



**Wanyama v Republic (Criminal Appeal 47 of 2021)  
[2024] KEHC 1518 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1518 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 47 OF 2021  
PJO OTIENO, J  
FEBRUARY 16, 2024**

**BETWEEN**

**CHRISANTUS WANYAMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment and decision of the Hon. W. K. Cheruiyot (RM)  
in Vihiga PM's Sexual Offence Case No. 17 of 20217 dated 29th December, 2017)*

**JUDGMENT**

**Case Background**

1. The appeal herein originates from Vihiga PM's Sexual Offence Case No. 17 of 2017 in which the appellant was charged and convicted to an offence of defilement contrary to section 8(1)(4) of the sexual offence act. The facts of the charge were that on diverse dates between 26th to 30th March 2016 within Vihiga County, the appellant intentionally and unlawfully committed an act which caused penetration of his genital organ with the anus of a 17-year old minor with mental disability.
2. Being alive to the fact that this Court did not have the advantages enjoyed by the trial court in seeing and hearing the witnesses testify as well as the defence case, I have no other obligation but to analyse and re-evaluate the evidence of the case presented before the trial court afresh and thereafter draw my own independent conclusions. The *East African court of appeal in Peters vs Sunday Post Limited* (1958) laid down the required standard of review of trial court's decision on appeal in three complementary principles being:
  - “(i) On first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;



- (ii) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- (iii) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

### **Summary of the prosecution submissions.**

3. PW1, the victim's grandmother testified that the accused was employed at her home as a gardener. It was her testimony that on the 30/03/2016 after she heard the minor scream in the house he had been sharing with the accused, she woke up and went to the scene saw the accused open the rear door and thereafter the complainant flee out. It was until the accused went to their home to attend a funeral that the victim revealed to her that the accused had on several occasions inserted his penis into his anus and that the accused would first close the victim's mouth with a cloth before threatening to stab him using a knife if he revealed the incident to anyone.
4. PW2, the minor victim, testified that the accused had on several occasions inserted his manhood in his anus. It is in his evidence that the accused would first cover his mouth using a cloth and thereafter threaten to kill him if he would let anyone know of the secret. He stated that on the day of the incident when he screamed at night, it was the accused who was having an intercourse with him. He indicated that it is the accused who opened the door and commanded him to escape out of the house but later on called him back. On cross-examination, he was never shaken by the accused, he affirmed that the accused had on many occasions inserted his manhood in his anus.
5. PW3, the clinical officer who examined and treated the minor indicated his age to have been 16 years at the time of the offence. He also assured that the victim was mentally challenged. It was his finding that the minor had abrasion accompanied by pain on the anal region, and bruises all over and the region with tenderness. On re-examination, he indicated to have noticed pus discharge from the region. He concluded upon examination of the victim that indeed the victim had been penetrated.
6. Evidence by PW4, the investigating officer, was that on 5/04/2016 the complainant in company of his grandmother reported the crime of defilement and he issued them with a P3 form. The statements by the two revealed that between dates 26th and 30th March 2016, the accused had occasionally been defiling the minor victim. The report followed an incident on the 30/03/2016, when the grandmother heard the complainant scream from the house he had been sharing with the accused before it was later revealed to her by the victim that it was the accused who was defiling him and that the accused had threatened to kill him would he let anyone know what had been going on. He further produced a copy of complainant's birth certificate, pexh5, which indicated the minor's date of birth as 8/01/2000.
7. PW5, step-mother to the complainant stated that on the material night when the minor victim screamed, she too went to the scene and saw the complainant escape from the house using the rear door and on asking the accused what was going on, the response was that they were just playing. With such evidence the trial Court found a prima facie case proved and put the appellant on his defence.
8. When put on defence, the accused denied all the alleged charges against him and asserted that he had been employed to work for PW1 as a gardener. He conceded the fact of having been sleeping with the complainant in the same house but different rooms. He reiterated that the victim had mental disability and on most occasions he would scream at night for no apparent reason and that on the night of alleged



defilement, he was outside the house and the complainant was just doing his usual thing of screaming for no apparent reason.

9. The trial court having put into consideration the prosecution evidence as well as the defence case made a determination that indeed the appellant had penetrated the minor by inserting his penis into his anus hence convicted the appellant with an offence of defilement. The appellant was therefore sentenced to a 15-years jail term to start running from the date of his arrest and detention in custody.

### **The appeal**

10. The appellant was dissatisfied with the conviction and sentence hence he lodged an appeal faulting the trial court's judgement on the following summarised grounds;
  - (i) That the learned trial magistrate erred in law and fact in recording a conviction and imposing sentence in trial which did not meet the constitutional threshold of fair trial contrary to article 50(2) (c) (g) (h)&(j) of *the constitution*.
  - (ii) That the learned trial magistrate erred in law and facts by finding age and penetration having been proved to the required standard despite the inadequate evidence adduced by the prosecution.
  - (iii) That the trial magistrate erred in law and fact by failing to observe and consider that there was no medical evidence of forensic nature to link him to the offence.
  - (iv) That the trial magistrate erred in law and fact by basing the conviction on discredited, doubtful, contradictory, inconsistent and malicious evidence which was not enough to uphold a safer conviction.
  - (v) That the sentencing court order of 15-years term imprisonment was not so directed on committal and warrant.

### **Issues, Analysis and determination**

11. I have considered the arguments made by the appellant, the prosecution evidence as well as the trial court's decision. I find that there are three key issues to be pertinent for determination by the Court. The issues are;
  - (i) Whether the appellant's rights enshrined under article 50(2)(c)(g)(j)&(h) were violated? If answered in the affirmative, what is the consequence thereof?
  - (ii) Whether the offence of defilement was proven to the required standard thereby warranting a conviction?
  - (iii) Whether the sentence imposed on the appellant by the trial magistrate was appropriate and directed on committal and warrant?
12. The Court shall commence its determination of the alleged violation and only progress into the merits of the conviction and sentence if the first issue is answered in the negative.

#### **a. Whether the appellant's rights of fair trial enshrined under article 50(2) (c) (g) (j)& (h) were violated**

13. It is the appellant's contention that his rights under Article 50(2)(c) of *the constitution* were violated as he wasn't provided with statements and documentary exhibits that the prosecution relied upon in achieving the conviction. He further faults the trial court for failing to explain to him his right to be



supplied with the same. He relies on provisions of article 50(2)(j) on his right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to such evidence. He also cites its part (c) which advocates for the right of the accused to have adequate time and facilities to prepare his defence. He mounts a further fault against the court for failure to inform him of his right to legal representation by an advocate at the expense of the State.

14. The records bears it out that the appellant was unrepresented through out and there is nothing on record to show that the prosecution offered to avail the trial materials or that the court did direct that the same be provided. The court take the view that it is the duty of a trial court to ensure that its processes are conducted in accordance with *the Constitution*. It is thus the duty of the court to record accurately its proceedings. What is thus not captured in the proceedings is deemed not to have happened. In that context there being no record that the copies of witness statements and documentary exhibits were furnished to the accused, the court finds that none was indeed furnished. That is a violation of his right to fair hearing which the court determines to wholly vitiate the entire proceedings and the resultant conviction.
15. In coming to this conclusion, the court is persuaded by the decision in *Joseph Ndungu Kagiri -vs- Republic* [2016] eKLR where the court in vitiating the trial process even though the accused had been acquitted had this to say: -

“...failure to provide the accused persons with witness statements prior to the trial was an illegality and a breach of their rights to fair trial.”

16. On the right to be afforded legal representation at the costs of the state, the tests is whether substantial injustice would suffered. The Court of Appeal in the case of *Karisa Chengo & Others vs Republic* (2014) eKLR discussed that right in details and what the court ought to consider first; the complexity of the case which is discernible from the issues of fact and law which may not be comprehended by the accused, secondly, the nature and seriousness of the offence in question like serious capital offence may attract public interest to the extent that the public may require some form of legal representation be accorded to the accused owing to the possible sentence and lastly the ability of the accused person to conduct and finance his own defence. One seeking state-fund legal representation must be 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.
17. Considering the above guidelines on substantial injustice, the Court is not fully persuaded that the appellant herein had satisfied the tests to demonstrate that substantial injustice would be occasioned to him and ought to have been accorded state-fund legal representation. The appellant claim of not being granted legal representation is not merited. It is not enough to demonstrate a serious offence. One must prove inability to procure an advocate at own costs. That comes from the accused and here no material was availed.
18. Having found that the trial was vitiated for violation of the appellant’s inderogable right to fair hearing, no meaningful purpose would be achieved by interrogating the propriety of the conviction reached and sentence imposed. The appeal is allowed, conviction quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:**

Appellant absent



Ms. Chala for the Respondent

Court Assistant: Polycap Mukabwa

