Wanjala alias Wafula v Republic (Criminal Appeal 79 of 2024) [2024] KEHC 15610 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 79 OF 2024

DK KEMEI, J

DECEMBER 6, 2024

BETWEEN

AARON WANJALA ALIAS WAFULA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal from the conviction and sentence delivered on 25th June 2024 by Hon W. K. Onkunya (PM) in Kimilili SPMC Sexual Offence No. E039 of 2023)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between 9th May 2023 and 16th May 2023 in Bungoma North Sub-County within Bungoma County, he intentionally caused his penis to penetrate the vagina of VNW a child aged 14 years.
2. In the alternative the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* of 2006. The particulars were that on diverse dates between 9th May 2023 and 16th May 2023 in Bungoma North Sub-County within Bungoma County, the Appellant intentionally and willfully caused his penis to come into contact with the vagina of VNW a child aged 14 years.
3. The Appellant denied the charges and thus a trial commenced wherein the Prosecution called five witnesses in support of its case. The trial magistrate considered all the evidence adduced and found the Appellant guilty of the offence of defilement and proceeded to convict him accordingly and then sentenced him to 10 years' imprisonment.

4. It is necessary to have a recap of the evidence tendered in the trial court. After a brief voire dire examination, the Court established that VNW was sufficiently intelligent and understood the meaning of stating the truth. The Court proceeded to record her evidence under oath.

5. PW1 VNW, testified that she does go to school, and was 15 years old. She presented her birth certificate (PMFI 3), which indicated her date of birth was 31st August 2008. She recalled that on 9th May 2023 at 6.00 AM, she was at the Appellant's abode in Mukungani as he had beckoned her and taken her to his home and that she stayed there for four days, from 9th May 2023 to 11th May 2023. According to her, the Appellant took her to his aunt's place on 11th May 2023, wherein his aunt requested her to assist in weeding out her shamba with some other girls. She stayed at the Appellant's aunt house for a day and that night the Appellant took her to the Simba belonging to the son of the house where they did tabia mbaya. On 16th May 2023, PW2 showed up at the Appellant's aunt homestead at 6.00 AM in the company of boys and they arrested them. She told the Court that they were taken to Kamukuywa Police Station and later to the hospital where she was treated. She confirmed before the Court that she knew the Appellant who had informed his aunt that he wanted to marry her, and that it was her first time to do tabia mbaya with the Appellant.

   On cross-examination, she told the Court that she was at the house of the Appellant for four days and that she was also arrested while still at his house while at his aunt's home. She reiterated that she speaks only the truth.

6. PW2 SW, testified that she is the mother to the Complainant herein and a member of the nyumba kumi. She recalled PW1 disappeared from their home on 9th May 2023, after her and her husband had disciplined her and that they only managed to find her on 16th May 2023 at 5.30 PM. where she found PW1 in Mukuyuni area at the home of the Appellant herein. She told the Court that acting on a tip off, in the company of her husband they proceeded to the house of the Appellant where they found PW1 sitting on the bed while the Appellant was chatting up with their informant. She told the Court that they took both the Appellant and the Complainant to Kamukuywa Police Station and that the following day, 17th May 2023, took the Complainant to Kimilili Sub-County Hospital. She told the Court that the Appellant was a neighbor but that she did not know him prior to the incident.

   On cross-examination, she told the Court that they found the Appellant at his house chattuing with the boy who alerted them of the whereabouts of PW1, one Amos, while PW1 was sitting on his bed in the Appellant's house.

7. PW3 Joshua Kisindani, testified that he is a clinical officer based at Kimilili Sub-County Hospital and that he was before the Court to present the Complainant's P3 form which was filled on 18th May 2023. He testified that he examined PW1 who had been sexually assaulted and that the degree of injury was harm. There were no visible injuries on her genitalia. However, there was no hymen. After a high vaginal wall swab, there was presence of epithelial cells which indicated that there was abrasion (wear and tear). There were no discharge from her genitalia. There were no presence of spermatozoa. He opined that there was defilement and he approximated the age of the injury to be about five days. He confirmed that the lack of spermatozoa was due to the fact that spermatozoa has a life span of three days and it could be that the Appellant used a condom. He produced the marked treatment notes of PW1 as PEXH1; the P3 form as PEXH 2 and the treatment notes of the Appellant as PEXH4.

   On cross-examination, he told the Court that the examination of the Complainant revealed that she had slept with someone and that on the examination of the Appellant there was no abnormal observation.

8. PW4 Humphrey Simiyu, testified that he is a student at Matili Polytechnic and a friend to the Appellant herein. He recalled that on 16th May 2023, the Appellant called him requesting his company to watch a game in Mukuyuni and on 13th May 2023, PW2 informed him that PW1 had run away from home. On 16th May 2023, he went to pick up the Appellant from home and that he saw PW1 sleeping on his bed. The Appellant requested that he waits for him outside and he took the opportunity to call PW2 and inform her that he had seen PW1 at the Appellant's house. The Appellant finally came out of his house and they proceeded to go and watch the game and later on the Appellant was arrested together with PW1 and taken to Kamukuywa Police Post. He identified the Appellant as the person in the dock.

   On cross-examination, he told the Court that he found the Appellant in his home and that the Appellant was arrested in his house. He insisted that he saw PW1 on the Appellant's bed and that it was at 6.00 p.m. and that the Appellant left PW1 in his house when they went to watch the game. He told the Court that the Appellant was arrested by nyumba kumi members.

9. PW5 No. 231114 PC Mark Barasa, testified that he is the investigating officer in this matter and that he is attached to Nasusi Police Post under Kamukuywa Police Station. He testified that on 16th May 2023, while at the station the Appellant and PW1 were brought in with the parents of PW1 alleging that they found her in the Appellant's house in Mukuyuni area Bungoma North. He booked the Appellants in Police custody as the parents had already lodged a report about the disappearance of PW1. The following day, he escorted the Appellant and PW1 to Kimilili Sub-County Hospital in the company of the parent of PW1. He proceeded to gather evidence and recorded the statement of PW1. PW1 confirmed that she was at the house of the Appellant herein and that he defiled her severally as she stayed with him from 9th May 2023 to 16th May 2023. He told the Court that the suspect was arrested by members of the public, parents of PW1 and another witness who escorted him to Kamukuywa Police Station. He later preferred charges against the Appellant and later charged him in Court. He produced in Court a copy of the Birth Certificate of PW1 marked as PEXH3.

10. When placed on his defence, the Appellant denied committing the offence, He testified that on 16th May 2023, while at home one Humphrey requested him to accompany him to watch a football match at Misemwa Market and when they got there they found no football match and decided to go back home. While on their way back home at Ondoti area, four boys came from behind and assaulted him, and on the arrival of PW2 and her husband, they asked him if he was residing with PW1 but he denied the same. He was later apprehended and taken to Kamukuywa Police Station.

    On cross-examination, he denied being the boyfriend of PW1 and that he did not defile her and that he was not arrested with PW1 as he was arrested at Ondoti area.

11. DW2 Dennis Sindani, testified that he knows the Appellant herein and that on 16th May 2023, at 5.00 p.m. while on his way to work he found the Appellant apprehended by five boys and that one of them informed him that they were hired to arrest the Appellant and take him to a certain woman whom he only recognized. According to him, the Appellant was assaulted and he learnt the following day that he was forwarded to the police at Kamukuywa Police Station.

    On cross-examination, he told the Court that he could only recall what occurred on 16th May 2023, within Ondoti area and that he found the Appellant apprehended by some youth at around 5.00 p.m. but he did not know why they arrested him.

12. DW3 Michael Waswa, testified that he knows the Appellant as he is a son to his neighbor. He recalled that on 16th May 2023 at 6.00 p.m. while from Kamukuywa nearing his house, he saw five boys

assaulting the Appellant and on inquiry, he found out that they had been hired and they left with the Appellant despite his efforts to stop them.

On cross-examination, he told the Court that the Appellant is not married but has a house and that he cannot recall what happened at his house between 9th May 2023 and 16th May 2023, and that he is not aware of why the Appellant was arrested and where exactly was he arrested.

13. DW4 Sarah Simiyu, testified that she knows the Appellant as he is a neighbor of his son. According to her, on 16th May 2023, in the evening while on her way from work at 6.00 p.m. she found a crowd of people assaulting the Appellant. She was not aware of the reasons for the assault and after awhile the mob took him to another place. She told the Court that on inquiry, she established that the Appellant was assaulted on allegations of having been found with a young girl but that the young girl was not present.

    On cross-examination, she told the Court that on 16th May 2023, she saw the Appellant and that after inquiries she was informed that he was found with a girl.

14. The trial Court considered the evidence adduced and found the Appellant guilty of the offence of defilement. The Appellant was allowed to mitigate and was thereafter sentenced to serve ten (10) years' imprisonment. The Appellant being dissatisfied by the conviction and sentence filed this Petition of Appeal dated 9th July 2024. The grounds raised were that;

    a. The learned trial magistrate erred in law and in fact when she failed to find that the Complainant did not testify that she had sexual intercourse with the Appellant.

    b. The learned trial magistrate erred in law and in fact when she concluded that when the Complainant stated that the Appellant did "tabia mbaya" (bad manners) to her meant the Appellant had sexual intercourse with her.

    c. The learned trial magistrate erred in law and in fact when she failed to consider that the Complainant was having menstrual period during the time she is alleged to have had sexual intercourse with the Appellant.

    d. The learned trial magistrate erred in law and in fact when she failed to find that the Prosecution had failed to call crucial witnesses.

    e. The learned trial magistrate erred in law and in fact when she failed to inform the Appellant of his right of legal representation as enshrined in Article 50 (h) of the *Constitution* of Kenya.

    f. The learned trial magistrate erred in law and in fact in convicting the Appellant based on contradictory Prosecution evidence.

15. The Appeal was canvassed by way of written submissions. Both parties complied. This Court has considered this appeal and the response made. I have highlighted both the evidence tendered by the Prosecution and the defence in the lower court. The work of this Court as an Appellate Court is to re-evaluate the evidence with a view to coming to own conclusion and findings, well aware that unlike the trial Court, it did not have the benefit of having seen the witnesses testify first hand.

16. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This

court is guided by The Court of Appeal case of *Okeno – VS – Republic* (1972) EA 32 where it was stated as follows:

> "An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

17. In the case of *Republic Vs Edward Kirui* (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of *Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another* (2008) INSC 1688 where the case of *Bhagwan Singh Vs State of M. P.* (2002)4 SCC 85 was cited as follows:-

> "The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining as to whether all or any of the accused has committed any offence or not."

18. The Appellant ,as i have observed above was charged with the offence of defilement contrary to Section 8(1) (3) of *Sexual Offence Act* which provides: -

> "A person who commits an act which causes penetration with a child is guilty of an offence termed as defilement."

19. This appeal has raised the following issues for determination namely;

    i. Whether the prosecution's case against the Appellant was proved to required standard.

    ii. Whether the defence was considered by the trial Court.

    iii. Whether sentence imposed was proper.

Whether the prosecution's case was proved beyond doubt.

20. In his ground of this appeal, the Appellant claims that the Prosecution failed to call crucial witnesses to testify. According to him, the Prosecution failed to call one Amos who alerted PW2 of the presence of PW1 in the house of the Appellant. The principles to consider in determining the issue of crucial witnesses was dealt with in the leading case of *Alfred Bumbo and Others vs Uganda* Criminal Appeal No 28 of 1994, the Supreme Court stated thus:

> "While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each whether police evidence is essential, in addition to prove the charge."

21. Section 6 of the *Office of the Directorate of Public Prosecutions Act*, it is provided that:-

> "Pursuant to Article 157(10) of the *Constitution*, the Director shall not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the *Constitution*, this Act or any other written law…"

22. This provision is underpinned in Article 157(6)(a) of the *Constitution* of Kenya that states that:-

> "The Director of Public Prosecutions shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed."

23. It is submitted that the Prosecution failed to call the necessary witness who was needed to establish the truth about who alerted PW2 of the presence of PW1 in his house.

24. It is evident from the aforesaid provisions that the independence of the office of the director of public prosecutions is jealously guarded both by the *Constitution* of Kenya and Statute. In this regard, this Court fully associates itself with the holding of *Alfred Bumbo and Others vs Uganda* (*Supra*) that the Prosecution cannot therefore be directed on how to conduct its case. It decides on who to call as witness and the number of witnesses to testify in a case.

25. On whether the Appellant's right to hearing under Article 50 were violated. Article 50 (2) (h) provides as follows:-

> "50(2) Every accused person has the right to a fair trial, which includes the right-
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

26. Article 50 (2) (h) requires that an accused be informed of the right to be assigned counsel at the State expense if substantial injustice would otherwise result. He is also supposed to be informed of this right promptly. From the record, the Appellant was not informed of the said right. However, the said right is not absolute. One has to demonstrate that substantial injustice would result to him if the right is not complied with. The Supreme Court in *Karisa Chengo* (2017) eKLR considered the said Article 50 (2) (h). The Court stated as follows at paragraph 94 :-

> "In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:
>
> i. the seriousness of the offence;
>
> ii. the severity of the sentence;
>
> iii. the ability of the accused person to pay for his own legal representation;

iv. whether the accused is a minor;

v. the literacy of the accused;

vi. the complexity of the charge against the accused."

27. It simply means that the said right is not an automatic one and an accused has to demonstrate that they will suffer substantial injustice as expressed in the *Karisa Chengo case*. In Kenya today only persons charged with murder or children in conflict with the law are entitled to automatic legal representative at State expense. Other people have to prove that they will suffer substantial injustice.

28. In *David Njoroge Macharia* (2011) eKLR, the Court of Appeal expounded on what substantial injustice entails when it said:-

> " Article 50 of the *Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where "substantial injustice would otherwise result". Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses."

29. During the bond hearing pending appeal, it is clear that the Appellant at the time of his trial Court case was a minor as his birth certificate indicates his date of birth as 6th October 2006. This simply means that at the time of his arrest, the Appellant herein was aged 16 years old.

30. In *Pett vs. Greyhound Racing Association* (1968) 2 All ER 545 Lord Denning presented himself thus: -

> " It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task."

31. In *South Africa in Fraser vs. ABSA Bank Limited* (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

> " Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the *Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation...."

32. In Kenya, Nyakundi, J. in *Joseph Kiema Philip vs. Republic* (2019) eKLR added his voice on the subject in the following manner: -

> " ......it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced......"

33. In this case, the Appellant has demonstrated that substantial injustice was occasioned to him due to the fact that he was not informed of the right and that no counsel was assigned to him at State expense considering the fact that he was a child in conflict with the law. On perusal of the Court record, the Appellant was not made aware of this right by the trial Court. In the end, I find that the appellant's right to be promptly informed of the right to choose an advocate was infringed and that renders the whole proceedings a nullity. The question then is how should this Court proceed?

34. In the instant case, the offence was committed on diverse dates between 9th May 2023 and 16th May 2023 and that the Appellant was convicted on 24th June 2024. So far, he has served about three months. It is clear from the trial Court record that the Appellant was charged and sentenced as an adult which was not the case. It is imperative to note that in view of Section 239 of the *Children Act* No 29 of 2022, our children law recognizes our lived reality that more often than not the child offender is first a child in need of care and protection whose welfare ought to be taken into consideration even as the criminal charges are proceeding against that child. The child offender is a child in need of care and protection, who, should the circumstances dictate, would return to the hands of the Secretary Children Services who now has a role in dealing with the child who is in conflict with the law, in view of section 239(1) (d)(e)(h)(i),(l) and (m) which provides.

239. Methods of dealing with children in conflict with the law

(1) Where a child is tried for an offence, and the court is satisfied as to their guilt, the court may deal with the case in one or more of the following ways—

(a) ;

(b) ;

(c) ;

(d) commit the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake the care of the offender;

(e) if the child is between twelve years and fifteen years of age, order that the child be sent to a rehabilitation institution suitable to the child's needs and circumstances;

(f) ;

(g) ;

(h) place the child under the care of a qualified counsellor or psychologist;

(i) order that the child be placed in an educational institution or vocational training programme;

(j) ;

(k) ;

(l) make a restorative justice order;

(m) make a supervision order.

35. Evidently, in this new dispensation, the Directorate of Children Services has a major role in the rescue, rehabilitation and reintegration of the child in conflict with the law. It is evident that there is urgent need for the creation of awareness amongst the child justice agencies of the new requirements of the law put there to enhance child protection for those who enter the criminal justice system. The police officers ought to have confirmed that the Appellant herein was truly an adult prior to proceeding with the recommendations to the Prosecution to pursue charges against him. In the instant appeal, the charge sheet indicates the Appellant as an adult as at the time of the arrest but conveniently there is no indication of an identity card number on the said record. That besides, the law requires that a police officer who arrests a child ought to not only inform the parent/guardian, but also the Secretary Children Services or an authorized officer within 24 hours. Upon receipt of that information the children officer is to carry out an assessment and submit that report to the police officer. Of importance is what the report should contain; information on the socio-economic and personal circumstances and the needs of the child with a view to safeguarding the welfare of the child.

36. In the instant appeal, the proceedings were concluded at the Magistrate's Court and that a minor was tried and sentenced as an adult. So far, everything on the record indicated that there was non-compliance with the *Children Act* and this occasioned injustice to the minor.

37. Consequently, this Court should quash the conviction, set aside the sentence on the grounds that the Appellant's right to fair trial under Article 50(2)(g) of the *Constitution* and his rights as a child offender were infringed.

38. As held above, under no circumstances should prejudice be caused to an accused person. I therefore, find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial especially that of a minor and therefore the entire proceedings in sexual case number Kimilili Sexual Offence Number E039 of 2023, Republic vs. Aaron Wanjala alias Wafula are hereby declared to be a nullity and are hereby quashed. I therefore, find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings plus the conviction and set aside the sentence imposed. The Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

Order accordingly.

DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Aaron Wanjala............................... Appellant

Natwati for Were ....for Appellant

M/s Kibet...................................for Respondent

Kizito/Ogendo.............................Court Assistant