Kipngetich v Republic (Criminal Appeal E027 of 2024)
[2025] KEHC 9799 (KLR) (4 July 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E027 OF 2024

CM KARIUKI, J

JULY 4, 2025

FROM ORIGINAL CRIMINAL CASE NO. E024 OF 2021 AT SPM'S COURT KILGORIS

BETWEEN

RICHARD KIPNGETICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with offence of defilement c/s 8(1) as read with section 8 (3) of the *sexual offences Act* no 6 of 2006 LOK whereof he was convicted and sentenced to 20 years imprisonment. Being aggrieved and dissatisfied with the verdict and sentenced to 20 years imprisonment he appealed and set forth the following grounds of appeal inter alia: -

    i. That, the learned trial magistrate failed in both law and facts by convicting the appellant without observing that the offence of defilement was not proved beyond reasonable doubt.

    ii. That, the trial magistrate erred in both law and facts by convicting the appellant despite the glaring contradictions and inconsistencies thus making his conviction unsafe.

    iii. That, the trial magistrate further erred in both law and facts by convicting the appellant using a scanty and fabricated medical report.

    iv. That, the learned magistrate further failed in both matters of law and facts by convicting the appellant using a shoddy investigation tendered by the prosecution side.

    v. That, the sentence of 20 years imprisonment imposed to the appellant is extremely harsh and punitive and the appellant prays this Hon. Court to have the sentence reduced to any manageable jail term.

vi. That, the minimum-maximum mandatory sentences under *sexual offences act* were termed unconstitutional, thus the appellant prays that may this Hon. Court exercise its discretional powers to have the sentence of 20 years imprisonment reduced to enable him to go look after his siblings who are suffering back at home.

2. Parties were directed to canvass appeal by way of submissions which they filed and exchanged.

3. Appellant Submissions

4. On prove of the case beyond reasonable doubt, the appellant submit that, PW5 narrated to court that he did physical examination and found PW2's vagina had no physical injuries on genitalia, her hymen had no physical bleedings, no physical bruises as the labia she had no discharge. On lab investigations no spermatozoa were done, the accused was examined, there were no physical injuries to the genitalia, but he had a whitish discharge from the urethra.

5. The hymen is noted and the P3 for the girl, conclusion the child was defiled, the question is, if PW2 was defiled that very day and was examined on 5/7/2021 as alleged by the clinical officer there could be a possibility that indeed it was the appellant who defiled PW2 (the complainant in this case), if PW2 was forcefully defiled and she had never done this before does it mean that there were no injuries to be noted? And if there were no injuries noted as alleged by PW5 in this case that gives a clear impression that PW2 was not defiled. And if she was defiled something strange could have been noted in her private parts.

6. The conclusion by the clinical officer that the child was defiled was null and void since nothing was found in PW2's vagina to link the appellant with the said offence. There was a piece of evidence adduced at the trial court that there was a recovery of a condom packet which was not substantiated to whom it belonging to. If proper investigation was to be carried out by way of finger dusting the condom packet, then it was to be verified exactly as to who used the condom to defile the complainant (PW2). ‘

7. There were no samples of blood, sperms, hair or clothes taken for forensic test or DNA to link the appellant with the said offence. In the issue of hymen missing, it has been held in notable authorities that a broken hymen is not conclusive evidence of penetration. Reliance made on the case of Kisii Hccra No.126 of 2011, Josephat Nyabwabu Vs Rep, where Court held that:

> “ Further the appellant was convicted on the basis of the evidence of pw2 to the extent that the hymen of the complainant was missing/broken and it was in evidence of penetration, the courts has held severally that broken hymen is not conclusive evidence of penetration and therefore in convicting the appellant the trial court fell into error.

8. PW 1 the complainant's mother testimony was that the complainant had some disability complexity where one ought to ask him/herself how it was possible that PW I sent PW2 to go and get some medicine and yet the said PW2 had some problems of maybe forgetting. How sure was PW I that PW2 will remember the type of medicine she sent PW2? Based on the above facts the evidence adduced at the trial court was not safe for conviction and consequently to meet out sentence of 20 years imprisonment.

9. It is not in dispute that the appellant was found at the pool table as it was indicated by the police officer (PW4 &PW6) and arrested the appellant who later was taken to the police station for identification. On arrival the appellant is when he met his accusers at the first place he was not picked/ identified, and he was released and later re-arrested and compelled to wear a cap and that is when PW2 identified him as the person who defiled her.

10. The question is, did the investigation officer conduct their investigation as per the standard of the law? Suppose someone other than the appellant had committed the crime and the appellant was brought in on something he was not versed with? Is it the appellant who is the only person who rides Boda-bodas within that area? Does it mean that it is the appellant who can manage to have the said cap that was won by the perpetrator during the alleged crime? Was it hard for the officers who carried the investigation in this case not including some other people with the same cap the appellant was arrested with for easy identification? Failure to do all this makes the investigation doubtful.

11. PW l, the complainant's mother on page 4 of 49 did say that the child had been defiled. Her clothing was soiled with Uchafu ya Wanaume. This was in her panty and biker. It is not clear as to why forensic DNA was not carried out since there were samples which could have been extracted for examination Citing from the case of Boniface

12. Kyalo Mwololo v Republic court of appeal at Nairobi criminal application No. 1 of 2006, where the court held that where a person is charged with the sexual offence a court may direct an appropriate forensic sample for the purpose of forensic and other scientific testing including DNA test (r 5, sexual offences (medical treatment regulations). All the evidence adduced by PW I revolved on hear-say evidence. All the evidence and what was recorded by the trial court were not realistic to base a heavy and excessive sentence. And the court took an advantage to convict the appellant to 20 years simply because PW2 had some disability problems. The court ought to be very keen in recording evidence of this kind.

13. Appellant submits that, PW3 testimony that he saw the appellant who stopped the motorcycle and entered the maize plantation near their home. The complainant had been sent to go to the market. Also saw the appellant pulling victim forcefully into the maize plantation. That pw3 was sick and was outside the house. From the above script of statement, the question is whether, PW3 was to be trusted by the trial court?

14. PW3 at all times she did not tell the court whether she was standing, seated or sleeping when the pulling was taking place, PW3 did not tell the court the distance from their home up to where the pulling was taking place, even if PW3 was, it does matter how serious she was sick but what matters is how she managed to see the appellant pulling PW2, is there anything that stopped her from making efforts to where the pulling was done? If she could have done so, then the identification could have been clear beyond recognition. PW3 saw that PW2's life was in danger since she was pulled into the maize plantation; raising alarm was to be a solution even if she was sick. Failure to this PW3 's evidence should be nullified by this court.

15. Appellant submits that the 20 year minimum sentence meted out on him disregarded the individual characteristic of each case and thus infringed on his right to dignity as provided in Article 28 of *the Constitution* and further that the same was against the Judiciary Sentencing Policy that provides, that in as much as they reduce sentencing disparities, they fetter the discretion of the court sometimes resulting in grave injustices particularly for appellants case, reliance was made on the cases of . Fredrick Otieno Odero v Republic 120211 eKLR, Alister Antony Pereira v State of Maharashtra.

16. He submitted further that, issue of maximum mandatory sentences was exhaustively exhausted where court ruled that Minimum or Mandatory nature of sentencing under the sexual offence cases was unconstitutional vide Petition No. E017 of 2021 Maingi & others vs. republic judgment delivered at Machakos High court. The appellant therefore prays that this submission be allowed for the interest of justice since he pleads for leniency as far as the case is concerned, the appeal be allowed., the conviction be quashed and the sentence of 20 imprisonment be set aside. That, upon the grant of (orders above) the appellant be set at liberty forthwith and in the "Alternative" the sentence be reduced/varied.

17. Respondent Submissions

Prosecution Submissions

Prosecution submitted that the ingredients of offence namely, age, penetration was established.

On age the same was proved as 13 years via birth certificate which was not contested,

On penetration the pw5 evidence and production of p3 form established penetration thus prove of the same ingredient. On identification pw2 and 3 identified the appellant as the person who defiled the victim.

Issues, Analysis and Determination

18. In determining this appeal, this court has a duty to analyse, evaluate and assess the evidence before it so as to come up with its own conclusions despite the appeal being supported in its entirety by the respondent's.

19. 13.The issues for determination are whether the charge sheet was defective and incurable and if so, what are the consequences. Whether the case was proved beyond reasonable doubt, whether the sentence was harsh and excessive and whether the minimum sentence imposed was unconstitutional.

20. The accused was charged under provisions of section 7 of the *sexual offences Act* no 6 of 2006, The same stipulates that – Section-7. Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities A person who intentionally commits rape or an indecent act with another within the view of a family member, a child or a person with mental disabilities is guilty of an offence and is liable upon conviction to imprisonment for a term which shall not be less than ten years. However, the trial court on its motion deemed it right to substitute charge to one of section 8(1) and (3) which completely changed the nature and ingredients of offence plus the gravity of the sentence without hearing the appellant who was un-represented. The court noted that both categories of offences did not lie within the realm oof cognate offences. The provisions invoked to justify that was section 382 of the CPC cap 75

21. In the Kenyan *Criminal Procedure Code* (Cap 75), Section 179 deals with scenarios where a person is charged with a more serious offense, but the evidence only supports a conviction for a minor or included offense. Section 382 addresses when errors or omissions in the legal process (like the charge sheet or other proceedings) should not automatically overturn a conviction, unless they have caused a failure of justice.

22. Section 179: Conviction for a Minor or Included Offence

23. This section allows a court to convict a person for a lesser offense if the evidence presented supports that lesser offense, even if it was not explicitly charged. This means that if the main charge fails, but the facts prove a subset of that charge, the accused can still be found guilty of the smaller subset. For example, if someone is charged with robbery with violence but the evidence only proves simple robbery, the court can convict them of simple robbery under this section.

24. Section 382: Errors and Omissions Not Necessarily Fatal

25. This section emphasizes that minor errors or omissions in the legal process (like a misspelled name, a flawed summons, or an incorrect date in the charge sheet) do not automatically invalidate a conviction. The court must consider if these errors or omissions have actually prejudiced the accused. If the error did not cause a failure of justice (meaning it didn't prevent the accused from understanding the charge

or preparing a proper defence), the conviction can stand. The court will also consider whether the error could have been easily corrected earlier in the proceedings.

26. In essence, Section 179 provides flexibility in charging and convicting based on the evidence presented, while Section 382 Section 382 of *Criminal Procedure Code* CAP 75: Finding or sentence when reversible by reason of error or omission in charge or other proceedings

27. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

28. prevents technicalities from overriding the substantive justice of a case.

29. Section 382 of the Kenyan *Criminal Procedure Code* (Chapter 75) essentially states that a court's finding, sentence, or order will not be reversed or altered on appeal or revision due to errors or omissions in the legal proceedings (like the charge, summons, or judgment) unless those errors have caused a failure of justice. The court will consider whether the error could have been caught earlier when deciding if justice was truly failed.

30. In simpler terms, the law acknowledges that mistakes happen during legal processes, but it doesn't automatically invalidate the entire case unless the mistake significantly harmed the fairness of the trial. Here's a more detailed breakdown:

    i. Reversal on Appeal or Revision:

        a. Section 382 addresses appeals and revisions of lower court decisions.

    ii. Errors and Omissions:

        It covers mistakes, oversights, or irregularities in various legal documents and procedures within a criminal case.

    iii. "Failure of Justice":

        The core of the section is the requirement that the error must have led to a failure of justice to warrant overturning the decision.

    iv. Early Objection:

31. The law also emphasizes that if an error could have been raised earlier in the proceedings (and wasn't), that may be considered when deciding if a failure of justice occurred.

32. Section 382 CPC Cap 75 LOK - Finding or sentence when reversible by reason of error or omission in charge or other proceedings Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure

of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

33. The Court of Appeal in the case of Benard Ombuna v Republic (2018) eKLR held that "the test whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of charges preferred against him and as a result, he was not able to put up an appropriate defence."

34. Similarly in the case of Peter Ngure Mwangi v Republic (2014)eKLR the Court of Appeal addressed itself on the issue of a defective charge when it set out two factors for consideration namely; whether or not the charge sheet is indeed defective and whether or not even with such defect justice will still be met.

35. The substantive law on a defective charge is section 134 of the *Criminal Procedure Code* which provides that; " every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of offence charged."

36. The issue of defect was never raised by the prosecution nor was appellant notified it only turned out that the facts were not aligning with the provisions invoked in the charge sheet thus court purporting to substitute and or correct or even amend charges.

37. The prosecution noted the error vide the submissions filed but never sought amendment which could have entailed appellant being heard on the issue, but prosecution assumed it but cited the provisions as if amendment was automatic. Surely this was not merely formalistic error but substantive and prejudicial to the appellant.

38. Having found that the appellants were prejudiced by the defective charge sheet, the next question to determine is whether a retrial should be ordered. The Court of Appeal in Pius Olima & another –Vs- Republic [1993] eKLR reiterated the principles to guide the court in determining whether to order a retrial. It thus held: -"The principles that emerge are that a retrial may be ordered where the original trial as was found by the High Court……is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

39. Therefore, a retrial after a defective trial should only be ordered if it's in the interests of justice and if no prejudice will be suffered by the appellants. In this case, noting the effluxion of time since when the alleged offense took place in July 2021, revitalizing a charge at this point would be prejudicial to the appellant and defeats the ends of justice as the appellant would be expected to plead afresh to a charge long after its occurrence.

40. Consequently, I allow the appeal, quash the conviction and set aside the sentence of the trial court. The accused shall beset at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KILGORIS THIS 4TH DAY OF JULY, 2025.

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CHARLES KARIUKI

JUDGE