REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL APPEAL NO. 44 OF 2020

DANIEL KIHARA WANJERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment in the Chief Magistrate's Court at Thika,

***V. Kachuodho, SRM** in Sexual Offences (SO) Case No. 97 of 2017 dated 20TH August, 2020)*

JUDGMENT

1. ***DANIEL KIHARA WANJERI*** was convicted of the offence of defilement by Senior Resident Magistrate, Thika and was sentenced to life imprisonment. He filed this appeal and at this initial stage, I wish to reproduce how the appellant addressed his petition. It is as follows:-

> ***"****DANIEL KIAHARA WANJERI*, ***the above named appellant being dissatisfied by the judgment of the honourable Senior Resident Magistrate,*** *V. Kachuodho, (Ms),* ***delivered on 20th August, 2020 in the*** *Sexual Offence (S.O.) Case NO. 97 of 2017* ***appeal against the sentence only on the following grounds:-"***

2. The grounds the appellant relies on in support of his appeal are:-

> *1. The learned magistrate erred in law and in fact in sentencing the appellant excessively under the circumstances of this case.*
>
> *2. The learned magistrate erred in adopting her own speculation, probabilities, experiences, opinions, prejudices and fanciful theories in sentencing the appellant when the evidence was extremely inadequate and deficient.*
>
> *3. The learned magistrate erred in meting out a very harsh and excessive sentence anchored on no tangible evidence proper to prove the charges against the accused person.*
>
> *4. The learned magistrate erred in ignoring the appellant's mitigation and past clean record being first offender awarding him harsh sentence, had she done so, she conceivably could have arrived at a different decision and/or sentence.*
>
> *5. The learned magistrate did not appreciate the ingredients of proving charges of defilement as levelled against the appellant.*
>
> *6. The learned magistrate erred in convicting the accused person solely on circumstantial evidence which was laced with contradictions and inconsistencies.*
>
> *7. The learned magistrate disregarded the appellant's evidence in arriving at the erroneous decision.*
>
> *8. The learned magistrate failed to appreciate the glaring contradictions in the prosecution case and thus misleading herself to convict the appellant.*
>
> *9. The learned trial magistrate erred both in fact and in law by failing to find that the failure to call crucial witnesses namely, A and M fatally weakened the prosecution case.*
>
> *10. The learned magistrate erred in convicting the appellant without considering the fact that there were two Post Rape Care*

reports supplied to the appellant clearly contradicting each other.

11. The trial court failed to appreciate that the medical findings were overwhelmingly inconsistent with the offence of defilement in that no injuries were found on the labia areas of the complainant. The broken hymen could have been done either earlier or after the alleged incident and no lacerations were noted.

12. The learned magistrate erred in convicting the accused person when the evidence on record and the prosecution did not prove the case beyond any reasonable doubt.

13. The trial, the conviction and sentencing of the appellant was laced with bias against the accused person although since the commencement of investigations to trial, the learned magistrate ignored the apparent vindication and persecution of the appellant.

3. Even though the appellant's petition seems to be "mixed bag" of partly seeming to only appeal against sentence, and also seeming to appeal against sentence and conviction, I will proceed to treat this appeal as though it is an appeal against both conviction and sentence. That indeed would be the right way to proceed because the learned counsel for the appellant, in the submissions, filed and submitted on both conviction and sentence.

4. This is the first appellate court. I will be guided by the case ***KIILU & ANOTHER VS. REPUBLIC (2005) KLR 174*** where the Court of Appeal stated how first appeal should be considered, thus:-

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions: Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.***

5. AW in December, 2017 was a 2 years old girl. On 14th December, 2017 AW was left by her mother under the care TM, a 12 year old girl. The mother of AW had gone to do casual work. On her return home, this is what she said:-

> ***"I found AW lying on bed but eyes were open. I woke up the baby and put her on my laps. She was looking haggard, tired, and sickly."***

6. The mother, thinking AW was hungry tried to feed her but AW did not eat as well as she normally did. It was then that the mother decided to wash her. This is what the mother told the court:-

> ***"I put water in basin to wash her. I removed her clothes and put her in basin. I saw dirt, whitish and reddish discharge coming from her private parts. I removed her from the basin and examined her and saw the whitish discharge on her private parts."***

7. She called TM and asked her what had happened to AW. TM informed her that she heard AW cry and when she went to check she found the appellant in that room and zipping up his trouser. The appellant was known to the mother because they lived on the same plot. The mother took AW to the police station and later to hospital.

8. TM a class 4 student informed the court that on the material date she placed AW on bed, in her mother's house, for her to sleep. There was no one in that house. Around 1.00 p.m. TM who was in her house nearby heard AW crying. This is what she told the court:-

> ***"I heard AW crying. I went to AW's house. I find (sic) Kihara (appellant) inside mama AW's house. AW was lying on the bed crying. I found Kihara standing near the bed*** *'akijifunga longi yake' (while zipping his trouser)."*

9. TM asked the appellant what he was doing at the house of AW's mother but he did not answer her. Appellant was their neighbour and she knew him. TM noted AW looked disturbed.

10. Dr. Kanina Muthua, from Thika Level 5 hospital produced before court P3 form for AW, which was filled by a doctor at Thika Hospital. He stated the examination of AW revealed reddening of the *libia* both the *majora* and *minora.* In the P3 form, it was also noted that there was bloody discharge. There were pus cells noted. The doctor who examined AW confirmed that there was penile penetration of AW. The doctor therefore concluded AW was defiled.

11. Appellant offered unsworn defence. He stated in his defence that he used to clean offices. Then he said:-

> ***"The complainant is a very small child. It is impossible for me to have got hold of her. The act is alleged to have happened during the day. Yet during the day am (sic) at work and only go home at night."***

12. The learned trial magistrate, in her considered judgment in part, stated:-

> ***"From the foregoing, the only reasonable conclusion was that there was no possibility of mistaken identity of the person who***

defiled the child, who was a person well known to the prosecution witnesses, who they identified as the accused person (appellant) herein. In the circumstances, I find that no one else but the accused defiled the minor."

13. The appellant, in his written submission in support of his ground 1,3,6 and 13 submitted that the trial court violated his constitutional rights, as provided under **Article 50** of the Constitution. He expound that submission by stating that the trial court failed to inform him of his right to obtain legal representation during his trial. Appellant cited the case ***DANIEL MPAYO NGIYAYA V. REPUBLIC (2018) eKLR*** to support his submission that the Constitution requires the court where a person faces serious charge or severe sentence, to inform such person his right to be represented by counsel.

14. The Court of Appeal in the case ***THOMAS ALUGHA NDEGWA VS. REPUBLIC (2016) eKLR*** engaged in an in-depth discussion on **Article 50 (2)(h)** of the Constitution which made reference to the right to legal representation. **Article 50 (2)(h)** provides:-

"Every accused person has the right to a fair trial, which includes:-

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

15. The Court of Appeal in the case ***THOMAS ALUGHA NDEGWA*** (supra) made a finding that that right to legal representation was not absolute. The court stated that there are instances where that right can be limited. The court then concluded that the Legal Aid Act under **Section 40**, requires one who wishes to have legal representation to apply in writing. This is what the Court of Appeal stated in the case ***THOMAS ALUGHA NDEGWA VS. REPUBLIC (2016 eKLR*** thus:-

"In Kenya, *Section 43(1) of the Legal Aid Act* ***sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.***

In the instant application, it is clear the framework for full implementation of Article 50 (h) is now in place as required by the Constitution. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to section 41 of the Legal Aid Act is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate."

16. It needs to be noted that the Court of Appeal in the above case considered an application by the appellant to be accorded, before that court, legal representation. The Court of Appeal in ordering the appellant to be legally represented did not make adverse mention of the fact that appellant was unrepresented before the magistrate's court, the trial court, and before the High Court, the court that entertained the first appeal. That indeed, is in keeping with the provisions of **Section 43(6)** of the Legal Aid Act which provides that the lack of legal representation is not a bar of continuation of proceedings against a person.

17. It follows from the above discussion that nothing turns on the submission of the appellant that his trial was marred by the trial court's failure to inform him of his right to legal representation.

18. The appellant in support of his grounds 2,5,8,10,11 and 12 in his petition submitted that the prosecution failed to prove offence of defilement.

19. Section 2 of the Sexual Offences Act defined penetration. That Section was considered in the case ***IRENE OTIENO OCHIENG VS. REPUBLIC (2017) eKLR thus:-***

"Section 2 of the Sexual Offences Act defines penetration as:

'The partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of MARK OIRURI MOSE VS R (2013) eKLR when the Court of Appeal stated thus:

'…Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ...' (emphasis added).

Later the Court of Appeal, then differently constituted, in the case of ERICK ONYANGO ONDENG V. REPUBLIC (2014) eKLR held as such on the aspect of penetration:

'In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the

offence. It is not necessary that the hymen be ruptured.'"

20. The doctor's evidence supported the prosecution's case by proving that there was penetration of AW. That conclusion of the doctor is supported by the holding in the case of ***IRENE ATIENO OCHIENG VS. REPUBLIC*** (supra). Although appellant alleged the doctor's evidence had contradiction, there was no contradiction, and the appellant failed to specify what contradiction he referred to.

21. It was also not necessary for the appellant to be medically examined for penetration to be established: See the case ***KASSIM ALI VS. REPUBLIC (2006) eKLR.***

22. TM's evidence is very clear that she was alerted by the crying of AW and upon going where she had left AW sleeping, she found the appellant zipping up his trousers. Later, AW was found to have dirt, reddish and whitish discharge from her private parts. This Court is satisfied that penetration was proved to the required criminal standard.

23. Appellant in his submission in support of his grounds 4,7 and 9 submitted that his defence of *alibi* was not considered by the trial court.

24. It is indeed correct that the trial court, by its judgment did not specifically consider the appellant's defence of *alibi.*

25. The Court of Appeal in the case ***VICTOR MWENDWA MULINGE VS. REPUBLIC*** rendered itself thus in consideration of *alibi* defences:-

> ***"It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution;*** *SEE KARANJA VS REPUBLIC,* ***this court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilty is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigating and thereby prevent any suggestion that the defence was an afterthought."***

26. Does the defence offered by appellant, in any way, upset the prosecution evidence? I would answer in the negative. Appellant stated in his unsworn evidence that the defilement occurred during the day, and during the day he is normally at work. There was no mention of what work he did or where he worked. That evidence would be incapable of being tested by the prosecution. I do indeed find that that defence was an afterthought. Although the Investigating Officer (I.O), on being cross-examined stated that appellant usually worked at the police station, the I.O. was not asked whether at 1.00 pm on 14th December, 2017, when the offence occurred the appellant was at police station. It follows that the defence offered by the appellant was not alibi defence. That defence was not adequately particularised. It leads me to draw an inference adverse to the credibility to alibi defence. It did not raise reasonable doubt of the prosecution's evidence.

27. From the above, I find no merit to the appeal on conviction.

28. In the case ***FRANCIS OWINO OTIENO VS. REPUBLIC (2020) EKLR*** the court considered the Court of Appeal decision by which the Supreme Court's decision on mandatory sentence was found to be unconstitutional as follows:-

> ***"The reasoning in the above*** *FRANCIS MURUATETU* ***case has been extended to mandatory minimum sentences imposed under the Sexual Offences Act and by extension, to all other statutes prescribing minimum sentences by the Court of appeal in DISMAS WAFULA KILWAKE V R [2018] eKLR, and in JARED KOITA INJIRI V REPUBLIC [2019] eKLR where the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:-***
>
> > ***'In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in*** *FRANCIS KARIOKO MURUATETU & ANOTHER V. REPUBLIC, SC PET. NO. 16 OF 2015],* ***which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.'***
>
> ***Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***
>
> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.***

The Court of Appeal in CHRISTOPHER OCHIENG V R [2018] eKLR stated as follows:-

> ***'In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis… Needless to say, pursuant to the Supreme Court's decision in*** *FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC* ***(supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial.'"***

29. In view of the above, this Court is justified to interfere with the trial court's sentence of life imprisonment.

30. Bearing in mind that the offence was perpetrated against a defenceless 2 year old girl and that the appellant took advantage of his neighbourliness to commit the offence, I find a sentence of 20 years is appropriate.

DISPOSITION

31. The judgment of this Court is as follows:-

(a) Appeal against conviction is dismissed.

(b) The trial court's sentence is set aside, ***DANIEL KIHARA WANJERI*** is sentenced to serve 20 years imprisonment, which sentence shall start from 20th August, 2020.

JUDGMENT DATED and DELIVERED at KIAMBU this 20th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

Appellant: .....present

Respondent: .....Ms. Kathambi

Mr. Geresa for appellant

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE