Kangogo v Republic (Criminal Appeal E079 of 2023)
[2025] KEHC 10638 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E079 OF 2023

RN NYAKUNDI, J

JULY 23, 2025

BETWEEN

DANCAN KIPKOSGEI KANGOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Eldoret by Hon. R. Odenyo (SPM), in Criminal Sexual Offence Case No. 18 of 2012 delivered on 30/9/2022)

JUDGMENT

Representation:

M/s Angu Kitigin & Co. Advocates

Ms. Kirenge for the state

1. The Appellant herein, Dancan Kipkosgei Kangogo was charged with the offence of defilement contrary to section 8[1] as read with section 8[2] of the Sexual Offenses *Act No. 3 of 2006*. The particulars are that on 31st December 2011 at [Particulars Withheld] Village in Keiyo South District within the Rift Valley Province, the Appellant unlawfully and intentionally caused his penis to penetrate the genital organ [vagina] of RJK, a child aged eleven [11] years.

2. In the alternative, Appellant was charged with the offence of indecent act with a child contrary to section 11[1] of the *Sexual Offences Act* No 3 of 2006 herein referred to as Sexual Offence Act.

3. The Appellant was also charged with the offence of defilement contrary to section 8[1] as read with section 8[2] of the Sexual Offenses *Act No. 3 of 2006*. The particulars are that on 31st December 2011 at [Particulars withheld] Village in Keiyo South District within the Rift Valley Province, the Appellant unlawfully and intentionally caused his penis to penetrate the genital organ [vagina] of VJK, a child aged twelve [12] years.

4. In the alternative, Appellant was charged with the offence of indecent act with a child contrary to section 11[1] of the *Sexual Offences Act* No 3 of 2006 herein referred to as Sexual Offence Act.

5. The Appellant was tried and in the judgment delivered on 30th September, 2022, the trial court found the Appellant guilty of the offences of Defilement as charged. After considering the Appellant's mitigation, the court proceeded to sentence him to serve 10 years' imprisonment on each of the 2 counts which sentence was to run concurrently.

6. Being aggrieved by both his conviction and sentence, the Appellant filed the present appeal. Vide the Appellant's Petition of Appeal dated 18th August 2023, the Appellant set out some 10 grounds of appeal, which can be summarized as follows:

    a. The Learned Magistrate erred in law and fact by failing to appreciate that the appellant was not accorded a right to a fair trial contrary to Article 50[1] [2] of *the Constitution*.

    b. The Learned Magistrate erred in law and in facts by failing to find that ingredients of the offence of committing indecent act with children were not proved.

    c. The Learned Trial Magistrate erred in law and fact in relying on prosecution evidence not proved beyond reasonable doubt.

    d. The Learned Trial Magistrate erred in relying uncross examined evidence of the prosecution which position disadvantaged the appellant and hence arriving at an erroneous judgement and sentence.

    e. The Learned Trial Magistrate erred in by failing to allow the Appellant get legal representation in his defence alongside prosecution case for cross-examining.

    f. The Learned Trial Magistrate erred in sentencing the appellant, the sentence appellant is to suffer is harsh and without having regard to the principles of sentencing.

    g. The Learned Trial Magistrate erred in law by failing to consider the defence of the appellant that was plausible and that impeached the prosecution's case.

    h. That the prosecution charges preferred against the Appellant in this case were fatally defective for conviction.

    i. The Learned Trial Magistrate erred in failing to consider that the appellant as a first offender, the Appellant ought to be given the option of a non-custodial sentence with a view to reform.

    j. The Learned Trial Magistrate erred in both law and fact in imposing an excessive sentence on the appellant.

7. The Appeal was disposed by way of written submissions.

Appellant's Written Submissions

8. The Appellant filed his submissions dated 7th March 2025 in which the Learned Counsel Mr. Angu Kitigin submitted as follows. The learned counsel submitted that the degree of proof of an offence under criminal process is beyond reasonable doubt and that the trial court does not account for the difference between the P3 forms and as to why no DNA testing was not done to circumstantially corroborate the vision theory.

9. The Learned Counsel for the Appellant submitted that on the issue of failure to explain Right to Legal Representation, the trial court did not explain to the Appellant the consequences of failing to hire

legal representation. Although he later engaged the late Nyarotso Advocate to apply for reopening the prosecution's case for cross-examination, the court unfairly declined the request, stating that the witnesses were traceable neighbors and that the Appellant had failed to seek counsel earlier.

10. On the issue of Violation of the Right to Remain Silent, the learned counsel submitted that when the Appellant was put on his defence, the record does not show that the court explained his rights to either give evidence or to remain silent. This omission violated his right to a fair trial under Article 50 of *the Constitution*.

11. On the issue of sentencing, the learned counsel submitted that at the time of sentencing the complainants PW1 and PW2 were 23 years and 22 years and that the purpose of sentencing under the Kenyan legal system is foremost to reform the offender. He added that no social inquiry report or records of the accused were made available to the court. Counsel also submitted that the court was operating in an automated mode and hence sentenced the accused to a term of 10 years and that the sentence is harsh and punitive as the accused/appellant was 25 years; still young and a first offender. He further submitted that there is no data on age/condition of the accused/appellant, as no social inquiry was ever made or referred to a medical officer for ascertainment of his age. Reliance was made to the following cases: Court of Appeal at Nakuru [Criminal Appeal No. 106 of 2017] [2025] KECA 374 [KLR]; Daniel Otieno Yugi v Republic [2018] eKLR; Sawe v Republic [2003] KLR 364; Mwangi and Another v Republic [2004] KLR 32; Regina v Exall and Others [1866] 176 ER 850.

Analysis and Determination

12. This being a first appeal, this court is guided by the principles set out in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the 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 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] EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174."

13. The Appellant cited 10 grounds of Appeal from which I deduce three [3] main issue manifest for determination as follows;

    a. Whether the Appellant was accorded a fair trial in accordance with Article 50 of *the Constitution* of Kenya 2010.

    b. Whether the prosecution proved its case beyond reasonable doubt.

    c. Whether the sentence imposed was excessive or unlawful.

Whether the Appellant was accorded a fair trial in accordance with Article 50 of *the Constitution* of Kenya 2010.

14. The Appellant contended that the trial court violated his constitutional right to a fair trial by failing to: explain the consequences of not having legal representation; allow his counsel to reopen the prosecution's case and inform him of the right to remain silent when placed on his defence.

15. I take note that Article 50 of *the Constitution* provides for the right of an accused person as follows: -50.Fair hearing[2]Every accused person has the right to a fair trial, which includes the right—[g]to choose, and be represented by, an advocate, and to be informed of this right promptly;[h]to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

16. My understanding of the above provision is that the right of an accused person to be assigned an advocate is not absolute and is only a requirement where substantial injustice may occur in the absence of such representation. In David Macharia Njoroge v R [2011] eKLR the court held thus: -

> " State funded legal representation is a right in certain instances. Article 50 [1] provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 [6]. Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. 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 expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."

17. In Karisa Chengo & 2 Others v. Republic, CR. Nos. 44, 45 & 76 of 2014, the court also stated: -

> " It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case [supra] seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise." [Emphasis added]

18. In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital

offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation.

19. As to the claim that the court did not explain the right to remain silent, there is no indication from the record that this omission prejudiced the Appellant. The Appellant testified in his defence and therefore participated in the proceedings. Any technical oversight must be weighed against the fairness of the trial as a whole. I find no material irregularity or miscarriage of justice arising from these procedural complaints to warrant interference with the conviction.

Whether the prosecution proved its case beyond reasonable doubt.

20. Section 8 of the *Sexual Offences Act* stipulates as follows: - 8.Defilement

    [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. The ingredients of the offence of defilement were outlined in the case of Dominic Kibet v. R [2013] eKLR as follows: "To prove defilement the critical elements remain to be proof of penetration, the age of the complainant and possible identification of the assailant."

21. I take note that in this appeal, the main point of contention is with regard to the medical evidence where the Appellant submitted that the trial court did not account for the difference between the P3 forms and as to why no DNA testing was not done to circumstantially corroborate the vision theory. It is trite that medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the oral evidence tendered by the victim. In the case of Kassim Ali v Republic [2006] eKLR the Court [Court of Appeal] observed as follows:

> " So the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."

22. Further, on the need for corroboration, Section 124 of the *Evidence Act* provides thus: "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, [Cap. 15], where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him: Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

23. The effect of the provision to Section 124 was considered by the Court of Appeal in the case of Robert Kabwere Kiti v Republic [2012] eKLR, where the Court observed as follows:

> " Turning to corroboration as a requirement for the minor's evidence as complained by the appellant, in the Mohamed versus Republic case [2005 2 KLR 138] this Court made the following observations: 'By legal notice No.5 of 2005 which introduced the proviso to Section 124 of the *Evidence Act*, Parliament drastically qualified Section 124 of the *Evidence Act* to enable a court in a sexual offence case to convict on the sole evidence of a child of

tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful'."

24. From the evidence on record, and specifically the defense testimony, the Appellant did not come out clearly to controvert the testimony of the complainant. In my view, I find that the testimony of PW1 believable as against the mere denials and sympathy seeking sentiments of the Appellant. Even though the Appellant has contended that the DNA was not conducted and thus there is nothing to link him to the crime, the same did not absolve him of involvement since it is trite law that the offences such as defilement and rape cannot be proved through DNA but by oral evidence. I find that it is highly unlikely that the complainant could have been used as a victim of defilement so as to fix the Appellant. I am satisfied that the evidence of the complainants was credible and believable as they had no reason whatsoever to lodge a complaint against the Appellant. I am satisfied by the evidence by the Respondent which was quite overwhelming against the Appellant and that the Appellant's defence evidence did not shake that of the Respondent. The finding on conviction by the trial magistrate was quite sound and that the same must be upheld. I am convinced that indeed, penetration was sufficiently proved.

Whether the sentence imposed was excessive or unlawful.

25. It is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165[6] and [7] of *the Constitution* and section 362 as read together with section 364 of the *Criminal Procedure Code*. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. In the case of Shadrack Kipchoge Kogo v. Republic Criminal Appeal No. 253 of 2003[Eldoret], the Court of Appeal stated as follows; "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

26. Further, the Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru v. Republic [2002] eKLR restated as hereunder: -

> " 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."

27. In this case, the offences in which the Appellant was convicted of is the offence of defilement contrary to section 8[1] as read with Section 8[2] & 8[3] of the *Sexual offences Act* No. 3 of 2006. Section 8[3] of the *Sexual offences Act* provides that, "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." Section 8[2] of the *Sexual Offences Act* provides that, "[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."

28. The appellant was sentenced to the minimum sentence of 10 years' imprisonment on each of the 2 counts which sentences were ordered to run concurrently. In this case, the complainants were of the age of 11 years and 12 years respectively at the time of the offence. Thus, the appropriate penalty clause is Section 8[3] of the Act which prescribes the mandatory minimum sentence of 20 years' imprisonment where the victim is 15 years and below. Also, section 8[2] of the Act prescribes as sentence of life imprisonment where a victim is eleven years or less. I also take note of the fact that the appellant took an unfair advantage to secure and satisfy his sexual desires on the minors, children of only 12 &11 years respectively. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; [1] to protect the rights of the child; and [2] to signify the seriousness of the offence of defilement. Seriousness of the offence is a relevant factor in sentencing in sexual offences. Generally, it is worth to noting that, the assault leaves the innocent victim dramatized for the rest of her life time thus affecting her quality of life. To say the least, her self-worth and innocence is irreparably damaged by the beastly act which will affect her psychologically, emotionally and physically for the rest of her life. Deterrent sentence serves to deter other would be offenders.

29. Considering the circumstances surrounding the offence herein and the age of the victim, I am of the view that the sentence imposed against the appellant was appropriate and I have no reason to interfere. From the foregoing, I hereby uphold conviction and sentence. As a result, I order as follows:

    a. Appeal on conviction and sentence is hereby dismissed.

    b. The sentence period shall begin to run from the date he was sentenced by the trial court and shall also factor in and deduct the period, if any, that the Appellant spent in custody while awaiting his trial.

DATED AND SIGNED AT ELDORET THIS 23RD DAY OF JULY 2025.

In the Presence of:

M/s Sidi for the State

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R. NYAKUNDI

JUDGE