Kungu v Republic (Criminal Appeal 11 of 2018)
[2023] KEHC 23523 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23523 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 11 OF 2018

REA OUGO, J

SEPTEMBER 29, 2023

BETWEEN

MOSES WANGILA KUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of E,N. Mwenda, Senior Resident Magistrate at Bungoma delivered on 13th February 2018, Criminal Case No. 51 of 2016 on conviction and sentence)

JUDGMENT

1. The Appellant herein was charged with Defilement of a girl contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the night of the 9th and 10th day of January 2016 in Bungoma County, the appellant intentionally caused his genital organs namely penis to penetrate into the genital organ namely vagina of BWN a girl child aged six years. The appellant faced an alternative count to the main one, of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The appellant pleaded not guilty to the charges before the trial court and a full trial was conducted. The prosecution called eight (8) witnesses. This being a first appeal, it is the duty of this to reconsider, re-evaluate and reanalyze the evidence afresh and come to its own conclusion bearing in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (See *Okeno v Republic* [1972] E A 32.)

3. EN was the complainant's mother and she testified as Pw1. She testified that the complainant was six years old. She recalled that on 9th October,2016 at about 7:00 pm she was at home with her husband DNK (Pw4) while her children, KN (Pw3) and BN (Pw2) were playing outside. At about 7:30 pm she left to buy cooking fat (mafuta). She found the appellant seated outside house no. 7 waiting to see her neighbor. Pw1 informed the appellant that her neighbor was still at work but her husband, Pw4, was

home. The appellant had chang'aa in a bottle. She informed Pw4 that the appellant was asking for him. Pw4 peeped outside and saw the appellant with his chang'aa. Pw1 left her children playing outside.

4. After a few minutes Pw3 came in and told her that the appellant had asked for water to which she declined to give him and KN then returned outside. Pw3 came back inside the house for a second time informing her that the appellant kept asking questions. Pw1 instructed her to go and get the complainant and bring her inside. Pw3 did not find Pw2 outside. They then proceeded to search for her and went to police station. The search till 4.00am then they went home. She went to her mother's house and Pw3 later informed her that Pw2 had been found but she was bloody. Pw1 went to Police Station and filed a P3 form and then took Pw2 to the Hospital in Bungoma where she was admitted and treated. The complainant told her that the appellant told her that he was her father and proceeded to give her a piggy back ride to the forest made her his wife meaning that he tore her private parts.

5. Pw2 testified that she was six years old and that she played with her elder sister Pw3 on the field behind their house in the evenings and at night. She recalled that at night there was electricity from the Duka and Video shop. On the material day she was playing when the appellant came and asked for their names. Pw2 went to the house and told Pw1 about the appellant. The appellant then carried her and took her to the forest which was far from where they were playing. It was just the two of them, and she started screamed but he throttled her. The appellant then slept on her and pinched her where she used to urinate with his chululu (his thing for urinating). He then removed all of her clothes but did not remove his clothes except his trouser so that he could pinch her with his chululu. She cried but he throttled her and left her to go home alone. She did not know the name of the appellant. Pw1 went home but people had already slept and the house was empty, she slept as she bled. Her aunty picked her up and took her to the hospital in [particulars withheld] where they were told to go to Bungoma to a Hospital. She stayed at the hospital for many days and then she was discharged.

6. Pw3, the complainant's elder sister, testified that she was 8 years old and that she plays with the complainant behind their house, sometimes at night as there is a shop which has electricity light near the field. On 9th October 2016 at about 8:00 pm she was at home playing with the complainant in the field (the electric shop had the light on) when the appellant went to where they were. It was her first time seeing him. He talked to her and the complainant and asked for their names but they did not respond. He then asked for water and she went to the house to inform Pw1who refused to give him and went on to buy cooking fat. The appellant then asked if her father was home and Pw1 stated that he was. However, Pw4 saw the appellant said that he knew him and had seen him. She went to the house to ask if she could call Pw2 but when she returned outside the appellant had gone with Pw2. They started looking for Pw2. Pw1 started crying and went to her grandmother as she cried. She testified that in the morning before the sun was out the complainant was back home. She had blood on her and Pw1 took her to the hospital in Bungoma Hospital.

7. The complainant's father DNK, Pw4, testified that on the material day he was at home with his wife Pw1who had gone outside and sent for him. He went outside and found the appellant where the children were playing; there was light as the electric bulb was on. The appellant told him he was looking for the neighbor who was also a fundi, he told him that the neighbor was away as there was a padlock on his door. Pw4 was tired and went back to the house but the children were still playing outside. Pw1 served food and Pw3 was sent to get Pw1. Pw3 came back and told them that the appellant had taken the complainant away. They all rushed outside and went on [particulars withheld] road but they did not find them. The following morning at 6:00 am they were still looking for the complainant. In the morning, he met the appellant's in law at [particulars withheld] Market who was also involved in the search and he told him that the Appellant had been arrested and put in a house. He then went to his place at Landi Matope, opened the door and found the Appellant by himself

covering his stomach and his clothes were stained with blood. They went to [particulars withheld] Police station and the Appellant told them Pw2 had gone back home. They took the complainant to [particulars withheld] Hospital, then to Bungoma Referral Hospital where she was admitted and continued receiving treatment. He testified that the Appellant was someone he knew because he worked with his in-law. He had known the Appellant for about two weeks and he had seen him well that night because they spoke. On cross examination he testified that there was an electric bulb that shone outside the house.

8. Barasa Tom Juma (Pw5) testified that he had worked at [particulars withheld] Sub-district hospital for 9 years. He said that he examined the complainant whose outpatient no. was 45229/16. The complainant was too sick to walk properly due to the pain, she had an injury to her neck, marked tenderness at lower abdomen, labia was completely torn, her labia majora was inflamed and the entire vaginal area was bloody. They could not do a high vaginal swab because the complainant was in pain. The complainant was HIV Negative and there was strong evidence of forced sexual conduct. He also conducted an age assessment using the complainant's dental formula and confirmed that she was six years old. According to his colleague Ng'etich, the patient was referred to Bungoma Referral Hospital due to severity of her condition, a vaginal swab was done, syphilis test was negative and HIV test redone was negative. HVS the epithelial swab showed that they were 2 pluses (++) as a result of the friction in the canal. He testified that there was penetration. The complainant was treated with PEP.

9. Pw5 also produced the P3 form of the Appellant which was filled on 10th January 2016. He examined the Appellant's private parts; his penis had no abrasions or bruises but it had blood stains. HIV and syphilis tests were was negative. He opined that there was evidence of sexual activity. He testified that there was a possibility that the blood on the complainants and appellants private parts were the same blood based on the history. The private parts of the appellant did not have any injury bruise; it was evident that that the blood was not his.

10. PC Robert Khalake No. 76000 (Pw6) testified that he is stationed at [particulars withheld] Police Station and was the Investigating Officer. He testified that on 10th January 2016 at 8:00 am he was at the Police station when the case was allocated to him. It was reported by Pw4 on behalf of the complainant who is his daughter. The complainant was playing with her sister outside their house when the Appellant arrived at the scene and took her. On 10th January 2016, the appellant was arrested by the public and surrendered to [particulars withheld] Police Station. The complainant and he admitted to the members of the public that he had returned Pw2 home. Pw2 was found in bed at home bleeding and brought to the police station. Pw6 noted that Pw2 and the appellant had blood in their clothes and he kept their clothes. The complainant was rushed to [particulars withheld] Hospital for treatment. He proceeded to take statements. The appellant was charged and his blood sample taken and sent to Government Chemist Nairobi.

11. ON (Pw7) testified that he stays in [particulars withheld] and that on 9th January 2016 at 10:00 pm he was at home when the appellant arrived. The Appellant's hands were bloody and that he proceeded to lock him in the house. He went to look for Pw4 and asked whether the child had been found and informed him that the appellant was locked in his house. When he returned with Pw4 to his house, a crowd had already formed. The appellant asked them not to beat him but instead take him to the police station so that they could assist in tracing the child. Pw4 asked the Appellant where the child was; he said he did not take the child. Upon reaching the police station, the appellant said that he had taken the child home.

12. Harry Kiptoo Sang (Pw8) testified that he is a lab analyst with the Government Chemist in Nairobi with 14 years' experience. He holds a Bachelor's of Science from Moi University. On 14/01/2016 he received the following items in khaki envelopes: pink dress marked 'A', white t-shirt marked 'B', grey

under pant marked 'C', brown/blue/green/pink stripped skintight marked 'D', white vest marked 'E', Blue under pants marked 'F'. He also received a blood sample marked 'G' (for the complainant) and blood sample marked 'H' (belonging to the appellant). The samples were forwarded by No. 61106 Sgt Phillip Mwaura of [particulars withheld] Police Station. The police memo form requested that the items be examined for blood or semen and determine any relationships. Pw8 examined the items and arrived at the following conclusion:

a. The dress item 'A', t-shirt 'B', under pant 'C' and vest 'E' were all heavily stained with human blood.

b. Items 'F' under pant and skin tight 'D' were moderately stained with blood.

c. There was no semen detected in item A, B, C, D, and F.

d. No DNA profile was generated from the dress, item A

13. Pw8 concluded that the DNA profiles generated from the blood stains on the t-shirt 'B', the under pant 'C', the skin tight 'D', the vest 'E', the under pant 'F' all matched those generated from the blood sample marked G (blood from Pw2).

14. The appellant was placed on his defense testified that he stays in Namwela working as a turn boy. On 10/01/2016 at 7:00 a.m. he went to work at Wabutia Market and saw 2 people standing next to him. They accused him of stealing their phone and he denied the allegation. He told the 2 to take him to take him to the police as they were assaulting him. He was taken to [particulars withheld] police station but did not see the people who took him there. The following day he was brought to court and different charges were preferred which he denied.

15. After reviewing the evidence, the trial court convicted the appellant of the main charge and sentenced him to life imprisonment. The appellant dissatisfied with the decision of the subordinate court filed his petition of appeal before this court on 14th March 2018. He later abandoned the grounds of appeal on the face of his petition of appeal and filed amended grounds of appeal on 14th December 2022. The appellant raised the following grounds:

1. That, the learned magistrate of the trial court erred in law by failing to find that the elements of the offence (i.e age and identification) were not conclusively proved to warrant a conviction by law.

2. That, the learned magistrate erred in law and fact by failing to find that the voire dire was badly conducted in the present case in violation of the law.

3. That, in default of any acquittal, this honorable court will exercise its discretion in giving another sentence after considering the mitigation that will be tendered by the appellant herein.

16. The appeal was canvased by way of written submissions and both parties filed their respective submissions.

Appellant's Submissions

17. The appellant in his submissions filed on 14th December 2022 submitted that the elements of the offence were not conclusively proved. The age assessment of the complainant done was not proved well as the only medical evidence tendered was MFI 5 form estimates age of the child as 6 years. Reliance was placed on *Kaingu Elais Kasomo vs Republic* (Malindi) CR. App. No. 504 of 2020 where the court of appeal held that the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards would be more useful.

18. On identification, the appellant submitted that it was merely dock identification by the prosecution witnesses. The appellant further submitted l that the voire dire examination conducted on the minors were not well done because Pw2 and Pw3 were only asked elementary questions. It was submitted that they were not asked whether she knew the reason of saying the truth and the meaning of an oath. In *Joseph Opando v Republic*, CR. App No. 91 of 1999, the court of appeal outlined the stages to be followed in determining whether or not a child of tender years may give sworn evidence. First, the examination must endeavor to ascertain whether the witness understands the meaning, nature and purpose of the oath, if satisfied the witness must be allowed to give sworn evidence. However, where the witness does not understand the latter, witness will be examined by the court to ascertain whether the witness is possessed of sufficient intelligence to justify the reception of his or her evidence though not on oath; simple elementary questions would normally be asked.

19. The appellant further submitted that the court omitted the above-mentioned stages which raises questions as to the evidence of Pw2 and Pw3 and that if voire dire was conducted under the second stage then they ought to have given unsworn testimonies. The subordinate court just asked simple elementary questions. He also cited the case of *R v Lal Khan* (1981) 73 cr. app R 190 where Lord Justice Bridge stated that in order for a magistrate to decide who should be properly sworn, he/she should consider whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. The appellant contends that the evidence of Pw2 and Pw3 were not properly received.

20. The appellant submits further that the court considers interfering with the sentence meted by the trial court. Life imprisonment as stipulated under the mandatory gravitation of *sexual offences act*, basing on the recent changes to law. The *Judiciary sentencing guidelines* which have been in use since 2015 sets out the principles underpinning the sentencing process. They include proportionality, equality, uniformity, parity, consistency, accountability, inclusiveness and importance; respect for human rights and fundamental freedoms. This means that the court can grant the appellant more lenient sentence as it enjoys unfettered discretion on what sentence to give. In *Evans Wanjala Wanyonyi v R* (2019) eKLR the court substituted a 20-year term of imprisonment with an imprisonment term of 10 years. In George Kuria Mwaura v Republic the Court of Appeal, exercised its discretion in the defilement case by awarding the appellant 15-year sentence from a conviction of life imprisonment.

Respondent's Submissions

21. The Respondent in their submissions argued that there was nothing in the record of appeal showing that the Appellant was a child at the time of the offence, during trial and/or at sentencing. It is impossible to have an appellant person to have been sentenced to an adult prison if he was a child. The appellant did not at any point state that he was a child even when he was placed to his defense he said that he was a turn boy on a tractor; a child cannot be employed as a turn boy.

22. On the second ground of appeal, i.e., that the P3 form and the medical certificate were inadmissible since its maker is not the one who submitted it in court, the respondent submits that no prejudice was occasioned because the contents remained the same. At page 38 of the proceedings the prosecutor applied to have the documents produced by Pw5 and the Appellant did not object.

23. On identification, the respondent submits that the appellant was identified by Pw1, Pw2, Pw3 and Pw4 who saw him seated where Pw2 and Pw3 were playing. The security lights were on when the children were playing outside. Pw4 talked to the appellant whom he knew because he used to work with his nephew and the appellant was the person last seen with the complainant before disappearing

with her. Furthermore, the DNA Analysis was done on the blood samples found on the appellant's cloths and report showed that they matched the DNA Sample of the complainant. The Appellant did not explain how the complainant's blood was found on his clothes. There was sufficient evidence connecting the appellant to the crime. The Respondents submits that this appeal lacks merit and should be dismissed.

Analysis And Determination

24. I have carefully considered the amended grounds of appeal, submissions by parties and the evidence of record. I do note that the respondent's submissions were directed towards the petition of appeal filed on14th March 2018 which were abandoned by the appellant when he filed amended grounds of appeal on 14/12/2022. Where an appellant has been convicted of defilement, the appellate court should re-evaluate the evidence to ascertain that there was proof of age of the complainant (which must be below 18 years), the appellant must be positively identified and there must be penetration as defined by section 2 of the *Sexual Offences Act*. In the event the three essential elements were not proved beyond reasonable doubt, then it would render the conviction unsafe.

25. The appellant has attacked the judgment of the subordinate court on grounds that the element of age and identification were not sufficiently proved. Pw1 who was the complainant's mother testified that the child was 6 years old at the time of the offence. Her testimony was further corroborated by the age assessment report, Pexh5 that was produced by Pw5. Pw2 also testified that she was 6 years old. In my view, the evidence pertaining to the child's age was sufficiently proved.

26. I now turn to identification of the appellant. Pw1, Pw2 and Pw3 had never seen the appellant prior to the incident. However, Pw4 testified that he knew the appellant as he had worked with the appellant's relative for 2 weeks. Pw4 testified that when Pw1 called him to have a chat with the appellant, it was about 8:00 p.m. but he clearly saw the appellant as there was sufficient lighting from the electric bulb that was on.

27. Pw2 also testified that the appellant put his penis in her vagina. She told the trial magistrate that:

> " He pinched me where I use to urinate with his chululu – his thing for urinating. He removed my clothes. All my clothes. He did not remove his clothes. He was wearing clothes including a trouser. He removed his trouser so that he can pinch me with his chululu.I cried, he throttled me..."

28. Pw2 after the incident told her mother, Pw1 that the appellant made her his wife by tearing her vagina. Pw1, Pw2, Pw6 all testified that the child had bloody clothes. This was explained by Pw5 who examined the minor and produced her treatment notes as Pex1 testified that Pw2's entire vaginal area was bloody. The hymen was completely torn. The labia majora was also inflamed. Pw2 could not walk properly as she was in pain. He formed the opinion that there was penetration. He also testified that the child had a neck injury consistent with the testimony of Pw2 that the appellant throttled her. Pw7 testified that when the appellant came to his house, he had blood on his hands. Pw6 who received the appellant at the station upon his arrest also confirmed that the appellant clothes had blood. Pw6 took the blood clothes of the appellant and the child which were forwarded to the government chemist. Pw8 who analyzed the appellant's and Pw2's clothing concluded that the appellant's clothes were stained with blood belonging to Pw2. The evidence by Pw8 further fortifies the evidence on identification and on the basis of the evidence of Pw2, Pw4, Pw7 and Pw8 the prosecution proved beyond reasonable doubt that the appellant was perpetrator of the offence. The elements of penetration and identification in my view was proved beyond reasonable doubt.

29. Although the appellant urged this court to find that voir dire was not properly conducted, I find no evidence to support this argument. The Court of Appeal in *Maripett Loonkomok v. Republic* [2016] eKLR held as follows:

> "We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterate what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See *James Mwangi Muriithi v R*, Criminal Appeal No.10 of 2014. 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. Voir dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voir Dire definition" Duhaime's Legal Dictionary. But the origin of the rule on voir dire examination of a child witness as we know it today was first applied in the ancient yet landmark English case of *R v Braisier* (1779) 1 Leach Vol. I, case XC VIII, PP 199 – 200, which incidentally was a case involving sexual assault on a girl under 7 years of age. The twelve Judges in that case stated, in part, that; ".. an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence" (our emphasis)
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> Although this decision, through section 19 of *Oaths and Statutory Declarations Act* underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See *Johnson Muiruri v R* (1983) KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See *James Mwangi Muriithi* (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See *Nicholas Mutua Wambua and another v Msa* Criminal Appeal No.373 of 2006.

30. I have considered the voire dire exam of both Pw2 and Pw3 and note that they both knew the distinction between the truth and a lie and further understood that if they hold the bible and tell a lie God will punish them. It is on this basis that the trial magistrate ruled that Pw2 and Pw3 were competent to give sworn testimony.

31. Finally, the appellant argued that he should get a lenient sentence considering that there are recent changes to the law on sentencing. Section 8(2) of the *Sexual Offences Act* provided for a mandatory life sentence. However, in a recent decision by the Court of Appeal in *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) had the opportunity to discuss the constitutionality of life sentence. The court stated:

> 21. ...we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.
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> ...
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> 26. We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence.

32. According to the appellant's presentence report, the appellant was 18 years old and a first offender. The probation officer recommended a non-custodial sentence. The appellant in his mitigation also sought a lenient sentence. The trial court sentenced the appellant to life imprisonment arguing that the act carried out on the child was inhuman and that the child's life was altered. The trial court did not however consider the appellant's mitigation, age and the fact that he was a first offender. The appellant was unjustly denied the chance to present his case in mitigation, while others facing less severe sentences are afforded this opportunity, thus constituting a form of discrimination. Therefore, in view of the Court of Appeal decision in *Manyeso v Republic*, the pre-sentence report and the appellant's mitigation, I set aside the sentence of life imprisonment imposed on the appellant and substitute it with a sentence of 30 years imprisonment. I have also taken into account the time spent in custody and the sentence shall run from 11th January 2016.

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

R.E. OUGO

JUDGE

In the presence of:

Moses Wangila Kungu/Appellant- Present

Mr. Ayekha For the Respondent