Wanjama v Republic (Criminal Appeal E075 of 2022)
[2025] KEHC 1548 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1548 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E075 OF 2022

AK NDUNG'U, J

FEBRUARY 19, 2025

BETWEEN

PATRICK WAHOME WANJAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E072 of 2017– V. Masivo SRM)

JUDGMENT

1. The Appellant in this appeal, Patrick Wahome Wanjama was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates on 01/11/2020 and 29/03/2021 at Laikipia East Sub-county within Laikipia County unlawfully and willingly caused his penis to penetrate the vagina of MK a girl aged 16 years. On 02/12/2022, he was sentenced to nine (9) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he appealed to this court vide a petition of appeal filed on 14/12/2022 which he sought leave to amend in his submissions and filed supplementary ground of appeal. The conviction and the sentence are being challenged on the following grounds;

    i. That the learned trial magistrate erred by denying him the statutory defence under section 8(1), 8(5) and 8(6) of the *Sexual Offences Act*.

    ii. That the learned magistrate erred convicting him while placing reliance on extra judicial confession that failed to comply with provisions of Article 50(2)(i) and 50(4) of *the Constitution* which rendered the trial to be unfair.

    iii. The learned magistrate erred convicting him without appreciating his defence and weighing it vis-à-vis the prosecution's case.

iv. The learned magistrate erred by applying wrong principles during sentencing without considering the favourable probation report pertaining his conduct in the community.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the complainant testified that the sex was consensual and that the alleged offence was committed during the Covid-19 long holiday so, as he said in his defence, he did not know the school the complainant was attending. Further, he was only 18 and the complainant was 16 years old which was unknown to him so it cannot be said that he was a sex pest preying on minors. Further a 16 years old female maybe deceptive in her appearance. That the evidence was that when he was confronted with the claim of impregnating the complainant, he agreed to get married to her and it cannot therefore be said that he had an intention of defiling a minor. Therefore, the matter of defilement remained unproved in light of statutory defence afforded by section 8(5) and (6) of the *Sexual Offences Act* which the trial court failed to invoke.

4. He submitted that the trial court judgment intimated that he had made a confession conceding that he defiled PW1 whereas the parameters required for an admissible confession were not met. Therefore, the trial court relied on the so called extra judicial confession that was not carried out in accordance with the law and this prejudiced him and led to unmerited conviction. On the issue of his defence, he submitted that the trial court erred by placing reliance on extra judicial confession. That it is not farfetched to hold that the police intimidated him to confess to defilement promising him not to prosecute him. That he was released after arrest for lack of evidence to be re-arrested again and charged with the charges and there was anomaly in the OB as there was no recording on his arrest and arraignment which renders the entire proceedings defective. His defence remained unchallenged and the reason for not carrying out the DNA test for him to ascertain the paternity was not explained by the prosecution thus section 212 of the CPC was not complied with.

5. As to the sentence, he submitted that there were no aggravating circumstances and that he had agreed to take responsibility and get married to PW1 and cater for the child which showed his goodwill and responsibility which should have been interpreted as a favourable ground to accord him a non-custodial sentence. He urged the court to relook into the sentence in order to reduce it.

6. In rejoinder, the Respondent's counsel urged the court to ignore the Appellant's ground of appeal filed alongside his submissions for no leave was sought before amending the earlier grounds filed. He submitted that complainant's age was proved by her birth certificate that was produced as Pexhibit1 that she was between 14-15 years old at the time of the commission of the offense. That though the charge sheet indicated that she was 16 years, the same error is curable by section 8(1) of the *Sexual Offences Act*. As to penetration, he submitted that the same was proved through the evidence of the victim which was corroborated by medical evidence. As to the Appellant's contention that no DNA examination was done to confirm paternity, he submitted that there is no legal requirement for DNA to prove penetration. Reliance was placed on the case of AML vs Republic (2012)eKLR and Williamson Sowa Mbwanga vs Republic (2016) eKLR. As to identification, he submitted that the evidence revealed that the Appellant and complainant knew each other as they were neighbours and the Appellant conceded to these facts hence identification was proved.

7. He submitted that the Appellant did not raise the defence provided under Section 8(5) and 8(6) of the *Sexual Offences Act* during trial hence the same cannot be determined in this appeal since it was not an issue before the trial court. The complainant was still a school going child hence incapable of giving consent. As to sentence, he submitted that the trial court considered his mitigation in that he was a first time offender, remorseful and willing to take care of the child. The trial court also considered the fact that the victim was a minor, her education was affected and was pregnant as a result of the act. He

submitted that sentencing is a discretion of the trial court and the Appellant was supposed to show that the sentence was manifestly excessive, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle which he failed to establish. That the sentence of nine years was not only lawful but lenient in the circumstances.

8. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

9. I have in that regard read and considered the evidence as recorded at the trial court. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. In addition, I have put into account the applicable law, submissions filed and case law cited.

10. The evidence before the trial court was as follows. The complainant testified as PW1, stating that in November, 2020, she was at home since schools were closed due to Covid 19. The Appellant was her friend as they were neighbours. The Appellant wanted them to be lovers and he started buying her gifts and she caved in to his demands. They used to meet outside and it happened in her mother's absence. It reached a point that they slept together and they engaged in sexual intercourse (sex) which started around October, 2020. That they had sex twice the first time being in October and the second time between 25th-29th November, 2020.

11. It was her evidence that in March 2021, she was unwell and she went to hospital where a pregnancy test was done and it turn out that she was 5 months pregnant. She met her aunt in the hospital. She disclosed this to her mother who enquired as to who was responsible and she informed her that it was the Appellant and her mother reported the matter to police. That before having sex with the Appellant, she was a virgin and she did not have a grudge with him.

12. She testified on cross examination that the sex was consensual and the Appellant did not force her. That he gave her gifts to persuade and convince her to the sexual act (sex) and that they loved each other.

13. PW2, complainant's aunt, testified that she was in hospital when the complainant appeared with complaints of chest pain. She observed and noted that she was pregnant and she asked the doctor to conduct a pregnancy test which turned out to be positive. PW2 informed PW1's father about the pregnancy as confirmed in the pregnancy test. PW1 revealed the person responsible was Patrick Wahome who was their neighbour. She reported to the village elder who referred them to the police. That the Appellant admitted to be responsible. She maintained on cross examination that the Appellant admitted responsibility and he said that he was capable of providing for the child.

14. PW3 the complainant's father testified that he was at work and he was informed by PW2 that the complainant was unwell and he asked PW2 to attend to her. In the evening, he was informed that the complainant was pregnant and she stated that the Appellant was responsible. They were summoned at the chief and he went there accompanied by his wife. The Appellant and his parents were present as well. The Appellant proposed to marry the complainant which was opposed by his wife. That at the time, the complainant was 15 years old. On cross examination, he testified that the Appellant admitted responsibility.

15. PW4, the clinician testified that he examined the complainant and prepared the P3 form. She reported to have been staying with the perpetrator and engaged in unprotected sex. On examination, there were no injuries to her genetalia, there was a whitish per vaginal discharge which was non-foul smelly, pregnancy test was positive, VDRL negative, PIPC was negative and on urinalysis there were pus cells, on high vaginal swab there were pus cells, no spermatozoa and the hymen was old broken. The result

of ultra sound was single viable foetus at 22 weeks and 2 days. He signed the P3 and PRC form which he produced as Pexhibit 2(a) and 2(b) respectively.

16. He testified on cross examination that he did not examine the Appellant and the complainant had no injuries on the genetalia.

17. PW5 was the investigating officer. He testified that they took the complainant to hospital and it was confirmed that she was pregnant. He interrogated her and she told him that the Appellant was responsible. She informed him that they were boyfriend and girlfriend and they used to have regular sexual intercourse after school when her parents were absent. That he interrogated the Appellant who admitted being responsible for her pregnancy and he was ready to provide for the unborn child. He produced the complainant's birth certificate as Pechibit1 and investigation diary as pexhibit2.

18. On cross examination, he testified that there was no order for his release as plea was taken to court and the ODPP referred it for advisory hence his release. That he confessed to impregnating the complainant.

19. In his sworn testimony, the Appellant testified that he was 19 years old. That on 29/03/2021, he left home for work and he was alerted by his colleague that he had some visitors. They introduced themselves as police and they escorted him to police station where he was informed that he was suspected of sexual engagement with a girl who is a neighbour. He was locked up for three days for them to conduct investigations. He was later released on 31/03/2021 for lack of evidence but he was arrested later by the same police officers for the same claim and arraigned the following day. That he was coerced and threatened to confess. His brother asked for a DNA test which was declined. He denied committing the offence.

20. On cross examination, he testified that he was 18 years at the time but he did not have his identity card. The complainant was his neighbour for a year and he did not know the school she was attending. The schools were closed due to Covid 19 and that he did not engage in sex with the complainant. That he was intimidated to admit to the charges but did not inform the court during plea taking since the investigating officer was present.

21. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.

22. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

23. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

24. In the present appeal, complainant's age was proved through her birth certificate which was produced as Pexhibit1 which indicated the date of birth to be 05/02/2006 whereas the offence is said to have been committed between 01/11/2020 and 29/03/2021 hence she was 15 years at the time of the commission of the offence. Though the charge sheet indicated that she was 16 years, the trial court rightly found this to be a minor error and proceeded to convict him under section 8(3) of the *Sexual Offences Act*. Therefore, the complainant was a minor for the purposes of the *Sexual Offences Act*.

25. As regards to proof of penetration, PW1 testified that they engaged in sexual intercourse (sex). They had sex twice, the first sexual intercourse being in October, 2020. That before having sex with the Appellant, she was a virgin. She testified on cross examination that they engaged with the Appellant in sexual act (sex) in November which was consensual and the Appellant did not force her. That he gave her gifts to persuade and convince her to sexual act (sex).

26. The medical evidence produced confirmed that PW1 was pregnant and it can be deduced from the stage of pregnancy that the conception was within the period PW1indicated the sexual intercourse took place.

27. The trial court was alive to the fact that it relied on the evidence of PW1. Of note is that the trial court appreciated the provision and application of Section 124 of the *Evidence Act*. PW1's evidence was corroborated by the medical evidence that confirmed pregnancy.

28. In Sammy Charo Kirao v Republic [2020]eKLR the court cited the Decision of the Supreme court of Uganda in Bassita v Uganda S.C Criminal Appeal No. 35 of 19995 where it was held;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt"

29. This court is very much alive to the requirement that to prove penetration a victim of a sexual offence needs todescribe the specifics of the act of penetration. This was the finding of this court in IMW V Republic {2024} KEHC 15434 (KLR) citing the decision in Julius Kioko Kivuva v Republic [2015]eKLR.

30. In Julius Kioko Kivuva v Republic [2015] eKLR the court held as follows;

> " The complainant (PW1) testified as follows in this regard:
>
> > "The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day"
>
> PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

31. In Nanyuki HCCRA No. E069 of 2023, faced with similar facts as in this appeal, this court stated;

> " In the circumstances of this case and in other similar cases where the prosecution's case on defilement is based on facts that reveal a long cohabitation and sexual relation complete with the birth of a child, it would be an absurdity to expect medical evidence to reveal any of the expected findings of a freshly broken hymen, tears on the labia majora, labia minora, lacerations, presence of spermatozoa (unless there is sexual activity shortly before examination) etc at the genetalia.
>
> It would be a second absurdity to expect evidence of sensory details where the sexual intercourse is habitual.
>
> In such circumstances resort must be had to the victim's evidence and other evidence as clearly put in Bassita v Uganda.
>
> The evidence of PW1 was that she had a long term relationship with the appellant with 2 continuos periods of cohabitation between January 2022 to March 2022 and again from October 2022 to 23/12/22. Out of the union, she testified that she got a child a fact confirmed by the evidence of PW2 and PwW4. PW3 too corroborates this evidence and indeed was there on the material night when PW1 was chased away when the appellant came with another woman.
>
> In his investigation, PW4 confirmed the cohabitation and when he was taken to the subject house by PW1, he found the appellant in the house with another woman.
>
> In my considered view, there is direct evidence of PW1 of penetration by the appellant and which evidence is corroborated by the circumstantial evidence of the long cohabitation of the appellant and PW1 as confirmed by PW3 and the investigations by PW4".

32. In this case, there is evidence of PW1 of several sexual encounters with the Appellant which led to a pregnancy. The record of the court as captured in the judgement of the trial magistrate notes that the complainant was firm in her testimony. She was able to recall the details of the material days very well including the months. She confirmed in cross examination that the sex was consensual. Indeed, there is evidence of the appellant accepting responsibility and offering to raise the child.

33. This evidence remains unchallenged at the trial by the Appellant who in defence raised the incident of his arrest on 29/3/21 without any attempt at an explanation or giving any exculpatory facts. While he had no duty to prove his innocence, to mount a successful defence, he needed to create reasonable doubts in the prosecution's case.

34. The fact of pregnancy is also circumstantial evidence that bolsters the prosecution's case on penetration. Where there is evidence that a victim was penetrated resulting into a pregnancy, this is corroborative evidence that goes to prove the fact of penetration. I agree with Mutuku J in Wayu Omar Dololo vs. Republic [2014] eKLR, where faced with a similar set of facts stated;

> " The trial magistrate took judicial notice that a pregnancy results from a sexual activity and as such found penetration proved. On my part, I have examined the evidence carefully. At the time of examination by a doctor, the complainant was heavy with child and the pregnancy was visible as observed by the trial court. Indeed at the time of hearing the complainant said she was nine months pregnant. A pregnancy is a biological condition that results from a sexual activity unless there is evidence that there was artificial implanting of fertilized ova into the uterus of a female human being. The trial magistrate had the opportunity to observe

the demeanour of the complainant as she testified. He was impressed by her demeanour and observed so in his judgement.

I have considered that under the proviso to section 124 of the *Evidence Act*, evidence of a single sexual offence victim does not require corroboration and a court can convict on such evidence upon recording reasons for believing such evidence. The trial court recorded the reasons why it believed the evidence of the complainant.

I am satisfied that evidence of pregnancy of the complainant is sufficient proof beyond reasonable doubt that penetration, whether partial or complete, took place. I am also satisfied that the appellant is the person who made the complainant pregnant therefore proving beyond reasonable doubt that defilement took place. In arriving at this conclusion I have considered that the relationship between the complainant and the appellant is not a one-off chance meeting but a continued relationship of boyfriend and girlfriend in which they engaged in sexual activity. ....."

".

35. From the totality of the evidence herein, am satisfied that penetration was proved to the required degree.

36. As regards the identity of the Appellant as the perpetrator, evidence is in abundance that the Appellant was well known to the complainant being a neighbor and one who interacted with her, wooing her with gifts and with whom she had consensual sexual intercourse with. The use of the word consensual in this sentence is deliberate and should not be confused with any suggestion that the complainant was capable of legally consenting to sex owing to her age!

37. On sentence, the Appellant was sentenced to 9 years imprisonment. The sentence provided in law for the offence is found in section 8(1)(4) of the *Sexual offences Act* which provides as follows;

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

38. It readily emerges that the sentence meted out by the trial court was lower than the prescribed one in law. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

39. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte

> blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

40. The Court of Appeal of East Africa in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-

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

41. Where the sentence is manifestly excessive, an appellate court assumes the jurisdiction to interfere with the sentence of a trial court. (See R - v- Shershowsky (1912) CCA 28TLR 263).

42. Locally the law has been settled by the Court of Appeal in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 where the court stated;

> Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka – vs- R. (1989 KLR 306)"

43. Further exposition of the applicable principles is found in Bernard Kimani Gacheru vs. Republic [2002] eKLR where the court of Appeal rendered itself thus;

> It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

44. A review of the lower court record does reveal an infraction on the part of the trial court in sentencing given that the court meted out a sentence that was below the minimum sentence set in law. The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) while providing clarity on the legality on minimum sentences in the *Sexual Offences Act* and other laws arising from a misapprehension of the dicta in Muruatetu 1 and 2, confirmed that the minimum sentences imposed by the Act were not outlawed by the court's decision in Muruatetu case and are applicable.

45. The Appellant should thus count himself lucky to have gotten away with the lesser sentence. The court has the powers to enhance the sentence but noting that no Notice of Enhancement was served on the Appellant, this court shall let the matter lie.

46. The upshot is that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF FEBRUARY 2025.

A.K. NDUNG'U

JUDGE