Lang'at v Republic (Criminal Appeal E034 of 2021) [2023] KEHC 1400 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1400 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E034 OF 2021

RL KORIR, J

FEBRUARY 28, 2023

BETWEEN

RONEY KIPRONO LANG'AT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the Original Conviction and Sentence by Hon. J. Omwange, Senior Resident Magistrate at Sotik Magistrate Court, in Sexual Offence Case No. 52 of 2019)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on the diverse dates between October 3, 2019 and October 7, 2019 in Konoin sub-county within Bomet county, intentionally and unlawfully caused his penis to penetrate the vagina of FC a child aged 15 years.
2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on diverse dates between October 3, 2019 and October 8, 2019 in Konoin sub-county within Bomet County, intentionally and unlawfully touched the vagina of FC, a girl aged 15 years with his penis.
3. The Appellant was charged with a second count of abduction contrary to section 265 of the *Penal Code*, Cap 63 Laws of Kenya. The particulars of the charge were that on the 3rd day of October 2019 in Konoin sub-county within Bomet county, by use of force compelled FC to go with him to his house in [Particulars Withheld] village.
4. On October 15, 2019, the Appellant was arraigned in court to take plea where he denied all the charges. The Prosecution called 5 witnesses during the trial in support of their case. At the close of the Prosecution case, the trial court vide ruling dated February 26, 2020 placed the Appellant on his

defence and issued directions under section 211 of the *Criminal Procedure Code*. The Appellant elected to give unsworn statement and called no witnesses.

5. By judgement dated September 24, 2020, the trial court convicted the Appellant of the alternative charge of committing an indecent act with a child and count 2. The trial magistrate then sentenced the Appellant to serve 10 years imprisonment for the alternative charge and 6 months imprisonment for the second count.

6. Being dissatisfied with the decision of the trial court, the Appellant filed a Memorandum of Appeal on September 29, 2021 where he raised 5 grounds as follows:-

   1. That he pleaded not guilty on charges and maintained the same.

   2. That the learned trial magistrate erred in both law and fact by failing to note that he was not accorded a fair trial as stated under Article 50 (2) of the *Constitution of Kenya, 2010*.

   3. That the learned trial magistrate erred in law and in fact whereby he arrived at a determination without considering mitigation factors as stated in the Supreme Court decision on paragraph 70-71.

   4. That the learned trial magistrate erred in law and fact by convicting him on charges that did not meet the evidence that were not consistent and corroborative (sic).

   5. That the learned trial magistrate erred in law and fact on charges that did not meet the required standard of conviction.

7. On June 15, 2022, the Appellant filed an amended Memorandum of Appeal in which he raised three grounds as follows: -

   1. That the learned trial magistrate erred in law and in fact in meting a sentence without observing that the Appellant was not accorded a fair trial and that Article 50(2) of the *Constitution of Kenya* was violated against him.

   2. That the learned trial magistrate erred in law and in fact in failing to consider the irreconcilable contradictions in the adduced evidence of the Prosecution witnesses and the evidence of the two clinical officers in raising questions of the trustworthiness of the witnesses.

   3. That the learned trial magistrate erred in law and in fact in meting a mandatory minimum sentence which did not meet the constitutional threshold particularly Article 25, 27. 28 and 500 of the *Constitution of Kenya*, Petition E017 of 2021.

8. The Appeal was canvassed by way of written submissions.

The Appellant's Submissions

9. The Appellant's submissions were filed on June 15, 2022. He submitted that he was not accorded a fair hearing contrary to the *Constitution* under Article 50 (2) because he was never issued with police statements and that even if this never arose in the trial court, the appellate Court had a duty to ensure that the provisions of the *Constitution* were enforced.

10. The Appellant submitted that the evidence tendered by the Prosecution was inadequate, inconsistent, contradictory and unreliable as it was based on suspicion. That a witness whose evidence was relied upon by the court ought not create suspicion on their character or doubt on their evidence. Finally the Appellant submitted that the Prosecution did not prove their case to the required standard. To this end, he cited the case of *Mary Wanjiku Gichira vs. Republic* Criminal Appeal No 17 of 1998.

11. On sentencing, the Appellant submitted that the trial court failed to exercise its discretion in meeting the minimum mandatory sentence which was considered unjust and unfair because such sentences did not allow the trial court to consider the circumstances of the offender and were also disproportionate to the accused's culpability. That the trial court ought to have considered his mitigation and that the appellate court should exercise its discretion in reviewing the sentence.

The Respondent's/Prosecution's Submissions

12. The Prosecution's submissions are dated October 17, 2022 and filed on the same date. They submitted that the age of the victim was proven by PW2 the investigating officer who produced the Clinic Card which indicated that she was born on September 12, 2004. They submitted that the victim was 15 years old at the time of the offence.

13. On penetration, the Prosecution submitted that PW1 and PW5 who were clinicians both testified that the victim's hymen was missing and that no injuries could be noted because the victim was presented for examination three days after the incident. Therefore, even though there was no direct evidence of penetration, the court could still convict the Accused if they were satisfied that the victim was telling the truth.

14. On identity, the Prosecution submitted that the Appellant had locked the victim for 4 days and had sex with her so she could properly identify him. That the Appellant claimed he was framed but did not adduce evidence of the same.

15. Lastly, on sentencing, the Respondent submitted that the sentences for the two offences were legal and lawful after a consideration of the Appellant's mitigation. They urged the Court to dismiss the appeal.

16. The duty of a first appellate court is to review, re-analyze and re-evaluate the entire evidence from the trial court in order to arrive at its own independent conclusion. It must do so however, bearing in mind that it lacks the privilege to receive the evidence and see the witnesses first-hand. Further, the law does not stipulate the manner or length of analysis by a first appellate court as this would be pegged on the manner of style adopted by the appellate court. These principles were aptly stated in the case of *Sembuya vs. Alports Services Uganda Limited* [1999] LLR 109 (SCU), where Tsekooko JSC said at 11:-

> "I would accept Mr. Byenkya's submission if he meant to say that the Court of Appeal did not go into details of the evidence, but that is really a question of style. There is really no set format to which the re-evaluation should conform. A first Appellate court is expected to scrutinise and make an assessment of the evidence but this does not mean that the Court of Appeal should write a judgment similar to that of the (trial)."

17. This case entails two charges which I will analyse separately. I have perused the trial Record, the amended Memorandum of Appeal and the parties' submissions. The issues for my determination are:

    i. Whether the offence of defilement was proven to the required standard.

    ii. Whether the offence of abduction was proven to the required standard.

    iii. Whether the sentence was lawful and just.

i. Whether the Offence of Defilement was proven to the required standard.

18. The Offence of defilement is premised on section 8 of the *Sexual Offences Act* No 3 of 2006. It states as follows:-

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) 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.

(3) 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.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

(5) It is a defence to a charge under this section if—

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) the accused reasonably believed that the child was over the age of eighteen years.

6. The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

7. Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (cap 92) and the *Children Act* (No 8 of 2001).

8. The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

19. For the Prosecution to prove the charge of defilement against an accused, they must establish three ingredients which are age, penetration and the positive identification of the perpetrator. (See the case of *George Opondo Olunga vs. Republic* [2016] eKLR.)

20. The age of a victim in a sexual offence matter can be proven either by oral evidence from the victim or their parent, by medical evidence, by documentation or common sense/mere observation by the court. This was determined in the case of *Francis Omuroni vs. Uganda*, Criminal Appeal No 2 of 2000, where the Court of Appeal of Ugandan stated thus:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

21. In this case, the Prosecution called PW2 PC Joan Chepchirchir the investigating officer who adduced evidence of the victim's clinic card (P.Exh4). I have examined the copy of the clinic card and confirmed

the date of birth as September 12, 2004. It is my finding that at the time of the incident, the victim was indeed 15 years old. This ingredient of age stands proven.

22. The second ingredient is identification. The victim FC testified that she was on her way to her aunt's home at Bostal when she met the Appellant who forced her onto his motorbike. She then stated that she was taken round by the Appellant until 8.00 p.m. and eventually ended up at his house where they had sexual intercourse. In her testimony, the victim stated that she spent the first night with the Appellant who later locked her in the house while he went away to work the following day. During cross-examination, she stated that during her confinement, the Appellant would come back over lunch hour and take her to a river to bathe. She also testified that she had sexual intercourse with him twice and that she escaped from his house on 7th October 2019 when he left the door open. That she escaped and spent the night in a church before going home the next morning.

23. The above encounter demonstrates that the Appellant and the victim spent a significant amount of time together for there to be a mistake of identity on the part of the Appellant. I am satisfied that this second ingredient was also proven to the required standard.

24. The last ingredient is penetration. In sexual offences cases, penetration may be proven by the testimony of the victim and corroborated by medical evidence. In *Bassita vs. Uganda* S.C. Criminal Appeal Number 35 of 1995, the Supreme 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 victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt."

25. The victim testified that on the material date, the Appellant took her to his place, brought supper and asked her to have sex with him even though she refused. She further stated that the Appellant forced her and penetrated her by inserting his male genital organ into her female genital organ. During re-examination, she testified that she had sexual intercourse with the Appellant two times in three days.

26. PW1 Daniel Too the Clinical Officer at Mogogosiek health centre testified that he filled the P3 form (P.Exh1) and PRC Form (P.Exh2) upon examining the victim. PW5 Beatrice Rotich the clinical officer at Mogogosiek testified that she was the one who first examined the victim on 9th October 2019. She noted that her external genitalia was normal, that the hymen was absent and that there were no lacerations. She produced her treatment notes (P.Exh3). Both clinical officers formed the opinion that there was penetration, but it was long-standing.

27. I have closely examined the PRC Form (P.Exh2) and noted that it indicated that vaginal labias were both intact, hymen was broken but not freshly and there were no bruises on the cervix and vagina. PW1 concluded that there were no signs of immediate penetration and that the hymen was not freshly broken. My analysis of this evidence together with the testimonies of PW1 and PW5, is that there is a possibility that the victim herself could have been a sexually active person prior to the incident or on the other hand, that she had healed completely since she was examined 6 days after the incident. It was the testimony of PW5 that the hymen could take three days to heal completely. At this point, it is not clear to the Court whether the penetration occurred on the nights in question or whether it had occurred prior to the said incident.

28. Having stated the above, I refer to the degree of standard of proof in a criminal trial. In *Bakare vs. State* (1985) 2 NWLR at page 465, Lord Oputa of the Supreme Court of Nigeria explained this standard as follows:-

> "Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says; it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

29. In this case, it was clear that though the victim's hymen was broken proving that there was penetration, this evidence in respect of penetration was not cogent because PW1 the first Clinical Officer stated that the hymen was broken but not freshly while PW5 the examining Clinical Officer stated that her hymen was absent but there were no lacerations. Both officers concluded that penetration was long-standing. Thus, it cannot be ascertained beyond reasonable doubt that the Appellant was the one who occasioned the act of penetration on the victim on the material night or that she was already penetrated long before the incident or even that she was penetrated in both circumstances being the past and on the nights in question.

30. Further to this, I find that there exists a high possibility that the Appellant and the victim may have engaged in sexual intercourse on the days that they were together. However, suspicion alone would not be enough to sustain a conviction. The Court of Appeal in Tanzania stated this in *R vs. Ally* (Criminal Appeal No 73 of 2002) [2006] TZCA 71 as follows:-

> "Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted."

31. It is my view that the Prosecution evidence does not strongly demonstrate beyond reasonable doubt that the act of penetration was committed by the Appellant on the victim on the material night to sustain a conviction on the charge of defilement. I agree with the trial court that the 1st count was not proved. In the premise, I acquit the Appellant on the first main count of defilement contrary to section 8 (1) as read with section 8(3).

32. I now turn to the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The Act provides: -

> Indecent act with child or adult
>
> 1. Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
> 2. It is a defence to a charge under subsection (1) if it is proved that such child deceived the accused person into believing that such child was over the age of eighteen years at the time of the alleged commission of the offence, and the accused person reasonably believed that the child was over the age of eighteen years.

3. The belief referred to in subsection (2) is to be determined having regard to all the circumstances, including the steps the accused person took to ascertain the age of the complainant.

4. Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* (cap 92) and the Children's Act No 8 of 2001.

5. The provisions of subsection (2) shall not apply if the accused person is related to such child within the prohibited degrees of blood or affinity.

33. Section 2 of the *Act* defines indecent Act as:-

> " Indecent act" means any unlawful intentional act which causes-
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

34. It follows then that when a court finds that the evidence adduced by the Prosecution does not sustain the main charge, it must address itself to the alternative charge. It is not automatic that an accused should be convicted of the alternative charge in the absence of proof of the main charge. Each charge must be proven to the required standards and its ingredients must be properly established before arriving at a conviction.

35. I associate myself with the sentiments of Muya J. in *Vincent Kiprotich Tonui vs. Republic* [2017] eKLR wherein he stated thus:-

> " The complainant herself did not testify that the Appellant fondled her breasts and buttocks and/or touched her anus.........The learned trial magistrate correctly found that there was no evidence sufficient to convict for the offence of defilement.........The fact that penetration had not been proved and hence a charge of defilement could not be sustained, does not mean that an automatic finding ought to be made for an alternative count of indecent act without sufficient evidence. There must be adduction of such evidence to the stipulated standards of proof in a criminal trial which is proof beyond reasonable doubt. (emphasis added).

36. It follows that the ingredients of the offence of indecent act must be established in this case. The ingredients of the offence committing an indecent act with a child are:

(i) The age of the victim

(ii) That there was contact made by the accused on the breasts, buttocks, genital organs of the victim.

(iii) Positive identification of the perpetrator

37. I have already analysed the evidence tendered by the Prosecution in respect of age in this case. It is clear that the victim's age was already proven as 15 years and is not in contention at this point. I have also analysed the evidence of identification and as already stated found that the Appellant was positively identified as the person who spent three nights with the victim between 3rd and October 7, 2019.

38. As to the issue of indecent act, it was the victim's testimony that the Appellant penetrated her by inserting his male genital organs into hers. She stated that the Appellant forced her to have sex with him. The victim however, does not mention whether the Appellant touched her on her breast or buttocks or her genital organs with his body parts. Owing to the fact that I have already found that the evidence of penetration was questionable, it will be far-fetched to conclude that the victim's testimony that they had sex means that the Appellant touched her in the manner described by the law under section 2.

39. I am persuaded by the reasoning of Mrima J in the case of *Paul Otieno Okello vs. Republic*, Criminal Appeal No 3 of 2019 [2019] eKLR, that:-

> "As to whether there was any contact between any body part of the appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the appellant touched her genital organ, breast or buttocks. The complainant talked of the appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not lead to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt."

40. Looking at the judgement of the trial court, the learned trial magistrate merely addressed himself to the issue of having sex and stated that it was indecent for the Appellant to have had sex with the minor. He did not consider the ingredients of the offence before arriving at a conviction. This find was also contradictory as the trial court had dismissed the main count as not proved.

41. The above analysis was a misdirection in law as every criminal charge must be sieved through the process of establishing the ingredients that form its make-up. A court of law must subject the evidence to a proper and clear analysis before arriving at a conclusion because every criminal charge must be proven beyond reasonable doubt. It is my respectful finding that the trial court did not analyse the evidence to determine if the alternative charge was adequately proven. Indeed having dismissed the main count on the basis that penetration was not proved, it was a misdirection to conclude without proof that there was indecent act.

42. It is my finding, therefore, and based on the ingredients of the offence of indecent act that the Prosecution evidence in this case was insufficient to disclose the ingredients for the said offence. Under the circumstances, a conviction arising out of the same would be unsafe. Thus, I acquit the Appellant of the alternative charge.

ii. Whether the offence of abduction was proven to the required standard.

43. The offence of abduction is defined under section 256 of the *Penal Code*, Cap 63 Laws of Kenya:-

> Definition of abduction
>
> Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.

44. The Appellant was charged under section 256 as read with section 263 which provides as follows:

> 263. Punishment for wrongful confinement
>
> Whoever wrongfully confines any person is guilty of a misdemeanour and is liable to imprisonment for one year or to a fine of fourteen thousand shillings.

45. From the facts of this case, it was the victim's testimony that she met the Appellant on her way to her aunt's place at which point, the Appellant and another man forced her to get onto the Appellant's motorbike. That on the way, it seemed like the Appellant was going towards the direction where the victim was also going, but he chose to divert course. She testified that they went round together until 8.00 p.m. and then later ended up at the Appellant's place.

46. In her testimony, the victim stated that whenever the Appellant would leave, he would lock her in his house and that she only managed to escape on October 7, 2019 since the Appellant left the door open. She testified that she had been confined by the Appellant since October 3, 2019 and that in that period, the Appellant would only come over lunch hour to take her to a river to bathe.

47. The Prosecution also called the evidence of PW4, B.L, the victim's mother who testified that prior to her disappearance, she and the victim had had an altercation which led her (the victim) not to return home on 3rd October 2019. She stated that they reported the incident to the police station and later learned about the victim's whereabouts. It was her testimony that, that was when the victim was brought home and they took her for a medical examination.

48. I have analysed these two conflicting testimonies. On the one hand, the victim stated that she was forcefully taken by the Appellant and locked in his house for five days and would only be let out over lunch hour to go and bathe at the river. She also stated that she slept in a church on the day of her escape because she was afraid to return home. On the other hand, her mother PW4 testified that she went missing after they had had an altercation.

49. The victim's account of her ordeal raises a number of questions in my mind. She testified that she was forced onto the motorbike and before ending up at the Appellant's house at 8.00 p.m., they had been going round with the Appellant on the motorbike. In such circumstances, one would expect a person who is abducted to alert members of the public so that she may be rescued. She failed to do so and only testified that she did not scream because she feared for her life.

50. Secondly, the victim stated that she was locked in the Appellant's house where the Appellant would bring her food to eat and only let her out during lunch hour to go and bathe. I find this even more peculiar that she was let out of the house, and still returned with the Appellant to be locked in his house without so much as an effort to call for help from other people during the lunch hour bathing sessions yet the path to the river and the river itself were public spaces. It is my considered view that there were numerous opportunities for the victim to raise an alarm and alert people of her plight but she opted to remain calm in the custody of the Appellant for five days.

51. The last issue that raises questions in my mind is the fact that her own mother testified that they had had an altercation on the day that she chose not to come back home. The victim on her part only testified that she went home on 2nd October 2019 and found that there was no one so she decided to go to her uncle's place. This evidence raises doubt and discloses other plausible reasons for how the victim ended up in the Appellant's house for 5 days.

52. It is the conclusion of this Court that the victim went to meet the Appellant after she had had an altercation with her mother. Her mother's testimony that the family went into a frantic search for her clearly shows that this was a child who was motivated by truancy to disappear from home.

53. The conduct of the victim raises doubt in the mind of the court as to whether she was actually abducted and held in captivity for 5 days. This benefit of doubt goes to the Appellant. In the Federal Court of United States in the case of *United States vs. Smith*, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing *In re Winship*, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) Harlan, J. stated thus:-

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

54. I have arrived at the conclusion that the second count of abduction was not adequately proven to the required standard and hereby acquit the Appellant of the said charge.

55. The third issue on sentence is now superfluous having found that the charges were not proven to the required standard.

56. In the end, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise held.

57. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2023.

R. LAGAT-KORIR

JUDGE

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