

27. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of Bassita v Uganda S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence....."

28. It is trite law that the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. In Anil Phukan v State of Assam 1993 AIR 1462, 1993 SCR [2] 389 it was stated as follows: -

> " A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone"

29. It is always competent to convict on evidence of a single witness if that evidence is clear and satisfactory in every respect. The law is also clear that there is no particular number of witnesses required for proof of any fact.

30. Cognizant of the fact that sexual offences are usually not committed in public and that they almost always happen in privacy or secrecy or away from the public eye, parliament in its wisdom enacted Section 124 of the *evidence Act* which provides as follows;

> " 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."

31. The medical evidence did not offer much in support of the fact of penetration. This can easily be explained away by the fact that examination of the victim was way after the fact. However, as observed earlier, the absence of medical evidence is not fatal to the prosecution's case.

32. I have reviewed the evidence of the complainant in this matter. The same was laid out with clarity and precision with graphic details of what the Appellant did to her including smearing oil on her private part before inserting his penis in her private part. He gave her Sh. 300 and threatened to cut her head if she informed anyone of the act.

33. The record shows that the trial court based its conviction on the complainant's evidence and correctly invoked Section 124 of the *Evidence Act*. The court noted that that the evidence of the Appellant smearing the complainant's private part with cow milking oil and penetrating her private part with his went largely unchallenged by the Appellant. That he considered her evidence and found that her evidence alone could be relied on without being corroborated for reasons that he listened to her keenly, she was firm, she faced the Appellant and identified him in court as the person who defiled her. That she explained why she could not reveal what happened to her mother, she was able to recall the details

very well, her testimony remained unshaken by the Appellant and that he assessed her demeanour and she struck as a truthful witness. That he had no doubt to doubt her testimony and found her evidence to be credible and truthful.

34. In light of the above am satisfied that the finding by the trial court was based on a proper analysis of the evidence and the application of the law. I find and hold that the trial court did not err in convicting the Appellant on the evidence of the complainant's alone as sanctioned by Section 124

35. It is also noted that the complainant did not testify to the fact that she felt no pain and she did not observe any blood. This assertion by the Appellant is not borne out of record. Further, the fact that there were no injuries observed or there was nothing to show that she was defiled does not aid the Appellant as was rightly held by the trial court that she was examined days later hence unlikely that there might be evidence of injuries on her genital organ. Further, the defilement had been happening severally. Additionally, it is not a legal requirement that a victim must suffer lacerations, cuts, bruises or any other injury to the genital organ as was held in GDB v Republic [2017] eKLR.

36. As to failure to call F as a witness, it is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with Section 143 of the *Evidence Act* which provides that;

> " In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

37. In Bukenya And Others v Uganda [1972] EA 349 it was held that;

> " While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

38. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate.

39. F would have confirmed what the complainant told her but the evidence of the prosecution's case was enough for a court to make a determination.

40. On identity, the Appellant was a step-father to the complainant. They lived in the same house and the complainant testified that the Appellant would share a room with her mother. PW2 confirmed that they lived together and that she loved him. No doubt the Appellant was known to the complainant and he was therefore properly identified as the perpetrator of the heinous act.

41. I have considered his defence. Whereas the Appellant bore no duty to prove his innocence, his unworn statement at trial does not dislodge the prosecution's strong evidence. It is actually a non -coherent statement of how he was bought liquor by his wife only to be arrested in the morning by the police with no explanation. The line of defence that he had raised in cross examination that the accusers wanted to take his property disappears to thin air when he testified with the issue not getting even a fleeting mention. His defence was just a mere denial which was correctly rejected by the trial court.

42. With respect to sentence, the Appellant was sentenced to twenty [20] years imprisonment as provided in law. He urged the court to re-look into the sentence guided by the recent jurisprudence on mandatory minimum sentences and the fact that he was a first time offender.

43. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. [Ogolla S/o Owuor v R {1954} EACA 270].

44. The legal position in respect of mandatory minimum sentences in sexual offences has be clarified by the Supreme Court in Muruautetu 2 and lately in Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024].

45. In, R v Mwangi [supra], the court stated;

> " We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
>
> This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of Trusted Society of Human Rights v Attorney-General and others, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:
>
> "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the Governmental functions. *the Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."
>
> We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

G. Conclusion

46. Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

47. In light of the above, the sentence meted on the Appellant is legal and appropriate.

48. With the result that the appeal fails and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY JUNE 2025.

A.K. NDUNG'U

JUDGE