Mwai v Republic (Criminal Appeal E007 of 2021)
[2023] KEHC 22892 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E007 OF 2021

LM NJUGUNA, J

SEPTEMBER 29, 2023

BETWEEN

BERNARD KIBOGE MWAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. G.W. Kirugumi (PM) in the Chief Magistrate's Court at Kerugoya Sexual Offence No. 15 of 2019 delivered on 22nd June 2021)

JUDGMENT

1. This is an appeal arising from the abovementioned decision. The appellant has filed a petition seeking that the appeal be allowed, conviction be quashed and sentence be set aside on the grounds:

    a. that the trial magistrate erred in law and fact by applying the mandatory minimum sentence which is harsh, degrading and unconstitutional;

    b. that the appellant was denied right to counsel assigned by the state as provided under article 50(2) of the *Constitution*;

    c. that the trial magistrate failed to notice the inconsistencies, contradictions and discrepancies capable of raising doubts;

    d. that the trial magistrate failed to consider the medical evidence per the provisions of section 26 of the *Sexual Offences Act*;

    e. that the trial magistrate erred in law and fact by failing to appreciate that crucial evidence was not presented for instance the phone which contained photos of the minor that had allegedly been thrown in a pit latrine;

f. that the trial magistrate erred in law and fact by failing to consider that the element of penetration was not proved;

g. that the trial magistrate erred in law and fact by failing to consider that crucial witnesses were not called, for instance the family members of the complainant; and

h. that the trial magistrate failed to consider that there was a grudge as raised in the defense.

2. The appellant was faced with the charge of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 25th December 2019 in [particulars withheld] Village in Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of L.W. a child aged 6 years old.

3. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars for this charge were that on 25th December 2019 in [particulars withheld] Village in Kirinyaga County, the appellant intentionally and unlawfully did cause his penis to come into contact with the buttocks of L.W. a child aged 6 years old.

4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 5 witnesses in support of its case.

5. PW1 was the victim, a minor of tender age. The court conducted *voire dire* and allowed her to give an unsworn statement. She stated that during Christmas holidays they had visited her maternal grandparents and on the morning of 25th December 2019, the accused called her and asked her to accompany him to go to the coffee farm to look for the hook used in harvesting coffee. That she went to the farm and the accused followed her there, lay his sweater on the ground and asked her to lie on it facing up, then he removed her trouser and panty on one leg. That he then proceeded to insert his penis into her vagina and anus. That she felt pain and asked him to stop but he refused. That when she heard her mother calling her, she went towards the voice and the accused had gone away. That her mother called her brother who took them to hospital and the doctor examined her private parts and gave her medicine. She also stated that the accused had been showing her photos of pornographic nature in his phone but she did not tell her mother about it. On cross-examination, she recounted the events of the incident.

6. PW2, NWM and mother of the victim stated that her daughter was born on 24th July 2013 and she produced the birth certificate as prove. She stated that on the morning of 25th December 2019, she and her daughter were at her parent's home in [particulars withheld] village when she realized that she had not seen PW1 for about 30 minutes. That when she inquired from her mother, she said that she had thought PW1 was somewhere in the house but she wasn't. That PW2 went outside while calling out PW1's name and that PW1 came out from the shamba. That she also saw the accused coming out of the shamba using a different route at the same time. That PW1 told her what had happened and that the accused had defiled her. That PW2 called her brother who rallied some young men to arrest the accused and then he drove them (PW1 and PW2) to Kabonge Police Station and then to Kerugoya Hospital for examination and treatment where P3 and PRC forms were filled. That on the way home, PW1 told PW2 and her brother that the accused had been showing her pornographic content on his phone. That PW2 saw the accused person's phone which had a lot of PW1's photos. On cross-examination, she stated that PW1 said that the accused had been showing her pornographic photos on his phone.

7. PW3 James Mithamo Gathuku, principal clinical officer at Kerugoya County Referral hospital. He stated that on 27th December 2019 he completed P3 form from Kabonge Police post. That on 25th December 2019 PW1 was brought in looking sick and with injuries on her private parts. That a vaginal

examination showed that the injuries were about 2 hours old and an infection had set in as evidenced by pus in the urine sample. That the hymen was broken and there was pain in the genitalia. That PW4 also examined PW1 and filled the PRC form. That the minor was given medicine to prevent HIV. On cross-examination, he stated that from the history and examination of the tear in the hymen, the same was caused by penial penetration. That there were no sperms seen on examination and that the accused was not examined.

8. PW4 Naomi Njeri Benson, also a clinical officer at Kerugoya County Referral Hospital. She stated that she had examined the victim and noticed that the vaginal opening was reddish and tender to the touch and the hymen was broken. That there was nothing unusual on the anus. That there were no spermatozoa but upon testing samples in the lab, there was an infection which was treated with antibiotics and post-exposure drugs to prevent HIV. She produced the treatment notes and PRC form. On cross examination, she recounted her testimony and confirmed that she filled the PRC form. She also stated that there was forced penetration hence the injuries.

9. PW5 P.C. Ivy Mwende of Kabonge Police post was the investigating officer in the case. She stated that on the morning of 25th December 2019 at around 8AM, PW1 and PW2 went to the police post where they reported the incident of defilement. That she escorted them to Kerugoya County Referral Hospital where P3 form was filled after examination to confirm that PW1 was defiled by a person well known to her. She produced the stained clothing of the accused and the victim as exhibits in the case. She confirmed that she had ascertained the age of the victim through a birth certificate produced. On cross examination she stated that she did not know if there existed a grudge between the mother of the victim and the accused. That the accused refused to be escorted to hospital for examination.

10. After the close of the prosecution's case the accused person was placed on his defense.

11. He gave unsworn statement and stated that he and PW2 were involved in a relationship. That the day before the alleged incident, the accused and PW2 had spent time together and had sex at a lodging. That PW2 had seen the accused hugging another lady and was unhappy about it. That on 25th December 2019, he had woken up to do his usual chores when PW1 went to watch the cows and play with a calf. That after a while, PW2 called PW1 to the house but PW1 refused to go. That PW2 called again and PW1 went to the house. That soon after, PW2's brother arrived, then he left and returned with a crowd of people who arrested the accused and took him to the police station where he was detained until 5PM when his fingerprints were taken. He denied defiling the complainant and said that he had been framed.

12. The trial court in its judgment stated that PW1 was a credible witness and her testimony was corroborated by the evidence of PW3 and PW4 as well as the P3 and PRC forms. The accused was found guilty and sentenced to life imprisonment.

13. The parties on appeal were directed to file their written submissions and they both complied.

14. The appellant relied on the cases of *Maingi & Others v DPP* (2022) eKLR, *Samuel Momanyi v Attorney General & Another* (2012) eKLR, *Yawa Nyale v Republic* (2018) eKLR to challenge the application of the mandatory minimum sentence by the trial court terming the same as unconstitutional. He also submitted that he was denied the right to representation by counsel provided by the state as provided under Article 50(2)(g)(h) of the *Constitution*, thereby disadvantaging him. On this he also relied on the case of *Karisa Chengo v AG* (2019) eKLR. He decried the medical evidence saying that it failed to connect the offence to the accused person and it was inconclusive. That the evidence was inconsistent and unreliable. He cited the cases of *Langat Dinyo Domokonyang v Republic* (2017) eKLR and *Sawe v Republic* (2003) eKLR and added that the offence was not proven beyond reasonable doubt.

15. The respondent submitted that all the elements of the offence were proved beyond reasonable doubt. That the testimonies of PW1, PW3 and PW4 fully proved penetration occurred. They relied on section 124 of the *Evidence Act* and stated that there was sufficient evidence placing the appellant at the scene of the crime. That the court duly considered the facts before it to convict and sentence.

16. From perusal of the petition of appeal and submissions, it is my view that the issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt; and

    b. Whether the sentence imposed by the trial court is harsh and excessive.

17. This court is well aware of its obligations as a first appellate court and it endeavors to review the evidence at trial and reach its own conclusion. In the case of *Okeno v Republic* [1972] EA 32 I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

18. Under section 8(1) and (2) of the *Sexual Offences Act*, the prosecution had the task of proving the elements of the offence beyond reasonable doubt. These elements are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

19. Regarding the age of the victim, The *Sexual Offences Act* defines "Child" within the meaning of the *Children's Act* No 8 of 2001 which defines a "Child" as

> " .....any human being under the age of eighteen years."

    A birth certificate was produced to confirm that she was born on 24th July 2013 and was 6 years old at the time of the offence. Both the trial court and this court are satisfied that the victim was indeed a minor.

20. On penetration, PW1 stated that on the day of the incident, she was called by the appellant to go and collect the coffee harvesting hook from the coffee farm. That she went into the farm and the appellant followed her. That the appellant removed his sweater, which was produced as an exhibit and told PW1 to lie on it facing up. That he removed her trouser and panty forcefully from one of her legs and then inserted his penis into her vagina. The trouser and panty that had been worn by the victim during the incident were also produced as exhibits and PW4 stated that they were torn and soiled. Going by the proviso in section 124 of the *Evidence Act*, the testimony of PW1 is sufficient.

21. Even if the testimony by PW1 needed corroboration, the same was provided by PW3 and PW4 who confirmed that the minor indeed was defiled. PW3 stated that the hymen was broken and there was

onset of an infection following lab-tests. That she also has injuries on her genitalia, which seemed to have been inflicted about 2 hours prior to the time of examination. PW4 stated that the vaginal opening was reddish and sensitive to the touch and the hymen was broken. That the hymen was broken by penial penetration.

22. It is my observation from the evidence that not much time passed between the time when the incident occurred and when it was reported and the victim presented to the hospital for examination and treatment. It is therefore my view that the penetration was sufficiently proven beyond a shadow of doubt.

23. On the third element of positive identification of the assailant, PW1 stated that the appellant is known to her and he is employed as a farmhand by the complainant's grandparents. This person was not a stranger to her. PW2 stated that she saw the appellant coming from the same farm where PW1 was coming from, using a different route heading back into the homestead. These two pieces of evidence sufficiently placed the appellant at the scene of the crime at the time when the crime happened. The appellant in his defense did not give sufficient evidence removing himself from the scene, neither did he have an *alibi*. Additionally, even if the court was constrained to rely only on the evidence of PW1 alone, the honourable magistrate would have been empowered by section 124 of the *Evidence Act* and previous decisions like the case of *Wamunge v Republic*, (1980) KLR 424 where it was held;

> "It is trite law that where the only evidence against a defendant evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it a basis for conviction"

24. Consequently, on the first issue of whether the offence was proved beyond reasonable doubt, it is my view that the standard of proof was sufficiently met.

25. On the issue of inconsistencies in the evidence, the question is whether or not the alleged inconsistencies will affect the substance of the case itself. The appellant claims that there was inconsistency in the evidence. He stated that PW1 stated that she followed the appellant to the farm while PW2 stated that the appellant sent PW1 to get the coffee harvesting hook from the farm. In my view, this inconsistency does not change the substance of the case or its outcome. In the case of *Erick Onyango Ondeng' v. Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred v Uganda,* Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

26. The appellant pointed out that the prosecution failed to call crucial witnesses and produce exhibits that would have had an effect to the case. In my view, this is not a ground of appeal that can be adjudged within our current legal system which is adversarial. In this adversarial system, the court makes its decision based on the evidence placed before it. The prosecution is at liberty to choose their evidence and witnesses according to relevance in the case. To this end, I am guided by the case of *Dorcas Jemutai Sang v Republic* (2011) eKLR where the court held *inter alia*, that:

> "I shall proceed to ground (iv) of the appeal and say that it was a significant fact that the appellant did not call or failed to call any witness at the trial...In an adversarial legal system

like the one in Kenya, a party greatly undermines their case by failing to call witnesses. In this respect I find that this is not a ground to quashing the trial court's decision."

27. On the issue of the appellant's right to counsel at the expense of the state, I shall take the position of the court of appeal in the case of *Thomas Alugha Ndegwa v Republic* [2016] eKLR where the court relied on the case of *Karisa Chengo & 2 Others v R*, CR NOs. 44, 45 & 76 OF 2014, stated:

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (*supra*) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."
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> The South Africa Constitutional Court in the case of *Fraser v Absa Bank Limited,* (66/05) [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) (15 December 2006) stated:
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> > "…. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation…… The extent to which this might be appropriate or sufficient in a particular case will depend on all relevant prevailing factors, including the complexity and seriousness of the criminal charges."

28. It is my view that the right of the appellant was not expressly denied but application of the article 50(2) of the *constitution* towards capital offences where a substantial injustice would otherwise result.

29. In the premises, I find no reason to depart from the finding of the trial court as I am guided by the case of *Mbogo & Another v Shah*, [1968] EA, p.15 the court held that;

> "An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."

30. In light of the foregoing and considering the record of the trial court and the submissions in this appeal, I hereby uphold the trial court's finding on conviction. However, on the sentence of life imprisonment, I am guided by the supreme court's decision in the case of *Muruatetu & another v Republic*; *Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (Muruatetu 2) where the unconstitutionality of mandatory minimum sentences was discussed at length. In that regard, I do order as follows:

a. The sentence of life imprisonment is hereby set aside and reduced to 30 years imprisonment to run from the date of sentencing by the trial court.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent