**Kirema v Republic (Criminal Appeal E014 of 2020)**
**[2022] KEHC 14793 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14793 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT CHUKA**

**CRIMINAL APPEAL E014 OF 2020**

**LW GITARI, J**

**OCTOBER 12, 2022**

**BETWEEN**

**DAVID MWENDA KIREMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(The appeal is against the decision of the Senior Resident Magistrate delivered on July 29, 2020 in Marimanti Criminal Case No. 41 of 2019)***

## JUDGMENT

1. The Appellant instituted these proceedings *vide* a Petition of Appeal that was filed on December 1, 2020. The appeal is against the decision of the Senior Resident Magistrate delivered on July 29, 2020 in Marimanti Criminal Case No. 41 of 2019.

2. The appeal is premised on the grounds that the learned trial magistrate erred in matters law and fact by:

    a. Convicting the Appellant on uncorroborated prosecution evidence.

    b. Failing to consider that the adduced evidence was insufficient to hold conviction.

    c. Failing to consider that the Appellant was constitutionally entitled for legal assistance hence failed to conform a fair trial. (sic)

    d. Imposing a harsh sentence without taking into account that the Appellant being a first offender was constitutionally guaranteed for the benefit of the least severe punishment.

3. The case against the Appellant was one of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, 2006 (hereinafter referred to as the "Act"). He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Act.

4. On the main charge, it was alleged that on September 10, 2019 at [Particulars Withheld] village of Gakurungu location within Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of JGM, a child aged 6 years old.

5. On the alternative charge, it was alleged that on September 10, 2019 at [Particulars Withheld] village of Gakurungu location within Tharaka Nithi County, the Appellant intentionally touched the vagina of JGM, a child aged 6 years old.

6. The Appellant denied the charge and the matter proceeded to full trial. In the end, the trial court found the appellant guilty, convicted him and sentenced him to serve life imprisonment. It is this decision that the Appellant is now challenging in this appeal.

7. The appeal was canvassed by way of written submissions. In his written submissions that were filed on March 2, 2022, the Appellant submitted that the evidence adduced by the prosecution did not prove the charge to the requisite standard. The Appellant further faulted the trial court for not cautioning him on the magnitude of the charges he was facing.

8. In addition, it was the Appellant's submission that the treatment note produced as evidence in the lower court proved the offence of indecent act and not defilement. Finally, the Appellant submitted that the sentence meted upon him was harsh and excessive considering that he was a young man and a first offender. The Appellant thus urged this court to allow this appeal and set aside the sentence meted out against him.

9. In response, the Respondent filed its written submissions on April 21, 2022. The Respondent submitted that by dint of Section 124 of the *Evidence Act*, the trial magistrate did not err in convicting the Appellant on the strength of the victim's uncorroborated evidence. The Respondent further submitted that the elements of the offence herein were proved beyond reasonable doubt as required by law. On the issue of the Appellant not being granted legal assistance, the Respondent relied on the case of *Thomas Alugha Ndegwa v. Republic* [2016] eKLR and submitted that the right is not absolute.

**Issues for determination**

10. From the grounds of appeal raised herein as well as the respective submissions of the parties, it is my view that the main issues for determination are:

    a. Whether the prosecution proved its case against the Appellant to the required standard.

    b. Whether the Appellant was accorded a fair trial.

    c. Whether the sentence meted against the Appellant was harsh or excessive in the circumstances.

**Analysis**

11. The duty of this court as the first appellate court is to subject the evidence to a fresh and exhaustive examination, draw its own findings and arrive at its own conclusion while bearing in mind the fact that the trial court had the advantage of hearing and seeing the witnesses. [See: *Okeno v. Republic* (1972) E.A, 32.]

12. Based on the above authority, I shall now proceed to analyze the issues raised in this appeal under the following heads.

**a. Proof of the Prosecution's case against the Appellant to the required standard**

13. Grounds of Appeal No. 1 and 2 are covered under this head.

14. It is common ground that the burden of proof in criminal cases lies with the prosecution. This position has been upheld in numerous cases. In *David Muturi Kamau v Republic* [2015] eKLR, the Court of Appeal, expressed itself as follows in this regard:

> " The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in*Miller v Ministry of Pensions*, [1947] 2 All ER 372 stated:
>
> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice." "

15. The Appellant herein was charged in the main count under the provisions of Section 8(1) of the Act which provides that a person who commits an act which causes penetration with a child commits an offence known as defilement. The ingredients of the offence of defilement were highlighted in the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013 which stated as follows:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

16. Proof of a victim's age is a key ingredient to prove in an offence of defilement given that the penalty is heavy dependent on the complainant's age. In this case, a birth certificate serial no. xxxx (P.Exhibit 1) was produced in evidence to prove PW1's age at the time of commission of the alleged offence. The authenticity of the said birth certificate was not challenged by the Appellant. The victim was born on August 4, 2013. This means that she was 6 years old at the time the subject offence was committed on 10/9/2019. The prosecution thus proved the age of the victim to the requisite standard.

17. The other elements that needed to be proved were penetration and identification of the Appellant as the perpetrator. On proof of these two elements, the Appellant has faulted the trial court for convicting the Appellant based on evidence that was allegedly not corroborated. To this end, the Respondent conceded that the prosecution did rely solely on the evidence of the victim herein, which evidence was not corroborated. They urged the court to consider the law under Section 124 of the *Evidence Act*.

18. As a general rule of evidence embodied in Section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

> " 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."

In this regard the State relied on the following court of appeal decisions.

In the case of *J.W.A.v. Republic* [2014] eKLR, the Court of Appeal observed:-

> " We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having

conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

A similar position was taken in *Mohamed –v- Republic* [2006] 2 KLR 138 where the court stated:-

> "It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

19. In addition, Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

20. When considering the evidence of a single witness, it is trite that such testimony needs to be tested with greatest care. In this regard, I echo the holding in the case of *Abdala bin Wendo and another -vs- R* (1953) 20 EACA166 where the Court held as follows:

> "'Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safety be accepted as free from the possibility of error."

21. Section 2 of the *Act* defines "penetration" as the partial or complete insertion of the genital organs of a person into the genital organs of another person.

22. In this case, the victim testified as PW1 and told the court that on the material day in the afternoon hours, the Appellant did bad manners to her. The victim told court that she knew the Appellant well and used to call him 'uncle' although he is her cousin as he is the son to her uncle from her father's side. She explained that she had gone to pick berries in her grandmother's farm. Her mother then sent her to get her lesso. The Appellant was there and heard the victim being sent. The Appellant followed her to K's house. When she got to Kaveso's house, the Appellant held her and made sexual advances on her which she declined. The Appellant then lifted the victim's dress, removed his thing for urinating and put it between the victim's legs as he laid on top of her. The victim cried. One Ciriaka responded to the cries, saw the Appellant on top of the victim, and she went to call the victim's father. The Appellant had already left the scene by the time the father of the victim arrived there. According to PW1, her father saw the watery discharge that the Appellant had left on her. PW1 further told the court that it was not the first time that the Appellant had held her and had sex with her.

23. PW2, was the victim's mother. She told the court that on the material day, she had gone to her maiden home and spent the night there. She received the news that her daughter was defiled on the next morning. She then took her daughter to the assistant chief's office before reporting the matter to the police. It was her testimony that the Appellant had defiled the victim previously and that as a family, they resolved to settle the matter out-of-court.

24. According to PW3, the investigating officer, PW2 went with the victim to Tunyai Police Post and reported that the Appellant had defiled the victim. She interviewed PW1 who told her that the Appellant had accosted her while she was picking wild fruits, wrestled her to the ground and had forceful sexual intercourse with her. She escorted the victim to Tunyai Hospital where she was examined and treated. PW3 told the court that the Appellant was later arrested by the father of the victim with the help of members of the public.

25. PW4 is a clinical officer. She produced in evidence the victim's P3 form in relation to the subject incident (P.Exhibit 3) that was filled by her colleague who had been re-deployed. PW4 stated that she was familiar with her colleague's handwriting and signature. It was her testimony that upon examination of the victim, her hymen was broken though not freshly, and her vulva was reddish and swollen. No bruised were seen but some mild discharge was visible from the victim's vagina. According to her, the swollen vulva was evidence of penetration.

26. From both the evidence of PW1 and PW4 as well as the P3 form produced in court, it is my view that there was penetration and the same was proved to the requisite standard of any reasonable doubt. On identification, it is my view that the evidence of PW1 sufficiently pointed to the Appellant as the perpetrator as he was known to her and according to the learned trial magistrate, the victim was confident and consistent with her answers on cross-examination. Accordingly, I opine that the prosecution did prove its case against the Appellant to the required standard of beyond any reasonable doubt. As such, this ground of appeal therefore fails.

**b. Whether the Appellant was accorded a fair trial**

27. Ground of Appeal No. 3 is covered under this head.

28. The right to free legal counsel at the expense of the State is guaranteed by *the Constitution* of Kenya (2010) through two key provisions. The first provision in this regard is Article 48 of *the Constitution* which recognises the right of access to justice for all. It provides that:

> " The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

29. The second provision is Article 50 of *the Constitution* which gives the right to a fair hearing. Article 50(2)(h) provides that:

> " Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly." [Emphasis added]

30. The record shows that the Appellant in this case was not represented by counsel and the offence of defilement that he was charged with attracted a penalty of life imprisonment. The Appellant is therefore faulting the trial court for not explaining to him the magnitude of the charges he was facing.

31. In the case of *Thomas Alugha Ndegwa* (*supra*), cited by the Respondent herein, the Court of Appeal held as follows:

> "(16) ...it is clear that the right to legal representation at state's expense is a fundamental human right and essential to the realization of a fair trial. However this right is not absolute and there are instances where the same can

be limited. In the case of *S v Halgryn* 2002, (2) SACR 211 (SCA) para 11, Harms JA stated that:

"Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations."

...

...

...

[20] In Kenya, Section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.

(21) In the instant application, it is clear the framework for full implementation of Article 50 (h) is now in place as required by *the Constitution*. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates."

32. Guided by the above authority and the cited constitutional and statutory provision, it is my view that this ground of appeal equally fails as the charge and particulars of the offence that the Appellant was facing was read to him in a language that he understood and the Appellant never applied for legal assistance before the trial court made its final determination.

**c. Whether the sentence meted against the Appellant was harsh or excessive in the circumstances**

33. Ground of Appeal No. 4 is covered under this head.

34. Section 8 of the Act provides for the offence of defilement of children of different ages. The younger the child, the more severe the sentence. Section 8(2) of the Act provides as follows:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

35. In this case, the victim was aged 6 years old at the material time. The Appellant submitted that he was entitled to a lesser definite sentence as he was a first offender. He relied on the case of *Francis Karioko Muruatetu & Another -vs- Republic*, Petition No. 15 & 16 of 2016 in further submitting that mandatory sentences were rendered unconstitutional by the apex court.

36. In this regard, the Supreme Court did clarify the position in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR by stating that:

"

" [10] It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, In that paragraph, we stated categorically that;

[48] Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right".

Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

(11) The *ratio decidendi* in the decision was summarized as follows;

> " 69. Consequently, we find that Section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute."

[Emphasis added]

In recent decision by the Court of Appeal in *Joshua Gichuki Mwangi-v-Republic* C.A. Nyeri Criminal Appeal No.84/2015. The court stated that the mechanical nature of mandatory sentences may promise certainity of seventy of sentences, it is often at the expenses of proportionality and an individualized approach to sentencing whcih balances between deterence and the rehabilitation of an accused. The court further went ont o state that ....."this court is a live to the fact that some accused persons are obviously deserving no less than the minimum sentences provided in the *Sexual Offences Act* due to the heinous nature of the crimes committed

> they will continue to be appropriately punished as held in *Athanus Lijodi-v-Republic* (2021) eKLR. The court also cited its decision in *Dismas Wafula Kilwake-v- Republic* (2019) eKLR where it held, "Being so persuaded, we hold that the provisions of Section of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing.
>
> An appellate court will therefore not interfere with the sentence merely because the mandatory sentence was imposed. It will consider whether the trial court applied the correct principles and the considerations had in passing the mandatory sentence. In this case, the trial magistrate observed that the appellant was clearly a habitual serial sexual predator who should be separated from the community. His heinous acts of commission on the victim of tender age may never be erased in her. As for accused his beastly acts call for a lengthy institutionalized mode of rehabilitation. The victim and the community need not be apprehensive of the accused's over sexual desires anymore. This comments were based on pre-sentence report which also contained the victim's impact statement. It is my view that the sentence imposed was based on sound reasons and the learned trial magistrate properly applied the principles of sentencing. I find no resont to interfere with the sentence.

37. A reading of the above Supreme Court's judgement shows that the mandatory minimum sentences provided under Section 8 of the *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of defilement.

38. Accordingly, it follows that the sentence meted against the Appellant was therefore a legal sentence and not excessive in the circumstances as the same is the mandatory sentence provided by law. Furthermore, this court cannot overlook the fact that the Appellant has committed a heinous crime that the appellant has occasioned trauma and suffering to a young girl. As such, it is my view, the appeal also fails under this head.

**Conclusion_**

39. The upshot of the above analysis, is that the appeal is devoid of merit and is dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 12TH DAY OF OCTOBER, 2022.**

**L.W. GITARI**

**JUDGE**