Wanjiku v Republic (Criminal Appeal E042 of 2022) [2024] KEHC 9337 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9337 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E042 OF 2022

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

SIMON GICHUKI WANJIKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment delivered by Hon. S. K. Nyaga, Senior Resident Magistrate on 31st August 2022 in Murang'a Chief Magistrate's Court S. O. No. E026 of 2021, Republic v Simon Gichuki Wanjiku)

JUDGMENT

Background

1. Simon Gichuki Wanjiku was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars are that Simon Gichuki Wanjiku on the 11th day of November 2021 at around 1700 hours in [particulars withheld] within Murang'a County intentionally and unlawfully caused his penis to penetrate the vagina of PW a child aged 11 years.

3. In the alternative count, the Appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

4. The trial magistrate considered the evidence of the 7 prosecution witnesses and the unsworn evidence of the Appellant and convicted the Appellant who was sentenced to serve life imprisonment.

5. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -

1. That the learned trial court magistrate erred in matters of law and fact by convicting and sentencing I the Appellant on the prosecution case that was not proved beyond any reasonable doubt.

2. That the learned trial court magistrate erred in matters of law and fact by convicting and sentencing I the Appellant on evidence that was full of contradictions and discrepancies.

3. That the learned trial court magistrate erred on matters of law and fact by not declaring that PW1 and PW2 as unreliable and vulnerable witnesses who required protection.

4. That the learned trial court magistrate erred on matters of law and fact by convicting and sentencing I the Appellant on unconstitutional minimum mandatory sentence.

5. That the learned trial court magistrate erred on both matters law and fact by not according I the Appellant to a fair trial.

6. The Appellant prayed that the appeal be allowed, conviction quashed, sentence set aside, and he be set at liberty in the interest of justice.

Prosecution's Case

7. The Complainant (PW1) said that on 11.11.2021, when she got home from school, she was instructed by her grandmother to go to the river to fetch water. She said that her brother F accompanied her and that the Accused who was farming went and carried her on his shoulders and took her to the bush, put leaves in her mouth and defiled her. That they returned home late and found their uncle who flogged her for taking long at the river. That when Francis (PW2) was about to be beaten, he disclosed the ordeal and that it was the reason for their lateness.

8. The Complainant's grandmother (PW3) informed Teacher Lucy (PW5) about the incident who said they went to Murang'a Children Rescue Center where they were referred to Murang'a Hospital and later to Murang'a Police Station. The Clinical Officer John Ndeleva Mwangi (PW4) from Murang'a District Hospital who examined the Complainant established that hymen was broken, the vagina was swollen and noted brown discharge. That vaginal swab showed infection and sexual contact and he treated the Complainant and gave her PEP. PW4 said he filled the P3 Form on 13.11.2021 which he produced as ExP1, produced Treatment Notes as ExP2 and lab results as ExP3 (a), (b) and (c).

9. The Investigating Officer PC Wambui Wambua (PW7), from Murang'a Police Station said that on 12.11.2021 the defilement report was made under OB 47/12/11/2021. She accompanied PW5 and the Complainant to Murang'a Level 5 Hospital where she was examined and a P3 Form filled. On 13.11.2021, she visited the scene in the Company of the Complainant and liaised with his colleague PC Samson David (PW6) from Gikandu Police Post and arrested the Accused. PW7 said the Complainant did not have a birth certificate but her age was assessed to be 9-11 years. PW7 produced the Age Assessment Report as ExP4(a), the x-ray Report as ExP4(b) and the Court Order as ExP4(c).

Defence Case

10. The Appellant was placed on his defence and he gave unsworn evidence that he worked as a farm hand and that on 13.11.2021 at 5.30 am, he had been sent by his boss to the shop and when he went back he found 2 police officers and Ciiru, his ex-girlfriend. He said that he was arrested and arraigned in court the next day. That Ciiru had gone to his employer and took vegetables which she did not pay for. That she then threatened the Appellant that he would see. The Appellant said that he is a busy person in the farm so he could not have found time to do what he has been accused of.

11. This appeal was canvassed by way of written submissions.

Appellant's Submissions

12. The Appellant submitted that certain elements must be proved beyond reasonable doubt for the offence of defilement as was held in the case of *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it was held: -

> " The critical ingredients forming the offence of defilement are age of the Complainant, proof of penetration and positive identification of the assailant."

13. The Appellant stated that the age of the victim is not in dispute as it was proved by the age assessment report dated 4.2.2022. The Appellant submitted on the ingredient of penetration that the only person who confessed in court to have come in contact with the genitalia of the victim was PW3. However, it is not explained to what extent and whether she was qualified to do so. That from the testimony of the Clinical Officer, there was no inference of penetration as there was no indication of freshly broken hymen or blood stains. That there were no injuries at all despite the fact that it was alleged that defilement was forceful. The Appellant argued that the court has pronounced itself severally on broken hymen and that it cannot be total proof of defilement as was held in the case of *P.K.W v Republic* (2012) eKLR

14. On the truthfulness, reliability and credibility of the victim, the Appellant relied on the case of *Ndungu Kimani v Republic* (1979) KLR 282 where the court stated that

> " a witness in a criminal trial whose evidence is proposed to be relied on, should not create an impression in the mind of the court that he is not a straight forward person and raise suspicion about his trustworthiness."

The Appellant argued that in as much as the Complainant made her story to appear real, she failed to show the emotions usually accompanied in a true story. That the trial court did not test the truthfulness of the Complainant despite rampant contradictions in her testimony. That she claimed she knew the Appellant as a *shamba boy* and also testified not to have known the Appellant and only saw him on the material day. That she also testified to have been told by her grandmother about the Appellant.

15. On the ingredient of identification of the perpetrator, the Appellant cited the case of *R v Turnbull & Others* (1973)3 ALL ER 549 and stated that PW1 and PW2 did not mention the Appellant's name and that the name of the Appellant was mentioned by PW3 and PW5 who were never in direct contact. That during arrest, the Complainant was not present to identify the person she alleged to have defiled her to the police. That in *Wamunga v R* (1989) KLR 424, the Court of Appeal held:-

> " Where the only evidence against an accused is evidence of identification, or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification was favourable and free from possibility of error it can safely make it the basis of a conviction."

16. The Appellant submitted that the prosecution failed to call key witnesses, Mwangi and Shiru, who were at the center of the whole story and who could have identified the real perpetrator.

17. The Appellant argued that he was denied Constitutional right to fair trial and his right to representation were infringed contrary to Article 50(2)(c) of *the Constitution* of Kenya 2010 and was held in the case of *Zahira Habibullah Sheikh & Another v State of Gujarat & Others* AIR 2006 SC 1367.

The Appellant contended that he was not accorded the right to cross examine the probation report that the trial court relied upon in sentencing him. That the court also had the mandate of informing him his right of representation.

18. The Appellant also submitted that the trial court convicted him on a minimum mandatory sentence of life without considering his mitigation. The Appellant stated that in *Fatuma Hassan Salo v Republic* (2006) eKLR where Makhandia, J. held that

> "sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judicially. The trial court must be guided by evidence and sound legal principle. It must take into account all relevant factors and exclude all extraneous or irrelevant factors."

That the sentence imposed on the Appellant was therefore inhumane and unreasonable, and does not serve the purpose for sentencing at all.

Respondent's Submissions

19. The Respondent submitted that the offence of defilement is rooted on 3 main ingredients being the age of the victim (must be a minor), penetration and proper identification of the perpetrator. That the ingredients are provided for under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006 and must each be proven as was restated in the case of *George Opondo Olunga v Republic* (2016) eKLR.

20. The Respondent stated that age of the victim was not disputed. On proof of penetration, the Respondent submitted that PW1 testified that the Appellant took her to the bushes, removed her clothes, removed his and inserted his penis into her vagina. That when PW3 checked the private parts of the minor, she observed that they were swollen, red and had blood stains. The findings of PW4, the Clinical Officer, was that the hymen was broken, vagina was swollen and brown discharge was noted. That this evidence corroborated the evidence of the victim that indeed there was penetration.

21. On identification of the perpetrator, the Respondent argued that the Complainant stated the Appellant was a *shamba boy* in the village, that she had previously seen him and when she went home, she used to see him carry arrow roots. That PW2 the brother to the victim said he saw the Appellant do *tabia mbaya* to the victim and that there was no one else in that area at that time. That when they got home, PW2 for fear of being beaten stated that it was Simon who was employed at Munene's farm who had grabbed PW1 and taken her to the bush. That in her evidence, PW1 stated that she did not know the Appellant's name but she was able to confirm he was a *shamba boy* and described what he did to her. The Respondent submitted that identification of the Appellant was that of recognition. That he was someone well known to the witnesses and the likelihood of error was next to minimal. The Respondent relied on the case of *MW v Republic* (2019) eKLR where the High Court at Kajiado stated as follows regarding recognition: -

> "The effect of recognition as opposed to identification of a stranger is that it drastically reduces the possibility of mistaken identity."

22. On the ground of availing essential witnesses, the Respondent submitted that the legal provisions on calling of witnesses is found in Section 143 of the *Evidence Act* which provides: -

> No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact.

23. The Respondent cited the case of *Republic v George Onyango Anyango & Another* (2016) eKLR which cited with authority the cases of *Bukenya & Others v Uganda* (1972) EA 549 and *Keter v Republic* (2007) 1 EA 135. The Respondent argued that the 7 witnesses called by the prosecution were sufficient to give cogent and reliable evidence to convict the Appellant. That the 2 minors narrated what happened at the scene while the other witnesses corroborated their evidence. That the witnesses called by the prosecution were sufficient to prove the case against the Appellant beyond reasonable doubt.

24. The Respondent submitted that the contradictions pointed out by the Appellant were not material to shake the evidence of the prosecution. The Respondent relied on the decisions of the court in *Philip Nzaka Watu v Republic* (2016) Cr App 29 of 2015 and *Joseph Maina Mwangi v Republic* Criminal Appeal No. 73 of 1993. In *MW v Republic* (2019) eKLR. the High Court at Kajiado held: -

> "The law as regards the issue of contradictions and discrepancies is very crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of the witness being rejected."

25. The Respondent pointed out that the Appellant stated that his right to fair trial was infringed when he was not allowed to cross examine on the probation report that the trial court relied upon when sentencing him. The Respondent submitted that the report was not binding on the court and failure to cross examine on it was not prejudicial to the Appellant. The Respondent laid emphasis on the case of *Dennis Kiprotich Byegon v Republic* (2022) eKLR where the High Court at Bomet was faced with a similar issue on appeal and the court noted that a pre-sentence report is not a binding document but only meant to give the court an overall picture and clear understanding on the suitability of any sentence. That it helps capture the sentiments and feelings of the victim, the victim's family as well as the community towards the accused and the alleged offence.

26. On the position of the Appellant that the court did not consider his defence and that there was a grudge between him and one Ciiru, the Respondent contended that the issue was only raised at the defence stage when the Appellant gave unsworn evidence and that the prosecution had no opportunity to test his evidence in cross examination. That the same was never raised anywhere else in the trial and that the same came as an afterthought.

27. On whether the sentence was excessive, the Respondent relied on Petition No. 97 of 2021, *Edwin Wachira & Others v Republic* on the discretion of the court in sentencing and submitted that the aggravating factors greatly outweighed the mitigating factors and a deterrent sentence is best in the circumstances. The Respondent urged the court to find no merit in the appeal and to dismiss the same in its entirety.

Analysis and Determination

28. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered

the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

29. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

    i. Whether the Appellant was accorded fair trial

    ii. Whether the prosecution's case was proved to the required standard

    iii. Whether the trial court relied on evidence that was full of contradictions and discrepancies

    iv. Whether PW1 and PW2 were unreliable and vulnerable witnesses who required protection

    v. Whether the sentence was harsh and excessive

Whether the Appellant was Accorded Fair Trial

30. The Appellant argued that his right to fair trial under Article 50(2)(c) of *the Constitution* was contravened when he was not given an opportunity to cross examine the Probation Report that the trial court relied upon in sentencing the Appellant.

31. In *Nicholas Mukila Ndetei v Republic* (2019) eKLR it was held as follows: -

> " I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so."

32. In light of the holding in the above authority, failure to cross examine on the probation report did not amount to infringement of the right to fair trial as it is used by the court in determining appropriate sentence and the court is at liberty to elect whether or not to use it.

Whether the Prosecution's Case was Proved to the Required Standard

33. The age of the victim, whether there was penetration and identification of the perpetrator are the three main ingredients upon which the offence of defilement is rooted for proof to the required standard include.

34. There was no dispute on the age of the victim as PW7 produced the Age Assessment Report and X-Ray as ExP4(a) and 4(b) respectively which showed that the Complainant was aged between 9 and 11 years. On whether there was penetration, PW4, the Clinical Officer who examined the complainant, filled the P3 Form and documented lab results observed that hymen was broken, the vagina was swollen and brown discharge noted. He then formed the opinion that the brown discharge was an indication of sexual contact. On identification of the perpetrator, there was no doubt in the evidence of PW1 and PW2 that the Appellant was the one who indeed defiled the Complainant as he lived and worked in the neighbourhood and was familiar to the said prosecution witnesses.

Whether the tRial Court Relied on Evidence that was Full of Contradictions and Discrepancies

35. The contradictions pointed out by the Appellant in his submissions are in relation to his identification as the perpetrator. The Appellant submitted that the Complainant claimed she knew him as a *shamba boy* but testified that she did not know him and only saw him on the material date. That the Complainant also said it was her grandmother who told her about the Appellant. The Appellant also submitted that the Complainant testified that she saw the perpetrator coming from her side but she did not explain whether it was the same person farming or uprooting arrow roots. The Appellant stated that it is a mystery how PW3 identified him to the police yet she was not at the scene.

36. The court in *MTG v Republic* (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment) cited with authority the case of *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 as follows: -

> "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. This case notes that from the prosecution's evidence particularly the evidence of PW1, PW2 and PW3, the issue herein was more of recognition rather than identification. The Appellant was employed in the neighbourhood as a farmhand. The Complainant in her evidence said she had seen in the place he was employed as a *shamba boy* and that when she goes home she sees him carrying arrowroots. PW2 said they found the Appellant uprooting arrowroots and that he lured them with the arrowroots. PW3 in cross examination confirmed that the Appellant lived in a homestead, 6 pieces of land away.

38. The contradictions and discrepancies pointed out by the Appellant on his identification as the perpetrator are therefore minor and cannot lead to rejection of the prosecution's evidence.

Whether PW1 and PW2 were Unreliable and Vulnerable Witnesses Who Required Protection

39. Section 31 of the *Sexual Offences Act* provides for vulnerable witnesses as follows: -

    1. A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is

        a. the alleged victim in the proceedings pending before the court;

        b. a child; or

        c. a person with mental disabilities.

    2. The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of: -

        a. age;

        b. intellectual, psychological or physical impairment;

        c. trauma;

d. cultural differences;

e. the possibility of intimidation;

f. race;

g. religion;

h. language;

i. the relationship of the witness to any party to the proceedings;

j. the nature of the subject matter of the evidence; or

k. any other factor the court considers relevant.

3. The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.

40. In the case of *J K N v Republic* (2015) eKLR, Lesiit, J. held: -

> " 18. Under the *Sexual Offences Act*, the court hearing a case of a child complainant in a sexual offence has an additional and critical duty and role to play. In the case of a child complainant especially, the court has the extra duty to determine whether the child is a vulnerable witness, and if so the specific action(s) the court should take are set out under the *SOA*. That process of assessing whether the child complainant is vulnerable and whether there will be a need for an intermediary can only reasonably be carried out at a pre-trial conference. I say so because it would be too late to conduct the inquiry on the date set for the trial. This is because once a witness is declared a vulnerable witness needing an intermediary the court must make an order for an intermediary to be sought for. The intermediary should then be available on the date set for the hearing."

41. Upon perusal of the trial court records, this court establishes that PW1 and PW2 underwent voire dire examination as a result of which PW1 gave sworn while PW2 gave unsworn evidence and the Appellant cross-examined the minors who were able to give concise responses. The issue of PW1 and PW2 being vulnerable witnesses ought to have been addressed at the point where voire dire examination was being conducted. The Appellant's ground that the two witnesses were unreliable and vulnerable is an afterthought and has no basis.

Whether the sentence was harsh and excessive

42. The Appellant was sentenced to life imprisonment pursuant to Section 8(2) of the *Sexual Offences Act* which provides as follows: -

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

43. However, in consideration of the holding in *Julius Kitsao Manyeso v Republic* (2020) eKLR that an indeterminate life sentence without any prospect of release or a possibility of review is a degrading punishment, this court substitutes the life imprisonment sentence with 30 years imprisonment.

44. In conclusion, this court finds that the appeal succeeds partially. The appeal on conviction is dismissed, the appeal on sentence is allowed. The sentence of 30 years imprisonment is to run from 15th November 2021 when the Appellant was first arraigned in court pursuant to Section 333(2) of the *Criminal Procedure Code*. 14 days right of appeal explained.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Peter Og'indi - Court Assistant

Muriu for Respondent

Appellant present