



REPUBLIC OF KENYA



KENYA LAW
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**Langat v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 16054 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E029 OF 2023**

RL KORIR, J

DECEMBER 19, 2024

BETWEEN

BENARD LANGAT APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
E051 of 2021 by Hon. Omwange J. in the Magistrate's Court in Sotik)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 30th October 2021 in Konoin Sub-County within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of AC, a child aged 11 years.
2. The Appellant pleaded not guilty to the charge before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case. The trial court found that the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave unsworn testimony and did not call any witness.
3. In a Judgement dated 27th April 2023, the trial court found the Appellant guilty of the offence of defilement, convicted him and sentenced him to serve life imprisonment.
4. Being aggrieved with the Judgment of the trial court, the Appellant, Langat through an undated home-made Petition of Appeal appealed against his conviction and sentence on the following grounds reproduced verbatim: -
 - i. That I pleaded not guilty at the trial and I still maintain the same.



- ii. That the learned trial Magistrate erred in law and fact by failing to realize that the main ingredients of the present offence was not proved to the required lawful standards.
 - iii. That the learned trial Magistrate erred in law and fact by basing his conviction on the Prosecution's witnesses whose evidence was marred with contradictions, inconsistencies, discrepancies and glaring gaps.
 - iv. That, the learned trial Magistrate erred in both law and fact by rejecting my plausible defence without any explanation.
5. The Appellant filed further grounds of Appeal and they are reproduced verbatim as:-
- i. That the trial Magistrate erred in law by awarding a life sentence which was against the spirit of *the Constitution* of Kenya and did not meet the objectives of sentencing.
 - ii. That the learned trial Magistrate erred in law and fact by dismissing his alibi defence which was cogent and truthful.
 - iii. That the Appellant was not accorded a fair trial contrary to Article 50(2) of *the Constitution* of Kenya.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan vs State of Karnataka and Others Criminal Appeal No. 637 of 2015* as follows:-

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed.....”

7. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled AC (PW4) on 30th October 2021. PW4 testified that the Appellant did bad manners to her by penetrating her female organ using his male organ. PW4 further testified that her grandmother (PW2) found them in the house.
9. AM (PW2) who was the victim's grandmother testified that on the material day at around 4 p.m., she came back home and found the kitchen open. That the Appellant and the victim came out of the kitchen and ran in opposite directions.
10. Daniel Kiprotich Too (PW5) who was the clinical officer testified that he examined the victim six days after the alleged commission of the offence. He testified that due to the passage of time, he could not find anything positive and could not confirm whether the victim had been defiled or not. He however stated that he found pus cells and white blood cells in the victim's urine which indicated that the victim had an infection. PW5 further stated that the victim had a long standing broken hymen.



The Appellant's Case

11. The Appellant, Benard Langat (DW1) denied committing the offence. He stated that on the material day (30th October 2021), he was arrested as he walked on Hillary Ngetich's land and he was taken to the police station.

The Appellant's submissions.

12. In his undated submissions filed on 6th March 2024, the Appellant submitted that the Prosecution case against him was not proved. That the Prosecution failed to prove penetration and the clinical officer testified that he could not confirm whether the victim was defiled or not. The Appellant further contended that an old broken hymen was not proof of penetration. He relied on P.K.W vs Republic (2012) eKLR.
13. It was the Appellant's submission that the Prosecution failed to prove the victim's age. That the victim did not state her age and the clinical officer (PW5) did not conduct an age assessment on the victim. It was the Appellant's further submission that he was not identified as the perpetrator. That dock identification was misleading and he was not arrested with the victim.
14. On sentence, the Appellant submitted that the life sentence was harsh as it was indeterminate. That his right to a less severe punishment was guaranteed by Article 50(2) (p) of *the Constitution* of Kenya.

The Prosecution's/Respondent's submissions

15. Through their submissions dated 4th December 2023, the Respondent submitted that they proved the age of the victim who was 11 years of age through the production of the victim's Birth Certificate. That their evidence on the victim's age was uncontested.
16. It was the Respondent's submission that the Appellant was positively identified by the victim. That the Appellant and the victim (PW4) were not strangers to each other as the Appellant was a farmhand at her (PW4) uncle's house. It was the Respondent's further submission that the Appellant was recognized and placed at the scene by the victim's grandmother (PW2).
17. The Respondent submitted that they proved penetration. That the victim's oral account was clear that vaginal penetration was established and the clinical officer noted that the victim had an old broken hymen. They further submitted that the clinical officer did not find anything significant after the examination due to the passage of time which he explained.
18. The Respondent submitted that the Appellant merely denied committing the offence and they asked this court to reject his defence.
19. I have gone through and considered the trial court's proceedings, the undated Petition of Appeal filed on 13th June 2023, the undated Appellant's written submissions filed on 6th March 2024 and the Respondent's submissions dated 4th December 2023. The following issues arise for my determination:-
 - i. Whether there were procedural issues affecting a fair trial.
 - ii. Whether the Prosecution proved its case beyond reasonable doubt.
 - iii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iv. Whether the sentence preferred against the Appellant was just and fair.



i. Whether there were procedural issues affecting a fair trial.

20. In his further grounds of the Appeal, the Appellant lamented that his right to a fair hearing under Article 50(2) of *the Constitution* of Kenya had been violated. Article 50(2) of *the Constitution* of Kenya provided:-

Every accused person has the right to a fair trial, which includes the right—

- (a) to be presumed innocent until the contrary is proved;
- (b) to be informed of the charge, with sufficient detail to answer it;
- (c) to have adequate time and facilities to prepare a defence;
- (d) to a public trial before a court established under this Constitution;
- (e) to have the trial begin and conclude without unreasonable delay;
- (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
- (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
- (h) 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;
- (i) to remain silent, and not to testify during the proceedings;
- (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- (k) to adduce and challenge evidence;
- (l) to refuse to give self-incriminating evidence;
- (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
- (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
 - (i) an offence in Kenya; or
 - (ii) a crime under international law;
- (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
- (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
- (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.



21. The Appellant was not specific on which of the rights above was infringed upon by the trial court. I have however keenly gone through the trial court record and noted that the Appellant took plea on 5th November 2021 which plea was unequivocal. I have also noted that the Appellant participated in the trial where he cross examined MN (PW1) and when he was placed on his defence, he adequately presented his defence. There was no evidence to indicate that the Appellant's right to a fair trial had been violated and I dismiss this ground of Appeal.

ii. Whether the Prosecution proved its case beyond reasonable doubt.

22. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender ought to be proved.

23. Regarding the age of the victim, MN (PW1) who was the victim's mother testified that at the time of the alleged commission of the offence, the victim (PW4) was aged 11 years. She produced a Birth Certificate as P.Exh 1. PW1's testimony on the victim's age was uncontroverted after cross examination.

24. In *Mwalengo Chichoro Mwajembe vs. Republic*, Msa. App. No. 24 of 2015 (UR), the Court of Appeal held: -

“the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa - vs - Republic, Criminal Appeal No. 19 of 2014* and Omar Uche *Vs Republic, Criminal Appeal No. 11 of 2015*. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.....”

25. I have looked at the Birth Certificate (P.Exh 1) and it showed that the victim (PW4) was born on 30th May 2010. It is my finding that at the time of the commission of the offence, the victim (PW4) was aged 11 years old.

26. With regard to the issue of identification, the victim (PW4) testified that on the material day, she was at her grandmother's place. That the Appellant came, called her to the kitchen and did bad manners to her. PW4 further stated that her grandmother found them in the house. The Appellant positively identified the Appellant in court.

27. AM(PW2) who was the victim's grandmother stated that on the material day at around 4 p.m., she found the Appellant and the victim and when they saw her, they ran in opposite directions. PW2 further stated that the Appellant was a worker in her son's house. PW2 positively identified the Appellant in court.

28. Mercy Langat (PW3) stated that the Appellant was an employee in her home and she got the information of the defilement from her in-law's wife (PW1). PW3 positively identified the Appellant in court.

29. From the evidence above, it was clear to me that the Appellant and the victim (PW3) were well known to each other. There was clear evidence that the Appellant was an employee of the complainant's uncle and lived in his employer's house which was in the same farm with the victim's home. This evidence



was more of recognition than normal identification. Further, PW2 who found both the Accused and the complainant in her kitchen knew both of them well. They both scattered when PW2 found them. The act of running away denoted guilty conduct. I find the identification evidence as shown in this particular case was strong and free from any doubt.

30. Flowing from the above, it is my finding that the Appellant was positively identified by the victim (PW4) as the perpetrator of the offence.
31. With regard to penetration, Section 2 of the [Sexual Offences Act](#) defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
32. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence was insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
33. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
34. Regarding medical evidence, Daniel Kiprotich Too (PW5) a clinical officer from Mogogosiek Health Centre testified that he examined the victim (PW4) six days after the alleged commission of the offence and found that she had an old broken hymen. He further testified that the victim had pus cells and white blood cells in her urine which was an indication of an infection.
35. It was PW5's testimony that due to the passage of time, he did not find anything positive after examining the victim and that he could not confirm whether the victim had been defiled or not. He produced the treatment notes, P3 Form and PRC Form as, P.Exh 2, P.Exh 3 and P.Exh 4 respectively.
36. I have looked at the aforementioned exhibits and they all indicate that PW4 was examined on 3rd November 2021 which was approximately 4 days from the material day (30th October 2021). The exhibits indicated that the victim had a long standing broken hymen and did not have lacerations on her genitalia and therefore there was no evidence of recent penetration.
37. Having considered the above evidence, it is my finding that due to the passage of time between the alleged commission of the offence and the date of examination, the medical evidence in this case was wanting and it did not assist the court in determining if there was penetration or not. This court wonders why the victim was not taken for medical examination as soon as the immediate family members learnt of the defilement as the evidence clearly shows that the victim's grandmother and mother got to know by the following day.
38. However, as earlier stated, the court can use the sole testimony of the victim as a basis for conviction. Section 124 of the [Evidence Act](#) provided:-

Notwithstanding the provisions of section 19 of the [Oaths and Statutory Declarations Act](#) (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

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



39. I have carefully gone through the victim's testimony where she stated that the Appellant did bad manners to her by inserting his male genital organ into her female genital organ. The victim further stated that they were found in the house by her grandmother. This testimony was corroborated by her grandmother (PW2) who stated that she found the Appellant and the victim in the house and they (Appellant and victim) ran away.
40. It is my finding from evaluating the victim's evidence that her evidence was cogent, believable and enough to establish penetration. She was able to describe to the trial court how the Appellant defiled her. I have also noted the fact that the Appellant ran away when they were caught by the victim's grandmother which indicated a guilty conscience.
41. I have considered the Appellant's submission that the complainant's broken hymen did not suggest penetration. That might very well be true. I have however considered the circumstances of the case and found no reason to disbelieve the testimony of the victim that she was penetrated by the Accused.
42. I have re-evaluated the evidence and found all the ingredients of the offence proved. It is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

iii. Whether the Appellant's defence placed doubt on the Prosecution's case.

43. The Appellant denied committing the offence. He stated that on the material day (30th October 2021) he was arrested as he walked on Hillary Ngetich's land and was thereafter charged with the offence of defilement. I have considered the Appellant's defence and it is my finding that his defence was weak and a mere denial.
44. It was a ground of the Appeal that the trial court did not consider his alibi defence. Having looked at and considered the Appellant's defence in its entirety, it is my finding that his defence did not raise the issue of an alibi. As already noted above, it was a mere denial.
45. Flowing from the above, it is my finding that the Appellant's defence did not create any doubt on the Prosecution's case which I have already found proven.

iv. Whether the sentence preferred against the Appellant was severe.

46. The Appellant was charged under section 8(3) of the [Sexual Offences Act](#) which provides the penalty as follows:-

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.

47. The evidence however clearly showed that the victim of the offence was 11 years old and therefore the applicable penal section was section 8(2) of the [Sexual Offences Act](#) which provides the penalty 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.

48. The Appellant was sentenced to serve life imprisonment. While meting out the sentence, the trial court noted that the Appellant was an employee of the victim's extended family and he took advantage of the victim when he knew nobody was at home.



49. The Appellant submitted that the life sentence was harsh and inhumane as it was indeterminate in nature. He further submitted that he had a right of a lesser sentence as guaranteed under Article 50 (2) (p) of *the Constitution* of Kenya.

50. For this court to interfere with the trial court sentence, it must be shown that the trial court acted on the wrong principle or ignored material factors when meting out the sentence. In *Nelson Ambani Mbakaya vs Republic* (2016) eKLR, the Court of Appeal stated that:-

“Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.....”

51. As earlier noted, the Appellant was sentenced to life imprisonment. The Court of Appeal in the case of *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) (7 July 2023) (Judgment) declared a life sentence unconstitutional.

52. However, recently, the Supreme Court ruled that the Court of Appeal had no jurisdiction to declare a section of the law unconstitutional if the constitutionality of the statute or section of law was not brought up first before the High Court. The Supreme Court further clarified that for a statute or a section of the law to be declared unconstitutional, must be litigated first in the High Court and then have the Legislature amend the Act.

53. In *Republic vs Joshua Gichuki Mwangi and 4 others*, Petition Number E018 of 2023, the Supreme Court of Kenya held:-

“We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the *Muruatetu* Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the *Muruatetu* case and the *Muruatetu* directions in this instance.....

.....Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence.....

.....Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system.



Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.....

.....We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

54. The import of the above decision was that a life sentence was a legal and valid sentence.
55. After considering the circumstances of the case, I agree with the trial court that the Appellant who was well known to the victim had sexual intercourse with the victim, whose naivety he clearly took advantage of. He deserved the sanction of the law. The life sentence was harsh and excessive but as already shown above, it was a lawful sentence.
56. In the end, I uphold the conviction and affirm the sentence. The Appeal is dismissed. The Appellant has 14 days’ right of appeal to the Court of Appeal.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF DECEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Mr. Njeru for the State, Appellant present acting in person and Siele (Court Assistant).

