



REPUBLIC OF KENYA



KENYA LAW
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**Muraguri v DPP (Criminal Appeal E036 of 2021)
[2024] KEHC 4034 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E036 OF 2021
SM MOHOCHI, J
APRIL 24, 2024**

BETWEEN

PAUL MUCHINA MURAGURI APPELLANT

AND

DPP RESPONDENT

*(Being an Appeal from the judgement Conviction and Sentence of Hon
E.S SOITA Resident Magistrate delivered on 16th November, 2021
in Molo Chief Magistrate's Court Criminal Case No. E052 of 2021)*

JUDGMENT

Introduction

1. The Applicant filed the Instant Appeal on the 23rd November 2021 and subsequently without the leave of the Court filed an undated amended petition of Appeal on the 25th January 2023. The Appeal was admitted on the 16th October 2023 and set down for hearing.
2. The Appellant 29th March, 2021 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. The Particulars of the charge are that-

On the 24th March, 2021 at Londiani Sub County of Kericho County, intentionally and unlawfully caused his penis to penetrate the vagina of SKR a girl aged 7 years old.



3. The Appellant also faced an alternative charge of committing Indecent Act with a child contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006. The Particulars are that:

On the 24th March, 2021 at Londiani Sub County of Kericho County, intentionally touched the vagina of SC a child aged 7 years old with his penis.

4. The Appellant pleaded not guilty to the charge and was subjected to a full trial from the 29th March 2021 to the 16th November 2021 with the Prosecution calling five (5) witnesses while the Appellant gave sworn evidence in defence was cross-examined and the case was closed where he was convicted on the main charge and sentenced to serve life imprisonment.
5. The Appellant being dissatisfied with the entire Judgement filed this Appeal seeking that this Court allows his Appeal, quashes the lower Court's conviction, sentence be set-aside and the Appellant be set at liberty.
6. The Appeal was argued based on the following Twelve (12) grounds in the undated Amended Grounds of Appeal filed on the 25th January 2023 reproduced in verbatim: -
 - i. The Learned trial Magistrate erred in law and in fact, in convicting the Appellant on Charges not proved by the Prosecution beyond reasonable doubt.
 - ii. The Learned trial Magistrate erred in Law and in fact, in admitting evidence by the Complainant contrary to the express provisions of Section 124 of the *Evidence Act* (Cap. 80) Laws of Kenya.
 - iii. The Learned Magistrate erred in Law and in fact, in admitting the evidence of the Clinical Officer PW5 which was equivocal and incomplete and proceeding to convict the Appellant on such evidence yet it was not in compliance with Rule 6 of the Sexual Offences (Medical Treatment) Regulations, 2012.
 - iv. The Learned Magistrate erred in law and in fact, by failing to conclusively ascertain the actual age of the accused thereby imposing an excessive sentence on the Appellant.
 - v. The learned magistrate erred in law and in fact, in convicting the Appellant despite the material and glaring contradictions in the prosecution evidence and its witnesses.
 - vi. The learned magistrate erred in law and in fact, in failing to find that the victim taking a warm bath after the alleged offence may have compromised the prosecution case as it also illuminates the state of mind of the prosecution witnesses.
 - vii. The learned magistrate erred in law and in fact, by holding that the prosecution had proved its case against the Appellant to the required standard of law whereas the evidence on record is not sufficient to make such a finding.
 - viii. The learned magistrate erred in law and in fact, by failing to interrogate testimonies by prosecution witnesses potentially exculpating to the Appellant.
 - ix. The learned magistrate erred in law and in fact, by failing to find that the duration of the alleged injury does not coincide with the time stated for the alleged offence as stated by the prosecution witnesses.
 - x. The learned magistrate erred in law and in fact, in failing to consider that the prosecution witness, PW4, the police officer, did not investigate the alleged crime and solely relied on PW1



and PW2's statements and did not also address the root cause of the matter as regards the extortion claims by the Appellant.

- xi. The Learned trial Magistrate erred in law and in fact, by reaching a conviction of guilt against the Appellant in circumstances where the evidence was against the weight of the evidence on record.
- xii. The Learned Magistrate erred in law and in fact, by imposing an excessive and harsh sentence on the Appellant.

Appellant's Case

7. The Appellant in his submissions dated 11th December 2023 submitted on two (2) framed issues that;
 - i. Whether the Prosecution proved the charges beyond reasonable doubt;
 - ii. Whether the sentence imposed was harsh and excessive.
8. As to whether the Prosecution proved the charges beyond reasonable doubt the Appellant submitted that it is trite law that the evidence of a single witness, the victim, is Sufficient without need of corroboration. Section 124 of the Evidence Act Cap 80 Laws of Kenya provides as follows: -

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim 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,”

9. That in achieving the above, it is imperative the Court follows due process of voir dire. The procedure for conducting a voir dire examination was stated in the celebrated case of Fransisco Matove Vs. Regina [1961] E.A to be: -

“ the trial magistrate should question the child to ascertain whether the child understands the nature of the oath; and if the Court does not allow the child to be sworn, it should record whether or not, in the opinion of the Court the child is possessed of sufficient intelligence to justify the reception of evidence, and understands the duty of speaking the truth”.

10. The Appellant submit that, consequences of non-compliance with Section 19 of the Oaths and Statutory Declarations Act was articulated by the Court of Appeal in Samuel Warui Karimi v Republic [2016] eKLR that:

“...we are in agreement the purpose of undertaking voire dire examination in a criminal trial is to protect the guaranteed right of a fair trial. Where the witness as in this case was aged 12 years and that essential step was not taken in a criminal trial, that trial becomes problematic. In the circumstances we find the evidence by the complainant was not properly received thus, the conviction of the appellant becomes unsafe to sustain as she was the complainant and not any other witness.”



11. The Appellant submit that, the question then is whether the trial was vitiated or whether the other evidence tendered was consistent with the evidence tendered by PW1, the victim, hence, the need for corroboration.

12. That indeed the evidence of a single witness, the victim, is sufficient without need of corroboration. Section 124 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows: -

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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. It is Appellant submission that, the testimonies propagated by the Prosecution witnesses were inconsistent, illogical and only cast a lot of doubt in the Prosecution's case, which should have been in the Appellant's favor.

14. That the crux of the submissions is to demonstrate that, the Appellant's conviction is not safe since the Court has to certain as who penetrated the victim, PW1.

15. That, PW3, being the Uncle who found the victim at the Appellant's home was the silver bullet and the trial failed or was not attentive to his testimony as he was the first to arrive and took the victim to her mother, PW2.

16. That, PW3, upon cross examination, testified and said the following: -

“At 7pm, I was at his home. I did not know the child was missing, I only heard the child being beaten by her mother..... he used the phone of the accused person to say that we have found the victim in his house. We found the victim at the sitting room, the accused came out when we knocked the door and when we inquired he said the victim was in the house. I saw the victim had no problem while

17. That this testimony by PW3 paints a picture and sheds light of the first interaction between the victim, PW1 and a third party, being Ann, other than the Appellant herein. more on PW2.

18. That, PW3's testimony is of more probative value since he had the first encounter and even used the Appellant's phone to call PW2.

19. That it is trite law that an eyewitness is a person who gives direct evidence on how an event took place and therefore his/her testimony would have more probative value compared to that of a corroborative witness who can only but provide circumstantial or indirect evidence of the events surrounding the accident. Accordingly, the trial magistrate ought to have placed more weight to the testimony by PW3 rather than relying

20. From the proceedings on records, PW3 was accompanied by Ann, PW1's aunt and found the victim at the Appellant's house, neither Ann nor PW3 were alarmed, as at that point, the victim had no problems.



21. In relation to the above, PW2 testified and said the following: -

“N said he heard his niece talking inside. I saw my daughter walking in a funny way with her legs crossed.”

22. From the above testimonies, it is safe to say that the victim was well when she came from the Appellant's house, only PW2 saw the victim walking with legs crossed yet PW3 testified that he "saw the victim had no problem while leaving the house."

Respondents Case

23. The Respondent submitted that the conviction was sound and the Appellant was well known and his identification evidence was watertight

Analysis and Determination

24. It is the duty of this first Appellate Court for an exhaustive examination of the Trial Court proceedings in criminal cases as was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

“In *Okeno v R* [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –v- R* [1957] EA. 336) and to the appellate Court's own decision on the evidence”.

25. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla –v- R* [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Courts findings and conclusion; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424.”

26. This Court has carefully considered the entire body of evidence and witness testimonies in the Trial Court and shall not regurgitate verbatim what transpired but rather consider the issues immersing against the evidence and testimonies.

On the issue of the charges not having been proven beyond reasonable doubt

27. The Appellant contends that the trial magistrate was in error in admitting evidence by the Complainant contrary to the express provisions of Section 124 of the *Evidence Act* (Cap. 80) Laws of Kenya that “voir dire” conducted vitiated the trial and that inconsistency in PW1 necessitate corroboration and that the victim's evidence was unsafe to sustain the conviction

28. Voir dire examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See *Duhaime, Lloyd*. “VoiR Dire definition” *Duhaime's Legal Dictionary*). With specific regard to the testimony of children, voir dire examination is essential to enable the Court satisfy itself that the child is conscious of the truth. The purpose of voir dire was explained by this Court in *Johnson Muiruri vs Republic* [1983] KLR 445 as follows:

1. “Where, in any proceedings before any Court, a child of tender years is called as a witness, the Court is required to form an opinion, on a voir dire



examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the Court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate Court is able to decide whether this important matter was rightly decided.
 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the Court took is clearly understood.
 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”
29. This Court has carefully considered the “voire dire’ administered and finds no fault save for the fact that counsel for the Appellant proceeded to cross-examine PW1 while the Court had clearly indicated the witness is to give unsworn evidence, this Court finds this disturbing and that the victim was clearly deprived off protection of the law and thus such proceedings forming cross examination of PW1 ought to accordingly be disregarded.
30. No objection was ever raised by the Appellant regarding the voir dire examination or the subsequent admission of PW1’ testimony. Again, it bears repeating that the purpose of voir dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth. In this case, the record shows that a brief interview was conducted in this regard on PW1; to which the victim even indicated to the Court that “I am going to say the truth in Court”.
31. In this case, from the record it can be seen that the complainant had a good recollection of the events preceding the occurrence of the offence, the Court notes that the victim broke down in tears while testifying. This Court does not thus find any inconsistencies on her testimony.
32. The cumulative evidence together with the medical report left no doubt at all that FO was indeed defiled. The medical report dated 26th March 2021 had findings of presence of bruises and freshly broken hymen, the testimony of “BW” was that at the time of the defilement, the appellant lifted her skirt and pushed down her panties and “started doing bad manners using his thing”. Naturally therefore, the most that the medical report would reveal in such circumstances is an act of the defilement which it did.
33. The operative words in the Proviso’ in Section 124 of the *evidence Act* is “the only evidence” this case had 5 witnesses and medical evidence, the consistency in evidence transcended into the defence case, the victim PW1 was sent for steel wire by PW2 at 7pm and by 9.00 pm she had not returned, PW3’s evidence was critical in that he disrupted the on goings in the Appellants house by throwing a rock on the corrugated iron sheet this is a fact narrated by the victim and the Appellant.



In the second issue as to whether the sentence imposed was harsh and excessive.

34. In the Case of Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) the Court of Appeal found and held that;

“the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applied to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denied a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences were allowed to be heard in mitigation. That was an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*.

“An indeterminate life sentence was inhumane treatment and violated the right to dignity under article 28 of *the Constitution*. An indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment. It was a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation was achieved”.

35. This Court is bound by the Superior Court’s decision therefore, I find this appeal is partially with merit to the extent of the unconstitutionality of life imprisonment as an indeterminate sentence, it is therefore prudent for this Court to consider the Appellant’s mitigation and disturb the trial magistrate’s sentence by imposing a term limit which the Appellant shall serve.
36. The Appellant was invited to mitigate before the Trial Court he stated that, he was 77 years old he lived alone, his wife and children are in USA, he denied having committed the offence sought for leniency.
37. This Court equally notes the positive accolades of the Appellant, by the prosecution witnesses that the Appellant is highly regarded as “Guka” with his generosity.
38. The Appellant is now 79 years old for all intents and purpose, a senior citizen, who is sickly and suffers great physical pain due to the harsh conditions inside the prison cell, he suffers natural physical and emotional pain due to the natural course of human living. He has served two years and four months imprisonment.
39. This Court considers the Appellant’s age as a critical mitigation factor noting that, although age cannot justify appropriateness of the sentence, this Court shall deploy mercy as a discretionary factor considering humanitarian considerations.
40. In the South African case of S v Nyambosi (2009 1 SACR 447 (T) 451e-f) the Court held that;

“justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed, not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation.”

41. Under the sentencing guidelines on elderly and sick offenders, it is provided under paragraphs 20:25 and 20:26 as follows:

20.25 There is no special consideration for terminally ill and elderly offenders. However, as with the case of offenders with disability, the consideration is whether in view of the illness or age, the sentence is rendered excessive. There are two dimensions worth considering. First whether the



illness or old age would cause the offender to experience undue and unjustifiable hardship in custody. Further, whether the conditions in custody would be termed inhuman bearing in mind the offenders' state. Second, whether the offender's condition is one that would cause undue burden on other offender 'sand/or prison officers taking care of him/her. (emphasis added)

20.26 Article 57 of *the Constitution* affirms the right of older members of society to live in dignity. The sentence imposed on them must therefore not undermine this right.

42. This Court accordingly sets-aside the life imprisonment sentence imposed and substitutes thereof with a sentence Six (6) years. Two (2) years to be served in prison and thereafter to be released on Probation for the Four (4) remaining years. The sentence shall run from the date of conviction on 16th November, 2021 and since the Appellant has been in custody from that date he shall be forthwith set free after requisite processing by the probation department and unless otherwise lawfully held. This is in line with Section 333(2) of the Criminal Procedure Code as well as Section 12 of the same Act.

It is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAKURU ON THIS 24TH APRIL 2024.

MOHOCHI S.M

JUDGE

Quorum;

Applicant- Present

J. Marasi for Appellant

Ms Jacky Prosecution Counsel for the state

Schola; CA

