Karanja v Republic (Criminal Appeal E056 of 2025)
[2025] KEHC 7724 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKADARA

CRIMINAL APPEAL E056 OF 2025

J WAKIAGA, J

JUNE 5, 2025

BETWEEN

PETER MUNGAI KARANJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence in Criminal Case no SO 230 of 2019 of the Chief Magistrates Court at Makadara Hon. E Kanyiri PM)

JUDGMENT

1. 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* No 3 of 2006 the particulars of which were that on the 3rd day of September 2019 in Njiru Sub county of Nairobi County intentionally and unlawfully caused his penis to penetrate the genital organs of SN a child aged 15 years. He faced an alternative charge of committing an indecent act with a child contrary to Section 11 of the Act.

2. He was tried convicted and sentenced to serve 15 years' imprisonment on the charge of defilement on the 29th June 2022.

3. Being dissatisfied by the said conviction and sentence , he filed this appeal initially at the Criminal registry at Milimani upon being granted leave to file appeal out of time on the 24th august 2023 and raised the following :

    a. That the prosecution case was not proved beyond reasonable doubt

    b. That the trial court misapprehended sections 124 and 163 of the *Evidence Act* as regards the truthfulness of the victim and the inconsistencies and discrepancies of the prosecution case.

    c. That the appellant was not positively identified

d. That the court failed to take into account section 333(2) of the *Criminal Procedure Code* as regards time spent in custody before conviction.

Submissions

4. Directions were give of the disposal of the appeal by way of written submissions and on behalf of the appellant , it was submitted that the charge sheet was defective contrary to section 134 of the CPC in that whereas the charge sheet indicated the date of the offence as 3rd September 2019, PW1 the minor indicated in her evidence that it was on 1st September , while PW2 her mother and PW4 the Doctor stated that it was on 31st august 2019 and PW5 the Investigating Officer stated that it was on 3rd August.

5. It was contended that the variance in the prosecution evidence and the dates indicated on the charge sheet rendered the charge defective. In support thereof, reliance was placed on the cases of Isaac Omambia v R [1995] eKLR and Yongo v R [1983] e KLR

6. It was submitted that the said defect could not be remedied at this stage of appeal as was held in the case of Peter Ngure Mwangi v Republic [2014] eKLR and that the window provided for under section 382 of CPC is not available as the prosecution completely failed to remedy the same to the prejudice of the appellant as was stated in Benard Ombuna v Republic [2019] e KLR where the court of appeal stated that the test of whether the charge was defective was a substantive one and of relevance was whether the defect prejudiced the appellant.

7. It was submitted that the ingredients of the offence as stated in the case of George Opondo Olunga versus Republic [2016] eKLR were never established. It was contended that the appellant was not positively identified with PW2 giving his name as Peter Otieno and whereas PW 1 stated that he had visited her school with her mother PW2, she denied the same. It was the appellants contention that the age of the victim as per her birth certificate was 14 whereas PW2 stated that she was15 years old.

8. It was submitted that penetration was not proved as there PW1 testimony was that she slept in the chair while the appellant slept on the bed and that that his insistence of having sex with her was met with resistance from her and that the appellant did not have sex with her only to change her testimony that upon coming from the birth room the appellant held her by the waist pushed her onto the bed and laid on top of her and put his penis into her vagina a bit and she felt pain causing the appellant to leave her. It was contended that whereas PW3 testified that the hymen had multiple old tears which meant that PW1 was previously sexually active, there was no linkage with the appellant .

9. It was contended that vital witnesses including PW2 friend and one Jane in whose place PW1 slept were not called to testify and therefore on the authority of Bukenya &others v Uganda [1972] EA 549, the was urged to make adverse inference on the failure to call them.

10. It was submitted that the trial was marred with conflicting statements and grievous inconsistencies, thereby occasioning great prejudice and injustice to the appellant contrary to his rights under Article 50 of *the Constitution*, including the right to legal representation in support of which the case of David Njoroge Macharia v Republic [2011] eKLR was tendered.

11. On sentence it was submitted that the sentence was excessive in view of the Article 50(2) of *the constitution* , right to benefit from the the least severe of the prescribed sentence if the sentence had since changed. In support reference was made to Lima Tuje versus Republic [2016] e KLR , WOR v Republic [2022] KEHC412(KLR), Maingi &5 others v DPP [2022] KEHC13118(KLR) Dismas Wafula Kilwake v Republic [2019] eKLR , Eliud Waweru Wambui v Republic [2019]e KLR , Evans Wanjala Siibi v Republic [2019] eKLR and Taifa v Republic [2022] KEHC14230 (KLR) all post

Muratetu decisions on the court's discretion on sentence. The court was also urged to consider the provision of section 333(2) of CPC.

12. On behalf of the respondent , it was submitted that the charge sheet was not defective since the appellant understood the charge and was able to cross examine the prosecution witnesses. It was contended that the variance as to the particular date of the offence did not offend the provision of section 134 of CPC and in support thereof reference was placed on the case of Bernard Ombuna v Republic (supra) and Mokera v Republic [2023]KEHC 22910(KLR) .

13. It was contended that all the ingredients of the offence were proved beyond reasonable doubt and that the appellants right to legal representation was not violated as he was represented by an Advocate. Support was placed on the case of Republic v Chengo & 2 others [2017] KESC15 (KLR) where the supreme court where the court stated that a distinction must be made between the right to representation per se and the right to representation at state expense specifically .

14. It was submitted that the sentence was not excessive as the magistrate took into account the mitigating factors noting the Muruatetu decision as per the supreme court did not invalidate mandatory sentences in the *sexual offences Act* and that the appellant should have been sentence to a term not less twenty years.

Proceedings Before The Trial Court

15. This being a first appeal, the appellant is entitled to a re-evaluation of the proceedings before the trial court by this court while giving an allowance to the fact that unlike the trial court it did not have the advantage of seeing and hearing witnesses as was stated in Okeno v Republic.

16. It was the Prosecution case that PW1 who was a student I form two had on the 31. 8.2019 gone to buy mboga with her friend when she met the appellant who she knew as Peter , her mums' friend of one year, who used to go to her salon at times and whose uncle was married to her aunt, seated in a motor vehicle and to great him. He was then called by as customer, as he was leaving he told her to go wait for him in his house at BP Kinyango.

17. It was her evidence that he waited for him until 2 pm when he came back and that she slept in his house and in the morning the appellant asked her to have sex with him which she declined, when she got from the birth room the appellant held her by the waist pushed her onto the bed , pulled down his short opened her leg and put his penis in her vagina a bit. At 2 pm her friends came back to the appellants house and asked her to go home but could not since she was scared. It was her evidence that the appellant had called her on cell phone number 0723******, she later on went to pastor Rebeca who called her mum.

18. The next day they reported to the police station and was taken to hospital for medical examination. She stated that she went to the appellant's place on Saturday and that he was not her boyfriend and that he knew that she was in school. In cross examination she stated that the appellant took her to his house and left her there when he was called by a customer and that she had entered his motor vehicle many times and that he had at some stage gone to her school with her mother on parent's day at the request of her sister to talk to her .

19. PW2 the complainants mother stated that she had gone to work and when she came back on 31st august 2019 which was a Saturday , she did not find the compliant at home , she gave her age as 15 years. On Sunday she got a call from the appellant at 11.00am who used to call her Aunty and inquired what they had done to PW1, he then told her that he had been with her the previous night in the company of other girls and that she had left with the other girls and that he would go and find her. She told him

to take her to her uncle upon finding her. When her uncle called that appellant he promised to take the compliant to his house in the morning .

20. The following day when he was called he did not answer and witched off his phone. When she called him, he stated that he had not seen her making her to report the matter to the chief. She later got a call from a pastor friend of hers who told her that PW1 was at her place. She was taken to the Doctor who confirmed that whereas she was not pregnant, she had had sex severally.

21. In cross examination she stated that she knew him as pater Otieno and that she had his telephone number , stated further that the child wen t missing on 31st and the report was made on 3.9.2019 since she had trusted him with her child who had never slept out of home before the said date. She confirmed that she had taken photos with the appellant as a friend and not as lovers and that she did not know about his wife and that she visited him in remand upon his request through his uncle and some women for forgiveness. She stated that PW1 told her that she used to meet with the appellant and have sex.

22. PW3 Dr. Farah Mohamed produced the P3 form which confirmed the age of the victim as 15 years which a history of having been sexually assaulted by someone who locked her in his house. Her hymen had an old tear which is cause by penal penetration at 98%. PW4 Linet Kwamboka Odongo a Nurse confirmed that PW1 was born on 12.02.2005 on 3/9/2019 being a victim of sexual violence on 31st august 2019. Her vagina had mucus discharge with old hymen tear meaning that the incidence did not occur on the date of examination .

23. PW5 PC Mueni Kawawa received the report on 31.8.2019 that PW1 had disappeared from home on and that the appellant locked her in his house for two days. The appellant was arrested on 15th September 2019 and that he had an uber registration number KCM181 M .

24. When put on his defence the appellant stated that he met the complainant's mother as a customer of his uber and that they later became lovers. She took him to her home in Gitanga and found her father sick. Since he used to give her money to take her to the hospital, he disagreed with his wife and they separated, so he remained with PW2. On Friday he went with PW2 to her home when her chama were visiting her father and they had a disagreement and he left her there. On Sunday she called and he told her that he had decided to make up with his wife and since he had given her money to take the complainant to school, she told him to go for the cash on 26th June 2019.

25. She told him that she did not have the money and since he had gone back to his wife she warned and threated him through phone message which information he gave to his wife on 12.9. 2019 and posted that ": Rafiki aneza kawa adui " because he wanted people to know. It was his evidence that he used to live with the care taker and that PW2 was his lover and that the PW2 asked for half a million to enable her remove the case . DW2 Tabitha Mukeya confirmed that the appellant was living in plot called " banjo" in Dandora.

Determination

26. Yet another case of defilement. From the proceedings herein, the following issues have been identified by the court for determination :

    a. Whether the charge sheet was defective

    b. Whether the prosecution case was proved beyond reasonable doubt

    c. Whether the appellant defence was considered by the trial court

    d. Whether the sentence was excessive

e. Whether the appellant right to legal representation was violated.

27. Since the appellant has raised the issue of an alleged violation of his constitutional right, good order dictates that the court starts with this issue. Put differently, was the appellant entitled to legal representation ? the issue of legal representation in this country is not yet settled. It is however the agreed in principle that the only duty of the court is to inform an accused person of the right.

28. Faced with a similar issue Justice Wendo in the case of Chacha v Republic [2022] KEHC16370(KLR) had this to say " As regards sub article 2 (g), it is required that the trial court inform the accused person of his right to counsel promptly so that the accused can make an informed decision whether not to procure the services of an advocate or may qualify to apply for legal aid from the committee on legal aid. The said right cannot be limited by dint of article 25 of *the Constitution*.

29. In Chacha Mwita v Republic Criminal Appeal No 33 of 2019, J. Mrima said as follows of the above right.""Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett v Greyhound Racing Association (1968) 2 All ER 545 Lord Denning presented himself thus: -It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.In South Africa in Fraser v ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied inPOCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of *the Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....In Kenya, the Supreme Court in Petition No 5 of 2015 Republic -vs- Karisa Chengo & 2 others [2017] eKLR while dealing with various aspects of the right to a fair hearing under article 50 of *the Constitution* stated as follows: -the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

30. J Nyakundi in Joseph Kiema v Republic (2019) eKLR also added his voice when he said as follows:- .....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....

31. The court did not inform the appellant of his right to counsel as required. Failure by the court to comply with the said sub article renders the proceedings a nullity.

32. As to the right under such article 2 (h), one would only be entitled to an advocate assigned by the state at state expenses if it is demonstrated that substantial injustice would result. The said right is not automatic but is qualified in that one has to demonstrate that injustice will be suffered. The court in the case of David Njoroge Macharia supra – the Court of Appeal said expounded in substantial injustice as follows:-"Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to

disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where "substantial injustice would otherwise result". Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses."

33. The Supreme Court in Republic v Karisa Chengo (supra) also expounded on the what substantial injustice means. The court said:-"In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will bot be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include:-(i)the seriousness of the offence;(ii)the severity of the sentence;(iii)the ability of the accused person to pay for his own legal representation;(iv)whether the accused is a minor;(v)the literacy of the accused; and(vi)the complexity of the charge against the accused."

34. Whereas the appellant faced a serious charge of grievous harm that would have attracted at life imprisonment, it was not demonstrated that he did not understand the issues or that the case was complex or that he was not able to defend himself. The appellant did not demonstrate that he would suffer injustice if he proceeded without counsel."

35. In this matter the court records shows that on the date of plea taking, the appellant was represented by an Advocate by the name Juma and later on by a Mr Waweru who applied for bond on his behalf, I therefore take the view that he was not one who should have benefited from the services of an advocate at the state expenses and therefore this ground of appeal lacks merit as from the proceedings he was able to conduct the cross examination and offer his defence though with limitations which I shall referred to in the judgement.

36. On the issue of the defect on the charge sheet the date of the offence was indicated as 3rd September 2019, which is the date when the complainant came back home while the evidence of PW1 was that the appellant took her to his house on the 31st of August 2019 and according to the evidence on record she was able to resist the appellants demand for sex on that night or the morning of 1st September 2019. I therefore find no variance between the charge sheet and the evidence on record and consequently dismiss this ground of appeal.

37. On the proof of the prosecution case, the age of the compliant was proved through her testimony, that of her mother and the medical report. Penetration was also proved through her testimony and medical reports. The appellant was identified through recognition , he was known to the compliant as her mother's friend who used to come to their house a fact which was corroborated by PW2 and confirmed by the appellant in his defence. I therefore find and hold that his identification was unmistaken and free from error.

38. The only issue in controversy is whether the appellants defence was considered by the trial court and properly rejected in view of the failure by the prosecution to call witnesses who would have corroborated the complainant and her mother's testimony. In dismissing the appellants defence the trial court had this to say " the accused raised issue with PW2 being his lover and produced some photos. From the photos it is clear that the two knew each other very well, but what in the photo displays that they were lovers?"

39. The trial could should have taken the photos in the context of the appellants defence to the effect that they were lovers and that the case was lodged so as to get back at the appellant when the same declined

to give her money and when she told him " utajua haujui" and later a message to the effect "nitapotea" which he considered a threat forcing him to post that " Rafiki anaeza kea adui" since he wanted people to know.

40. This defence would have been looked at in the content of the complaints evidence and the failure to call the brother of PW2 (Uncle Mungai) Pastor Rebecca whose place she allegedly slept at and her two friends Mary and Jane who would haver put her together with the appellant. Further the prosecution did not produce the call records between the appellant and the complainant and the complainant's mother, which raised doubt on the prosecution case the benefit of which should have been given to the appellant, who was only required to raise a probable defence which I find he did.

41. Had the appellant benefited from legal representation, the same would have produced the telephone communications between his and the complainant's mother so as to buttress his case just in the same manner he had produced the photographs confirming close relationship with the complainant's mother.

42. Whereas there was a strong suspicion of the appellant having had "eaten both the mother and the daughter "thereby defiling the complainant, mere suspicion however strong can not be a ground for conviction in a criminal matter. The appellant should have been accorded the benefit of doubt in view of his defence herein looked at against the contradiction in the complainants account as to what happened and the possibility of the appellant being a victim of having been found out to be eating from both pots.

43. I therefore find and hold that his conviction was not safe and therefore allow the appeal against the conviction which I hereby set aside.

44. On sentence, whereas the appellant submitted pre- Muratetu 2 authorities, in view of Muruatetu 2 direction and the current jurisprudence from the Supreme court on the mandatory nature of the sentences in sexual offence, it is clear that the sentence mated herein was unlawful as the legal sentence should have been no less than twenty years. However, in view of the fact that the appellant was never warned of the possibility of the same being enhanced and the respondent's submission thereon , I will not interfere with the same had I dismissed the appeal.

45. In view of the matters contained herein, I allow the appeal on both sentence and conviction which I hereby quash and set aside, the appellant shall be set free forthwith unless otherwise lawfully held. The prosecution has right of appeal.

46. And it is ordered.

DATED SIGNED AND DELIVERED AT MAKADARA THIS 5th DAY OF JUNE 2025

J. WAKIAGA

JUDGE