Nyokabi v Republic (Criminal Appeal E051 of 2023)
[2024] KECA 1199 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1199 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E051 OF 2023

LA ACHODE, GV ODUNGA & SG KAIRU, JJA

SEPTEMBER 20, 2024

BETWEEN

MAGARET NYOKABI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment of the High Court at Garsen (Githinji J) dated 22nd February, 2023. in HCCRA No. E009 of 2022)

JUDGMENT

1. Magaret Nyokabi the appellant herein, was charged in the Principal Magistrate's Court at Hola, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006, (SOA). In the alternative, she faced a charge of committing an indecent act with a child contrary to Section 11(1) SOA.

2. The particulars in the main charge were that on the 12th and 15th of April 2021 at Village (Particulars withheld) in (Particulars withheld) Sub-County within Tana River County, the appellant intentionally and unlawfully caused her vagina to be penetrated by the penis of DM, a child of 14 years. The particulars in the alternative charge were that on the same dates and in the same place, the appellant intentionally and unlawfully touched the penis of DM, a child aged 14 years, with her vagina.

3. The prosecution called 9 witnesses to make their case against the appellant, when she pleaded not guilty to the charge. We have set out a brief summary of the case to bring this appeal into perspective.

4. DM the complainant, was aged 14 years and in class six at (Particulars withheld) Primary when, on 12th April 2021, he had the first tryst with the appellant who was his neighbour. The two were out in the forest collecting firewood when the appellant stopped him, held his penis and laid him on the ground. She stripped him of his shorts and underwear, pulled a condom out of her pocket and put it on his

penis. She got on top of him and inserted his penis into her vagina. At the end they parted ways and went back home using different routes.

5. On 15th April 2021 the appellant called DM to accompany her into the forest to collect more firewood. On the way back, the appellant began fondling his penis before she whipped out a condom from her pocket and instructed him on how to put it on. DM did as he was told and they proceeded to have sex once more. They discarded the condom at the scene after they were done and went away.

6. The appellant warned DM not to tell his parents what they had done. It was his testimony that he wanted to tell his parents what had happened but he could not bring himself to pronounce those words. However, when his mother learnt about it and asked him the next day, he did not deny it. He did not know who informed his mother. He was taken to the police station to make a report and to the hospital in Bura for examination. He was later summoned before the village elders to whom he narrated what had happened. He positively identified the appellant as the perpetrator.

7. PW2 was JF also aged 14 years and a class 7 pupil at (Particulars withheld) primary school. He testified that on 15th April 2021 at about 8.00am, he was sitting on a stone at their play area with his friends Sipi and Mwangi. They saw the appellant known to him as Nyoks pass by followed shortly thereafter by DM. They became suspicious and decided to follow the two. The youths watched the appellant collect firewood and place it in the sack she was carrying before she and DM entered a thicket.

8. The youths followed and saw the appellant pulling DM's red shorts down while DM struggled to keep them up. DM gave in and lay down with his lowered shorts. The appellant lowered her jeans shorts and lay on DM and they started doing what the witness described as "bad manners". He saw the appellant shaking on top of DM as he and his friends lay on the ground and watched them silently. When the two were done, they discarded the used condom and went their separate ways.

9. PW2 and his two friends moved to the scene where the two were seen consorting and collected the used condom and its red wrapper. They carried them to the village and told DM what they had witnessed. They then hid the condom and wrapper in a black paper bag in the compound of Mwangi's home. PW2 also informed the appellant what they had witnessed. The appellant promised to give them Kshs. 100 and beseeched them not to disclose her misdeeds to anyone. However, Mwangi and Sipi reported the matter to DM's mother and later to the village elders in a meeting. They produced the condom and wrapper as proof and PW2 positively identified the appellant as the person they had seen molesting DM.

10. PW3 JM also a 14 years old class 7 pupil at (Particulars withheld) primary school, and PW4 SS an11 years old class 3 pupil at (Particulars withheld) primary school, corroborated the testimony of PW2.

11. PW5 WN, a farmer living in (Particulars withheld) Village was DM's mother. She received the report of the incident and informed her husband. She also made a report at the village meeting and went with other women to bring the appellant to the meeting called by the village elders for questioning. The appellant denied committing the act but DM confirmed the allegations. PW5 took DM to Bura Health Centre for examination and the treatment notes dated 23rd April 2021 were subsequently produced in evidence. The appellant was her neighbour and they had no dispute.

12. PW6 MMN, a peasant farmer in (Particulars withheld) Village , recalled that on 22nd April 2021, PW5 came to the village meeting weeping and reported that her son had been defiled by the appellant. The women in the meeting stormed the appellant's home and brought her to the meeting for interrogation. She denied the allegations but the victim, PW2, PW3 and PW4 all confirmed what had happened. They handed over the appellant together with the exhibits to the police. PW6 knew the appellant and positively identified her in court.

13. PW7 Baraza Obed Jillo the clinical officer in Bura Sub-County Hospital and a holder of a Diploma in Clinical Medicine and Surgery, carried out tests on DM. He was assessed to be 14 years old, was in good general condition and had no injuries to his private parts. PW7 filled the P3 Form, prepared the treatment notes and filled the PRC Form which were produced as Exh 5, Exh 6 and Exh 7 respectively.

14. PW8 No. 231873 PC Benjamin Bore of Bura Police Station, Anti-Crime Section was among the officers who accompanied the OCS to Village to re-arrest a woman reported to have defiled a 14 years old boy. He took possession of the used condom and wrapper recovered at the scene of crime and escorted the appellant to the police station. He also recorded the statements of the complainant and witnesses. He handed the appellant to PW9 No. 105493 PC Grace Cherotich of Bura Police Station Gender Office who was the Investigating Officer in the case. PC Cherotich issued the victim with a P3 Form and escorted him to Bura Hospital for examination and age assessment. She subsequently charged the appellant.

15. At the close of the prosecution case the appellant was put on her defence. She denied the accusations in a sworn statement and averred that the case was fabricated by PW1's mother, whose maize crop had, on a previous occasion, been destroyed by the appellant's goat. The appellant was unable to pay the sum of Ksh. 50,000 demanded by PW1's mother to resolve the matter out of court and was thus charged.

16. The Resident Magistrate considered the evidence and held that even though the accused person was treated as a first offender, the offence she was charged with was serious. She sentenced her to 20 years.

17. Dissatisfied with the decision of the trial court the appellant appealed to the High court at Garsen on grounds that: the prosecution did not prove their case beyond reasonable doubt; the defence was not properly weighed; the case was speedily conducted denying her fair trial; the investigations were shoddy as the scene of crime was not visited and the sentence imposed was harsh, excessive and unjust.

18. In reply the respondent stated that the ingredients of defilement were proved. That the act of penetration was proved by the evidence of PW2, PW3 and PW4 who saw the appellant and Pw1 in the act and recovered the used condom. That the testimony of PW1's was enough to prove the element of penetration. The respondent also submitted that the appellant's right to fair hearing was not infringed because she took plea on 26th April 2021 and was informed of her right to legal representation to which she responded that she did not wish to be represented.

19. The respondent further submitted that the trial was conducted in a speedy manner because the prosecution witnesses were minors and would have forgotten certain details if the trial lasted a longer period. Finally, the respondent submitted that the sentence was just and fair, considering the circumstances of the case.

20. The learned Judge considered the appeal and dismissed it. He affirmed both the conviction and sentence of the trial court, to the chagrin of the appellant. She then filed a memorandum of appeal and supplementary grounds of appeal to this Court which we summarize as follows: Section 8 of the SOA is inconsistent with, or in contravention of Articles 50(2), 25, 27, 28 and 29 of *the Constitution* and should be altered with adaptations that rhyme with *the Constitution*. Further that the sentence imposed by the superior court is harsh, excessive and unjust and did not take her mitigation into consideration.

21. The Appellant filed undated written submissions and averred that: the mandatory minimum sentence is unfair because it interferes with the discretion of the Judges and magistrates in imposing alternative sentences, that it offends *the Constitution* which dictates fair trial and the benefit of equal treatment in law.

She relied on the case of Fatuma Hassan Salo v Republic [2006], Yawa Nyale v Republic [2018] EKLR to urge that the mandatory minimum sentence is unconstitutional because: it does not take into account the overall objectives of punishment; it disregards the individual characteristics of the offence; and, it does not appreciate the need to ensure separation of powers between the legislature and the judiciary.

22. The appellant submitted that the prosecution did not prove a critical ingredient of defilement, that is, penetration, beyond reasonable doubt as required under Section 107 and 109 of the *Evidence Act*. She urged the Court to impose a sentence that meets the end of justice and adheres to the principles of proportionality, deterrence and rehabilitation. In her view this would be achieved by reducing the sentence to the time served. She prayed that the appeal be allowed.

23. M/s Eva Kanyuira, Senior Principal Prosecution Counsel filed written submissions dated 16th July 2024 on behalf of the respondent and averred that: the unconstitutionality of Section 8(1) and (3) of the SOA was not raised before the High court. Therefore, the appellant is precluded from raising it before this Court. She relied on Petition *No. E018 of 2023*- R v Joshua Gichuki Mwangi to support her argument. She asserted that the appellant was accorded a fair trial and none of her constitutional rights were violated.

24. Counsel submitted that the sentence was not harsh, excessive or unjust and under Section 361 of the Criminal Procedure Act this Court lacks jurisdiction to hear matters of fact. That harshness of sentence falls within this purview. She relied on the Petition *No. E018 of 2023*- R v Joshua Gichuki Mwangi to support her argument. Counsel argued that the appellant showed no remorse upon being found guilty instead she vehemently denied committing the offence. That her mitigation was considered since she received the minimum mandatory sentence of 20 years.

25. Counsel asserted that all the grounds relied upon by the appellant in this appeal, were not raised before the High court and should therefore, be dismissed and the decisions of the trial court which was affirmed by the High court upheld.

26. The appeal came before us for plenary hearing on 23rd July 2024. The appellant appeared in person and M/s Eva Kanyuira appeared for the respondent.

27. Upon assessing the record and grounds of appeal, the submissions and the law applicable, the issues that fall for determination are as follows:

    a. Whether Section 8(1) and (3) of the SOA are unconstitutional.

    b. Whether the ingredients of defilement were proved to the required standard.

    c. Whether the sentence was excessive.

28. In determining this second appeal our mandate is confined to consideration of matters of law by the dictates of Section 361 of the Criminal Procedure Code. In Karinga v Republic [1982] KLR 2013 this Court set out the mandate of the Court on second appeal as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did"

29. On whether the provisions of Section 8(1) and (3) of the SOA are unconstitutional, the appellant submitted that the said sections are inconsistent with: Article 27 which provides for the right to

equality and freedom from discrimination: Article 28 which provides for the right to human dignity: Article 29 which provides for freedom and security of persons: and, Article 50(2) which provides for the right to fair hearing. The appellant stated that the lack of discretion by the court to give a sentence below 20 years was an infringement to her right to fair hearing since it did not take into account mitigating factors.

30. The appellant did not elaborate on the nature of the inconsistency complained of between Section 8(1) and (3) and the provisions of *the Constitution* adverted to. She also did not demonstrate in what manner she was discriminated against or how her human dignity was violated in the trial. The mandatory minimum sentence of 20 years provided for under Section 8(3) applies to all persons convicted for the offence of defilement of a minor aged between 12 and 15 years.

31. Article 29 provides for freedom and security of persons and also provides for the deprivation of that freedom if there is just cause. In this case the appellant was taken through a trial at the end of which she was convicted and sentenced and is serving a legal sentence. The deprivation of her freedom was therefore, justified and is not a violation of fundamental freedom.

32. The record of appeal indicates that the trial followed the proper procedure. The appellant had a chance to hear the evidence brought against her and to cross-examine the witnesses. She also got a chance to mount her defence and lastly, to offer mitigation. In any case the grounds raised in the second appeal are new and were not raised in the first appeal for consideration. We cannot therefore, fault the superior court for failing to render itself on these grounds when they not placed before it. In a nutshell, we find that the appellant has failed to demonstrate that her rights under *the Constitution* were violated.

33. We move on to assess the record of appeal to establish whether the ingredients of defilement were proved. Section 8(1) SOA provides that:

    (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    Three ingredients are therefore, necessary for the offence of defilement to be proved. These are that the victim is a child, that there is penetration and that the person responsible for the ignoble act was positively identified.

34. In the instant case the birth certificate of PW1 adduced in evidence as PEX4, indicates that he was born on 28th November 2006. The incidents took place on 12th and 15th April 2021. He was therefore, aged 14 years at the time of the offence. The appellant did not dispute the age of PW1 during trial, or on appeal and neither will we belabour it.

35. We assessed the evidence of the identification of the appellant and the act of penetration together. These two ingredients were testified to by PW1 and his evidence was corroborated by PW2, PW3 and PW4 respectively. The witnesses trailed the appellant and PW1 into the forest and gave a graphic description of what they saw the two doing. They retrieved the condom used by the two and its wrapper at the scene of crime which were produced in evidence. These items were however, of little probative value since they were not subjected to forensic examination to link them to the appellant or the minor. The question of a grudge between the appellant and the mother of the victim does not hold water since the complaint did not originate from the victim's mother.

36. In the end we are satisfied that the ingredients of penetration and the identification of the perpetrator were proved beyond reasonable doubt by the prosecution.

37. Lastly, the appellant submitted that the sentence imposed upon him was harsh, excessive and unjust. Section 8(3) provides that:

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

38. Section 361(1)(a) of the Criminal Procedure Code stipulates that:

> " A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section-
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High court, unless of the subordinate court had no power under section 7 to pass the sentence."

The severity of sentence complained of by the appellant is therefore, not a matter of law that is open for consideration by this Court on second appeal. The appellant has not demonstrated the existence of any of the foregoing exceptions to the rule. A minimum mandatory sentence sets the floor rather than the ceiling. Therefore, that which the Section prescribes is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose harsher sentence. (See Petition *No. E018 of 2023* (supra), Supreme Court, referred to by the prosecution.

39. Upon a thorough analysis of the record we find that the prosecution evidence against the appellant was overwhelming. The appellant repeated the act of defilement severally and showed no remorse upon conviction. It is our considered view that the sentence was commensurate to the offence. In the premise we find that this appeal is lacking in merit and is therefore dismissed and the conviction and sentence are upheld.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR