



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Republic (Criminal Appeal 5 of 2023)
[2024] KEHC 2671 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE
CRIMINAL APPEAL 5 OF 2023**

RB NGETICH, J

MARCH 14, 2024

BETWEEN

DANIEL KIPKOSGEY RONO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against both conviction and sentence arising from the
Judgement by Hon. R. Koech (SPM) delivered on the 15th March, 2023
in Eldama Ravine Magistrate's Court S/O No. E004 OF 2022)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence were that the appellant on the night of 13th day of March, 2022 at Koibatek Sub- County within Baringo County, intentionally and unlawfully caused his penis to penetrate the anus of HNA a child aged 6 Years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that the Appellant on the night of 13th day of 2022 at Koibatek Sub- County within Baringo County, intentionally and unlawfully caused his penis to come into contact with the anus of HNA a child aged 6 years.
3. When called upon to plead to the charges, the Appellant denied the charges and the case was set down for hearing with the prosecution availed a total of 4 witnesses during the trial in support of their allegations against the appellant and upon hearing and determination of the matter, the court found the accused guilty of the charge of defilement, convicted and sentenced him to life imprisonment.



4. The Appellant having been aggrieved and dissatisfied with the conviction and sentence, appeals against the judgment on the following grounds:-
 - i. That the learned trial magistrate erred in law and fact by convicting the Appellant in insufficient medical evidence that could not sustain such conviction.
 - ii. That the learned trial magistrate erred in law and fact by convicting the Appellant on evidence of hearsay information in court.
 - iii. That Learned trial magistrate erred in law and in facts in failing to appreciate that the prosecution evidence was marred with contradictions which greatly violated the credibility of the prosecution evidence.
 - iv. That the learned trial magistrate erred in law and fact by failing to appreciate that the investigating officer's evidence was marred with contradiction.
 - v. That learned trial magistrate erred in law and in fact by concluding penetration was proved.
 - vi. That the Learned trial magistrate erred in law and in fact by finding that the prosecution evidence to be quite overwhelming, notwithstanding the glaring contradiction between the prosecution evidence.
 - vii. That the learned trial magistrate erred in law and in fact by convicting the appellant on the strength of the prosecution's case which was evidently full of glaring facts.
 - viii. That the learned trial magistrate erred in law and in fact by failing to appreciate that the nature of the appellant's arrest was inconsistent with innocence.
 - ix. That the learned trial magistrate erred in law and in facts by failing to inquire from the prosecution regarding the criminal past records.
 - x. That the learned trial magistrate erred in law and in facts by harshly imposing a severe penalty on the Appellant and yet the court had discretion to pass a more lenient sentence.
5. The appellant prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.
6. The appeal proceeded by way of both written submissions and oral submissions, the Appellant filed amended grounds of appeal together with the submissions as follows: -
 - i. That , the learned trial magistrate erred in matters of law and facts during the trial of this case when he failed to note that the prosecution case violated his rights according to the new constitution of kenya,2010 to let him spent more than 24 hours in police custody.
 - ii. That , the learned trial Magistrate erred in law and facts during the trial of this case when he failed to consider on his side that during the evidence of examination, he was not examined to proof allegations.
 - iii. That , the learned trial magistrate erred in law and fact during the trial of this case when he failed also to note that all the investigations of this case was poorly done according to the trial record.
 - iv. That , the learned trial magistrate erred in law and fact during the trial of this case when he relied on the evidence adduced by the prosecution witnesses which was very contradictory according to the trial record.



- v. That the learned trial magistrate erred in matters of law and facts during the trial of the case when he rejected his defence without cogent reasons why it was not acceptable.
7. The Appellant prays for the total review of the appeal, conviction and sentence quashed and the Appellant be set at liberty.

Appellants Submissions

8. The Appellant submits that the evidence of the four prosecution witnesses availed by the prosecution holds no waters to warrant a conviction as none of the prosecution witnesses witnessed the incident. He further submits that his rights under Article 49 of *the constitution* was violated because he was arrested on the 16th day of March, 2022 but he was arraigned in court on the 21st March, 2022 which was a period of 6 days after arrest.
9. The Appellant submits that the doctor narrated to the court very clearly on how he examined the complainant and submit that he is prejudiced because he was not examined after arrest to prove that he was the one who defiled the complainant herein and relied on the case of *Kennedy Mwangi –Vs- Republic* [2005] eKLR.
10. The appellant submits that there were a lot of mistakes in the prosecution’s case and that he was framed and urges the court to note all the mistakes and grant him a benefit of doubt and or grant him a lenient sentence from the life imprisonment awarded to him in the case.
11. Further that the prosecution evidence was not corroborated and the complainant testified in court that his father coached him on what he was to come and say in court. He submits that when he cross examined the mother of the complainant, she said she noticed that her child was defiled in the morning. He stated that the incident occurred on the nights of 13th and 14th which is 4 to 5 days meaning the incident occurred when the father of the complainant was in the house. His argument is that all the evidence adduced before the court by all the prosecution witnesses were lies and relied on the case of *Ramkishan Padya VS Republic* [1957] E.A L.R 339.
12. The appellant submits that his defense was not considered by the trial court. He states that he was framed in this matter but the court failed to note this during the hearing of the case. He places reliance in the case of *Jane Nyambura Vs Republic* 1953 Criminal App. No. 21. He urged this court to evaluate clearly all the evidence of the trial court and find in his favour.

Respondent’s Submissions

13. The Respondent submits the Appellant was charged with the offence of defilement of a child aged 6 years contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* and the prosecution was required to prove the age of the minor, penetration and identification. The prosecution counsel submits that the victim was a 6 year old boy who gave evidence describing what transpired and he identified the Appellant as Lole.
14. The Respondent submits that the complainant identified Lole and described where the penetration took place being his home. That the prosecution produced treatment notes as Exhibit 1, laboratory request report and a P3 Form as exhibit 2 which confirmed that the child was sodomized and on the age of the child, the prosecution produced birth certificate as exhibit 3 which indicated the date of birth as 4th October, 2016.
15. The respondent further submit that the date of the incident was the night of 13th March, 2022 which shows the child was 6 years old and was confirmed by birth certificate which also confirmed that the



child was a male child. She submits that the prosecution's case was proved beyond reasonable doubt. That the child's evidence was credible and was corroborated by the doctor.

16. On the issue of sentence, she submits that the Appellant was sentenced to life imprisonment which was in accordance with the Sexual offences Act since the child was 6 years and the Act provides life imprisonment if the child is below 11 years and the sentence was therefore as per the law.

Analysis And Determination

17. This is the first appellate court, the duty of the first appellate court was well set out in the case Okeno Vs. Republic [1972] E.A 32 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 Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 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 findings and conclusions; it must make its own findings and draw its own 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.”

18. Also, in the case of Mark Oiruri Mose -Vs- Republic [2013] e KLR Criminal Appeal No.295 of 2012 the Court of Appeal stated as follows: -

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

19. In view of the above, I have perused the petition of appeal, the record of appeal and the rival submissions by the parties and identify the issues for determination in this matter are as follows:-

- i. Whether the charge against the accused was proved beyond reasonable doubt.
- ii. Whether the trial court violated the Appellants rights under Article 47 of the constitution during the trial.
- iii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.

i. Whether the charge against the accused was proved beyond reasonable doubt.

20. The ingredients for the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR.



(a) Penetration

21. The first ingredient in proving the offence of defilement is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:-

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

22. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child in order to determine whether there was penetration.

23. The complainant in this case who testified as Pw1 stated that the accused whom she knew as Lole was at her home at night and while her mother was sleeping in the bedroom, the appellant removed his trouser “na kunidinya”. He said the appellant did bad manners to him through his behind, that he felt pain. He said he told his mother in the morning. He was taken to police station by his mother and also to Hospital. He positively identified the accused in the dock as Lole. He stated that the accused did bad manners to him in the place he uses to defecate (Kububuu)

24. Pw5 was Dr. Timothy Chesang, testified that he is attached to Eldama Ravine Sub- County Referral Hospital said upon examining the child, his rectal part was tender, his stool stained with blood-stained stool. lab report showed no spermatozoa. He made diagnosis of sodomy. He produced the treatment notes and P3 Form as P.exh 1 and 2 in court as exhibits. From the foregoing, the child’s evidence was corroborated by the doctor’s evidence which confirmed sodomy.

(b) Proof of age

25. In respect to age, the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows: -

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

26. In view of the above, I note from record that Pw2 the mother of the victim one HAK, testified that the that HNA who is her child was 7 years old at the time she testified. She said the minor was born on 4th October, 2016. Pw 4 one NO. 111193 P.C Sammy Mokorino produced certificate of Birth for the minor as Exhibit 3. It confirmed pw2’s evidence that the minor was 6 years at the time of the offence.

(c) Identification of assailant

27. PW1 said he knew the accused as Lole as he had been seeing him in Bondeni. The accused admitted that they slept together with the complainant on the alleged date of the offence. The accused therefore placed himself at the scene of the offence and confirmed that the minor knew him. There is therefore no doubt on identity of the appellant as the perpetrator of the offence herein.



28. In view of the above the three ingredients of the offence were proved beyond reasonable doubt.

ii. Whether appellant's constitutional rights were violated

29. The Appellant argued that his rights under Article 47 of *the constitution* were violated by being held in custody for more than 24 hours. The court has a duty of ensuring that accused persons' rights are protected. There are four (4) factors which should assist the Court to assess and determine whether a particular defendant has been deprived of his right. They are:-

- (1) Length of delay
- (2) The reasons given by the prosecution to justify the delay
- (3) The responsibility of the accused for asserting his rights
- (4) Prejudice to the accused

30. Record show that the appellant failed to assert his right from the time he appeared in Court and throughout the proceeding and in my view, it should be interpreted to mean he waived his constitutional right; further, he has not shown any prejudice that he suffered as a result of the violation. It is also worth noting that a declaration that an accused's right has been violated does not automatically entitle the accused to acquittal.

(iii) Whether sentence imposed was harsh and excessive.

31. On whether the sentence meted on the appellant by the trial court was harsh and excessive, 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.

32. The Appellant herein was sentenced to serve life imprisonment. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Shadrack Kipchoge Kogo vs. Republic* Criminal Appeal No. 253 of 2003(Eldoret), where 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 that the sentence was so harsh and excessive that an error in principle must be inferred”

33. The Appellant was charged under Section 8(2) of the *Sexual Offences Act* which provides the sentence of mandatory life imprisonment. The trial court imposed the mandatory life imprisonment against the appellant. However, the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between *Julius Kitsao Manyeso vs Republic* declared the sentence of life imprisonment unconstitutional; Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

34. In view of the above, the appellant herein is entitled to benefit from change of jurisprudence in respect to sentence of life imprisonment. I however take note of the fact that the child defiled herein was 6 years old; he was a male minor defiled through the anal opening and there is no doubt he experienced serious pain and the act may traumatize him for the rest of his life time. In view of the above, I am inclined to set aside life sentence and impose 30 years imprisonment.



35. Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Life sentence is hereby set aside.
3. The appellant to serve 30 years imprisonment.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14TH DAY OF MARCH 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Ms Ratemo for State.

Accused Absent.

Karanja, Court Assistant.

