Samita v Republic (Criminal Appeal 194 of 2019)
[2024] KECA 948 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 948 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 194 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JULY 26, 2024

BETWEEN

WYCLIFFE SAMITA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, (Wendoh, J.) dated 9th April, 2019inHCCRA No. 131 of 2017)

JUDGMENT

1. Wycliffe Samita, the appellant herein, was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offence were that on 27th January, 2017, in Bungoma North, he intentionally caused his penis to penetrate the vagina of NNJ[1], a child aged 6 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* based on the same facts as to victim, time and place.

2. Having denied the charge, the case went to full trial at the conclusion of which the trial court (D. Onyango, SPM, as he then was) convicted the appellant of the main count in a judgment dated 15th December, 2017. On the same day, the learned magistrate sentenced him to life imprisonment.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (Wendoh, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 9th April, 2019 but read by Riechi J. on 20th May, 2019.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised six (6) grounds in his (Supplementary) Memorandum of Appeal. Two of the six are duplicated. The remaining four are that:

    1. That the proceedings leading to the conviction of the appellant were conducted in violation of the appellant's constitutional rights to fair trial.

    2. That the prosecution evidence was mired in inconsistencies, discrepancies and glaring gaps which were not considered by the two courts below.

    3. That the sentence of life imprisonment imposed on the appellant has been declared unconstitutional; and that the appropriate sentence if the conviction is upheld should be 10 years imprisonment under the authority of Benard Barasa v R (Eldoret Court of Appeal Criminal Appeal No 313 of 2018).

    4. That the two courts below did not apply section 333(2) of the *Criminal Procedure Code*

6. We will briefly rehash the evidence as it emerged at the trial; establish the applicable standard of review in this second appeal; then revisit these grounds of appeal in light of the applicable standard of review.

7. NNJ is the survivor of the crime. She testified as PW2. She was six (6) years old. After voir dire, following which the trial court concluded that she was too young to know the meaning of oath and, therefore, gave an unsworn statement, she narrated to the court that on 27th January, 2017, the appellant, whom she referred to as "Samita", was ferrying her home from school in a boda boda when he took her to some "shrubs." He then removed her clothes and panties before putting his "chero" in the "place [she uses] to urinate". She explained that "chero" is what boys use to urinate. She told the court that afterwards, the appellant took her home but that her aunt, B (PW3) noticed that she was bleeding as she was washing her. B, then, called NNJ's mother, N (PW1) and a neighbour (C), who did not testify at the trial.

8. Brenda confirmed that she noticed that NNJ's genitalia were bleeding as he washed her in the evening. She was alarmed and immediately called a neighbour and NNJ's mother. N examined NNJ's genitalia and on noting the bleeding inquired what had happened. NNJ narrated that the appellant had defiled her. NNJ, then, reported the matter, first to Naitiri AP Camp, and then to Mbakalo Police Post. She also got a P3 form with which she took NNJ for examination and treatment at Naitiri Sub-county hospital.

9. Nelima explained that the appellant is her neighbour and her employee: she had employed him to operate her boda boda – the self-same one that the appellant was using to ferry NNJ from school back home.

10. At the hospital, NNJ was treated by a clinical officer on the same day – 27th January, 2017 – and returned on the 28th January, 2018 when she was examined by Edwin Masika Wafula, a Clinical Officer. Edwin filled the P3 Form and appeared in court as PW4. He produced it as evidence and testified that upon physical examination of NNJ he found a swollen Labia majora; vaginal bleeding; and inflamed vaginal walls. The hymen was intact but bruised. He formed the opinion that there was partial penetration.

11. PC Peter Musinya, the investigating officer, rounded off the prosecution case with formal testimony about his conduct of the investigations. He produced the exhibits – including the birth certificate of NNJ showing that she was six (6) years old at the time of the incident.

12. In his sworn evidence, the appellant protested his innocence and said that he was arrested randomly for no reason at all. He denied that he knew the complainant or her mother. He denied that he was a boda boda rider; and even denied that he knew a place called Luuya village where the incident happened!

13. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong v R*, [1984] KLR 611."

14. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. We will now consider the four grounds of appeal raised by the appellant.

15. We begin by noting that in his first appeal, the appellant raised the first two issues raised on this appeal.

16. Regarding the argument that the trial violated his constitutional rights to a fair trial, the appellant complained to the High Court that he had not been given witness statements and that this violated his right to have facilities to prepare for his defence under Article 50(2) (c) and (j) of the *Constitution*. Our case law has now established without a doubt that it is the Prosecution's duty to provide the witness statements to an Accused Person and the trial court's duty to ensure compliance with this constitutional requirement.

17. In the present case, the learned Judge scoured through the record, as we have done, and concluded that at every occasion when the trial proceeded, the appellant informed the court that he was ready to proceed. At no instance did he indicate to the court that he did not have the witness statements; and he raised the issue for the first time on appeal giving the impression that this was an afterthought. By indicating to the trial court that he was ready for the hearing without requesting for the witness statements, the appellant was implicitly confirming to the court that he had the witness statements. The Supreme Court has explained an accused person's minimal obligations to ask for the witness statements in *Hussein Khalid & 16 others v Attorney General & 2 others* [2019] eKLR in the following words:

> " " ... Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

18. This puts to rest the appellant's first complaint.

19. In the second ground, the appellant persists in arguing that the prosecution case was mired in fatal contradictions and discrepancies and that the evidence does not, as a whole, satisfy the very high standard of beyond reasonable doubt for a criminal prosecution. On our part, we will merely point

out that there are concurrent findings by the two courts below regarding the facts of the case and we are unable to say that they are so perverse as to invite our interference with them. The two courts below considered the so-called contradictions and found none. They both found the narrative of the survivor, NNJ, compelling and truthful, one that remained unshaken on cross-examination despite her tender age. They, further, found circumstantial corroboration to have been supplied by the testimonies of Nelima, Brenda and Edwin Wafula. This evidence went to the elements of identity of the perpetrator and the fact of penetration. Incontrovertible evidence on the age of the survivor was supplied in the form of the birth certificate produced at trial. Finally, the appellant did no favour to himself by giving an easily falsifiable, wafer-thin denial in his defence: that he did not know the complainant; the mother; or even the village the incident happened! He said that he did not even know how to ride a motor cycle! The two courts below easily found the defence incredulous and contradictory even based solely on the lines of cross- examination that the appellant had adopted which clearly showed that he had a relationship with the cast of characters who formed the prosecution witnesses.

20. In short, the appellant's challenge on conviction fails. As a second appellate Court, we have no justification whatsoever to depart from the concurrent findings of the two courts below.

21. Turning to his challenge on sentence, the appellant's first argument is a familiar one: it is that the life sentence mandatorily imposed on him by dint of section 8(2) of the *Sexual Offences Act* was unconstitutional – both for the mandatory nature of the sentence (which impermissibly takes away the sentencing discretion of the trial court) and for the indeterminate nature of the sentence. To support this ground, the appellant has cited this Court's decision in *Julius Kitsao Manyeso v Republic* Malindi Criminal Appeal No 12 of 2021 (Nyamweya, Lesiit & Odunga, JJAs).

22. Even though the respondent opposes this aspect of the appeal, protesting that the offence committed is so serious that it deserves the life imprisonment sentence which was imposed, our emerging jurisprudence has crossed the rubicon on this point: the statutory fettering of sentencing courts with mandatory minimums under the *Sexual Offences Act* is unconstitutional. See, for example, this Court's decisions in *Joshua Gichuki Mwangi v Republic* (Nyeri Court of Appeal Court of Appeal) Criminal Appeal No 84 of 2015 (unreported); and *Julius Kitsao Manyeso v Republic* -Malindi (Court of Appeal) Criminal Appeal No 12 of 2021.

23. Additionally, our most recent jurisprudence has similarly declared life imprisonment as unconstitutional due to the indeterminate nature of the sentence. See *Frank Turo v Republic* - Kisumu Criminal Appeal No 157 of 2017 and *Evans Nyamari Ayako v Republic* – Kisumu Criminal Appeal No 22 of 2018.

24. In the *Evans Nyamari Ayako Case*, this Court, in applying Articles 27 and 28 of the *Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.

25. Consequently, we must allow this aspect of the appellant's appeal only to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of section 8(2) of the *Sexual Offences Act*, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.

26. Having done so, we must determine the appropriate sentence. In the specific circumstances of this case, we have no doubt that the severest punishment imposed on the appellant was justified given the age of the complainant (only six years old) and the fact that the appellant breached a trust placed on him by the parent to the minor to take her safely home. Instead, he turned prey and defiled her in a manner most foul. The objective seriousness of the offence and the circumstances in which it was committed

makes the life imprisonment imposed a commensurate sentence. We will simply translate it to thirty (30) years imprisonment under the *Evans Nyamari Ayako* Principle.

27. Finally, the appellant's final ground of appeal must succeed: he simply asks that we apply section 333(2) of the *Criminal Procedure Code* to the term sentence we have just imposed. He is entitled to that by dint of that section.

28. The upshot is that the appellant's appeal against conviction fails and is hereby dismissed. His appeal against sentence minimally succeeds. The indeterminate life sentence imposed is hereby translated to a term sentence of thirty (30) years imprisonment.

    The sentence of 30 years shall be computed to begin on 30th January, 2017 since the appellant was in custody since that day.

29. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR