Kinyanjui v Republic (Criminal Appeal E170 of 2023)
[2025] KEHC 2582 (KLR) (Crim) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E170 OF 2023

AB MWAMUYE, J

FEBRUARY 13, 2025

BETWEEN

JAMES WAINAINA KINYANJUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the original conviction and sentence by Hon. M.A. Opondo (SRM) delivered on 22nd February, 2019 in Makadara Chief Magistrate's S.O. Case No. 21 of 2017, Republic -vs- James Wainaina Kinyanjui)

JUDGMENT

1. The Appellant, James Wainaina Kinyanjui, was charged with the offence of defilement contrary to Section 8 (1), as read together with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The Appellant was equally charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. It was alleged that on 25th January, 2017 in Kamukunji Sub-County within Nairobi County, the Appellant intentionally and unlawfully caused his penis to touch and penetrate the vagina of CMN a female child of ten (10) years.

3. The Appellant pleaded 'not guilty' to both counts and the matter proceeded for trial. The prosecution called a total of six witnesses in support of their case against the Appellant. At the close of prosecution's case, the Trial Court was satisfied that the prosecution had established a prima facie case against the Appellant; and consequently, put the Appellant on his defence.

4. The Appellant took the stand and gave his testimony under oath but did not call any other witnesses. At the close of the Appellant's case, the Trial Court convicted the Appellant of sexual assault contrary

to Section 8(1) as read with Section 8 (2), of the *Sexual Offences Act*. After hearing the Appellant in mitigation, the Trial Court sentenced the Appellant to a term of twenty (20) years imprisonment.

5. Being dissatisfied with both the conviction and sentence, the Appellant filed a Petition of Appeal that espoused the following grounds of appeal, verbatim:

   i. The learned Trial Court magistrate erred in law and facts in convicting by failing to appreciate the fact that the Appellant was found guilty but insane indicative of temporary insanity at the alleged commission of the instance offence and hence prejudiced by the verdict under section 12 of the penal code, section 162 through 167 of the criminal procedure code which stands impugned and which conflicted with constitutional provisions under article 25, 27, 29 & 160 since a sick person's place is not prison but the hospital, further violating the Doctrine of Separation of powers hence prejudiced.

   ii. The learned trial magistrate erred in law and facts in convicting without considering that primary penetration was not well established by the medical evidence beyond reasonable doubt required by the law.

   iii. That the learned Trial Court magistrate erred in law and facts in convicting by failing to consider the omission by the learned trial magistrate to explain the accused person of his right to legal representation and the right to be represented by an advocate of his choice at the state expense in violation of Article 50 (2) (g) (h) of *the constitution* of Kenya 2010.

   iv. That the learned Trial Court magistrate erred in law and facts in convicting by failing to appreciate that the imposed sentence remains unconstitutional since the Appellant was not that kind of a person to be imprisoned.

6. The parties filed and exchanged written submissions in the Appeal. The Appellant's written submissions were not dated while those of the Respondent were dated 16th December 2024.

7. In his written submissions, the Appellant argues that he was found guilty but insane, which the Trial Court didn't properly consider. He further argues that there was no sufficient proof of penetration since the act described (rubbing on thighs) does not meet the legal definition of penetration. The Appellant also submitted that his right to legal representation was violated. The Appellant claims he was not informed of his right to an attorney, especially as a possibly insane person. Article 50(2)(g)&(h) of the Kenyan Constitution, 2010 requires informing the accused of their right to legal representation, and providing one if substantial injustice would occur. The Appellant further argued that imprisoning an insane person is unconstitutional and thus objects his sentence and urges this honourable court to allow his appeal, quash the conviction and set aside his sentence.

8. On the other hand, the respondent's submissions focused on proving the elements of defilement: penetration, age, and identification. The Respondent submitted that all elements of the offence were proved beyond reasonable doubt and the appeal should be dismissed since the Trial Court's conviction and sentence was safe and proper.

9. This being the first appellate court, it is our duty as well set out in the case of Okeno v Republic [1972] E.A 32 which states as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala v Republic [1957] E.A 570. 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; it must make its own findings and draw its own 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 had the advantage of hearing and seeing the witnesses."

10. Further in the case of Mark Oiruri Mose v Republic [2013] eKLR Criminal Appeal No. 295 of 2012 the court of appeal stated: -

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the Trial Court afresh, analyze it, evaluate 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 demeanor of the witnesses and hearing them give evidence and to give allowance for that."

11. In view of the above, I have considered the grounds of appeal against the record of appeal and the submissions of both parties, and it comes out clearly that the issues for determination in this matter are; whether the charge against the accused was proved beyond reasonable doubt, whether the Trial Court failed to properly consider the Appellant's mental state, whether the Appellant's right to legal representation was violated, and whether the sentence imposed was unconstitutional given the Appellant's alleged insanity.

12. On the first issue, I wish to consider whether the three ingredients of defilement were proved beyond reasonable doubt.

    i. The age of the victim

13. From the record of the Trial Court, I am satisfied that there was no error in the identification of the complainant's age as a ten-year-old minor. The production of her birth certificate was sufficient proof and, in any case, not in dispute in this Appeal.

    ii. Whether the element of penetration was established

14. On whether there was penetration, penetration is proved though the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case must be sufficient to determine whether penetration occurred.

15. The Complainant (PW 1), testified that the accused grabbed her by the left arm blind-folded her then dragged her into a room. That he removed her skirt and blouse and rubbed his private parts against hers. It was her testimony that during this ordeal the accused had tied her hands at the back with a rope and her eyes and mouth still blind folded and gagged. That when he was done, he kicked her out together with her bag. That from outside she could see where she was from and could see the accused who had not locked his door.

16. PW3 a clinical officer testified that PW1 visited their facility on 25th January 2017 complaining of sexual abuse. Examination revealed her genitalia was wet with non-smelly clear fluid. That she had reddening and fresh bruises on the inner labial walls at the posterior. That her hymen was swollen but intact. She produced a medical report as PExhbt 1 and PRC form as PExhbt 2. It was her testimony that it was not normal to find the injuries that were found in the 10year old and that the injuries were consistent with her narration.

17. PW5, Dr. Maundu who on 25th January 2017 examined PW1 on allegations of defilement. Examination showed that she had pinch marks on the inner parts of her thighs and that the injuries

were a day old. That the virginal walls were inflamed and tender and that the hymen appeared to have been traumatized but was not broken. He produced a P3 of the victim as PExhbt 3.

18. The Appellant on the other hand submitted that he just slept on PW1's private part, then rubbed his private part on the complainant's thigh which is an act that cannot withstand penetration. He further submitted that by virtue of him being insane, he just knew what he had done had satisfied his thirst and such a conduct falls under section 11 (1) of the S.O.A and not section 8 (1) of the S.0.A.

19. From above, the Appellant argues that penetration was not sufficiently established, as the act described by the victim involved rubbing on the thighs. 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 organs of another."

20. The medical report indicated injuries consistent with trauma, but the hymen remained intact. Penetration does not require the rupture of the hymen; redness, swelling, or other forms of trauma can suffice as evidence. The victim's testimony, corroborated by the medical evidence, suggested penetration. Therefore, the Trial Court's finding was consistent with the law.

iii. Whether the Appellant was properly identified

21. On the question of whether the Appellant was properly identified and linked to the offence, I will rely on the case of Republic v Turnbull [1970] 3 ALL E.R. 549 as quoted with approval by the Court of Appeal in the case of Michael Ng'ang'a Kinyanjui v Republic where Lord Widgery, C.J. held:

> "... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witnesses ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance..."

22. PW1 stated that she was blindfolded during the act but got to see the accused when she was thrown out of the house. It was her testimony that when she was outside, she removed the blindfold and was able to see where she was from and also saw the accused since he had not closed his door.

23. PW4 who is the victim's mother testified that her daughter took her to the accused's house. PW6 who is the investigating officer corroborated this by stating that she was led to the accused's house where they found the accused. That the accused confirmed that he was the only occupant of that house.

24. In Kariuki Njiru & 7 Others v Republic, Criminal Appeal No. 6 of 2001, the Court emphasized that identification evidence must be scrutinized and free from the possibility of error. Given that multiple witnesses corroborated the complainant's identification of the Appellant, this Court finds no error in the Trial Court's finding on identification.

25. On the second issue, the Appellant contends that the Trial Court failed to properly consider his insanity at the time of the offense and during the trial proceedings. Under Section 12 of the *Penal Code*, a person is not criminally responsible for an act if, at the time of its commission, they were suffering from a mental disease that rendered them incapable of understanding their actions.

26. Sections 162 to 167 of the *Criminal Procedure Code* provide the legal framework for dealing with accused persons found to be insane. Notably, where an accused is found to be insane at the time of the

offense, the proper course is to make a special finding of "guilty but insane" and to order their detention at the President's pleasure.

27. In the present case, the Trial Court ordered a psychiatric evaluation at Mathare Hospital, and the medical report concluded that the Appellant was fit to plead. There was no express finding that he was insane at the time of the offense. Since the medical evidence did not establish insanity at the material time, the Trial Court correctly proceeded with the trial and sentencing. The burden was on the Appellant to prove his insanity at the time of the act, and during the trial as established in Joseph Kieti Seet v Republic [2014] eKLR, where the court noted that mere allegations of mental illness, without medical substantiation, do not suffice to displace criminal liability. The court went on to hold that: - ".....at plea taking time the Appellant was possessed of mental faculties that were capable of distinguishing right from wrong so as to bear legal responsibility for his actions. Consequently, the trial cannot be declared a nullity."

28. The Appellant was convicted and sentenced on the 9th April, 2019. In his initial ground of appeal received in court on 6th June, 2023 the issue of insanity was not included. It was only raised later when he filed another ground of appeal and submissions thereby suggesting that the same was an afterthought.

29. Given that the medical report did not confirm insanity, and that the Appellant was able to participate in his trial, the Trial Court cannot be faulted for proceeding with conviction and sentencing.

30. On whether the Appellant's right to legal representation was violated, the Appellant asserts that he was not informed of his right to legal representation, as required under Article 50(2)(g) and (h) of *the Constitution*, particularly given his alleged mental condition. Article 50(2)(g) and (h) of *the Constitution* guarantees the right to legal representation and state-appointed representation where substantial injustice may occur. The record shows the Appellant conducted his defense effectively, cross-examined witnesses, and demonstrated understanding of proceedings.

31. In William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020*) [2022] KECA 23 (KLR) the court held: "that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial."

32. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. However, in the present appeal, the Appellant did not raise the issue of legal representation in the Trial Court, and the record of the Trial Court shows that the Appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered any or any substantial injustice. For these reasons, I do not find any merit in the Appellant's arguments that his right to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* was violated, and therefore, this ground of appeal fails.

33. On the last issue, an appellate court should not interfere with a sentence unless the Trial Court acted upon wrong principles or overlooked material factors. (See Ogolla s/o Owuor v Republic [1954] EACA 270).

34. The Appellant argues that sentencing an insane person to imprisonment is unconstitutional. The Trial Court imposed the mandatory minimum sentence of 20 years under the *Sexual Offences Act* after mitigation. However, if the Appellant had been found guilty but insane, a different sentencing approach would have been required.

35. Psychiatric conditions must be properly examined when sentencing. Since the psychiatric report did not confirm insanity, the Trial Court had no option but to impose the statutory sentence and I find no reason to interfere with the findings of the Trial Court on the sentence. Therefore, this ground fails.

36. That being said, and for the reasons set out above, I am satisfied that the prosecution's evidence met the threshold of proving the case beyond reasonable doubt; and that the Trial Court did not err in law and in fact in convicting the Appellant. Accordingly, the appeal on conviction is dismissed.

37. The appeal on sentence is equally dismissed. I am satisfied that the Trial Court did take into account the period the Appellant was held in custody. I therefore order that the sentence imposed of twenty (20) years should run from the date the Appellant was arraigned in court on January 31, 2017.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE