Nambaso v Republic (Criminal Appeal E006 of 2023)
[2025] KEHC 4737 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4737 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL E006 OF 2023

CM KARIUKI, J

MARCH 13, 2025

BETWEEN

JUNIOR NAMBASO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. G. Sagero (S.R.M) in Narok CM SOA No. E016 of 2020 delivered on 11.10.2023)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 20 years imprisonment for the defilement of a 15-year-old girl.

2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide a memorandum of appeal dated 03.06.2023. The appellant filed grounds of appeal as follows.

    i. That the learned trial magistrate faulted in law and fact when he unlawfully failed to observe that the ingredient of the offence in the instant case was not proved beyond all reasonable doubt as required by law in sexual offences. The age assessment was not produced in court by the maker of the said document in violation of section 77(1)(3) of the *Evidence Act* CAP 80.

    ii. That the learned trial magistrate faulted in law and fact when he based the conviction on a single testimony merely alluded to by PW1 without circumspect; that such evidence was not free from the possibility of error given that the evidence was not corroborated to credibility and veracity of the said witness and its account.

    iii. That the learned trial magistrate erred in law by contravening the mandatory provisions of section 200 of the criminal procedure code.

iv. That the learned trial magistrate erred in law and fact when sadly objected to the appellant's defense without cogent reasons yet the same was indeed remarkably comprehensive in casting conceivable doubts to the strength of the prosecution case.

v. That the learned trial magistrate misdirected his mind and arrived at the wrong decision when he held that the complainant was speaking the truth while there was no independent evidence to corroborate this and further that the magistrate did not himself see the demeanor of the complainant or record the evidence of the prosecution witnesses.

vi. That the learned trial magistrate erred in law and fact in not attaching weight to the doubts that were raised by the prosecution witnesses.

vii. That the sentence meted was harsh, excessive in the circumstances, and bad in law.

viii. That learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard.

ix. That the pundit trial magistrate misdirected himself on the effect of the contradiction and inconsistency upon the probative value of evidence tendered before him.

x. That the learned trial magistrate erred in law and fact in convicting the appellant and in not finding that some essential witnesses were not availed in court to testify despite their roles in the alleged commission of the offence.

xi. That the learned trial magistrate misdirected his mind and erred in law in delivering a speculative judgment that was not premised on the analysis of evidence.

Brief facts

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. No 3 of 2006 and an alternative charge of indecent act with a child contrary to section 11(1) of the same act. The appellant was also charged with a second count of failing to protect a child from harmful cultural rites contrary to section 14 as read with section 20 of the Children's *Act No 8 of 2011*.

4. The particulars were that on diverse dates between 24.12.2017 and April 2020 at [Particulars Withheld] area in narok south sub-county within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PSK a child aged 15 years.

5. On the alternative charge of indecent act with a child, the particulars were that on diverse dates between 24.12.2017 and April 2020 at [Particulars Withheld] area in narok south sub-county within Narok County intentionally and unlawfully touched the vagina of PSK a child aged 15 years with his penis.

6. On the second count of failing to protect a child from harmful cultural rites, the particulars were that on 24.12.2017 at [Particulars Withheld] area in narok south sub-county within narok county, the appellant willfully and negligently failed to protect PSK a child aged 15 years from harmful cultural rites namely early marriage that negatively affected her health, social welfare, and psychological development.

7. The appellant was tried and convicted on count I. The appellant was sentenced to 20 years imprisonment.

Directions of the Court.

8. The appeal was canvassed by way of written submissions.

The Appellant's Submissions.

9. The appellant submitted that the age assessment report was not produced by the maker hence the same is discredited therefore the ingredient of defilement which is the age of the victim was not proved. The appellant contends that the testimony of PW1 on her age was not corroborated. The appellant relied on section 77 of the *evidence act*, the Court of Appeal case in Chaol Rotil Angela vs Republic [2001] eKLR, the Court of Appeal Case in Okumu v Republic (Criminal Appeal 178 Of 2018), and the Court of Appeal Case In Sibo Makovo v Republic [1997] eKLR.

10. The appellant submitted that although the proceedings indicate that section 200 of the *Criminal Procedure Code* was complied with no explanation was given on the language used to communicate to the appellant. The appellant relied on section 200(3) of the *Criminal Procedure Code*, Joseph Gituku Wangai & 5 others v Republic [2005] eKLR, and Ndegwa v Republic [1985] KLR 535

11. The appellant submitted that the charge sheet was defective for being at variance with the testimony of PW1 on when the offence occurred. The appellant contends that the charge sheet indicates 24.12.2017 while the complainant stated 24.12.2019. The appellant relied on section 137 of the criminal procedure code, and Nyamai Musyoka v Republic [2014] eKLR.

12. The appellant submitted that the sentence of 20 years is excessive, harsh, and very punitive because of its mandatory nature. The appellant relied on Hadson All Mwachongo v Republic [2016] eKLR, State v Tom, State v Bruce (1990) S A 802(A), Malberger, JA, Mithu Singh V State of Punjab, 1983 AIR 473, Uganda in Susan Kigula & 417 others v Attorney General, and Francis Karioko Muruatetu & Another v Republic, Pet No 16 of 2015.

13. The appellant submitted that the credibility of the complainant is questionable, especially on how she traveled from Lemek which is in narok west to [Particulars Withheld] in narok south on foot with wildlife in the area. The appellant relied on Ndungu Kimanyi v the Republic (Criminal Appeal No. 22 of 1979).

14. The appellant submitted that the parents of the complainant were not called to corroborate the allegation that she was married off by her parents. The appellant relied on Bukenya and Other vs Uganda [1972] EA 549.

The Respondent's Submissions.

15. The respondent submitted that the age of the victim was proved during the trial and was never disputed at all. The respondent relied on the age assessment report (P Exh3), evidence of PW1 and PW3.

16. The respondent submitted that the medical evidence corroborates the complainant's testimony that she was indeed defiled. The prosecution relied on the evidence of PW1, and PW3.

17. The respondent submitted that the complainant had lived with the appellant for three years which leaves no room for mistaken identity.

18. The respondent submitted that the trial court took into consideration the time served and sentencing guidelines and the gravity of the offence in reaching this decision.

Analysis and Determination.

Court's duty

19. First, an appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

20. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

    i. Whether the charge sheet was defective.

    ii. Whether the age assessment report is admissible having not been produced by the maker

    iii. Whether the prosecution proved its case beyond a reasonable doubt.

    iv. Whether the sentence was manifestly harsh and excessive

Whether the Charge Sheet was Defective.

21. The appellant submitted that the charge sheet was defective for being at variance with the testimony of PW1 on when the offence occurred. The appellant contends that the charge sheet indicates 24.12.2017 while the complainant stated 24.12.2019.

22. The appellant did not raise the issue of a defective charge sheet and proceeded to cross-examine the witnesses accordingly. This was a clear indication that there was no confusion, and he was aware of the charges that he was facing during trial. The charge sheet was not fatally defective as quoting 24.12.2017 and pw1 stating that she left with the appellant on 24.12.2019 seems to have been an error as the complainant clearly stated that they lived with the appellant for three to 2020. The charge sheet did not occasion the appellant any injustice.

23. In the premises, this ground of appeal is not merited and the same is hereby dismissed.

    Whether the age assessment report is admissible having not been produced by the maker

24. The appellant submitted that the age assessment report was not produced by the maker hence the same is discredited therefore the ingredient of defilement which is the age of the victim was not proved. The appellant contends that the testimony of PW1 on her age was not corroborated.

25. Section 77(1) of the *Evidence Act* reads:

> 77. Reports by Government analysts and geologists
>
> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner, or of any ballistics expert, document examiner, or geologist upon any person, matter, or thing submitted to him for examination or analysis may be used in evidence.

26. Section 33(b) of the *Evidence Act* provides the admission of documentary evidence by persons other than the makers thereof in circumstances, inter alia, where the maker's attendance cannot be procured, or whose attendance cannot be procured without unreasonable delay or expense. The section reads:

> 33. Statement by deceased person, etc. When statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) .....
>
> (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

27. In the case of Hadson Ali Mwachongo v Republic [2016] eKLR the court had this to say on the importance of proving the age of the victim in a case of defilement.

> " The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

28. Taking to mind that no objection was raised on the production of the complainant's age assessment report at the trial, and on the authority of sections 33(b) and 77(1) of the *Evidence Act*, I find that the trial Magistrate was by no means at fault in admitting such report in evidence as proof of the complainant's age. Accordingly, this court concludes that the complainant's age was established as 15 years at the time of the incident.

Elements of the offence of defilement

29. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* which provides:

> " 8
>
> (1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8
>
> (3) "A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be

sentenced to imprisonment for term of not less than twenty years."

30. 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:

    1) Age of the complainant.

    2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see Mark Oiruri Mose v R [2013] eKLR; and

    3) The accused was the assailant.

31. See the case of Charles Wamukoya Karani Vs: Republic, Criminal Appeal No. 72 of 2013.

32. PW1 testified that she was 15 years old.PW3 a clinical officer produced an age assessment report (P Exh3) which assessed PW1's age at 15 years. He confirmed that the age assessment was done by a dentist who confirmed that she was 15 years.Based on the evidence adduced, the age of the victim was 15 years at the time of the defilement.

33. PW1 stated that the two men; the appellant and another returned another day. Her father asked her to pack her bags and follow the appellant. They left to the appellant's place in a motor vehicle. She was received by women who gave he the name Noosiamo. She spent the night with the appellant. How she was married to the appellant who had intercourse with her on her second night with him. She stated that they cohabited with the appellant as husband and wife between 2017 and 2020 when she escaped due to cruelty from the appellant.

34. PW3- the clinical officer stated that the complainant was defiled after being subjected to early marriage. He found that her hymen was broken with old tags. Urinalysis showed infection which he attributed to sexual intercourse. She also had an FGM scar with keloids. He concluded that PW1 was defiled when she was 15 years old. He produced the P3 form, and treatment notes as P Exh 1, and 2 respectively.

35. The analysis of the evidence yields the inescapable conclusion that the prosecution proved to the required standard that penetration did occur of PSK Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom? PW1 testified that the appellant was married to her. The appellant in his defence denies knowing PW1.

36. According to PW1, the appellant went to her home in the company of another as a suitor on 24/12/2019. She was handed over to him as a wife by her father. She gave the same information to PW2 and PW4.The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled PSK The girl knew the appellant well and gave such a succinct account of the times and manner they had unprotected sex. This is a person she knew and trusted. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex. Thus, who defiled her.

37. Based on the evidence adduced, the appellant caused the penetration of PSK The court, therefore, finds that the appellant was properly convicted on the charge of defilement based on evidence that proved the case against him beyond reasonable doubt.

38. In the upshot, the appeal on conviction is dismissed.

On sentence.

39. The relevant penalty clause under which the appellant was sentenced is Section 8(3) of the *Sexual Offences Act*, of which section provides that:

> 8
>
> (3) "A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years".

40. This appeal relates to section 8(3) of SOA. And, as was expressed by the Court of Appeal in Dismas Wafula Kilwake vs. Republic [2018] eKLR: -

> " We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

41. The trial court noted that the section prescribes a sentence of not less than 20 years. The trial court considered the mitigation by the appellant and the circumstances surrounding the offence including the fact that apart from marrying an underage girl and defiling her, the appellant turned violent and subjected her to suffering.

42. The law is clear on such offences where minors do not have the capacity to consent to any sexual relationships and even marriage. Thus, a deterrent sentence is necessary. The trial court also noted the time the appellant had spent in custody.

43. The victim was a child- she was 15 years old. The manner the offence was committed was by taking advantage of a child. The child is likely to also suffer post-traumatic effects, from agonizing memories of the incident. In addition, the fact that the prevalence of the offence justifies 20 years imprisonment in this case. Therefore, a deterrent sentence is necessary.

44. There is new jurisprudence; Minimum sentences set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See the Supreme Court in Republic vs Joshua Gichuki Mwangi and Initiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.

45. But the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in 'a proper case', or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion

towards 'the ceiling'; whilst limiting the exercise of discretion below 'the floor' in sentencing; whether such an approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, 'it is Parliament...that sets the parameters of sentencing for each crime in statute'; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and 'legislative sentencing'.

46. The 'proper case' should not also be taken to mean that, there is no work that has been done about minimum or mandatory minimum sentences by courts, lawyers, and other multi-disciplinary eminent scholars and practitioners in Kenya. And the wisdom in tapping into such a body of work as we craft the final touches on the dress.

47. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences are important objects of punishment, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life.

48. Furthermore, the Supreme Court decision in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), emphasized the court's obligation not to interfere with mandatory minimum sentences prescribed under the *Sexual Offences Act*. In that case, the Supreme Court categorically held that the minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

49 .

The apex court held:

> " 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different sets of meanings and circumstances.
>
> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

50. In the circumstances, the 20-year imprisonment sentence is upheld.

Conclusion and orders

i. The appeal on conviction and sentence is dismissed.

ii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13TH DAY OF MARCH, 2025.

CHARLES KARIUKI

JUDGE