Wanjala v Republic (Criminal Appeal E25 of 2022) [2023] KEHC 23100 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23100 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E25 OF 2022

REA OUGO, J

SEPTEMBER 28, 2023

BETWEEN

AYUB MASINDE WANJALA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the decision of Hon. Munyekenye s SPM's Webuye court vide Criminal Case S/O No 26 of 2016 delivered on 3/3/2022)

JUDGMENT

1. The Appellant herein was charged with Defilement contrary to Section 8(1)(2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on an unknown date and time between the month of August and September 2016 in Bungoma County, the appellant intentionally and unlawfully penetrated the vagina of MW a child aged 8 years.
2. The Appellant faced an alternative count to the main one, of committing an indecent act contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge are that the appellant on unknown date and time between the month of August and September 2016 in Bungoma County, intentionally and unlawfully rubbed his penis to penetrate into the vagina of MW.
3. The appellant pleaded not guilty to the charges before the trial court and a full trial was conducted. The prosecution called five (5) 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.)
4. MW (PW1) was the complainant and she testified that she was 10 years old. She identified the Appellant as the perpetrator and referred to him as her father. She told the trial court that the appellant raped her, meaning he did 'tabia mbaya' (bad behavior). The Appellant had raped her for many days

and the last time he did it was under a tree during the day. She further recalled that the appellant had also raped her in a sugarcane plantation. She had worn a dress and panty when the Appellant told her to undress and she proceeded removed her panty only. The Appellant had his clothes on. He proceeded to sleep on top of her. The Appellant had his clothes on and was dressed in a trouser. He unzipped his trousers and raped her and told her not to tell anyone about it. She testified that nobody saw them and she did not tell anyone. The Appellant raped her many times but she did not tell anyone. She felt pain in her private parts and when her mother asked why she was not walking properly she told her she was raped by the Appellant. Her mother and grandmother then proceeded to take her to the hospital where a doctor examined her. She identified the Appellant as Ayub at the dock. On cross examination she testified that the Appellant did not go to their home, however she knew him as her father. The footpath where the Appellant raped her was the one she took to school. There was only one homestead and trees between their home and the school.

5. DW alias DWM testified as PW2. She testified that she was the complainant's guardian. The complainant's biological mother was LN. She had lived with the complainant since 2015 and that her husband, is the father to the complainant. She knew the Appellant because he was her brother-in-law. On 17th September 2016, at 6:00 p.m. while she was cooking, she saw the complainant walking with difficulty; her legs were apart. The complainant sat next to her and she saw that she was in pain. She asked PW1 what was wrong and PW1 told her that she had pain in her private parts and lower stomach. PW2 undressed her and saw that pus and blood were oozing from her private parts. PW1 told her that the Appellant had raped her in their farm under the trees. She then took PW1 to the hospital. She also asked her husbandto inform the Appellant that they knew what he had done and thereafter he disappeared. PW2 reported the matter to the police station at Webuye and was given a P3 form. The complainant in 2016 she was 7 or 8 years. The complainant told her that the Appellant had raped her repeatedly.

6. PW3, Linet Ogero No 100589, PC attached at Webuye Police Station in the gender office, testified that on 18th September 2016 CS and PW2 entered her office accompanied by a minor. The complainant aged 8 years reported that she had been defiled by a known on diverse dates in the same year. The two women told her that the accused person was Ayub Masinde who was the complainant's cousin. According to her investigations on 17th September 2016 PW2 saw her daughter walking with difficulty and proceeded to check the complainant's private parts and found rashes oozing from her vagina. The complainant told her that she had been defiled by the Appellant. They had already gone to Webuye County Hospital for treatment so she issued a P3 form which was later filled. On 19th September 2016, Administration Police Officers attached to the DO's Office brought the appellant to Webuye Police station. She visited the scene and testified that the incident took place at a tree plantation almost 300 meters from the complainant's home.

7. Leticia Mbalu (PW4), a clinical officer at Webuye County Hospital, testified on behalf of her colleagues Lawrence Kimtai and Wafumbwa Warua who had prepared the treatment report. She explained Lawrence Kimtai was leave while Wafumbwa Warua had retired. On 17th September 2016, Lawrence attended to PW1 who complained of defilement and lower abdominal pains. She had allegedly been defiled severally within 3 (three) months and the last defilement had happened a week earlier. On examination, the complainant had rashes on her external genitalia extending to the anus region and there was discharge at the labia area, however there were no tears. She said an impression of defilement was formed and samples sent to the lab. Th results were that the PH was normal at 7.5 which was normal, there was pus cells, which could have meant an infection either from defilement or hygiene. A high vaginal swab showed red blood cells and pus cells meaning that there was an open wound injury that may have been caused by trauma or urinary infection. However, the trauma showed defilement.

HIV and VDRL were negative. The child was treated and put on medication. On 19th September 2016, the complainant was reviewed by Wafumbwa. On examination the complainant had a red vaginal imposer (wall of the vagina) and hymen was absent, the conclusion was that there was penetration due to defilement.

8. The assistant chief, Pius Wanyonyi Wekesa (PW) produced a letter from that emanated his office dated 10th January 2018 addressed to the Webuye Police Station, gender desk. He testified that the Appellant and Joseph Wanjala(deceased) went to his office and admitted that the Appellant had committed an offence and that they wanted to negotiate at home. Joseph Wanjala was the father to the Appellant. PW5 was informed that a child aged 7 years within the family had been defiled. However, since it was a criminal case, he referred the case to the police. On cross-examination he testified that he could not recall when Joseph Wanjala went to his office but it was in 2016. The appellant was not known to him at the time and he spoke to Joseph Wanjala.

9. The trial court put the appellant on his defence. He testified that he lived in Mahala village where he was a mechanic and that he had not defiled the complainant or rape. At the time he was charged he was living in Matulo. He denied taking the complainant to school on his motorcycle. On cross examination he testified that he did not ask for forgiveness and neither did he go to the chief with his uncle to negotiate. He also denied making any confession.

10. The trial magistrate after reviewing the evidence the trial court convicted the appellant of the main charge and sentenced him to life imprisonment. The appellant being dissatisfied with the conviction and sentence, filed a petition of appeal on 27th October 2021on grounds that:

    1. The appellant pleaded not guilty to the said charges.
    2. The learned trial magistrate erred in law and fact in rejecting the offence that was not shaken by the prosecution side.
    3. The trial magistrate erred in law and fact in the decision while basing it on extraneous factors.
    4. There was contradiction between PW1, PW2 and PW3 a fact that the magistrate ignored while delivering the ruling.
    5. The learned magistrate erred in law and fact in the decision that were full of contradictions and without analyzing the same.
    6. That the learned trial magistrate erred in law and fact while disregarding the mitigation adduced by the appellant.
    7. The learned magistrate erred in law and fact by acting with bias towards the appellant while delivering her judgment.
    8. The trial magistrate erred in in law and fact in conducting proceedings that violated the right of the appellant as the provision of the laws of Kenya hence null and void
    9. I wish to raise more grounds of appeal when I'm fully furnished with court proceedings.

11. The appellant urged the court to quash the conviction, set aside and or vary the sentence and set aside the appellant at liberty. The appeal was canvassed by way of written submissions. The Appellant in his submissions dated 10th January 2023, amended the grounds of appeal. In the amended grounds of appeal, he contends that:

    1. The lower court magistrate erred in law by convicting the appellant herein a life sentence yet the purported life sentence is defacto unconstitutional and violates appellants' rights to fair trial.

2. The pundit judge failed in matter of law by failing to observe that the appellant herein was not accorded with a right to procedural due process as provided by article 25 (c) as read with article 50(2) of the *Constitution* of Kenya 2010 which is the supreme law of the land, thus rendering to a serious miscarriage of justice.
3. The pundit judge gravely erred in point of law by convicting the appellant herein on the basis of the prosecution case that had not been proved beyond reasonable doubt as prescribed under section 111 of the *Evidence Act* cap 80 Laws of Kenya thus rendering the whole process prejudicial to the appellant.
4. The pundit magistrate erred in points of law by failing to evaluate the evidence in its entirely thus arriving at an erroneous decision.
5. The trial court erred in law in breaching the rights of the appellant to adduce and challenge evidence pursuant to article 50(2)(j).

12. The appellant urged the court to allow the appeal in its totality quash the conviction, set aside the sentence and set the appellant at liberty.

13. The appellant in his submissions argued that the evidence on record showed that the trial court did warn itself of the dangers of taking evidence of a minor a minor and neither does the record show that the minor was telling the truth. The appellant questioned whether the complainant was trained to narrate the story by her guardian and whether the police in taking statements of the minor used leading questions to confused her. The Appellant relies on the case of *Chila v Republic* (1976) E.A where the court stated that the judge should warn the assessors and himself of the dangers of acting on uncorroborated testimony of the complainant and that in the absence of corroboration, the judge may convict if the judge is satisfied that that the evidence is truthful, however if no warnings are given then the conviction will be set aside unless the appellate court is satisfied that there has been no failure. He argued that because of immaturity of children, they can be easily influenced by adults to lie or the parent may take the child through the story again and again so that it becomes divided in untruth and leading questions by the police may confuse the minor. Children may fail to realize how important it is to speak the truth and for it to be accurate, in addition children may behave in in a way evil beyond their years and therefore the court should be cautious before convicting a person on uncorroborated evidence of minors. The Appellant argued that PW1, the complainant in her testimony stated that “I love my mother. If she tells me something I must listen to her even if it is not true”. He urged the court to exercise its duty and interrogate the reliability of the complainant’s evidence.

14. The appellant also submitted that there was no sign of recent penetration as the blood seen were accounted to trauma. Therefore, the evidence of penetration is based on strong suspicion and more likely that the appellant was not examined to link him to the crime. In *Sawe v Republic* (2003) eKLR the court stated that suspicion however strong cannot provide basis of inferring guilt which must be proved by evidence beyond reasonable doubt. The appellant contends that although the evidence of penetration was proved there was no proof beyond reasonable doubt that the appellant was responsible for the penetration herein hence it is expedient for the evidence to be rejected and the appellant acquitted. This was a violation of Article 50 (2).

15. The Appellant submitted that the court erred in law in breaching the right of the appellant to adduce and challenge the evidence. The appellant was not provided with typed proceedings at the close of the prosecution case pursuant to article 50 (2)(j)(k) of the *Constitution* of Kenya. It shows on record that the appellant severally asked for the typed proceedings but was not given. Further the trial magistrate erred in failing to consider the term served in custody by the appellant pursuant to section 333 (2)

of the *Criminal Procedure Code*. The Appellant submitted that the trial magistrate erred in law in disregarding the appellants cogent alibi defense that was strong in the face of the weak prosecution evidence.

16. The prosecution submitted that the minor was 8 years at the time of commission of the offence. According to the birth certificate she was born on 29/12/2008 while the offence was committed on unknown dates between August and September 2016. PW1 testified that the appellant asked her to remove her panty and he defiled her and this was corroborated by medical evidence. She also identified the appellant and referred to him as Ayub. None of the prosecution witnesses gave contradicting evidence. The appellant did not offer a remorseful mitigation. The prosecution submits that the appeal lacks merit and the court should dismiss it and uphold the judgement and sentence of the trial court.

Analysis and Determination

17. I have considered evidence adduced before the trial court and the rival submissions by the parties. The issue raised by the appeal is whether the prosecution proved the offence of defilement to the required standard; and whether the sentence was harsh.The offense of defilement rests upon three elements: the age of the victim (must be a child), penetration, and the accurate identification of the perpetrator.

18. The prosecution proved that the complainant was a child below the age of 18. According to the birth certificate, the child was born on 29/12/2008 and was 7 years at the time of the assault. The appellant was the brother to PW1's father and well known to her. While the prosecution evidence was that the appellant was well known to PW2 this court must satisfy itself that identification was favorable and free from any potential for error. In *Wamunga v Republic* [1989] KLR 426, the Court stated that:

> [I]t is trite that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can be safely make it the basis of conviction.

19. PW1 testified that the incident took place during the day under a tree. The appellant had also defiled her in the sugarcane plantation. The evidence led by the prosecution show that the incident took place when there was sufficient light and the appellant who was PW1's relative was well identified.

20. PW1 testified that the appellant undressed her and defiled her. PW2 saw the appellant walking with difficulty and she examined her and found that there was pus and blood oozing from her private parts. Although PW1 was taken to the hospital a week after the incident PW4, testified that PW1 had rushes in her genitalia. High vaginal swab revealed that she had blood and pus. The blood cells indicate that the child had an open wound injury in her vagina which was due to defilement. He also noted that the hymen was absent and concluded that there had been penetration. There was also evidence from PW5 that the appellant and his father approached him to have the matter settled outside court but he declined for reasons that it was a criminal matter. The appellant's defense was that he lived in Matulo and did not defile PW1. His defense was a mere denial incapable of displacing the prosecution evidence mounted against him.

21. Nonetheless, the appellant also argues that there was a violation of Article 50 (2) (j) of the *Constitution*, which provides that an accused person shall be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. According to the court record, on 2/2/2017 when the matter was coming up for hearing before the trial court the appellant's counsel requested for witness statement and the trial magistrate directed those copies of witness statement and documentary evidence be supplied. However, there was no indication from the record that the

statements were supplied. Ngugi J in *M E M v Republic* [2018] eKLR when dealing with a similar issue stated:

> "21. In this case, the Appellant says on appeal that the witness statements were never supplied to him. However, he does not allege that he asked for them and that the Court failed to give them. Indeed, his argument is that the Court record does not reflect that he was given witness statement. This argument verges on the technical: that failure of the Court to record that an Accused Person has been given witness statements is a per se proof violation of his constitutional right to fair trial. I do not think our decisional law has enunciated such a rigid and formalistic rule.
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> 22. Instead, our case law provides a more functional approach. While it is a salutary practice for a Trial Court to record to indicate that it has given orders for an Accused Person to be provided with the statements or has facilitated their supply, failure to record this is not necessarily fatal. As I held in an earlier case:
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> > It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial.
>
> However, an Accused Person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the Court. This minimum obligation on the Accused Person triggers the Court's duty to ensure the documents are supplied before commencement of the trial.
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> *Francis Muniu v Republic* [2017] eKLR.
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> 23. In his case, as in the Francis Muniu Case, there is evidence that the Appellant participated in the trial vigorously through cross-examination which is in an indication that he knew the case facing him well. There is also no indication that he asked for the witness statement and was not supplied with them. These two factors lead to the conclusion that the fair trial rights of the Appellant were not violated in this case: he either received the witness statements or failed to fulfill his minimal obligation to inform the Court that he did not have the statements."

22. There is a clear indication from the record from the trial court that the appellant be given witness statements. Thereafter, neither the appellant nor his counsel raised the matter of witness statements, suggesting that they were indeed provided with these statements. The appellant's advocate cross examined the prosecution witnesses and at the close of the prosecution case the appellant gave sworn testimony. I therefore find that the appellant's right to fair trial was not violated.

23. Finally, the appellant also challenged the sentence meted by the trial magistrate arguing that life sentence is unconstitutional and a violation of the appellant's rights. 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.

24. The appellant did not offer any mitigation, however, according to the prosecution records, the appellant was a first offender. The trial court sentenced the appellant to life imprisonment on grounds that the appellant was PW1's uncle and PW1 looked up to him for protection and he took advantage of that. Although the trial magistrate, in the ruling on sentence mention that she considered the fact that the appellant was a first offender, this was not reflected on the sentence meted. Therefore, in view of the Court of Appeal decision in *Manyeso v Republic* (*supra*) and the fact that the appellant was a first offender, I set aside the sentence of life imprisonment imposed on the appellant and substitute it with a sentence of 30 years in prison. In computing the sentence, the period spent in remand and in jail will be taken into account. Right appeal explained.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF SEPTEMBER 2023

R.E. OUGO

JUDGE

In the presence of:

Ayub Masinde Wanjala/ Appellant- Presen

Miss Omondi - For the Respondent

Wilkister/Okwaro -C/A