Nyikunzi & another v Republic (Criminal Appeal E071 & E072 of 2022 (Consolidated)) [2024] KEHC 1259 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1259 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E071 & E072 OF 2022 (CONSOLIDATED)

PJO OTIENO, J

FEBRUARY 9, 2024

BETWEEN

JOEL NANDARA NYIKUNZI ..... 1ST APPELLANT

PETER KEYA MAKOBELO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeals from the conviction and sentencing of Hon. G. Ollimo (SRM) in Butere SRMC SO Case No. E004 of 2022 dated 12th October, 2022)

JUDGMENT

1. The appellants were arraigned before the Senior Resident Magistrate at Butere in Sexual Offences Case No. E004 of 2022 charged with the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 24th and 25th day of January 2022 in Butere Sub County within Kakamega county, the appellants intentionally and unlawfully caused their penises to penetrate the vagina of WN a woman aged 18 years without her consent.

2. In the alternative, the appellants were charged with the offence of committing an indecent act with an adult contrary to section 11(A) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 24th and 25th day of January 2022 in Butere Sub County within Kakamega county, the appellants intentionally and unlawfully touched the vagina of WN a woman aged 18 years without her consent.

3. The appellants pleaded not guilty to the charges and the case proceeded to full trial with the prosecution calling a total of seven (7) witnesses whose evidence can be summarized as below;

4. PW1, the complainant who was both deaf and dumb gave an unsworn statement after a determination by the court that she could not comprehend the nature of an oath and she testified that she was 18

years old and a student at [Particulars Withhheld] School. She stated that one Saturday morning she went to the bathroom where she was followed by the appellants who gagged her and defiled her. She stated that she recognized the appellants because they were at their homestead on the 24th and 25th day of January, 2022. It was her testimony that the appellants first defiled her on the 24th when she had gone to fetch firewood and the first appellant started to touch her inappropriately but she did not report to anyone and that when they again defiled her on 25th she informed her aunt who locked them in a house until the police came and arrested them. She also went to the station and later to hospital in the company of the police.

5. On cross examination by the 1st accused (2nd appellant) she stated that he was dressed in a red shirt and black trousers and denied that they were related.

6. On cross examination by the 2nd accused (1st appellant) she stated that the appellants had posed as casual laborers at their homestead and that her aunt contracted them to shell maize.

7. On being questioned by the court she stated that the 1st accused defiled her first as the 2nd accused did a happy dance then the 2nd accused defiled her immediately thereafter as the 1st accused seized the door.

8. PW2 testified that PW1's father is her brother in law and that the appellants were helping them shell maize at the homestead of PW1's father. She stated that on 25/1/2022 at about 4PM she returned home from hospital and found the complainant in her home whereupon she informed her that she had been raped. She did not ask the identity of the perpetrators because she was not conversant with sign language and that she immediately called the complainant's father.

9. On cross examination by the 1st accused she stated that she did not bother to ask the identity of the perpetrators because she is not conversant with sign language.

10. PW3, a teacher at the Mumias School for the Deaf testified that she was the complainant's interpreter and that on 25/2/2022 she received a call from the complainant's father informing her that the complainant had been raped and she dashed to the police station where she interrogated the victim who recounted that she was at home alone with two male individuals performing some casual work at their home and that the men raped her in turns. She stated that they raped her on 24 and 25th January, 2022.

11. On cross examination by the 1st accused she stated that the complainant described him as having dreadlocks which he had at the time whilst the 2nd accused was described as chubby.

12. On cross examination by the 2nd accused she stated that she witnessed the identification process and that she relied on the information given by the complainant to identify the accused persons and that the complainant further identified the accused persons from other male individuals.

13. PW4 gave evidence that on 25/1/2022 he was employed by the complainant's father together with the appellants to shell maize when between 3-4PM the appellants took a break from work. He further stated that he saw the complainant at the verandah walking to take a bath while her assistant escorted her carrying water.

14. On cross examination he stated that they were four men in the home and that all of them were escorted to the police station where an identification parade was conducted and the complainant identified the appellants.

15. PW5, testified that the complainant was his niece and that on the material day he was with his colleagues at the complainant's home shelling maize when at about noon the 1st accused left and returned shortly thereafter. At 3PM the 2nd accused then left and informed them that he was going to drink water but he

returned shortly thereafter. At 6PM he was informed by the complainant's father that the complainant had been raped.

16. On cross examination by the 1st accused he stated that the 1st accused had left before lunch but returned at lunch time and that he had worn a red t-shirt.

17. PW6, a clinical officer attached at Butere Sub County Hospital testified that on 25/1/2022 at around 8:30PM two police officers brought the complainant and the appellants to the hospital for examination. On examining the complainant, she noted that she had a whitish discharge and her hymen was not intact. Her labia appeared inflamed with tenderness on both labias and the vaginal core. On examining the 1st appellant she noticed that he had bruises on the shaft of the penis and they were very fresh with minimal bleeding and there was also tenderness on palpation of penis. On examining the 2nd appellant she noted that his penis was in a fair general condition with no bruises and no discharge.

18. PW7 testified that she was the investigating officer and that on the 25th day of January, 2022 she was at the station when she was informed by her senior about a rape case. Together with her two colleagues they proceeded to the scene where they found four men and the complainant. Using sign language, the complainant identified the appellants as her assailants. They arrested the duo and took them to Butere Police Station.

19. The evidence of PW7 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the accused persons were put on Defence.

20. The 2nd appellant testified as DW1 and in his sworn evidence he recalled that on 25/1/2022 he was at the home of the complainant shelling maize and packing them in sacks when at around 2PM he left the homestead leaving the 1st appellant and that he returned at 4PM to finish the remaining work. At 5PM a Mr. James Anywa made a call to confirm if they had completed their assignment and instructed them to wait for to return. The police then appeared and arrested him and was escorted to Shiatsala police station and later to the hospital.

21. On cross examination he stated that he was arrested together with four other men at the complainant's homestead and that when they were taken to the station the complainant only identified the 1st appellant.

22. The 1st appellant testified as DW2 and gave unsworn evidence where he stated that on 25/1/2022 he was contracted by James Anywa to perform some casual job at his homestead where he worked until 5PM and that as he was planning to leave he learnt that a young girl had been raped and within two minutes' police arrived and they were handcuffed and when the complainant was summoned she identified him and the 2nd appellant as the perpetrators.

23. Judgment was subsequently delivered and the appellants were convicted of the offence of gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006 and each of them was sentenced to serve life imprisonment.

24. Aggrieved with the judgment and sentence of the trial court, the appellants lodged the subject appeal.

25. The 1st appellant's memorandum of appeal filed in court on 6th July 2023 is premised on the grounds that the prosecution's evidence was full of contradictions, his defence was not considered and that the sentence was harsh.

26. The 2nd appellant's petition of appeal dated 21st October, 2022 is premised on the grounds that he was convicted yet the case was not proven beyond reasonable doubt, his defence was not considered,

the prosecution evidence was marred with discrepancies and that the sentence was harsh and that it contravened article 50(2)(p) of THE *Constitution*.

27. The appeal has been canvassed by way of written submissions and I can only see the 2nd appellant's and respondent's submissions.

2nd Appellant's Submissions

28. It is his submission that he was not identified by the complainant since it was her evidence in chief that it was not the 2nd appellant who defiled her but the 1st appellant. He further states that the element of penetration was not equally proved against him since it was the evidence of the clinical officer that medical evidence showed that he had no bruises on the penile shaft, no discharge was noted and that there was equal hair distribution.

29. He further contends that the prosecution's evidence was contradictory to sustain a conviction and cites the variance to include; a) PW1 stated that she entered the bathroom and closed the door but did not clarify how the appellants gained access; b) PW1 stated that she was alone at the homestead yet PW4 stated that he saw PW1 being escorted to the bathroom by her assistant and that PW4 and PW5 told the court that they were also at the homestead shelling maize; c) PW1 told the court that she was raped on 24th and 25th of January 2022 yet she stated that on 24/1/2022 she met with the 1st appellant who touched her inappropriately.

30. On his defence not being considered, he submits that the trial court did not analyze the evidence of PW1 who stated that she was not part of the perpetrators and the evidence of the clinical officer who stated that his genitals were in a fair condition.

31. On the sentencing being harsh he submits that the sentence prescribed for gang rape under section 10 of the *Sexual Offences Act* No. 3 of 2006 is a minimum of 15 years which can be enhanced to life and he argues that the trial magistrate failed to exercise his discretion in giving him the maximum sentence.

Respondent's Submissions

32. It is their submission that the elements for the offence of gang rape against the appellants was proved beyond reasonable doubt in that the element of penetration was proved by PW1 who recounted how she had gone to take a bath and the appellants followed her and defiled her which statement was corroborated by PW6, the clinical officer, who stated that the victim's vagina had a whitish discharge, hymen was not intact, labia appeared inflamed and there was tenderness on both labia and tenderness on vaginal cores. They argue that PW6 further stated that the 1st appellant had bruises in the shaft of his penis which were very fresh and he also had minimal bleeding which she referred to as non-negligible with tenderness on palpation of the penis. They assert that the evidence of PW1 that she was raped remained consistent during cross examination by the appellants and by the court.

33. On the element of identification, they submit that it was by recognition since the appellants had been in the complainant's homestead doing some casual jobs of shelling maize.

34. On the absence of consent, they submit that the complainant was gagged, seized and raped and that consent cannot be coerced in which regard they cite the case of *Daniel Kaberu v R* (2021) eKLR.

35. On the element of whether the appellants in association of each other with a common intention defiled the complainant they submit that the complainant explained in detail how the two appellants took turns to defile her. They argue that the appellants both acted with a common intention to hold the complainant hostage in the bathroom and rape her in turns.

36. On the issue of sentencing the prosecution submits that the trial court properly applied its discretion on sentencing and that the reason for the enhanced sentence was explained by the trial court to be that the appellants took advantage of a vulnerable person who was deaf and dumb and who was unable to defend herself.

Issues, Analysis and Determination

37. I have looked at the grounds of appeal and the submissions by the parties and the issues that arise for my determination are;

    a) whether the offence of gang rape was proved beyond reasonable doubt against the appellants;

    b) whether the prosecution's evidence was marred with inconsistencies and contradictions and its effect on their conviction;

    c) whether the appellants defence was considered and;

    d) Whether the sentence meted on the appellant was harsh and excessive. The court shall strive t deal with those issues in a seriatim manner.

Whether the offence of gang rape was proved beyond reasonable doubt against the appellants

38. The elements of the offence of gang rape can be deduced from a reading of section 10 and section 3(1) of the *Sexual Offences Act* to be;

    a. Penetration

    b. Lack of consent

    c. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape

    d. Positive identification of the perpetrators

39. On penetration, the general rule under section 124 of the *Evidence Act* is that it can be proven by the oral evidence of the victim and this position is fortified by the court of appeal in *Martin Nyongesa Wanyonyi vs. Republic* Criminal Appeal No. 661 of 2010, (Eldoret), citing *Kassim Ali vs Republic* Criminal Appeal No. 84 of 2005 (Mombasa) where the court stated that:

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

40. In the present appeal, the complainant narrated how the appellants followed her to bathroom and raped her in turns. She stated that the 1st accused defiled her first as the 2nd accused did a happy dance then the 2nd accused defiled her immediately thereafter as the 1st accused seized the door. Her evidence was corroborated by PW6, the clinical officer, who stated that in examining the complainant, she noted that she had a whitish discharge and her hymen was not intact. Her labia appeared inflamed with tenderness on both labias and the vaginal core. On examining the 1st appellant she noticed that he had bruises on the shaft of the penis and they were very fresh with minimal bleeding and there was also tenderness on palpation of penis. On examining the 2nd appellant she noted that his penis was in a fair general condition with no bruises and no discharge.

41. Based on the above, I find that penetration was proved by the prosecution.

42. On the lack of consent by the complainant to the sexual acts, section 42 of the *Sexual Offences Act* provides that a person is said to consent if she agrees by choice, and has the freedom and capacity to make that choice. In *Republic v. Oyier* [1985] eKLR, the Court of Appeal held as follows:-

> " The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not."

43. In *Charles Ndirangu Kibue v Republic* [2016] eKLR, the observed that a woman is said to consent only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power, to act in a manner that she wants.

44. The complainant testified that the appellants gagged her and defiled her. These actions are not synonymous to a woman consenting to sex.

45. Turning into the third element of whether the appellants had the common intention to rape the complainant, the doctrine of common intention was explained by the court of appeal in the case of *Dickson Mwangi Munene & Another v Republic* [2014] eKLR as follows;

> " This provision has been interpreted and the doctrine of common intention dealt with by our courts in several cases. In *Solomon Mungai v. Republic* [1965] E.A. 363, the predecessor of this Court held that in order for this section to apply, it must be shown that the accused had shared with the other perpetrators of the crime a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged."

46. It was the testimony of the appellant that the 2nd appellant defiled her first as the 1st appellant did a happy dance then the 1st appellant defiled her immediately thereafter as the 2nd appellant seized the door. These actions denote that the appellants had the common intention to rape the complainant.

47. On the positive identification of the appellants, the appellants confirmed that they were contracted to shell maize at the homestead of the complainant and their faces were thus familiar to the complainant.

48. The 2nd appellant has contested that he was not identified by the complainant and that she only identified the 1st accused. The complainant in her examination in chief could not identify the 2nd appellant but on cross examination she recalled that the 2nd appellant at the time of the incident had dreadlocks which he had since shaved and she confirmed that he was one of her assailants. PW3 confirmed that the 2nd appellant indeed had dreadlocks at the time of his arrest.

49. I thus find that prosecution established to the required standard of proof that it was the appellants who sexually assaulted the complainant.

Whether the prosecution's evidence was marred with inconsistencies and contradictions and its effect on their conviction

50. Contradictions in the testimony of witnesses was explained by the court of appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA as follows;

> " Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two

pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

51. The contradictions cited by the 2nd appellant were that; a) PW1 stated that she entered the bathroom and closed the door but did not clarify how the appellants gained access; b) PW1 stated that she was alone at the homestead yet PW4 stated that he saw PW1 being escorted to the bathroom by her assistant and that PW4 and PW5 told the court that they were also at the homestead shelling maize; c) PW1 told the court that she was raped on 24th and 25th of January 2022 yet she stated that on 24/1/2022 she met with the 1st appellant who touched her inappropriately.

52. The court in *Twehangane Alfred v Uganda* Crim. App. No 139 of 2001, [2003] UGCA, 6 held as follows on contradictions;

> "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."

53. The contradictions cited by the 2nd appellant do not rule out the fact that the complainant was gang raped by the appellants. They do not deal with the real substance of the case. The same are not grave or substantial enough going to the strength of the evidence and shaking the foundation of the conviction to depict it as unsafe.

Whether the appellant's defence was considered

54. I have perused the judgment of the trial court and I have noted that the evidence of the appellants were duly considered. The judgment reads in part at page 7:-

> "I have also considered the evidence of the accused persons. According to accused 1, whereas he admits that he was at PW1's homestead on material date, he nevertheless maintains his innocence insisting that as far as he is concerned, he was not identified as the perpetrator by PW1.
>
> Regarding accused 1's defence, this court opines that the same is a mere denial as there is overwhelming evidence as I have related above linking him to the offence."

55. It is clear to the court that the evidence offered by the defence was duly considered and found not to have controverted that put forth by the prosecution.

Whether the sentence meted on the appellant was harsh and excessive

56. The circumstances in which a court may interfere with a sentence were addressed in the case of *Wanjema v Republic* Criminal Appeal No. 204 of 1970 (1971) EA 493, 494 where it was held as follows: -

> "An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

57. The sentence prescribed for gang rape under section 10 of the *Sexual Offences Act* No. 3 of 2006 is a minimum sentence of 15 years' imprisonment, which can be enhanced to life imprisonment. That latitude affords the court a free hand to mete out any sentence in between. However, sentence being a discretionary matter, for reasons to be given by the court. Nothing stops the court from giving any other sentence permitted by law including non -custodial sentence where merited

58. The appellants in this instance were sentenced to life imprisonment, a sentence that remains in our statutes despite a declaration by the Court of Appeal that it is unconstitutional. The court of appeal sitting at Malindi in Criminal Appeal No. 12 of 2021 *Julius Kitsao Manyeso v Republic* found the sentence of life imprisonment to be unlawful by holding as follows;

> "We note that the decisions of this Court relied on by the Appellant, namely *Evans Wanjala Wanyonyi vs Rep* [2019] eKLR and Jared Koita Injiri vs Republic Kisumu Crim.App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

59. Being bound by the decision of the court of appeal, it my finding that the sentencing of the appellant to the indeterminate life imprisonment was unconstitutional.

60. On the argument by the 2nd appellant that the sentence violated their constitutional rights under article 50(2)(p) of the *Constitution* to benefit of the least severe of the prescribed punishments for an offence, I must state that this provision is subject to the circumstances surrounding the offence. The trial magistrate indicated that there were aggravating circumstances to warrant the appellants to be sentenced to life imprisonment since the victim being deaf and dumb was vulnerable and could not defend herself. The court agrees with the trial court that the complainant was vulnerable and that her attackers deserve harsh and deterrent sentence, but the court finds the sentence of life imprisonment to not only indeterminate and thus unconstitutional but also to have been imposed in a manner that suggests that the trial court felt hamstrung with the mandatory statutory sentence in the statute and without exercising the undoubted discretion. For that failure, the sentence calls for interference.

61. Accordingly, for the reasons set out above, this appeal partially succeeds in that the sentence of life imprisonment imposed on each of the appellants is hereby set aside and substituted with a sentence of 20 years' imprisonment computed from the date of the arrest being 25/01/2022.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 9TH DAY OF FEBRUARY, 2024

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Appellants present in person

Court Assistant: Polycap Mukabwa