Korir v Republic (Criminal Appeal E027 of 2023)
[2025] KEHC 289 (KLR) (14 January 2025) (Judgment)

Neutral citation: [2025] KEHC 289 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E027 OF 2023

RL KORIR, J

JANUARY 14, 2025

BETWEEN

ENOCK KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case Number E010 of 2022 by Hon. Wamae E. in the Magistrate's Court in Bomet)

JUDGMENT

1. The Appellant was charged with the 1st count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 20th January 2022 at [Particulars Withheld] within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.C, a child aged 8 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 20th January 2022 at [Particulars Withheld] within Bomet County, he intentionally and unlawfully touched the vagina of A.C, a child aged 8 years with his penis.

3. The Appellant was charged with the 2nd count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 20th January 2022 at [Particulars Withheld] within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.C, a child aged 9 years.

4. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 20th January 2022 at [Particulars Withheld] within Bomet County, he intentionally and unlawfully touched the vagina of A.C, a child aged 9 years with his penis.

5. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called eight (8) witnesses in support of its case. After the Prosecution had closed its case, the trial court found that the Prosecution had proved a prima facie case against the Appellant and the Appellant was placed on his defence. The Appellant presented his defence and did not call any witnesses.

6. In a Judgment dated 17th May 2023, the trial court found that the Prosecution had not proved its case against the Appellant on the 1st count of defilement. The trial court however found that the Prosecution had proved its case against the Appellant on the 2nd count of defilement and sentenced the Appellant to serve 20 years imprisonment.

7. Being aggrieved with the Judgement of the trial court, Enock Korir appealed against his conviction and sentence on the following grounds reproduced verbatim:-

   I. That the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof.

   II. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence which was not adduced in court during the trial.

   III. That the learned trial Magistrate erred in law and fact by depending on conspiracy based evidence which was not proved beyond reasonable doubt.

   IV. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.

   V. That the learned trial Magistrate erred in law and fact by relying on uncorroborated evidence.

   VI. That the learned trial Magistrate erred in law and fact by relying on evidence adduced by the Prosecution which was inconsistent, contradictory and full of irregularities.

   VII. That the learned trial Magistrate erred in law and fact by rejecting my plausible defence without any further explanation.

8. The Appellant filed additional grounds of Appeal on 17th October 2024 reproduced verbatim as follows:-

   I. That the learned trial Magistrate erred in law by convicting the Appellant and sentencing him to serve a sentence of 20 years imprisonment which was awarded in a mandatory form without considering the circumstances which prevailed during the commission of the offence and other constitutional provisions.

   II. That the learned trial Magistrate erred in law and fact by holding that the offence of defilement was proved but failed to note that the ingredients of the offence were not proved by the Prosecution.

9. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Court of Appeal in the case of Mark Ouiruri Mose vs Republic (2013) eKLR, held that:-

   > " 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"

10. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution's Case.

11. It was the Prosecution's case that the Appellant defiled A.C (PW2) on 20th January 2022. PW2 testified that on the material day, the Appellant called her to his shop and took her to a room which had a bed. PW2 further testified that the Appellant inserted his male genital organ into her female genital organ and threatened to kill her if she screamed. PW2 stated that the Appellant then gave her a "kangumu".

12. Geoffrey Kirui (PW6) who was a clinical officer testified that he examined PW2 and found that her outer genitalia had bruises and blood, her labia majora and labia minora had bruises and spermatozoa was seen on the victim's outer genitalia. PW6 further testified that upon vaginal examination, he found spermatozoa, pus cells and epithelial cells which indicated that sexual intercourse had occurred.

13. It was PW6's testimony that there was evidence of penetration as the hymen was freshly broken.

14. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

The Accused/Appellant's Case

15. The Appellant, EKK testified as DW1. He denied committing the offence and testified that on the material day, he was in his shop from 8 a.m. to 10 p.m. He further testified that he was arrested on 22nd January 2022 on allegations of defiling PW1 and PW2.

16. It was the Appellant's testimony that he did not know the two complainants (PW1 and PW2) and only met them at the police station.

The Appellant's Submissions.

17. In his undated submissions filed on 17th October 2024, the Appellant submitted that the sentence issued by the trial court was couched in mandatory terms and left no room for the trial court to award a lesser sentence. That section 8(2) of the *Sexual Offences Act* deprived the court the use of judicial discretion while sentencing and it was thus unjust and unfair. He further submitted that this court consider that he had spent some months in remand and apply the provisions of section 333(2) of the Criminal Procedure Code.

18. It was the Appellant's submission that the court should consider the circumstances of the case and his mitigation before meting an appropriate sentence in accordance to sections 216 and 329 of the Criminal Procedure Code. That in the circumstances of the present case, the sentence of 20 years was harsh. It was his further submission that if his sentence could not be reviewed by this court, then his access to justice as envisioned by Article 48 of *the Constitution* would be infringed upon.

19. The Appellant submitted that the Prosecution did not prove the charge of defilement. That the evidence tendered in the trial court was inconsistent and full of contradictions. He submitted that the case was full of suspicion and in law, suspicion could not be used as a basis for conviction.

20. It was the Appellant's submission that the age of the victim was in doubt. That the charge sheet and the victim's testimony showed that the victim was aged 9 years and the P3 Form showed that she was aged 14 years. It was his further submission that the investigating officer (PW8) did not confirm to the trial court what was contained in the victim's Birth Certificate. That in the absence of corroborative

evidence (age assessment report, school leaving certificate or baptismal card), the age of the victim was unknown. He relied on John Otieno Obwar vs Republic (2011) eKLR.

21. The Appellant submitted that the Prosecution did not prove penetration. That the breakage of the hymen meant that the victim was not a virgin. He further submitted that the trial court erred when it used this evidence to conclude that there was penetration. He relied on PKW vs Republic (2012) eKLR. That a broken hymen could be a result of several things like injury or vigorous physical activities.

22. It was the Appellant's submission that no one witnessed the commission of the offence.

23. The Appellant submitted that the Prosecution evidence was full of irregularities and contradictions. That PW1 and PW2 who were pupils at [Particulars Withheld] did not explain why they were not in school and one wondered if it was for disciplinary reasons. The Appellant further submitted that the parents of PW1 and PW2 should have shed light as to the absence of PW1 and PW2 from school. That this made the testimonies of PW1 and PW2 doubtful.

24. It was the Appellant's submission that the trial court did not consider his defence. That he had no burden to prove his innocence. It was his further submission that the trial court should always have the Accused's defence while analysing the Prosecution's case and must satisfy itself that the Prosecution had by its evidence left no reasonable possibility of the defence being true. He relied on Ouma vs Republic (1986) KLR 619.

25. The Appellant urged this court to set aside the trial court Judgement.

The Prosecution's submissions.

26. In their submissions filed on 8th October 2024, the Prosecution submitted that they proved the age of the victim. That the victim informed the trial court that she was aged 9 years old. That further her age was confirmed by her mother (PW3), brother (PW4), teacher (PW5), clinical officer (PW6) and the investigating officer (PW8).

27. It was the Prosecution's submission that penetration was proved. That the victim gave a step by step account on how the Appellant lured her to a room behind his shop and penetrated her. It was their further submission that the Appellant threatened to kill the victim if she screamed.

28. The Prosecution submitted that the victim's evidence was corroborated by PW3, PW4, PW5, PW6 and PW8. That additionally, the clinical officer (PW6) produced a P3 Form, PRC Form and treatment notes which indicated that the victim had been penetrated.

29. It was the Prosecution's submission that the victim knew the Appellant well. That the Appellant was a shopkeeper and his shop was located near the school where the victim attended. It was their further submission that the victim referred to the Appellant by his first name. That the offence took place during the day at around 4 p.m. hence there was no chance of mistaken identity.

30. The Prosecution submitted that even though the Appellant denied committing the offence, he admitted that he knew the victim was a student at Komu Tengecha Primary School and that he owned a shop near the school. That he did not call any witness to corroborate his evidence thus his evidence amounted to a mere denial.

31. It was the Prosecution's submission that the minimum sentence provided for under section 8(2) of the *Sexual Offences Act* was life imprisonment. That the trial court was lenient in sentencing the Appellant to serve 20 years imprisonment. It was their further submission that the Appellant was properly convicted and sentenced.

32. I have gone through and given due consideration to the trial court's proceedings, the Grounds of Appeal filed on 2nd June 2023, the Amended Grounds of Appeal and Appellant's written submissions both filed on 17th October 2024 and the Respondent's written submissions filed on 8th October 2024. The following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Appellant's defence placed doubt on the Prosecution case.

    iii. Whether the sentence preferred against the Appellant was lawful and appropriate.

i. Whether the Prosecution proved its case beyond reasonable doubt.

33. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

34. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an Accused person. The age of the victim may be proved through the production of a birth certificate or a parent's testimony. Rule 4 of the Sexual Offences Rules of Court 2014 provided:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

35. A.C (PW2) testified that she was 9 years old and that she was a Grade One student at Tengecha Primary School. The Appellant did not cross examine the victim (PW2) on her age.

36. Similarly, EC (PW7) who was the victim's mother testified that the victim (PW2) was aged 9 years as she had been born on 9th April 2012. The Appellant did not cross examine PW7 regarding the age of PW2. PW7 produced a Birth Certificate as P.Exh 8. I have looked at the Birth Certificate and I have confirmed that the victim (PW2) was born on 9th April 2012 which would make her 9 years of age when the offence was allegedly committed.

37. With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs Republic(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

38. The victim (PW2) testified that on the material day, the Appellant lured her to his shop which had a bed. That he removed her underwear and inserted his penis into her vagina. The victim further testified that the Appellant gave her a "kangumu" (loosely translated to mean bun) and she went home. When the victim as cross examined, she confirmed that she knew the Appellant and that he gave her a "kangumu".

39. GY (PW4) who was the victim's brother in law testified that on the material day at around 4 p.m., he found the victim with the "kangumu" and when he interrogated her where she got it from, the victim explained the circumstances which led to her to be given the "kangumu". PW4 further testified that the Appellant was his neighbour and their houses were approximately 800 meters apart. When PW4 was cross examined, he reiterated that the Appellant was his neighbour and that he knew him.

40. No. 105637 PC Caroline Nthenya who was the investigating officer testified that she visited the scene which was a shop that had a bed. That she arrested the Appellant in his shop and escorted him to the police station.

41. The Appellant testified that he did not know the victim. When the Appellant was cross examined, he stated that his shop was approximately 200 meters away from Tengecha Primary School and confirmed that he lived inside his shop which he had partitioned into a business premise and living quarters.

42. From the evidence above, it is my view that the identifying evidence was more recognition than simple identification. The identifying evidence of the victim was cogent and believable. She identified the Accused as the person who invited her into his shop and who took her to his bed and defiled her.

43. GY (PW4) who was the victim's brother in law and guardian stated that the Appellant was known to them as he was their neighbour. The investigating officer (PW8) also testified that they arrested the Appellant in the shop that the victim had identified as the place where she had been defiled. The Appellant confirmed that the shop was his business premise and living quarters.

44. Flowing from the above, I am satisfied that the identification evidence was free from doubt and there was no possibility of mistaken identity. It is my finding therefore that the Appellant was positively identified as the perpetrator.

45. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

46. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.

47. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.

48. PW2 testified that on the material day, the Appellant called her to his shop and took her to a room which had a bed. PW2 further testified that the Appellant inserted his male genital organ into her female genital organ. This testimony remained uncontroverted after cross examination.

49. Regarding medical evidence, Geoffrey Kirui (PW6) who was a clinical officer testified that he examined PW2 and found that her outer genitalia had bruises and blood, her labia majora and labia minora had bruises and spermatozoa was seen on the victim's outer genitalia. PW6 further testified that upon vaginal examination, he found spermatozoa, pus cells and epithelial cells which indicated that sexual intercourse had occurred. It was PW6's opinion that there was evidence of penetration as the hymen was freshly broken.

50. PW6 produced the victim's PRC Form, P3 Form and treatment notes as P.Exh 5, 6 and 7 respectively. I have looked at the exhibits and they corroborate PW6's testimony that the victim had spermatozoa on her genitals, had bruises on her labia majora and labia minora and had a freshly broken hymen.

51. I accept the medical evidence presented by PW6 that there was penetration. He observed bruises on her labia majora and broken hymen which in his professional opinion showed vaginal penetration.

52. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that the Prosecution proved its case against the Appellant in count 2 beyond reasonable doubt.

53. I observe that the Accused was acquitted on the first count. In acquitting the Accused, the trial court made several observations as follows. First it noted that the victim A.C who testified as PW1 retracted her statement to the police and that in the trial she was declared a hostile witness thus making her an unreliable witness and her evidence untrustworthy. Secondly, that once a witness is declared hostile, their evidence becomes almost worthless and of no value to either the prosecution or the defence. That the inevitable conclusion was that the witness was unreliable and was discredited completely. The trial court then went ahead to reject the evidence of PW1 in toto and proceeded to acquit the Accused on count 1.

54. From the outset, I must observe that the trial court failed to consider that the victim (PW1) a Grade 2 pupil aged only 8 was a vulnerable witness who ought to have been declared as such and given the protection and support available under the law to enable her testify without fear. Indeed when recalled, she told the court that she had lied in her testimony as a result of having been threatened by the Accused.

55. Secondly, the trial court was in error in completely rejecting the evidence of PW1. It was evidence of negligible probative value and while the court would not rely on it of itself, it could be considered alongside other evidence. Although PW1's evidence was of negligible probative value, it at least confirmed that she was a pupil at [Particulars Withheld] alongside PW2 and knew the Accused's shop.

56. There was sufficient evidence form other witnesses in the trial to prove that PW1 was defiled and which the court ought to have considered. PW2 (A.C) told the court how she was on her way home form school when the Accused lured both herself and PW1 to his shop. She vividly described how the Accused defiled them in turns, beginning with herself while PW1 watched, and after that defiled PW1 as she (PW2) watched. That after he was done, he gave each of them "kangumu" and they went to their respective homes.

57. PW2's evidence above placed both PW1 and the Accused at the scene.

58. The Clinical Officer (PW6) testified that he examined both victims on 21st January, 2022 and produced medical evidence in the form of two P3 Forms and 2 PRC Forms. With respect to PW1, the PRC (Exhibit 1) Form stated that she was examined on 21/1/2022 at 15.30pm and she had a newly broken hymen and bruises in the vaginal wall. That laboratory results (P.Exhibit 3) showed presence of epithelial cells, red blood cells and spermatozoa. The P3 Form (P.Exhibit 2) contained the same details. PW 6 made a finding that PW1 had been defiled.

59. With respect to the age of PW1, there was an age assessment report (P.Exhibit 4) indicating that she was 8 years old. It was also the testimony of her mother that she was born on 9/4/2012 and her Birth Certificate (P.Exhibit 8) which placed her age at 9 years at the time of the defilement having only turned 9 just two months before the material date.

60. It is this court's view therefore that despite the child victim having been declared a hostile witness and her testimony being rendered worthless, there was sufficient evidence to prove the commission of the charge in Count 1. It was clear that she was 9 years old, in Grade 2, and had been defiled. The identity of the perpetrator was given by PW 2 her co-victim whose evidence placed both PW1 and the Accused at the scene and was an eye witness. This court wonders why the Prosecution did not appeal acquittal on the 1st count.

61. This case brings to the fore the need to equip trial courts with skills to appreciate how trauma may affect victims of sexual offences and the impact of such trauma on their conduct and testimony. Without descending to the arena of conflict, the court can protect child victims within the law and more importantly evaluate other evidence before arriving at a conclusion that a case was rendered hopeless by the fact of a traumatized victim's conduct and failure to testify.

62. It is the hope of this court that relevant training in the adjudication of defilement cases will soon be availed by Kenya Judiciary Academy to all actors in the administration of criminal justice.

63. I now turn back to the present appeal to consider the Appellant's defence in court.

The Appellant's defence.

64. The Appellant (DW1) denied committing the offence. He testified that on the material day, he was in his shop from 8 a.m. to 10 p.m. He further testified that he was arrested on 22nd January 2022 on allegations of defiling PW1 and PW2.

65. It was the Appellant's testimony that he did not know the two complainants (PW1 and PW2) and only met them at the police station.

66. Having analysed the Appellant's defence, it is my finding that it was a mere denial. He did not provide any witness to corroborate his testimony. It is my further finding that the Appellant's defence was weak and as a whole, did not cast any doubt on the Prosecution's case which I have already found proven.

Whether the sentence preferred against the Appellant was lawful and appropriate.

67. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. The Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, (1954) EACA 270, held as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

68. The penal section for this offence is found in section 8(2) of the *Sexual Offences Act* which states that:-

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

69. It is clear from the above that once an Accused is convicted for the offence of defilement under section 8(2) of the *Sexual Offences Act*, then the prescribed sentence was life imprisonment. This therefore meant that the 20 year sentence meted by the trial court was unlawful.

70. This court is empowered to disturb an unlawful sentence and enhance it as provided for by law. The Court of Appeal in Denis Kinyua Njeru v Republic [2017] KECA 424 (KLR) quoted SJM versus Republic (2016) eKLR, and stated as follows:-

> " In the present appeal, the first appellate court did not convict the appellant for a more serious offence. It sustained the conviction by the trial court for defilement but interfered with the sentence, which it found to be illegal under section 354 of the Criminal Procedure Code, the High Court has power on an appeal against conviction to increase or reduce the sentence. In Kenneth Kimani Kamunyu versus Republic [2006] eKLR, this Court reiterated that an appellate court has jurisdiction to interfere with an illegal or unlawful sentence. While we agree that it is good practice for the court to warn an appellant before the hearing of the appeal that should the appeal fail it would be obliged to substitute an illegal or unlawful sentence with the proper sentence prescribed by law, the duty of the appellate court to impose the lawful sentence as prescribed by law is not undermined by the failure to issue such warning or conviction."

71. Further, in Kenneth Kimani Kamunyu v Republic [2006] KEHC 3428 (KLR), Makhandia J. (as he then was) held:-

> " The principles upon which an appellate court acts when dealing with appeals on sentence have long been settled. In the case of Sayeka Vs. Republic (1989) KLR 306, it was held inter alia:
>
> "..... The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principles or overlooked some material factors or the sentence is manifestly excessive in the circumstances of the case....." Further in the case of Stephen Ondieki Nyakundi Vs. Republic, Ca No. 91 Of 2005 (unreported) the Court of Appeal held "that the court can only interfere with the sentence if it is shown to be unlawful....."

72. I have considered the circumstances of the case. The Appellant defiled the victim who was of tender years and threatened to kill her if she raised an alarm. In my view, the circumstances of the offence were aggravating. I have also considered the Appellant's mitigation in the trial court that he was a first offender and sole breadwinner of his family.

73. It is my finding that the Appellant must be held accountable for his actions and must serve a deterrent sentence as a punishment and to discourage others who want to perpetuate this vice. As already stated above, the trial court sentence was unlawful and it calls for my interference.

74. In the final analysis, I uphold the Appellant's conviction. As mandated by law, I hereby vacate the 20year sentence and substitute it with life imprisonment as provided by law.

75. The Appellant shall serve life imprisonment which shall be deemed to run from the date of sentence by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 14TH DAY OF JANUARY, 2025.

R. LAGAT-KORIR

JUDGE

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