Kinyanjui v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 8758 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8758 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL E011 OF 2024

RB NGETICH, J

JUNE 19, 2025

BETWEEN

SAMWEL MBUGUA KINYANJUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal on both conviction and sentence in Criminal case No. 108 of 2012 where the Appellant was sentenced to life imprisonment by Hon. M. Ochieng SRM at the Magistrate court at Eldama Ravine by a judgement delivered on the 26th February, 2013)

JUDGMENT

1. The Appellant Samwel Mbugua Kinyanjui was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that the accused on the 6th day of February, 2012 at about 12:00 hours in Koibatek District of Baringo County, caused his penis to penetrate the vagina of EMB a child aged 5 years contrary to Section 8(1) as read with Section 8(2) of the *Sexual offences Act* No.3 of 2006.

2. The Appellant faced an alternative charge of committing an indecent Act with a child contrary to Section 11 (1) of the *Sexual offences Act* No. 3 of 2006. The particulars being that the Appellant on the 6th day of February, 2012 at about 12:00 hours, in Koibatek District of Baringo County, committed an indecent act which caused his penis to come into contact with the vagina of EMB a child aged 5 years old.

3. The Appellant denied the charge and the matter proceeded for trial with the prosecution calling 5 witnesses in support of their case and by a judgement delivered on the 26th February 2013, the trial court found the accused guilty of the main charge and convicted him under Section 215 of the *Criminal Procedure Code*. The trial court subsequently sentenced the accused to life imprisonment.

4. Dissatisfied with the judgement of the trial court, the Appellant has moved this court vide a petition of appeal which was amended under Section 350(2) (v) raising the following grounds of appeal: -

   i. That the Honourable magistrate erred in matters of fact and law as penetration was not proved and neither was it proved to have been caused by the Appellant.

   ii. That the Honourable magistrate erred in matters of law and fact in that the prosecution's case was marred with inconsistencies which resulted in prejudice against the Appellant.

   iii. That the Honourable magistrate erred in both matters of law and fact as the prosecution did not discharge its burden beyond reasonable doubt, contrary to Section 107 of the *Evidence Act*.

   iv. That Honourable magistrate erred in law and fact by not considering the weight of the Appellant's mitigation and defense, which was also not rebutted by the prosecution contrary to Articles 25(c), 47(1), 50(1) and 159(2)(e) of *the Constitution* and Section 11 of the *Evidence Act*.

   v. That Honourable magistrate erred in law and fact by awarding a disproportionate sentence owing to the particular circumstances of this case, which sentence has been declared unconstitutional.

   vi. That the Appellant's time of one year in remand custody was not factored under Section 333(2) of the *Criminal Procedure Code*.

   vii. That the sentence was mandatory in nature and did not consider the Appellant's mitigation.

5. The Appellant prays that this court be pleased to allow the Appeal, quash the conviction, set aside the sentence and he be set at liberty. The Appeal was canvassed by both written and oral submissions.

Appellant's Submissions

6. The Appellant submits that the alleged victim, though a child of tender years, did not state that the appellant defiled her. That she merely stated that what was done was "tabia mbaya", which is ambiguous and borders on indecent act by the appellant. That the oral testimony is not in line with Section 2 of the *Sexual Offences Act* No.3 of 2006 as no reference to genital organs is made as the appellant merely stated that he slept on her during the episode.

7. That from the evidence on record, it would appear that PW1 was severely wounded but the medical evidence, taken just 24 hours after the alleged act, does not show any such magnitude of injuries, not even lacerations.

8. The Appellant submits that the oral evidence of PW2, the clinician, at Eldama Ravine district hospital was so detailed yet he states that the age of injuries is 24 hours. That there was no presence of injuries on examination, redness on vaginal walls and no evidence of vaginal tears which appellant submits it shows the witness was not credible and the report is doubtful.

9. Further that PW3, a police officer stated that he recovered clothes from the alleged crime scene but the same were not taken for analysis to prove the case beyond reasonable doubt. He submits that the witness further stated that he visited the crime scene and entered the appellant's one-roomed house since the door was not secured and saw unmade bed and some bed clothes on the floor. The appellant submits that the officer was selective in tendering evidence. That the bedsheets were then supposed to be bloodstained as per the evidence but they were not taken for analysis to ascertain that PW1 was indeed defiled on the bed.

10. The appellant submits that PW1 was categorical that on the material day, she stated that she was wearing a trouser but the prosecution instead tendered in evidence of a supposed flowered bloodstained dress in court.

11. The appellant submits that the exhibits taken ought to have been taken for DNA analysis to establish whose blood stains were on the clothes collected. That this would have made the prosecution case watertight as any blood can be obtained from any source to implicate an accused person.

12. That the prosecution treated the evidence in a casual manner and the trial court did not give it due consideration. That the identification of the appellant was also not procedural as PW3 stated that no one helped them to identify the accused as he has been working at Timboroa for 4 years.

13. That on the other hand, PW5, a police officer, told the court that the complainant identified the appellant at the police station as the person who defiled her. He argues that identification was therefore not done on the spot and it is highly suspicious that the police did not arrest the correct person. He argues that they had no description of the appellant and the assertion by PW3 may point to a grudge he could have been harboring against the appellant or malice.

14. The appellant further submits that the prosecution failed to prove PWI's age. That there was a general consensus even by the trial court that PWI was 5 (five) years old, but PWI's mother did not give her child's date of birth when she gave her oral testimony.

15. The applicant submits that the trial court failed in not ordering age assessment to be conducted on PW1. That age is a fact requiring concrete and tangible proof as it is a determinant in sentences in sexual offence cases and must be proved beyond reasonable doubt. That a mere declaration by the prosecution that PW1 is 5 years old does not suffice. That not even school records were tendered in court to ascertain the child's age.

16. The applicant submits that the trial magistrate erred in determining the case as it was riddled with many inconsistencies and was contradictory. He places reliance in the case of Eric Onyango Ondeng v Republic [2014] eKLR, to support his case and submitted that the inconsistencies presented in this case are not minor and that the trial court failed to address them adequately, in breach of Article 48 of *the constitution*.

17. The applicant submits that his defence and mitigation was not given weight. That the magistrate completely disregarded the appellant's defence and mitigation by not giving them weight prior to sentencing. That the appellant was already prejudiced.

18. Further that the court declared him as a first offender but no mitigation was heard as the sentence was mandatory in nature. The appellant submits that trial is unfair when mitigation is not heard, while it is part of the trial process. As it breaches Articles 25(1) and 50 of *the constitution*; an absolute right.

19. That mandatory sentences are seen to be discriminative as there is differential treatment in dealing with prisoners as those without mandatory sentences are accorded the chance to mitigate. That such differential treatment offends Articles 10 and 27 of *the Constitution* 2010.

20. He submits that sentencing should offer a convict the opportunity for rehabilitation and re-integration back to the society but the life sentence imposed does not offer the appellant such prospects. That this follows that the appellant's dignity is stripped, which is contrary to Article 58 of *the constitution*.

21. The appellant submits that life sentence is cruel and degrading treatment under Articles 27 and 28 of *the constitution* and relied on the case of Evans Wanjala Wanyonyi v Rep. [2019] eKLR CR Appeal No.312 of 2018, where the appellant's sentence was reduced from 20 years to10 years.

22. Further that Life sentence was declared unconstitutional in Evans Nyamari Ayako v Republic,CR. AppealAP. 22 of2018 at Kisumu and the court substituted the life sentence.

23. In conclusion, the appellant denies committing the offence and submitted that the charge of defilement was not proved beyond reasonable doubt. That he was prejudiced by conflicting witness testimonies, lack of witness statements and doubtful medical/expert evidence; that the sentence imposed was harsh and wholly unfair in the circumstances.

Submissions By Prosecution

24. The prosecution submitted that they were required to prove that there was penetration, age of the minor and the identity of the perpetrator and submitted that the ingredients were proved beyond reasonable doubt and conviction was therefore proper.

25. The prosecution submit that penetration was proved by the evidence of the complainant and the doctor who produced P3 as exhibit 2. On identification, the accused was well known to the complainant and the mother and the offence took place in his house and the issue was not identification but it was the issue of recognition and the minor was able to identify the perpetrator in court. Further from the complainant's mother, she was categorical that she was 5 years old and she was able to explain why she did not have documents; she stated that the documents were lost during clashes and submit that the ingredients for the offence of defilement were proved beyond reasonable doubt and the conviction and sentence should not be interfered with.

26. In respect to sentence, the prosecution submit that the accused was charged under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* with the minor being 5 years hence he was sentenced to life imprisonment as provided by Section 8(2) of the *Sexual Offences Act* and pray that the sentence should not be interfered with.

27. On the 20th May, 2025 the appellant informed the court that he was not challenging conviction and prayed that the sentence be reduced.

Analysis And Determination

28. This being the first appellate court, I am required to reevaluate and analyze evidence adduced before the lower court and arrived at independent determination. This I do while bearing in mind the fact that unlike the trial court I did not have the benefit of taking evidence first and for this I give due allowance. The principles that guide the first appellate court were set out in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court 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] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R. [1957] EA. 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 finding and conclusion; 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 has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] E.A 424."

29. In view of the above, I have perused and considered evidence adduced before the trial court and the appellant having informed this court that he is no longer challenging conviction, what is left for this court's determination is whether this court should interfere with sentence imposed by the trial court. The appellant was charged with the offence of defilement contrary to Section 8(1) of the *Sexual Offences Act* which provides as follows:-

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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.
>
> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

30. The Appellant has argued that his mitigation was not considered and that the sentence meted on him was harsh and excessive. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of Mbogo & Another v Shah [1968] 1 E.A. 93 thus: -

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

31. Further the Court of Appeal in the case of Ogolla s/o Owuor v 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."

32. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. In the case of Shadrack Kipkoech Kogo -vs- R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

> " 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 v R. (1989 KLR 306)."

33. Further in the case of Bernard Kimani Gacheru v Republic [2002] eKLR the Court of Appeal restated as follows:-

> " 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."

34. The Appellant herein was sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(2) of the *Sexual Offences Act* provides that:-

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

35. Under *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed it shows that, the younger the victim, the more severe the sentence. The age of the victim of sexual offence is therefore an aggravating factor which the court should always consider amongst others in sentencing.

36. In this case, the complainant was of the age of 5 years at the time of the offence and the appropriate penalty clause is Section 8(2) of the Act which prescribes the mandatory minimum sentence of life imprisonment where the victim is 11 years and below.

37. I take note of the fact the supreme court in the recent clarification of applicability of Muruatetu case, restated that it is only applicable to mandatory sentences in murder cases and not mandatory minimum sentences under the *sexual offences Act*. In the case of Muruatetu II the Supreme Court clarified that the decision did not interfere with mandatory minimum sentenced in other cases but only applied in murder cases. Further in Republic v Evans Nyamari Ayako (Petition No.2 of 2024) [2025] KESC 20 KLR the Supreme Court found that the Court of Appeal ought not to have proceeded to set a term of thirty years as a substitution for life sentence. The court stated as follows:-

> " In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers."

38. In view of the above, life imprisonment is legal and upon taking into consideration all the requisite factors in sentencing the appellant, the sentence of life imprisonment by the trial court is legal. From the foregoing, I see no reason to interfere with the lower court's decision on the sentence.

39. Final Orders: -

    a. Appeal on conviction is marked as abandoned

b. Appeal on sentence is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET HIGH COURT THIS 19TH DAY OF JUNE, 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Ms. Omari for the State.

Appellant: present.

Court Assistant: Karanja.