Mutua v Republic (Criminal Appeal E122 of 2022)
[2024] KEHC 17160 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17160 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E122 OF 2022

TM MATHEKA, J

MAY 24, 2024

BETWEEN

SYLVESTER WAMBUA MUTUA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Being an Appeal from the ruling of Hon. C.A Mayamba (P.M) in the Senior Principal Magistrate's Court at Makindu Criminal Case No.E026 of 2022, delivered on 18th November 2022)

JUDGMENT

1. On 26/04/2022 AMM aged 9 years was coming from school about 5:00 pm. A person grabbed her from behind, covered her face with his hand and held her. He carried her to bush – removed her pant, lowered his trouser half way and inserted his urinating thing into hers. She would not scream because he covered her mouth – but she was able to identify him when he finished, as Wambua, the herdsman. He asked her to go. She left him there and went to home and went sleep.

2. When her mother PW2 came home, she found her sleeping. On asking she told her what had happened. She identified the person who had defiled her.

3. She was bleeding. Her mother rang her father and took the child to police station where they were referred to hospital. She gave the name of the person who defiled her daughter and he was arrested.

4. They were admitted in hospital – PW3 the clinical officer who filled the P3 produced the treatment notes, the PRC and operation notes. The child had sustained a perineal tear that had required stitching. The accused was arrested and charged with the offence.

5. In his defence he denied the offence and stated that he was indeed a herdsman but was arrested for an offence he never committed.

6. The trial court found him guilty, convicted him, sentenced him to 50 years imprisonment on 18/11/2022.

7. He was aggrieved and filed this appeal on the grounds:-

8. That there was a long duration from the date of offence and when P3 was filled.

9 . That the evidence of PW1 and PW2 are contradicting.

10. That medical report and medication was done 8 days after the date of crime.

11. That the appellant did not plead guilty of the offence and the sentence imposed was too harsh.

12. It was the appellant's position that the period between the date of alleged offence and filing of P3 was time spent looking for evidence to fix him – however, there is sufficient evidence that the child was taken to hospital required stitching and P3 could not have been filled before that. He argued that the medical examination was not done on the day of the crime but the record shows that the child reported the same day – she was taken to the police station the same day she was taken to hospital the same evening. The treatment notes are on record to establish those facts.

13. On its part the State affirmed the evidence on record – that age was of the complainant was established as nine years old. That defilement was proved as evidence of penetration was established by the child, and the medical evidence. That the defilement happened in the evening when there was sufficient light to see around– 5:00 pm – and the child was able to identify the accused person in the day light.

14. On age , the state relied on: Hilary Nyongesa v- Republic [2010] e KLR where Mwilu J. (as she was then) stated:

> " Age is such a critical aspect in sexual offences that it has to be conclusively proved. And this becomes more important because punishment (sentence) under the *Sexual Offences Act* is determined by the age of the victim."

15. One could argue that the position has changed with the finding that the mandatory nature of any sentence has been found to be unconstitutional. However I hold the view that with regard to sexual offences, the age of the victim vis a vis the age of the offender will always have a bearing on the sentence.

16. On penetration the state relied Mercy Chelangat vs Republic [2022] e KLR relied on in Bassita vs-Uganda S.C. Criminal Appeal No. 35 of 1995,where the Supreme Court of Uganda had the following to say in respect to proving penetration:

> " 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 the 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."

17. On identification the same court in Mercy Chelangat –vs- Republic

> " As in any criminal offence, the positive identification of a person is what connects them to that offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice." Further, the state

relied on the case of Kariuki Njiru & 7 Others –vs- Republic Criminal Appeal No. 6 of 2021 (unreported) where it was held as follows:

"Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

"Further to the above, it is well settled law that recognition may be more reliable than identification of a stranger."

18. The only issue for determination is whether the appeal has merit.

19. On conviction – I have carefully gone over the evidence on record. The ingredients of defilement were established. There is no doubt that this child was defiled – she stated so in clearly in her evidence in chief when she described what happened. She was bleeding when her mother found her, she immediately told her who had done it, and the accused was arrested.

20. The medical evidence is there. It was obtained immediately .She suffered a perineal tear that required stitching. No doubt there was forceful penetration.

21. Her age was not in dispute.

22. On identification of the perpetrator: She positively identified the accused, it was day light though evening and there was no hesitation, 30 minutes after the incident when her mother found her seeping she told her who had done it. The appellant was not a stranger- same evening – told her mother who did it.

23. The evidence also added up. There was no time wasted by the mother. There was no second guessing by the child and no iota of any reason why the child would plant this on the appellant. Hence as far as the conviction is concerned, the evidence was there and the conviction was warranted.

24. On sentence – the law provides for a mandatory life sentence, where the victim is below the age of 11 years . The learned trial court sentenced appellant to 50 years' imprisonment in my view to achieve the life sentence without using the term. The appellant submitted:

> " In the opinion of asking and wondering why he was sentenced to serve in prison for long time of 50 years, when there was no plea of guilty. The appellant did not plead guilty to the offence and yet he was sentenced to serve in prison. The appellant is afraid of what law, what justice and what criteria did the learned magistrate use to sentence him so many years in prison".

25. The trial court justified the 50 years' imprisonment with the impact on the offence on the minor.

26. The pre-bail report in the file shows that appellant was 38 years in 2022. Evidently the trial court was aiming at giving the appellant a life sentence without going through the mandatory route.

27. There is a reason the law provides for life sentence to keep people who are beyond repair away from the rest of society – but our prisons were also put there "Kurekebisha Na Haki" to rehabilitate with justice hence one of the aspirations of the criminal justice system is that persons who do horrendous things to other human beings in the forms of crimes can be kept away – for a while and come out better than when they went in. Otherwise there would be no need.

28. What the accused person did to this child may be unforgiveable and he deserves punishment. However, the justice system ought to trust itself to rehabilitate persons such as him.

29. Considering, the jurisprudence on sentencing with regard to life imprisonment , and the Kenya Prisons mandate to rehabilitate, taking lead from the Sentencing Policy Guidelines, the age of the appellant, the impact of the offence on the minor and the deterrent factor the sentence is revised from 50 years' imprisonment to 30 years imprisonment.

30. The appellant made a prayer for a retrial.

31. I have not found any reason to warrant a retrial.

32. Ultimately, the conviction is sustained, the sentence of the subordinate court is set aside and substituted with a sentence of 30 years imprisonment effective from the date of arrest.

33. R/A 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 24/04/2024

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

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