Kanini v Republic (Criminal Appeal 91 of 2023)
[2024] KEHC 9215 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 91 OF 2023

RC RUTTO, J

JULY 26, 2024

BETWEEN

PAUL MBUFA KANINI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of Hon. C.K. Kisiangani (SRM) at Ruiru Senior Principal Magistrate Court Sexual Offence Case No. 24 of 2020 delivered on 23rd November 2021)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of defilement contrary to section 8(1) as read with section8(2) of the *Sexual Offences Act* Cap 63A has lodged this appeal against his conviction and sentence to serve life imprisonment. The Appellant prays for the Appeal to be allowed, conviction quashed and sentence set aside.

2. The appeal is premised on the grounds set out in the petition as follows, that:

    a. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding, prosecution failed to prove case beyond reasonable doubt.

    b. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding the crucial prosecution witnesses were not availed.

    c. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.

d. The trial court convicted and sentenced the Appellant of the offence charged, notwithstanding, the vital ingredients of the offence charged were not proved as stipulated by law.

e. The age of the complainant was not ascertained by the court.

f. The medical evidence availed in court were riddled with inconsistencies.

B. Background

3. Before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 23rd May, 2020 in Ruiru Sub- County within Kiambu County, intentionally and unlawfully caused his penis to penetrate the vagina of YM a child aged 4 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 23rd day of May, 2020 in Ruiru Sub-county within Kiambu County intentionally and unlawfully touched the vagina of YM with his penis a child aged 4 years.

4. The appellant pleaded not guilty to both charges and to prove its case, the prosecution called 4 witnesses as follows; PW1 the Complainant, PW2 the mother to the Complainant, PW3 the Police Officer and PW4 the medical doctor.

5. At the close of the prosecution case, the trial court found that a prima facie case had been established and the appellant was placed on his defence where he gave unsworn evidence. He called no witness in his defence Upon consideration of the evidence on record and the parties' submissions, the trial court convicted the Appellant for the offence of defilement as charged under Section 215 of the Criminal Procedure Code. The Appellant was sentenced to life imprisonment.

C. The Prosecution Case

6. The complainant YM testified as PW1. First, the court conducted a Voire dire examination and noted that the witness was intelligent enough, and could respond to questions put to her, but due to her age she may not understand the value of oath. The court thus directed that she gives unsworn testimony.

7. PW1 testified that Paulo did something bad to her. That he lied he would buy her chocolate, then took her to a bush where there was grass, he removed her cloth and 'dinyad' her. Here the trial court noted that PW1 pointed at her private part between her leg while crying.

8. PW1 also stated that nobody was there, that she knew Paulo as she used to see him around their home. Further, that Paulo took her home where she told her mother and was taken to hospital. Pw1 was able to identify Paulo by pointing at the appellant on the computer screen.

9. PW2 LMM, the victim's mother, stated that on 23rd May 2020 at around 6pm, she went outside to get her child but did not find her. The children who were playing with YM then told her that she had gone with Paulo who was going to buy her sweets. She went to the shop but could not find YM, she then told the neighbours that her child was missing. A search for YM started. They went to Paulo's house but did not find him. They called his number, it was unanswered. At around 7p.m the accused answered and said that he was on his way coming. The accused arrived at around 8p.m while carrying the child on the back. The child looked sad and was unable to walk. When asked what was wrong the child responded saying 'hapa nyuma'. Some women then raised up her dress and found she was bleeding from her vagina. That the child informed her that Paulo took her to a house with no doors and put her on the grass, removed her pant and put her on his susu.

10. PW2 testified that she took the child to Ruiru Sub-County Hospital where the doctor said that the Child had been defiled. She also stated that Paulo was beaten up and escorted to Ruiru Police Station. PW2 identified Paulo as the accused who was appearing on the screen.

11. PW3, Corporal Esther Chepkoech Maina, the investigating officer, told court that she was assigned to investigate a case OB/52/23/5/2020, a defilement case. That she called the mother of the victim who came with the child and she escorted them to Ruiru Sub-County Hospital. That the doctor confirmed that the child had been defiled. The accused was in police custody having been arrested by members of the public on the date of the incident and brought to the police station.

12. PW3 informed court that she retained the child underpant and biker that had blood stains, that she prepared an exhibit memo and took them to government chemist but the results were not yet out. She also told the court that PW1 had informed her that the appellant who was their neighbor had called her to buy her sweets but instead took her to unfinished building, defiled her and carried her back.

13. PW4, Dr. Wangechi Irungu informed court that Dr. Kamau who had filled the P3 Form was on study leave, and she was conversant with his hand writing for they had worked together for two years. She stated that YM was defiled on 23rd May 2020 by a known person. On examination, her clothes especially the pantie and biker had blood stains, she had bruises in her vagina and vaginal walls and lacerations on anal orifice and hymen was broken. She was bleeding from a tear on the vagina walls and around the anal region. She was taken to the laboratory; she was HIV negative and did not have STI. Vaginal swabs showed presences of spermatozoa and pus. The anal swab showed blood, pus and sperms. The degree of harm was grievous. The child had been penetrated in her vagina and anus, she was treated and referred to counselling.

14. Further that the appellant was examined, his private parts were normal, his urine showed blood in his urine and had no STI. The doctor produced the following as exhibits; treatment card and laboratory results as Exhibit 2; P3 Form as Exhibit 3; PRC Form as Exhibit 4; and treatment card for accused and laboratory results as Exhibit 5.

D. The Appellant case

15. In his defence, the appellant gave un-sworn statement, he denied the charges. He stated that he works as a cook at [Particu Withheld] hotel, and at around 3p.m he went back home and found PW2 and other women talking. He called PW2 because they had lived together and were friends. That he asked her about some money he had lent her. She then said she had no money, but he insisted that he was not leaving without his money. PW2 told him to accompany her to her house and he went with her. That he went at 8p.m knocked her door and PW2 opened and when he asked for the money PW2 said that she will scream and call neighbours to teach him manners. That he told her that she will not leave without the money, that is when PW2 screamed and neighbours came out. PW2 told the neighbours that he had defiled her child, the neighbours did not wait for his explanation, they beat him and took him to the police station. He also stated that the blood on his clothes was his after being beaten and escorted to the police station.

E. The Appeal

16. The appeal proceeded by way of written submissions.

a. Appellant's Submissions

17. The appellant in his submissions reduced his grounds of appeal to three :

a. That the Learned Trial Magistrate erred in law and facts to rely on the advanced complainant's evidence which did not precede a conclusive voire dire examination and without requisite corroboration.

b. That the Learned Trial Magistrate erred in law and facts by not appreciating to exercise discretion and pronounce a determinate imprisonment term that appreciates sentencing mandate which is to rehabilitate and reintegrate.

c. That the defence evidence shaded substantial doubts on the prosecution case thereby a burden of proof shifted following mandatory pronouncement of life sentence.

18. On the issue of voire dire examination, the Appellant submits that the examination done excluded any indication to unearth the understanding of PW1 about the consequences of telling the truth. He relied on the case of *George Kalume Katsui v Republic (2018) eKLR Criminal Appeal No. 42 of 2016*.

19. He further submitted that the evidence of PW1 was inconsistent with the findings of the medical doctor, PW4, on penetration as the medical findings stated that "the child had bruises in her vagina and vaginal walls and lacerations on anal orifice and hymen was broken. She was bleeding from the tear at the vaginal wall around the anal region...The spermatozoa found were not subjected to DNA to find out who they belonged to", while the evidence of PW1 was that, "he "dinyad" me here (points at her private part between her while crying) with his hand". In that regard, the appellant submitted that there was need for the witness to succinctly state how she was defiled rather not to conjecture and speculate as was concluded by the trial court.

20. The Appellant submitted that the clothes worn by PW1 were never exhibited to add weight on the assertions made by PW1 which emanated from inconclusive voire dire examination. He relies on the case of *Wafula v Republic Criminal Appeal 263 of 2019*(2024) KECA 372 (KLR).

21. On sentencing, the appellant made reference to the Seychelles Court of Appeal in Poonoo v Attorney General on life sentence and urged the court to individualize the sentence tuned to the circumstances of the offense and grant a just sentence.

22. He further submitted that the court did not consider his mitigation when he stated that, "I have a family, children and a wife I am a breadwinner. I pray that the court considers this." That in not considering the circumstances of the case exhaustively, the trial court denied him from benefiting from Article 50 (2) (p) of *the Constitution* of Kenya 2010 on the right to least severe punishment, Sections 216 and 328 of the Criminal Procedure Code on the Right to Mitigation, Section 46 (1) (i) of the *Prisons Act* on the right to remission, Section 4 of the *Probation of Offenders Act* on the right to probation and the Kenyan Sentencing Guidelines on the right to rehabilitation and reintegration. That this amounted to discrimination by dint of Article 27 of *the Constitution* of Kenya.

23. The Appellant finally submitted that considering the Muruatetu case 1 and 2, life sentence is unconstitutional as it does not give the offender an opportunity to reform and have a second chance after rehabilitation to show his effort to amend his unlawful way and be a law-abiding citizen. He relied on the case of Republic v Otieno (1983) and Republic v Arrisol (1957) in submitting that the trial court did not consider him as a first offender who ought not to be subjected to a maximum sentence.

24. The appellant urged the court to find that the life sentence was not build on cogent incriminating evidence hence he prays for an acquittal.

b) Respondent's Submissions

25. The respondent opposed the appeal in its entirety and deduced the issues its considered for determination as follows;

    a. whether the charges leveled against the appellant was proper; and

    b. whether the evidentiary realm was met by the prosecution at the trial court and whether the same was consistent to prove guilt.

26. On the first issue, the Respondent relied on the case of Wamuloya Karani v Republic, Criminal Appeal No 72 of 2013 and submitted that the ingredients of the offence of defilement are age and penetration.

27. On the ingredient of age, the Respondent submitted that the victim's age was below 11 years which necessitated the trial court to give a maximum life sentence upon its findings of a guilt conviction.

28. On the ingredient of penetration, the Respondent submitted that Section 2 of the Statute broadens the scope to encapsulate both partial and complete insertion of one's genitalia into another's genitalia and that the trial court found it to have been the case hence the conviction. The Respondent further relied on the cases of Francis Matonda Ogeto v Republic (2019) eKLR and Daniel Maina Nyambura v Republic Criminal Appeal No. E10 of 2021 that stated that penetration also needs to be medically proved to warrant a conviction of the offence of defilement.

29. Regarding whether the prosecution met the evidentiary realm to secure conviction, the Respondent submitted that the Appellant was identified by the complainant in court as the one who defiled her, PW2 proved the victim's age by a Notification of birth which showed that she was a 4-year-old girl at the time of the offence. Reliance was placed in the case of Mwalango Chichoro Mwanjembe v Republic (2016) eKLR.

30. It was the Respondent's submission that the medical doctor who assessed the complainant noted in the P3 form that the complainant had been penetrated sexually, and the oral evidence of PW1 and PW2 pointed also to the fact that there was unlawful penetration in the genitalia of the complainant. Further, that the credibility and reliability of the witnesses brought forth was not at any time put into question as all the narrations by the witnesses were not controverted.

31. In urging the court to dismiss this appeal, the respondent urged the court to affirm the findings of the trial court.

F. Analysis and determination

32. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336; Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

> "the duty of the first appellate court is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered

the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

33. Having considered the record of appeal as well as the rival submissions by parties, I discern the following issues for determination:

    a. Whether the voire dire was properly conducted;

    b. Whether the prosecution proved its case to secure a conviction;

    c. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

a. Whether voire dire was properly conducted

34. The Appellant submitted that the voire dire examination excluded an indication to unearth the understanding of PW1 about the consequences of telling the truth.

35. The record clearly shows that before taking the evidence of the complainant, the trial court conducted voire dire examination of the witness and made a finding that the victim was intelligent enough to respond to the questions put to her, but however, that she did not understand the value of an oath. In that regard, the trial court proceeded to direct that she gives unsworn statement.

36. The Court of Appeal in Japheth Mwambire Mbitha v Republic [2019] eKLR, stated that the purpose of Voir dire is to ensure that the minor understands the solemnity of oath and if not at the very list the importance of telling the truth which was in this case.

37. Further, the Court of Appeal in *James Mwangi Muriithi v R, Criminal Appeal No.10 of 2014*, held that;

> " Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth..." (Emphasis added).

38. It therefore follows that the objective of voire dire examination is to establish whether the child understands the truth, it is an objective call at the discretion of the court and not a subjective one where one is obligated to tick a box or a checklist for it to have been conducted effectively. The learned magistrate clearly put questions to the child and in exercise of his discretion found that while she did not appreciate the essence of an oath, she understood the need of telling the truth. The court then directed that she gives unsworn testimony. I see no fault in this. Notably, the appellant has not, as a matter of fact, clearly stated the alleged faults he complains of in the manner the examination was done.

39. I therefore find no merit on the Appellant's submissions that voire dire was not properly conducted and dismiss this ground of appeal.

b. Whether the offence of defilement was proved beyond reasonable doubt

40. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement". While Section 8(2) states: 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.

41. In the case of George Opondo Olunga v Republic (2016) eKLR the ingredients for the offence of defilement were set out as:

    a. Proof of the age of the victim;

    b. Proof of penetration or indecent act;

    c. Identification of the perpetrator.

42. On the issue of age, the record shows that the birth notification was produced by the mother who testified as PW2 and it confirms that the child was born on 18th December, 2015 and she was therefore 4 years old and 5 months at the time of the offence. This evidence was not challenged by the appellant and age of the minor was therefore proved beyond reasonable doubt. I therefore find and hold that there was sufficient evidence to proof the age of the victim as being 4 years old and 5 months at the time the offence was committed. She was just a child below the age of eleven (11) years as stated under section 8(2) of the Act.

43. On penetration, Section 2 of the *Sexual Offences Act* defines it as the partial or complete insertion of the genital organ of a person into the genital organs of another person. It is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination were sufficient to determine whether penetration occurred.

44. From the record PW1 testified that the appellant lied to her that they should go to buy chocolate and then did something bad to her. That he removed her trouser while in the bush where there was grass. She stated that the appellant "dinyad" her as she pointed at her private part between her leg while crying. She further testified that the appellant took him home at night while she was bleeding. This evidence is collaborated by PW4 through the production of the medical reports produced as Exhibits 2, 3, 4, 5. The reports showed that the injury was classified as grievous harm, the child had bruises in her vagina and vaginal walls and lacerations on anal orifice and the hymen was broken. She was HIV and VDRL negative. Vaginal swabs showed presence of spermatozoa and pus. This evidence confirmed that the victim was penetrated hence corroborated the evidence of PW1.

45. Notably, the oral evidence of PW2 corroborated PW1's. She stated that when they examined the child with other women, they saw her bleeding from the vagina. This corroborated the narrative that the victim gave them immediately they had found her.

46. The trial court at arriving at its decision held that PW1 was a credible witness and proceeded to establish that the evidence of penetration as was stated by PW1 and corroborated by the medical evidence, was sufficient to prove penetration in accordance with section 124 of the *Evidence Act*, Cap. 80.

47. In the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court held that;

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

48. Consequently, guided by the above, I find that the evidence of the victim and the medical Doctor, PW4 was sufficient to proof the ingredient of penetration, and there is no reason to disturb the finding of the trial court. I affirm that penetration was proved.

49. Turning to identification of the perpetrator, PW1 testified that he knew the Appellant who she stated as "Paulo" as he used to see him around home. PW1 identified him by pointing at him on the computer screen as the one who took him to the bush and told him that if she screams, she will kill her with his hands. This was further supported by PW2, her mother who stated that she was in the house when the child was playing outside but when she finished cleaning utensils, she went outside to get her child only to be told by other children that her child went with Paulo after he told her that he was going to buy her sweets. That Paulo used to live in the plot but moved out. That after he was called several times, which calls went unanswered, the child's father called and he picked up saying that he was coming and indeed, he came with PW1 and claimed that he was at the neighbor's house. All this goes to address the issue of identification of the appellant, by the victim.

50. In his defence the Appellant confirmed being known to the complainant's mother, that they assisted one another and their families were friends. The appellant does not dispute the fact that he was well known to the victim.

51. Based on the above set of facts I find that the appellant was positively identified as the person who defiled YM. The identification was not only by way of dock identification when the victim identified the appellant in court (on the screen) but more fundamentally, it was identification by recognition.

52. Flowing from the foregoing I find that the prosecution proved all the ingredients of defilement. I find no reason to disturb the finding of the trial court. This ground of appeal thus falls, for lack of merit.

c. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional

53. The appellant was sentenced to life imprisonment. In passing sentence, the trial court stated:

> "I have considered the mitigation and the fact that the accused is a 1st offender. I have also considered the mitigation and nature of offence which the victim will have to live with the trauma all her life. Also, this offence is on the rise and therefore there is need for a determent sentence. For these reasons, I hereby sentence accused to life imprisonment".

54. The Appellant's submission is two-fold: first that the trial court sentenced him to life imprisonment without considering the circumstances of the case and appreciating the sentencing mandate which is to rehabilitate and reintegrate. Secondly, that the trial court failed to consider that he is a first offender and he ought to benefit from the least severe sentence.

55. On the first fold, the appellant seeks that this court considers the fact that life sentence is unconstitutional and on the second fold, the appellant urges this court to consider that he is a first offender and without a helper of family responsibility.

56. Section 8(2) of the SOA. Provides that:

> " 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"

57. The offense of defilement that the Appellant was charged with provides sentence of mandatory life imprisonment. The issue on sentence is however at the court's discretion and can only be interfered with on appeal if it was issued in error.

58. There has been however, conflicting decisions of the Superior Courts on the place of mandatory nature of the sentences in respect of sexual offences. The Court of Appeal in Kamusyi Ngulu v Republic [2020] eKLR held that the Courts will uphold sentences prescribed by the *Sexual Offences Act* if upon exercise of discretion and consideration of the facts of each case such sentence is arrived on merit.

59. The same Court of Appeal has in the case of Julius Kitsao *Manyeso v Republic Criminal Appeal no 12 of 2021* Court of Appeal at Malindi (unreported) held that the reasoning of the Supreme Court in Francis Karioko Muratetu & Another v Republic [2017] eKLR applies to the imposition of a mandatory indeterminate life sentence and proceeded to substitute the life imprisonment in respect of the Appellant who had defiled a four (4) year old child with a forty (40) years imprisonment.

60. The Court of Appeal in the case of *Lovone v Republic (Criminal Appeal 388 of 2019*) [2023] KECA 352 (KLR) (31 March 2023) (Judgment) maintained the sentence of life imprisonment as was enhanced by the first appellate court and it had this to say:

> " The act perpetrated by the appellant against the complainant, who at the time was a child of the tender age of only four years was heinous indeed. It will forever taint her life. Moreover, we note that the appellant was not remorseful for his action. As a result, we are of the view that the sentence meted upon the appellant by the Superior Court is commensurate with the offence and as such we find no justification to interfere with the sentence."

61. However, the most recent decision by a 3-judge bench of the Court of Appeal in the case of *Akhonya v Republic (Criminal Appeal 269 of 2019*) (2024) KECA 327 (KLR) (15 March 2024) at Kisumu (Unreported) allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement. The court had this to say: -

> " 8. 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*.
>
> 9. In the Evan 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.
>
> 10. Consequently, we must allow the Appellant's appeal herein 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.
>
> 11. In the specific circumstances of this case, however, we would agree with the Respondent that the objective seriousness of the case and the aggravating

> circumstances make the life sentence a commensurate sentence: the survivor of the ordeal was a girl of extreme tender years at 8 years old; and the atrocity committed on her resulted in extensive damage and impact to her. The offence called for a stiffly deterrent sentence; one that signals the society's opprobrium to the conduct of the appellant as it reflects the inherent seriousness of the offence."

62. Consequently, drawing from the foregoing contemporary jurisprudence that the indeterminate life sentence is unconstitutional, and that life sentence now amounts to thirty (30) years imprisonment, I set aside the life sentence and sentence the appellant to 30 years in prison.

63. The upshot is that the appeal on conviction fails for lack of merit but the appeal on sentence is allowed by substituting the sentence of life imprisonment with a sentence of thirty years to run from the date of his arrest (given that the appellant was in custody during trial) in accordance with Section 333 (2) of the Criminal Procedure Code.

64. Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 26TH DAY OF JULY 2024

For Appellants: Present in person -Kamiti Maximum Prison

For Respondent: Ms. Kui

Court Assistant: Peter Wabwire