



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanga v Republic (Criminal Appeal E007 of 2022)
[2022] KEHC 15546 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15546 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E007 OF 2022
RE ABURILI, J
NOVEMBER 21, 2022**

BETWEEN

ALFRED WAGANDA WANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the judgement by the Hon. S.W. Mathenge on the
10.2.2022 & subsequent sentence on the 17.2.2022 in the Principal
Magistrate's Court in Bondo in Sexual Offence Case No. 43 of 2019)*

JUDGMENT

Introduction

1. The appellant herein Alfred Waganda Wanga was charged with the offence of defilement contrary to section 8(1) s read with section 8(3) of the [sexual Offences Act](#) no.3 of 2006. The particulars of the charge were that on the 17/6/2019 at around 1900hrs in Rarieda sub-county within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of PAO a child aged 12 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#).
2. The appellant pleaded not guilty to the charge and the matter proceeded to trial where the prosecution called 4 witnesses while the appellant in his defence gave a sworn testimony and called no witness.
3. In her judgement, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and subsequently sentenced him to serve 20 years' imprisonment.



4. Aggrieved by the trial court's finding, the appellant filed his petition of appeal dated 2.3.2022 in which he raised the following grounds of appeal:
 - i. The learned trial magistrate erred in law and fact in convicting the appellant while the prosecution had failed to prove its case beyond reasonable doubt.
 - ii. The learned trial magistrate erred in law and in fact in convicting the appellant while the medical evidence was insufficient to sustain the charge.
 - iii. The learned trial magistrate erred in law and fact in convicting the appellant while the evidence on record was contradictory and inconsistent.
 - iv. The learned trial magistrate erred in law and in fact in failing to find that the complainant's age was not satisfactorily proven.
 - v. The learned trial magistrate erred in law and fact in failing to give due consideration to the appellant's defence.
 - vi. The appellant's conviction is against the weight of evidence on record.
 - vii. The sentence against the appellant is harsh and excessive in the circumstances.
5. The appeal was canvassed by way of written submissions. Only the appellant filed his submissions.

The Appellant's Submissions

6. The appellant submitted that the prosecution failed to tender/produce evidence in court and that the trial magistrate failed to consider the absence of forensic analysis on the victim's clothes that would have shed light on who the perpetrator of the crime was and in addition that the trial magistrate failed to consider the appellant's alibi defence.
7. The appellant relied on the case of *Nicholas Kipngetich Mutai v R* [2020] eKLR where the court held inter alia that even though the complainant was defiled, it had not been shown that the defilement or indecent act was perpetrated by the appellant.
8. The appellant submitted that the trial court failed to consider his mitigation because of the fixed term of sentence prescribed under the act. Reliance was placed on the case of *Yusuf Shiunzi v Director of Public Prosecution* [2020] eKLR where it was held that the mandatory sentences prescribed by the Act were unconstitutional.

The Role of this Court

9. The role of this appellate Court of first instance is well settled. It was held in the case of *Okemo v R* (1977) EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

Evidence before the trial Court

10. PW1, the complainant testified that on 17/6/2019 at around 6.30pm, she was at home washing dishes when Alfred went there and gave her Kshs. 40 although he did not tell her what the money was for.



- The complainant testified that she was alone in the house. She further testified that at about 7pm, she was cooking in the kitchen when she heard Alfred calling her so she left the kitchen and followed the voice.
11. PW1 testified that Alfred took her hand and led her to his bedroom. She testified that she was dressed in a full dress and that Alfred pulled it up and started playing with her breasts. The complainant testified that she wanted to scream but Alfred threatened to kill her. That he removed her underwear, tore it up, placed her on the bed, removed his penis and placed it in her vagina. She further testified that after a few minutes, she felt something like water flowing.
 12. The complainant testified that Alfred did not use a condom and told her to keep this secret between them after which she went to her grandparents' kitchen, cooked, ate and slept. She testified that her grandfather arrived after she had slept and that on the following day, she told him what had happened. It was her testimony that she went with her grandmother to Ndori Police Post and reported and were advised to go to Bondo sub-county Hospital then back to the police base. She testified that she was given a P3 form.
 13. PW1 testified that it was the first time Alfred was defiling her and that she was 12 years old. She identified Alfred as the accused in court and stated that she knew him as he was a neighbour.
 14. In cross-examination, PW1 stated that she wore a black dress with a white and black panty. She reiterated that she knew the accused and had known him for a longtime. It was her testimony that she had lived with her grandparents for 5 years and had known the accused for 3years. She testified that her house and that of the accused were not far apart and that she had other neighbours but on that day, the neighbours were not around. The complainant further stated that the accused did not use a condom and that he left fluid on her and further that she had not taken a shower by the time she was going to hospital. The complainant stated that she did not change her dress or panty.
 15. PW2, JAO, testified that on the 18/6/2019 at about 8am she was at home having arrived from a burial and found the complainant who told her how Waganda had defiled her the previous day. She testified that she went with the complainant to Ndori Police Base and reported the matter then proceeded to Bondo sub-county hospital where the complainant was examined and given medicine. She testified that they went back to the police station and that subsequently Alfred, her brother-in-law, was arrested. She stated that the complainant was 12 years old as evidenced in her baptismal card. She further stated that the complainant was born on 15/6.2007.
 16. In cross-examination, PW2 stated that she had lived with the complainant since 2016. She admitted that the complainant showed her the Kshs. 40 that consisted of 2, 20 shilling coins. She reiterated that she had gone for a burial and left the complainant with her grandfather and that on the day of the incident, the complainant's grandfather had gone to the market.
 17. She reiterated that the complainant informed her that the accused threatened to kill her if she screamed and that she wore the same clothes she had worn on the day of the incident when they went to the police station and hospital. PW2 stated that the complainant's panty was torn and that on the side but that the complainant could still wear it. She further stated that the complainant had a black dress with a white panty that had another colour on it.
 18. PW3 No. 101732 P.C. Patrick Musyoka of Ndori Patrol Base testified that on the 18/6/2019 he received a defilement case report from PW2 accompanied by the complainant, a child of 12 years. He testified that the minor reported how the accused defiled her on the 17/6/2019. It was his testimony that he issued them with a P3 form and a treatment note and that they went to Bondo District Hospital where the P3 form was filled.



19. PW3 produced the complainant's baptismal card as PEx3. He testified that the accused was arrested on 20/6/2019 and taken to court. He testified that the complainant informed them that she was defiled by Alfred Wanga, the accused, whom the complainant knew before and even referred to as 'Baba Mary'.
20. In cross-examination, PW3 testified that his statement was based on what the complainant had told him. He stated that the complainant did not present the Kshs. 40 to him. He further stated that he retrieved the clothes the complainant had at the time of the incident but did not take them for analysis. He further testified that he relied on the P3 and the complainant's statement to charge the accused however that no medical examination was conducted on the accused or samples taken from him.
21. PW4 Sammy Luzuri testified that he was the clinical officer who filled the complainant's P3 form. It was his testimony that on examination of the genitalia he found lacerations on the external part and that the hymen was broken. He further testified that the complainant had a whitish vaginal discharge. He further testified that on urinalysis she had epithelial cells which was also evident when he conducted an HIV swab. It was his testimony that the HIV and syphilis tests turned out negative.
22. PW4 testified that he found that there was a probability of vaginal penetration possibly from sexual activity and that he signed the P3 on 19/6/2019. He testified that the same results reflected on the PRC form. He produced the PRC form as PEX1 and the P3 form as PEX2.
23. In cross-examination, PW4 stated that he examined the complainant less than 24 hours after the incident and that he filled the P3 form 2 days later. He further testified that the complainant had indicated that no condom was used but that the only discharge he saw was whitish in colour. He further stated that no spermatozoa was seen. It was his testimony that he did not examine the accused.
24. Placed on his defense, the appellant denied committing the offence and instead gave an alibi that on the date of the incident he left for Kisumu at 12noon, to take a patient to Avenue Hospital and returned to Ndori at 7.30pm before going out with his friends and returning home at 9pm. The appellant attributed his arrest to a grudge between himself and PW2, the complainant's grandmother whose husband had been arrested in 2018.
25. In cross-examination, the appellant stated that the client whom he took to hospital was called Zipporah although he could not prove that he was with her on that day.

Analysis and Determination

26. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions and the applicable law in this appeal. The issues for determination emanating therein are:
 - a. Whether the prosecution's case was proved beyond reasonable doubt and
 - b. Whether the appellant's sentence was excessive and harsh.
27. In addition to the aforementioned issues for consideration, I will also consider the grounds raised in the appellant's petition and supplementary petition as well as the submissions.

Whether the prosecution proved its case beyond reasonable doubt

28. 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* No. 3 of 2006. The ingredients of the offence of defilement were set out in the case of *George Opondo Olunga v Republic* [2016] eKLR, where it was stated that the ingredients



of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

29. The prosecution was under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses.
30. On the identity of the appellant, the complainant testified that she knew the appellant prior to the offence as he was her neighbour and she had known him for the past 3 years. PW3, the investigating officer testified that when the complainant made her report, she referred to the accused as ‘Baba Mary.’ She also stated that the home of the accused and her grand parents’ home was near as they were close neighbours and that she had lived with her grandparents for 5 years. PW2 also testified that the accused was her brother in law.
31. In my view, the complainant was firm and resolute in naming the appellant as her defiler. I am persuaded that she knew the appellant prior to the incident and that there was no mistaken identity. I thus find that the appellant was identified beyond reasonable doubt.
32. Regarding the complainant’s age, the complainant testified that she was 12 years old. Her grandmother, PW2 corroborated this and testified that the complainant was born on the 15th June 2007. PEX3, a baptismal card was produced as exhibit showing that the complainant was born on 15th June 2007. A quick calculation shows that the complainant was 12 years, 2 days old at the time of offence, as contemplated under sub section 3 and therefore I find that the age of the complainant was proved beyond reasonable doubt to be 12 years.
33. On the issue of penetration, “Penetration” is defined under Section 2 of the Act to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
34. The complainant testified that the appellant defiled her on the 17/6/2019 and that he threatened to kill her if she screamed. She narrated how he went and called her while she was making meals in her grandmother’s kitchen, she got out and he led her away to his bedroom, tore her inner pants and took his penis and inserted it into her vagina and that although she wanted to scream, he threatened to kill her and proceeded to defile her upon which something like water came out of her vagina and she was left to go back to the kitchen where she cooked food, ate and slept until the following morning when she informed her grandfather who had arrived home after she had slept, following the incident.
35. On his part, the appellant denied committing the offence, he pleaded in his grounds of appeal that the prosecution failed to prove their case against him beyond reasonable doubt and that he was not subjected to any medical examination in light of the evidence that the complainant’s clothes were retrieved by the Investigations Officer but not subjected to analysis. The complainant further pleaded in his petition that he was convicted against the weight of evidence adduced. He further testified in his defence that he had taken a patient to Kisumu on the material day.
36. PW4, the clinical officer who examined the complainant found that there were lacerations on the external part and that the hymen was broken as well as a whitish discharge from the complainant’s vagina leading him to conclude that there was a probability of vaginal penetration possibly from sexual activity. On whether there was need for corroboration of that evidence by the complainant and PW4 with forensic evidence, Section 124 of the *Evidence Act* provides that:

“Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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.”

37. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW4, the clinical officer as indicated in the PEx2 (the P3 form). This evidence adduced by the prosecution when juxtaposed against the alibi defence set by the appellant, that his arrest was as a result of a grudge between himself and the complainant’s grandmother falls short.

38. In the case of *Kiarie v R* {1984} KLR The Court of Appeal laid down the following principles on a defence of alibi:

“An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate’s finding on the alibi because the finding was not supported by any reasons.”

39. It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court. However, in relying on an alibi defence, the entirety of the prosecution direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence at another stage of the proceedings should not escape scrutiny of the court.

40. In *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 the Court held that:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

41. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant. Albeit in Law, timeless of the disclosure might not be in issue, under Article 50 of the *Constitution* on the right to a fair hearing the prosecution required adequate notice to investigate the allegation of the alibi defence.

42. In the instant case I am not persuaded, as the trial court was not that the appellant’s alibi defence addressed significant aspect of the case against him of defiling the complainant minor.

43. As was stated in the persuasive case *R v Mahoney* {1979} 50 CCC

“The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it.”



44. The appellant's defense in my view amounts to a mere denial and is an afterthought it is not a credible *alibi*. It is dismissed.
45. The appellant also pleaded in his grounds of appeal that there were inconsistencies and contradictions in the evidence adduced against him to sustain his conviction. I have perused the prosecution evidence on record and in my view, they corroborate each other. I find no material or any contradiction that would render the appellant's conviction unsafe.
46. The Court of Appeal of Kenya addressed itself on the issues of contradictions in the case of *Richard Munene v Republic* [2018] eKLR stated as follows;
- “It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”
47. Accordingly, it is my opinion that there was no material contradiction in the prosecution case during the trial so as to prejudice the appellant.
48. In the end, I find and hold that the prosecution proved penetration beyond reasonable doubt and as a result, there was defilement as contemplated by the *Act*.
49. The appellant pleaded in his grounds of appeal that the trial court failed to consider his defence and further that the court disregarded his mitigation. From the trial court record, however, prior to sentencing, the trial court considered the appellant's mitigation and noted that the accused was, “on a defensive mode despite the overwhelming evidence against him.” I am persuaded that the trial court considered the appellant's defence and mitigation.
50. Taking all the above into consideration, I am therefore satisfied that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

Whether the appellant's sentence was excessive

51. The appellant pleaded in his grounds of appeal and submitted that his 20-year sentence was excessive in view of Article 50 (2) (p) of the *Constitution* . Article 50 (2) (p) of the *Constitution* , 2010, which provides that:
- “Every accused person has the right to fair trial, which includes the right.
- (p) to the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence.”
52. In *Alister Antony Pariera v State of Maharashtra*, as quoted in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:
- “Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime.



What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances”

53. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the *Constitution*.
54. The Court of Appeal on its part stated that pursuant to the Supreme Court’s decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis.
55. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence fails to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the *Constitution*. See *Christopher Ochieng v Republic* KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR, and *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR
56. However, the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR clarified the position and stated inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code.
57. In his decision in *WOR v Republic* (Criminal Appeal E017 of 2020) [2022] KEHC 412 (KLR) (26 April 2022) (Judgment) Ochieng J. (as he then was) stated inter alia that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act* and that he was unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement and that in his view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require.
58. This was the holding of Odunga J (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022).
59. In my view the decisions above are persuasive and not binding on this court. Taking into consideration the decision of the Supreme Court in *Muruatetu 2021 (supra)*, it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful unless otherwise changed and any sentence to the contrary is illegal. Furthermore, the circumstances under which the appellant defiled the young child are horrible. He even threatened to kill her. he does not deserve the discretion of this court. I decline to interfere with the lawful sentence imposed on the appellant by the trial court.
60. I find no error in the appellant’s conviction and sentence.
61. The upshot of the above is that the instant appeal against conviction and sentence is found to be devoid of merit and is hereby dismissed.
62. File closed.



63. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF NOVEMBER, 2022

R. E. ABURILI

JUDGE

