Ndegwa v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 10762 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10762 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E007 OF 2023

AK NDUNG'U, J

JULY 23, 2025

BETWEEN

MICHAEL WACHIRA NDEGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E025 of 2022– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Michael Wachira Ndegwa, was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 25/04/2022 at around 2115hrs at [Particulars Withheld] in Laikipia Central Sub County, Laikipia County willfully and unlawfully caused his penis to penetrate the vagina of CKM a child aged 16 years. On 16/01/2023, he was sentenced to ten (10) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he filed a petition of appeal on 27/01/2023. He sought leave in his submissions to amend the earlier filed grounds. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred convicting him on a case that was not proved beyond any reasonable doubt.

    ii. The learned magistrate erred convicting him on contradicting and hearsay evidence.

    iii. The learned magistrate erred convicting him without considering PW1's errant behaviour that dented her credibility, integrity and reliability as required by section 124 of the *Evidence Act*.

    iv. The learned magistrate erred by holding that the sexual intercourse was consensual without invoking Section 8(5) and (6) of the *Sexual Offences Act*.

v. The learned magistrate erred quashing his defence when the prosecution had failed to comply with Section 309 of the *Criminal Procedure Code*.

vi. The learned magistrate applied wrong principles during sentencing by ignoring his statutory provisions and relying on hearsay and contradictory evidence.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the offence was alleged to have been committed on the night of 25/04/2022 and on 27/04/2022. It was alleged that the complainant went back to his house raising the question why she would go back to her defiler again. Further the issue of material date was in variance between PW1 and PW2. PW1's evidence was also vague as to what transpired as she did not testify as to what time she found the complainant and the Appellant on 25/04/2022. That if the complainant visited him at 8:00pm-3pm, then at what time did PW1 find them? That one Mama Felix was alleged to have seen the complainant entering his house but she was not availed as a witness hence this evidence was hearsay and failure to call her left a gap in prosecution's case. She was also mentioned in the trial court's judgment meaning this was erroneously considered and admitted as evidence.

4. He submitted that the prosecution's evidence was contradictory in that, PW1 testified that on 27/04/2022, her mother went looking for her and knocked on the door whereas PW1 testified that on 26/04/2022 at 3:00pm, she went at his door. That the alleged date of the offence was 25/04/2022. There was no indication that PW2 ever visited his house. PW1 said that he was a neighbour but this was not corroborated by the complainant. There was no evidence that the complainant visited him on the night of 25/04/2022. Additionally, the complainant did not explain on what grounds she visited him on the night of 25/04/2022. He submitted that the belief alluded in Section 124 of the *Evidence Act* must take into consideration the circumstances of the case in line with Section 33 of the *Sexual Offences Act*. That a girl who sneaks on her own accord into men's houses cannot be said to be a credible witness and she was prone to lying as she had lied to her mother of her whereabouts on the morning of 26/04/2022. That the trial court only commented on her demeanour but not on her truthfulness, honesty and integrity. That her behaviour shows a person who could lie to her mother and could not be truthful and give credible evidence.

5. That there was no evidence that he lured the complainant to his house but she visited his house on her own accord. Further the medical evidence revealed that she was sexually active due to an old broken hymen and lacerations since there was no evidence that she had sex with him before the alleged date of 25/04/2022. That her behaviour left a lot to be desired since this was not a case of a minor being lured by a sex pest. She did not explain to her mother where she slept on the night of 25th after being asked which shows that she had no respect even for her mother. That according to the superior court (sic), her behaviour is taken of that of an adult and cannot be said that she was a victim of defilement and that is why Section 8(5) anticipated such behaviour and reliance was placed on the case of Kaura Katana Gona vs Republic [2015] eKLR. Additionally, girls who are 16 to 18 years can easily deceive unsuspecting persons as was held in the case of Eliud Waweru Wambui v Republic (2019) eKLR.

6. He submitted that his defence was dismissed without cogent reasons by the court. His defence also remained unchallenged by the prosecution as the prosecution failed to adduce any evidence in rebuttal in accordance with Section 212 and Section 309 of the *Criminal Procedure Code*.

7. Regarding sentence, he urged the court to relook at the sentence since the non- aggravating factor of the case were evident from the trial court record hence a lesser sentence would have served the same interest.

8. The Respondent counsel in her submissions urged the court to disregard the amended grounds of appeal for they were filed without leave of this court pursuant to Section 350(2) of the *Criminal*

Procedure Code and the prosecution was not given a chance to responded to the same. With respect to penetration, she submitted that it was sufficiently proved since the evidence of PW2 was solid and consistent and she was clear as to who defiled her. Her evidence remained unshaken even during cross examination and medical evidence corroborated her testimony. Proof of penetration was corroborated by the P3 form produced by PW3 which stated that her hymen was broken proving the assertion of penetration. Age was proved through her birth certificate, Pexhibit1. As to identification, she submitted that it was also sufficiently proved as PW2 spent the night at the Appellant's house which shows that he was therefore not a stranger and if he was a stranger, she would not have mistakenly identified him after spending the night with him. PW1 also testified that he was their neighbour.

9. With respect to Appellant's defence, she submitted that apart from merely denying committing the offence, he failed to give any conflicting version of event that would have cast doubt on the prosecution's case. As to the defence provided under Section 8(5) and (6) of the *Sexual Offences Act*, she submitted that the same was not raised during the trial and the Appellant was adamant in his defence that he has never met the complainant. Further, he did not demonstrate how this defence was to be considered in his favour as he did not demonstrate whether PW2 lied to him and reasonably believed her and he did not demonstrate any steps he took to ascertain her age. He did not dispute the complainant's age even at the trial hence this ground ought to fail. That he tried to attack PW2's character as a liar, wayward girl, disrespectful and that she willingly went to his house but this was flimsy and did not help his defence.

10. On the issue of sentence, she submitted that sentencing is at the discretion of the court which can only be interfered with if there is evidence that the discretion was exercised injudiciously, sentence was manifestly harsh, or that the court considered extrinsic factors, or omitted to consider material factors as was held in MMI v Republic [2022] eKLR and none of these factors have been urged. That the Appellant was sentenced to 10 years imprisonment whereas the law provides for 15 years imprisonment hence the sentence ought to be enhanced. She also submitted that there was no misdirection in terms of sentencing on part of the trial court hence the sentence was proper, not excessive, harsh or unconstitutional and she urged the court not to interfere with the same.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. A recap of the evidence then becomes necessary to equip this court properly for the review of the same.

13. The evidence before the trial court was as follows. PW1, the complainant's mother testified that on 25/04/2022, he found the Appellant with the complainant in his house. The complainant spent the night in his house and returned in the morning of 26/05/2022. She did not explain where she slept. The Appellant was their neighbour. She knocked on the door and when it was opened, she asked him to tell the complainant to step outside which she did. The complainant refused to tell her what happened between them and so she reported to the police and they were referred to hospital.

14. She testified on cross examination that the complainant went missing at 9:00pm and she could not look for her as it was dark. She knew the person who was washing clothes and who witnessed the incident but she did not record a statement. There were residents as well but they did not record witness statements.

15. PW2, the complainant testified that on 25/04/2022, she met the Appellant on the road and he asked her to visit him at his house after work. At 8:00pm, she went to his house. She testified that 'alikuwa anani force tuonane kimwili' which she declined. They had sex. He used his penis to insert in her vagina. It was very dark so she spent the night at his house. On 27/04/2022, he found her at their premises and she visited his house. They did not have sex on this particular day as they kept looking at the pictures

in his phone. While there, her mother went looking for her. She left with her and her mother made a report at police station and she was taken to hospital where she was examined. That she knew the Appellant and had known him since March.

16. On cross examination, she testified that on 25/04/2022, when she visited him, he insisted that they have sex. That where she stays, there are other residential houses with tenants. On 27/04/2022 her mother knocked on the door, he opened and confirmed that she was there and she then left with her mother. That the sex was not by the road but at his house. That she visited his house on 25/04/2022 at 8:00pm and it was dark and there were no people. She insisted that she was with him that night. That she was not interested in sex but he insisted. He invited her again on 27/04/2022. She narrated what happened between them and her mother took action. That on 27/04/2022, Mama Felix saw her going into his house and she reported to her mother.

17. PW3, the clinical officer produced the P3 and PRC forms on behalf of Fidelis Mbugua who was on leave. He testified that he was familiar with her handwriting and signature and had worked with her for a period of 3 years. He testified that on examination, the external genetalia was normal, there were laceration/ulcer or wound on the vulva, the hymen was broken, she was having a foul smelly per vaginal discharge, high vaginal swab showed gram positive bacilli, presence of pus cells and few epithelial cells. Other tests were negative. That her conclusion was that there was evidence of penetration based on the physical and lab examination. He produced the P3 and PRC forms as Pexhibit2(a) and (b) respectively.

18. He testified on cross examination that the patient was seen on 28/04/2022 after the intercourse on 25/07/2022 (sic).

19. PW4 testified that she was summoned by her boss on 27/04/2022 at 8:20pm who instructed her and a colleague to escort the complainant to the hospital for examination.

20. PW5 testified that he was assigned this case on 27/04/2022. He interrogated the complainant who informed him that she was defiled on 25/04/2022 by a well known person. The complainant was escorted to hospital. He arrested the Appellant with the assistance of the complainant's mother. He produced her birth certificate as Pexhibit1, her black trouser and pink inner wear as Pexhibit3(a) and (b) and the investigation diary as Pexhibit4.

21. On cross examination, he testified that he arrested the Appellant while on the road.

22. The Appellant in his sworn defence testified that he was arrested and taken to police station where he met a child and her mother who claimed that he defiled the child. That their testimonies were false. The complainant's mother was familiar as she was a customer at a shop where he was employed. The complainant was a stranger to him and he first met her at police station.

23. On cross examination, he maintained that he did not know the complainant and it was false that he had sex with her. That he thought that the mother brought up those charges because he may have sold her something in a bad way. That the child was not found in his house.

24. That was the totality of the evidence before the trial court.

25. I have read and considered the evidence as recorded at the trial court. In so doing, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the applicable law, the submissions on record and case law cited. Of determination is whether the prosecution proved its case to the required threshold in law.

26. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

27. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. In the present appeal, the complainant's age was not disputed at trial. PW5, the investigating officer produced her birth certificate as Pexhibit1.

29. The trial court was convinced that the complainant was a minor after observing her birth certificate that was produced during trial and noted that she was born on 30/10/2005 and thus she was 16 years old at the time of the commission of the offence.

30. On the question whether penetration was proved, upon review of the evidence, it is manifest that the PW2 gave forthright and clear evidence of how she went to the Appellant's house on the material night where they had sex which involved the Appellant inserting his penis in her vagina. This evidence remained unshaken under cross examination.

31. Section 124 of the *Evidence Act* gives an exception to the rule on corroboration of evidence by providing that the evidence of a victim of a sexual offence can on its own be the basis of a conviction provided that for reasons to be recorded the court is satisfied that the witness was telling the truth.

32. At trial, the trial magistrate after listening to the evidence categorically stated that he had no reason to doubt her testimony and found her evidence to be credible and truthful.

33. The evidence of PW1 finding PW1 at the house of the Appellant is circumstantial evidence that corroborates the evidence of PW1. Further, the medical evidence adduced confirmed penetration. It was the evidence of PW3, the clinical officer that, the doctor who examined the complainant found proof of penetration as the hymen was old broken, there were lacerations on the vulva, there were epithelial cells, pus cells, gram positive bacilli and her conclusion was that according to physical examination and lab results, the complainant had been defiled. These findings are well captured in the P3 and PRC forms. The complainant was examined on 28/04/2022, days after the ordeal. I harbour no doubts that penetration was proved.

34. An issue is raised about varying dates varying dates since PW1 testified that she found the complainant in his house on 25/04/2022 whereas the complainant testified that her mother found her on 27/04/2022.

35. This was just a minor contradiction as the complainant clarified that she went to his house on 25th and the second time on 27th when her mother found her. The investigation diary which was produced as Pexhibit4 also clarifies this issue as it indicated that PW1 reported that the complainant went missing on the night of 25/04/2022 and returned on 26/04/2022 in the morning. She also reported that on 27/04/2022, she learnt that the complainant was in the Appellant's house.

36. As was held by the Uganda Court of Appeal in Twehangane Alfred v Uganda, [5]Crim. App. No 139 of 2001, [2003] UGCA, it is not every contradiction that warrants rejection of evidence. It subtly stated: -

> 6. "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

37. The final ingredient that required proof is the identity of the perpetrator. It is in evidence that the complainant spent the night at the Appellant's house so there can be no mistaken identity. Her mother testified that the Appellant was a neighbour and the complainant testified that she had known him since March. The Appellant in his defence denied knowing the complainant but testified that her mother was a customer at a shop where he was employed. He was therefore not a stranger. Furthermore, PW1 found the complainant in his house and therefore identification was sufficiently proved.

38. In his defence, the Appellant denied the offence and knowledge of PW1. This was surely a mere denial that fell short of displacing the prosecution's evidence.

39. There has been a belated attempt in this appeal by the Appellant to call to his aid the defence afforded by Section 8(5) and (6) of the *Sexual Offences Act*. This defence is not open to the appellant at this stage as it was never raised nor canvassed at the trial court.

40. In any event, my view is that the said defence is only available to a person who acknowledges knowing the victim of the sexual offence, admits the penetration occurred but that he participated in the same believing that the victim was an adult, of course, based on how the victim presented herself.

41. It is trite that an accused who wishes to rely on this defence must lay such a basis during trial as was held by Mrima J in Irene Atieno Ochieng V Republic [2017] eKLR thus;

> " An accused person who wishes to take advantage of the defence in Section 8(5) and (6) of the *Sexual Offences Act* must lay such a basis during the trial. When such a serious defence is raised later, more so on appeal, that denies the prosecution the opportunity to interrogate the same by way of cross-examining the accused person and the other witnesses and that visits an injustice to the victim. Further an Appellant who raises such a defence for the first time on appeal, or an accused person who raises it for the first time when placed on defence, runs the risk of the defence being treated as an afterthought and the defence may not be of much assistance to such a party."

42. It therefore follows that the defence of deception is not available to the Appellant at this juncture. Furthermore, as observed by the Respondent's counsel, the Appellant had denied knowing the complainant in his defence and he cannot therefore claim that he was deceived by her yet he had denied knowing her. This is therefore an afterthought.

43. On the claim that a crucial witness was not called, one mama Felix, whom the complainant said saw her going to his house and who in turn informed her mother, it is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the *Evidence Act* which provides that;

> " In the absence of a provision of the law, no particular number of witnesses is required to prove a fact."

44. In Bukenya And Others V. Uganda [1972] EA 349 it was held that;

> " While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the

evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

45. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate.

46. With regard to sentence, he was sentenced to ten (10) years imprisonment. Section 8(4) provides for a sentence of not less than 15 years. The prosecution counsel submitted that the sentence ought to be enhanced but also urged the court not to interfere with the same as it was not excessive, harsh or unconstitutional.

47. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270).

48. The Appellant did not demonstrate any of the above factors. It is also noted that the sentence imposed was illegal as the law provides for a minimum sentence of 15 years. The Supreme Court in Muruatetu 2 and lately in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). stated;

> "We must also reaffirm that, 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. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
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> 67. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of Trusted Society of Human Rights v Attorney-General and others, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:
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> "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the Governmental functions. *the Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that

each will carry out those functions assigned to it without interference from the other two."

We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

G. Conclusion

Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

49. The state has sought enhancement of the sentence but there was no notice of enhancement served on the Appellant which hampers him from addressing the issue in the appeal. I will not disturb the sentence.

50. With the result that the appeal has no merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED THIS VIRTUALLY 23RD DAY OF JULY 2025.

A.K. NDUNG'U

JUDGE