Juma alias Finje v Republic (Criminal Appeal E049 of 2023)
[2025] KEHC 2392 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2392 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E049 OF 2023

E OMINDE, J

MARCH 6, 2025

BETWEEN

DANIEL SIMIYU JUMA ALIAS FINJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* in Eldoret Chief Magistrate's Criminal Case no E165 of 2022. The particulars of the offence are that on 22nd November 2022 at (particulars withheld) within Turbo Sub County, Uasin Gishu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ENB, a child aged 8 years.

2. In the alternative, he was charged with the offence of committing and indecent act with a child contrary to Section 11 of the *Sexual Offences Act*. The particulars of the offence are that on 22nd November 2022 at (particulars withheld) within Turbo Sub County, Uasin Gishu County, the appellant intentionally and unlawfully touched the vagina of ENB, a child aged 8 years.

3. The Appellant pleaded not guilty and the matter proceeded to full hearing. The prosecution called 6 witnesses in support of its case whereas the appellant testified as the only defence witness. Upon considering the evidence tendered in court and the testimonies of the witnesses, the trial court convicted the appellant of the main charged and sentenced him to serve life imprisonment.

4. Being dissatisfied with the conviction and sentence, the appellant instituted the present appeal vide a Memorandum of Appeal dated 19th January 2024. The appeal is premised on the following grounds;

    i. That the honourable magistrate erred in law and in fact when he failed to appreciate the fact that there was no corroborating evidence against the appellant as the appellants' spermatozoa was not found on the victim.

ii. That the honourable magistrate erred in law and fact by convicting the appellant on a defective charge sheet.

iii. The learned magistrate erred in law and fact in disregarding the relevant evidence on record on partial penile penetration that fitted the description of the alternative charge as opposed to the main charge.

iv. The learned magistrate erred in law and in fact by disregarding the fact that the prosecution witness I admitted in re examination that the appellant touched her vagina with his hand and not any other body part.

v. The honourable magistrate erred in law and in fact by sentencing the appellant on a case that was not proved beyond reasonable doubt as the witness statements were full of contradictions.

vi. The honourable magistrate erred in both law and fact when he sentenced the appellant on the main charge that proved for the excessive and extreme sentence of life imprisonment.

Prosecution evidence at the trial court.

5. PW1 was the minor complainant. The trial court having conducted a voire dire examination of the minor was satisfied that she appreciated the nature of what amounts to an oath and could give sworn testimony and she was accordingly sworn. She testified that she knew the appellant who was her grandmother's herds man and that they called him Finje. She stated that on the material date she was at her grandmothers' house at around 11 am playing when the appellant called her and she refused to go. She then called her friend to accompany her and they went to where the appellant was.

6. That the appellant gave her friend Kshs.50 and a bicycle and sent her to go and buy sweets. That while her friend was gone, the appellant took her to a thicket which was not far from the house. She testified that he undressed her and lay her to the ground and removed his trousers. She stated that he did 'tabia mbaya', and her exact words were that 'alinifanyia tabia mbaya hapo mbele' She explained that he touched her and did that thing when he was on top of her and she felt pain. She started screaming and her friends came, and on hearing them, the appellant escaped. Her three friends, M, V and V came to the scene. Her mother later came to the scene when she was called by phone and she was taken to hospital. She stated that she had not been coerced to frame the appellant. During re-examination, she stated that he used his hand to touch her and no other body part touched her.

7. PW2 was VVA, a minor aged 9 years. The court conducted a voire dire and noted that the minor did not understand what an oath was and therefore, she gave unsworn testimony. He testified that he knew the appellant as Finje and that he knew the complainant as well. Further, that on the material date, he was sent to the shop by the appellant and he is aware that something happened when he was gone. When returning from the shop he heard their two friends screaming saying 'eh kweli Finje'. When he arrived at the scene he saw the appellant removing the victim's clothes.

8. PW3 was a minor aged 12 years old named TW. The court conducted a voire dire and was satisfied that she knew the consequences of an oath. The witness then gave sworn testimony on the events of the material date. She testified that she knows the appellant and the victims as well as they are neighbours. She stated that they were at home playing on the material date when the appellant asked them if they wanted sweets. They all agreed.

9. That he then told them he would go with the victim since there was something her mother had left behind but the victim refused, saying that she would be accompanied by one of the other children. He then went with them and she remained behind playing. The appellant then sent PW2 to the shops

and remained with the victim. She followed the appellant and the victim and saw him removing her clothes. He removed his clothes and placed her on the ground. He covered her eyes with a polythene paper and placed his 'thing' on her 'cucu' (private parts) and they then ran to call their neighbour. She denied being coached or having a grudge against the applicant.

10. PW4 was the mother to the victim, JA. She testified that on 22nd November 2021 she was attending a graduation with her mother in law who received a call and told her that something had happened at home. She was told that her daughter had been raped and lost consciousness. She looked for a motorbike and went home where she found the appellant. She spoke to her child who explained to her that the appellant had removed her clothes and done 'tabia mbaya' to her.

11. She examined her daughter and saw sperms, then took her to Huruma Hospital for examination. She was referred to Moi Teaching and Referral hospital and upon arriving there, the doctor examined her and determined that she had been raped. She reported the incident at Kapyemit Police station and availed the victim's birth certificate which was marked a PExh3 as well the attendance card. Further, she testified that she the complainant was born on 18th September 2014. She also produced the P3 form they were issued with at the hospital. In cross examination she stated that she did not wash the child before taking her to hospital. That the Doctor reached the conclusion that the hymen was intact but she does not understand how she reached that conclusion.

12. PW5 was Patrick Owuor alias Pajero. He testified that on 22nd November 2023 he was at home when he heard children screaming. They were saying 'Finje amefanya tabia mbaya' and he stepped out of his house. He stopped the children and upon enquiring what was happening, they informed him that 'Finje amefanya tabia mbaya na mtoto wa jirani'. They told him that he did it in the bush, which was near his house. He saw a crowd gathering near the bush and he rescued Finje, taking him inside his house. He then called the village elder and informed him what was happening. The village elder came with the OCS and later on the mother to the victim also arrived. He testified that he did not see the appellant committing the offence, and he only heard the children shouting that he had done 'tabia mbaya'. He additionally stated that he did not have a grudge with the appellant.

13. PW6 was Ezekiel Rotuk, a village elder of [particulars withheld]. On 22nd November 2022, he recalled, he received a call from PW5 who told him there was someone who had committed an offence. He instructed him to apprehend the person as he was in a meeting with the OCPD Kapyemit Police Post. They then went to the scene and met PW5 who explained to him that the appellant had defiled a child. On asking where the child was he was informed that her mother had taken her to hospital. They apprehended the accused and took him to the police station together with two of the children to record their statements. They explained what had happened and recorded statements. He stated that he did not see the offence and that it's the children who explained what had happened.

14. PW7 was Dr. Irene Simiyu from Moi Teaching and Referral hospital. She produced the P3 form that she filled for the minor and testified that the victim was 8 years old. She stated that she examined the child and from her observations she observed that the hymen was intact and that the minor had fresh erythema and abrasions on the labia minora, erythema and abrasion at the posterior fourchette. The blood sample showed she had a urinary infection. She concluded that the minor had been defiled. She produced the P3 Form which was marked as PExh1a and the attendance card of the victim which was marked as PExh1b.

15. PW8 was PC Caroline Kipkoroi, stationed at Kapyemit Police station. She testified that she was the investigating officer in the matter and, that on 22nd November 2022 she received a case of defilement at around 1620 Hours. She booked the report in the occurrence book and recorded the statements of the witnesses. That the victim had already been taken to hospital by her mother. She then visited the scene

and established that the offence was committed in a bush near the village. She realised that the suspect lured the victim to the said bush where he defiled her. It was her testimony that the witnesses were mostly minors who said that the suspect had committed 'bad manners' which is children's language for sexual intercourse. She later issued a P3 form and took the victim and the suspect to Moi Teaching and Referral hospital where the P3 form were filled. She produced the birth certificate of the victim and testified that she was 8 years old at the time of the offence.

16. Upon considering the evidence and the testimonies of the prosecution witnesses, the magistrate was satisfied that the appellant had a case to answer and he was then placed on his defence.

Defence Evidence at the trial court.

17. The Appellant testified as DW1. He gave a sworn statement of defence an d did not call any witnesses. He testified that he stays at a lady pastors 'house. That that pastor is a mother in law to the complainant's mother. That the complainant stays with her parents and they are neighbours to the pastor. That they knew each other well. That pastor and the child's mother left home and they remained at home.

18. He testified that on 22nd November 2oss he had gone to demand money from one Nyuki at Quarry. That he was together with a colleague and they had gone to harvest maize. That as they were waiting for 'Nyuki' a drunk man and woman came and he was instructed to stand up by the man. The man told him to follow him to a certain house that sells chang'aa and he did. He found the owner of the house called Pajero who testified herein and they started to beat him. They had already called the police and he was then taken to the police station.

19. He denied defiling the child. He stated that he heard the Doctor's evidence and she said the child's hymen was intact. That if he did the act as alleged, the child would not be a virgin. That he also heard the testimony of the children and denied that he gave the children money. That he did not have money as had gone to demand for his money.

20. Upon considering the testimonies of the witnesses and the evidence tendered in court, the trial magistrate convicted the appellant on the main charge. The appellant was given an opportunity to mitigate and upon considering his mitigation, the trial court sentenced him to life imprisonment.

Hearing of Appeal.

21. The Appeal was prosecuted by way of written submissions. The appellant filed submissions dated 27th November 2024 through Messrs. Ng'eno Ondieki & Company Advocates. The state filed submissions through Prosecution Counsel S.G. Thuo.

Appellants' Submissions

22. Learned counsel for the appellant submitted that PW7, the doctor at Moi Teaching and Referral Hospital, clearly told the court that in her medical examination, she observed that the hymen was intact and no penetration had occurred. Further, that the accused was never taken to hospital for DNA testing and examination of his blood samples by the doctor. Counsel submitted that the witnesses lied before the court that the doctor told her that her daughter had been raped. Further, that PW1 testified that she went to hospital the same day of the incident and that the Appellant never touched her with any part of the body except his hand.

23. Counsel urged that the evidence of the three witnesses was contradictory to the extent that, while the doctor never observed sperms on the victim and at the same time, there was no blood as per the doctors' report. He urged that the testimony by PW1 and PW4 were purely cooked stories intended

to execute revenge on the accused person. Additionally, he submitted that there was no penetration whatsoever as per the doctor's report, hence, count 1 of the charge is purely fabricated. He urged that in re-examination PW1 clearly told the court that the appellant used his hand to touch "huku mbele" i.e. her private part. She put it very clear that no other body part touched "huku mbele" apart from his hands. He reiterated that the present charge sheet as framed is wrong and defective as Sections 8(1) and 8(2) of *Sexual Offences Act* were never violated.

24. It is the appellants' case that the honourable magistrate in making his verdict was guided by count l in the charge sheet, despite the fact that the evidence on record, especially that of PW1 and the doctor clearly shed light on the fact that there was no penetration. He urged that the magistrate exercised hostility in condemning the appellant to an excessive sentence. Additionally, that the evidence by the witnesses speaks to the alternative charge which attracts a lesser sentence.

25. Counsel reiterated that the evidence of the witnesses was contradictory and submitted that it is a requirement in criminal law that the case must be proven beyond reasonable doubt, not on a balance of probabilities. He prayed the court allow the appeal and set the appellant free forthwith.

Respondents' submissions.

26. Learned counsel for the state began by setting out the principles guiding the exercise of discretion on a first appeal by citing the case of Josephat Manoti Omwancha v Republic [2021] eKLR. He urged that as a first appellate court, this Court's role is to subject the whole evidence adduced before the trial court to a fresh and exhaustive scrutiny and make its own conclusions. He urged the court to bear in mind that it did not have the chance to see the witnesses in this matter testify.

27. In response to the argument that there was no corroborating evidence against the appellant as his spermatozoa was not found on the victim, counsel referred the court to the findings in the case of Michael Mumo Nzioka v R eKLR [2019] where the Superior Court observed that

" the presence of spermatozoa alone in a woman's vagina is not conclusive proof that she has had sexual intercourse nor is the absence of spermatozoa in her vagina proof to the contrary

28. Further, he invited the court to read the evidence of PW 7, Dr Irene Simiyu who examined the victim, where she confirms that the victim had changed her clothes and further, that this court has powers to make inference of the same in relation to lack of spermatozoa at the time of medical examination. On the issue of the defective charge sheet, counsel urged that the charge sheet met the legal threshold under Section 137 of the *Criminal Procedure Code Act* and prayed the court dismiss any claims to the contrary.

29. On the issue of partial penile penetration, counsel submitted that Section 2(1) of the *Sexual Offences Act* defines penetration to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. He cited the Court of Appeal decision at Nairobi in COA Cr. Appeal No 5 of 2013 Erick Onyango Odeng vs Republic in support of the submission that the court should not consider this ground of appeal.

30. Counsel submitted that Section 124 of the *Evidence Act* Cap 80 was fully complied with and the trial court was satisfied that the child was telling the truth and proceeded to make its findings. He urged the court to dismiss ground 4 of the appeal based on this. Additionally, that a party raising an issue has the burden to prove the same, pointing out that the appellant has not pleaded anything in support of the ground that the case was not proved beyond reasonable doubt.

31. On the harshness of a life sentence, counsel urged that for a perpetrator proven to have permanently scarred the innocent life of an 8-year-old Girl Child in close glare of her peers by a person well known to them, he deserves a deterrent sentence. He cited the decision of the Supreme Court of Kenya in

SCOK Petition No E018 of2023 Republic vs Joshua Gichuki Mwangi where the court faulted the Muruatetu decision for interfering with mandatory or minimum sentences laid in the *Sexual Offences Act*. Counsel urged the court to dismiss the appeal in its entirety.

Appeal on Conviction

32. In Okeno v Republic [1972] EA 32 the court stated thus;

> " The duty of the 1st appellate court is to analyse, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on the evidence. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified and must leave room for that.

33. The Court of Appeal in the case of David Njuguna Wairimu v Republic [2010] while citing with approval the case of Okeno v Republic Supra, stated as follows: -

The duty of the first appellate court is to analyze, re-evaluate the evidence which was before the trial court and itself come up with its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellant court may be depending on the fact and the circumstances of the case, come to the same conclusion as those of the lower court. It may reverse those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

34. In the case of Miller v Ministry of Pensions [1947] 2 All ER, 372 Lord Denning had the following to state on the kind of evidence that ought to be construed as proof beyond reasonable doubt;

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

35. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides as hereunder;

8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(2) "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."

36. The specific elements of the offence of defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

i. Age of the complainant;

ii. Proof of penetration in accordance with section 2(1) of the Act; and

iii. Positive identification of the assailant.

37. Having outlined the above, the court notes that in a nutshell, the appellant has impugned the judgement of the trial magistrate on the grounds that there was no corroborating evidence; No spermatozoa was found on the victim; The evidence on record is on partial penile penetration supports the alternative charge; The complainant stated that the appellant touched her private parts with his hand only; The witnesses gave contradictory evidence; The required standard of proof was not attained; The sentence of life imprisonment is excessive, extreme and harsh.

38. Even as the Court notes that the age of the complainant was not directly disputed by the appellant, given that it is the age that determines the sentence, it is necessary in re-evaluating the evidence the Court satisfies itself that this element of the charge was proved by the evidence on record beyond reasonable doubt.

39. The Court of Appeal in Edwin Nyambogo Onsongo v Republic [2016] eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof.

40. In the instant case, the evidenced adduced in establishing the age of the complainant was her Birth Certificate which was produced as PExh3. It indicates that the complainant was born on 18th September 2014 thus placing her age at 8 years on the date of 22nd November 2022 that she is alleged to have been defiled. This piece of evidence was not at all rebutted and or contradicted by the defence.

41. The issue of identification of the appellant is also not contested and so I need not delve into it However, the Court notes that this Appeal revolves mainly around the issue of penetration as follows; Whereas the appellant on the one hand denies that he defiled the complainant because the complainant herself testified in re-examination that he touched her private parts with his hand only, that the P3 Form shows that the complainants hymen was not broken and that there was also no spermatozoa on her.

42. On the other hand, the appellant argues that the evidence on record is that of partial penile penetration and which evidence supports the alternative charge of committing and indecent act with a child contrary to Section 11 of the *Sexual Offences Act* as opposed to the main charge of defilement. I note that this is one of the grounds of appeal and it has also been reiterated in the submissions.

43. The above being the case, on the denial that he defiled the complaint, I have perused the impugned judgement of the trial magistrate. I find the reasoning applied by the Hon Magistrate in reaching the conclusion that the prosecution case based on the said evidence was proved beyond reasonable doubt to have been very well analysed and articulated. The analysis by the Hon Magistrate considered the credibility of the witnesses, their evidence as well as the issue of corroboration raised by the appellant.

44. In finding that the complainant's evidence was not contradictory when looked at in its totality together with the evidence of the other child witnesses, the Hon Magistrate considered the ages of the complainant and the child witnesses and in observing that they are children, noted that they described the act using euphemisms as more often than not children of a similar age are wont to do. She also dwelt at length on the issue of penetration and what it denotes and she was satisfied that the offence of defilement was proved and she convicted and sentenced the appellant accordingly.

45. Given the appellant's submission that the evidence on record supports a lesser charge as in the alternative charge, the summation that the Court makes then is that contrary to the appellant's own

denial in light of his grounds of appeal, the appellant does in fact admit that he did engage in an indecent act with the complainant only that in his view, it did not reach the threshold of defilement to warrant the sentence of life imprisonment

46. In this regard, the definition of penetration as under Section 2(1) of the *Sexual Offences Act* is relevant. Penetration is defined therein as:

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

47. In this case by his own admission in his pleadings and submissions, the appellant admits that there was partial penetration of the complainant. This admission is indeed corroborated by the evidence on the P3 to the effect that the complainant's labia minora and the posterior fourchette had fresh erythema and abrasions a sign that there was friction on her vagina as was also rightly observed by the Hon Magistrate.

48. From the evidence on record, the shop where PW2 went was nearby, PW3 stated that she followed the appellant to where he took the complainant and witnessed what the appellant was doing to the complainant and she testified that they ran away screaming. The complainant too testified that she was in pain and she screamed and people came immediately to her rescue as the appellant ran away. All these factors in my considered opinion did interrupt the appellant hence the evidence of partial penetration. But much as it was partial penetration, as envisaged under the provisions of Section 2(1) above, it is penetration.

49. In my considered opinion, the situation pertaining given these circumstances is as was observed by the Court of Appeal in Mark Oiruri Mose v R [2013] eKLR as follows;

> " 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."

50. Given my findings as above, I am very well satisfied that the Hon Magistrate applied herself correctly to the evidence and the law made an appropriate finding on the guilt on the guilt of the appellant. I therefore find the conviction by the Hon Magistrate on the main count of defilement was well founded in law based on the evidence on record, the same is proper and I therefore see no reason to interfere with it. The same is accordingly upheld.

On whether the sentence of life imprisonment should be set aside, suffice it to say that the sentence provided in law under Section 8(2) of the *Sexual Offences Act* is as follows;

> " 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."

Appeal on Sentence.

51. However, The Court of Appeal in the case Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) held as follows on a sentence of life imprisonment meted in a defilement case;

> " We note that the decisions of this Court relied on by the Appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim. App No

93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application nos.66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

52. Given that the circumstances therein are similar to this case before the Court because both are cases of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, this Court shall go by the reasoning of the Court of Appeal as herein above reproduced, set aside the sentence of life imprisonment and substitute the same with a sentence of 40 years' imprisonment imposed by the Court of Appeal in the above cited case.

53. Right of appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 6TH MARCH 2025

E. OMINDE

JUDGE