Wanjiru v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 15371 (KLR) (Crim) (4 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15371 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E005 OF 2023

CM KARIUKI, J

DECEMBER 4, 2024

BETWEEN

JOSEPH MWANGI WANJIRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of Honourable Hon E N Wanjala – Principal Magistrate, delivered on 20th November 2023 in the Principal Magistrate Court at Engineer Sexual Offences Act Case No. E034 of 2022)

JUDGMENT

1. The Appellant was charged before the Honorable Court sitting at Engineer with the offense of defilement contrary to Section 8(1) (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offense were that the appellant defiled the complainant, a child aged 17 years, on diverse dates between 1st November 2021 and 28th March 2022.

2. He faced an alternative count of Committing an indecent act with a child contrary to Section 1 1 (1) of the *Sexual Offences Act* particulars being that on diverse dates between 1st November 2021 and 28th March 2022 in Kinangop within Nyandarua County, he intentionally caused his penis to come into contact with the vagina of RNN, a child aged 17 years.

3. He pleaded not guilty, and the matter went to trial.The matter proceeded to a full hearing. The prosecution called four (4) witnesses to prove its case. The defense called only the appellant, DW 1, who gave sworn evidence. following which the He was convicted and sentenced to fifteen (15) years imprisonment. He was aggrieved and thus lodged an instant appeal with nine (9) grounds, which the Appellant, in his submission, reduced to two grounds.

i. Whether the offense of defilement was proven to the required standard, thereby warranting a conviction?

ii. Whether the sentence imposed was appropriate?

4. The respondent did argue orally while the Appellant filed submissions.

5. Appellant Submissions

6. Did the prosecution prove beyond reasonable doubt that the Appellant perpetrated the penetration?

7. 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, and the victim must then satisfy the Court that, indeed, it is the appellant who perpetrated the penetration.

8. Section 124 of the *Evidence Act*, Cap 80.

9. In the present case, the complainant testified under oath that the appellant person was not the perpetrator, and she gave a different name to a person called Jackson Mwangi, who she indicated was responsible. In cross-examination, she stated that she was taken to the police station by her mother (PW2), who lied to her that they were going to visit her father, who was arrested. It was at the police station that she realized that the mother had tricked her, and she decided to lie to protect her boyfriend, whose name was Jackson. During cross-examination, she stated thus:

> "I love Jackson. I did not want him arrested. I am the one who decided to frame up the appellant person because Jackson disappeared. I recorded the statement involuntarily. Police had taken a cane for me, that is why I decided to record this statement. The appellant person has never asked me to hide and not come to Court. I do not even see the appellant person. My mother does not ask me to hide. I do not want to come to Court because I recorded a false statement. I came to ask the appellant person for forgiveness; framing up a person is not good. I will not frame someone else".

10. The trial magistrate disregarded the complainant's evidence and instead shifted the burden of proof to the Appellant. I have considered the evidence(sic) by the appellant person that he was framed up, but what is in the mind of the Court is why, among the many village boys or schoolmates, the appellant person was framed up. From the record, no reason for the frame-up has manifested DW1 was also unable to state why he was framed up; PW l gave the alleged reason for framing up DWI as because he was nearest, which was not elaborated more.

11. The burden of proof solely rests on the prosecution. The Court in PETER WAFULA JUMA & 2 OTHERS VS.- REPUBLIC (2014) EKLR:

12. The prosecution failed miserably in dispensing the burden of proof, and the trial magistrate should not have required the Appellant to explain why the complainant framed him.

13. The trial magistrate, in her judgment and consequent conviction, relied heavily on the statement of the appellant's statement recorded at the police station, yet no ruling was made to render it admissible as a confession under Section 25 A of the *Evidence Act*.

14. Section 25A provides as follows:

"

"(1) A confession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible and shall not be proved as against such person unless it is made in Court before a judge, a magistrate, or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of e person's choice.

(2) The Attorney General shall, in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights, and other suitable bodies, make rules governing the making of a confession in all circumstances where the confession is not made in Court

section 26 of the *Evidence Act* provides as follows:

"Aconfession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the appellant person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the appellant person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

15. The Court of Appeal in Kanini Muli v Republic [2014] eKLR held thus:

> In our view, irrespective of whether the confession under section 25A was made to the police or in Court before a judge or magistrate, the overriding duty of the trial court to satisfy itself that the confession was voluntary and was not procured by inducement, threat or promise remains intact and as heavy as ever. The judge or magistrate before whom a confession is made under section 25A is not a conveyor belt for mechanically recording statements and disposing of the maker of the statement.

16. In the present case, despite the appellant stating clearly that he was made to sign a pre-recorded statement, the trial court ignored such evidence and went ahead to rely on the statement, disregarding the law on confessions and condemning the Appellant based on the same.

17. Based on the above submission, the Appellant thus prays that appeal and set aside the trial court's judgment.

18. Respondent Submissions

19. The prosecution submitted, that the appellant was charged with defilement, alternatively, indecent Act. That it Proved it case to the needed standard in that.Age of victim. Identity of the offender and the penetration were established.

20. On age, the evidence by birth certificate produced P exhibit 1 per (PW3) Is set out on page 12 of the record. Pw1 was a student in Form 2 aged 17 years at the time of the incidences.On Penetration, the record of appeal page 13 in the last paragraph,the Appellant is said to have had sex with the victim.PW 2 mother to pw1,took her to the hospital, and the P3 form and PCR were filled. They were produced by PW 4 Doctor Martin Owuor on behalf of Doctor Agnes, and there was evidence of penetration corroborating complainant P W 1.

21. On identity – P W 1 evidence confirms that, she knew appellant vide evidence on page 12 of the record of appeal where on the 2nd paragraph she said she loved him and did not want him arrested. On Page

13 she Says the appellant was a student at their school. They were in the same school and well-known to each other.

22. Thus, the prosecution concludes that, all three ingredients of the offence of defilement were proven as required. Thus appellant was sentenced to fifteen years (15) years imprisonment. Sections 8(1) and 8(4) minimum mandatory sentences are fifteen (15) years, which is lawful.

23. Further it was submitted that, the P W 1 evidence is that there was a relationship. She was about 17 years old. The Appellant was 20 years old. She had to shield the appellant several times, thus becoming hostile. Victims of sexual offenses should be protected.

24. Issues, Analysis And The Determination

25. After going through the evidence on record, I find the issues for determination arewhether the repudiated evidence of a hostile witness was enough to convict the Appellant? did admission of alleged offense by appellant amount to admissible confession to be relied on to corroborate hostile witness testimony? And Especially was on the element of defilement of penetration proved i.e. that the Appellant penetrated the victim as alleged. WAS the Appellant accorded a fair trial?

26. This being a first appeal, the duty of the court is as was set out by the Court of Appeal in Okeno v Republic [1972] EA 32 that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's make own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. 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 finding and conclusion; 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."

27. The summary of prosecution case was that, the appellant defiled the complainant, a child aged 17 years, on diverse dates between 1st November 2021 and 28th March 2022.To prove that the prosecution case,4 witnesses were called whose testimonies were to prove the ingredients of the offense charged namely; Age of victim. Identity of offender and the act of penetration.

28. According to the prosecution, on age – evidenced by birth certificate produced P exhibit 1 (PW3). See page 12 of the record. She was a student in Form 2.on penetration: See page 13 in the last paragraph of record the Appellant had sex with the victim.The evidence being that PW 2 mother of victim took her to the hospital, and the P3 form and PCR were filled. They were produced by PW 4 Doctor Martin Owuor on behalf of Doctor Agnes, and thus there was evidence of penetration corroborating complainant P W 1.

29. And on identity – P W 1 evidence is that the victim knew appellant see page 12 record of appeal see 2nd paragraph she said she loved him and did not want him arrested. Page 13. Says the appellant was a student at their school. They were in the same school and well-known to each other.

30. Thus concluded that,all three (3) ingredients were proven as required. The appellant was sentenced to fifteen years (15) years imprisonment. Sections 8(1) and 8(4) minimum mandatory sentences are fifteen (15) years, which is lawful.

31. The P W 1 evidence was that there was a relationship. She was about 17 years old. The Appellant was 20 years old. She had to shield the appellant several times, thus becoming hostile.

32. However, the defence /appellant case was that and was so submitted that, Penetration can only be 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, and the victim must then satisfy the Court that, indeed, it is the appellant who did the penetration.

33. Section 124 of the *Evidence Act*, Cap 80. It was submitted that In the present case, the complainant testified under oath that the appellant person was not the perpetrator, and she gave a different name to a person called Jackson Mwangi, who she indicated was responsible. In cross-examination, she stated that she was taken to the police station by her mother (PW2), who lied to her that they were going to visit her father, who was arrested. It was at the police station that she realized that the mother had tricked her, and she decided to lie to protect her boyfriend, whose name was Jackson. During cross-examination, she stated thus:

    i. "I love Jackson. I did not want him arrested. I am the one who decided to frame up the appellant person because Jackson disappeared. I recorded the statement involuntarily. Police had taken a cane for me, that is why I decided to record this statement. The appellant person has never asked me to hide and not come to Court. I do not even see the appellant person. My mother does not ask me to hide. I do not want to come to Court because I recorded a false statement. I came to ask the appellant person for forgiveness; framing up a person is not good. I will not frame someone else".

34. The trial magistrate disregarded the complainant's evidence and instead shifted the burden of proof to the Appellant. She went ahead to make a finding "I have considered the evidence(sic) by the appellant person that he was framed up, but what is in the mind of the Court is why, among the many village boys or schoolmates, the appellant person was framed up. From the record, no reason for the frame-up has manifested DW1 was also unable to state why he was framed up; PW l gave the alleged reason for framing up DWI as because he was nearest, which was not elaborated more."

35. The burden of proof solely rests on the prosecution. The Court in Peter Wafula Juma & 2 Others Vs.- Republic (2014) EKLR:

36. The trial magistrate should not have required the Appellant to explain why the complainant framed him. IN her judgment and consequent conviction, relied principally on the statement of the appellant's statement recorded at the police station, yet no ruling was made to render it admissible as a confession under Section 25 A of the *Evidence Act*.

37. Section 25A provides as follows:

> "(1) A confession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible and shall not be proved as against such person unless it is made in Court before a judge, a magistrate, or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of person's choice.

38. Section 26 of the *Evidence Act* provides as follows:

> " Aconfession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the appellant person, proceeding from a person in

authority and sufficient, in the opinion of the court, to give the appellant person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

39. The Court of Appeal in Kanini Muli v Republic [2014] eKLR held thus:

> In our view, irrespective of whether the confession under section 25A was made to the police or in Court before a judge or magistrate, the overriding duty of the trial court to satisfy itself that the confession was voluntary and was not procured by inducement, threat or promise remains intact and as heavy as ever. The judge or magistrate before whom a confession is made under section 25A is not a conveyor belt for mechanically recording statements and disposing of the maker of the statement.

40. In the present case, despite the appellant stating clearly that he was made to sign a pre-recorded statement, the trial court ignored such evidence and went ahead to rely on the statement, disregarding the law on confessions and condemning the Appellant based on the same.

41. It is apparent that the Pw1 was treated as a hostile witness due to her evidence exonerating the appellant however the court falied to apply the law and jurisprudence on how such evidence is applied and relied on.

42. In Kenya, the provisions governing hostile witness testimony are primarily found in the Criminal Procedure Code (CPC). Specifically, Section 157 of the CPC addresses the issue of hostile witnesses. This section allows the party who called the witness to cross-examine them if they turn hostile, meaning they give evidence that contradicts their previous statements or the party's case.

43. In Daniel Odhiambo Koyo v Republic [2011] eKLR, the Court of Appeal stated the law on the probative value of the evidence of a refractory and hostile witness as follows:

> "... The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defense case. In Maghenda v. Republic [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:
>
> "The evidence of a hostile witness must be evaluated, in particular, if it tends to favor the appellant though it may not necessarily be acted upon by the Court."
>
> There is a thin line between a hostile and a refractory witness. Both are people who display reluctance to give evidence as required of them.
>
> Usually, a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the appellant or his reluctance to testify...
>
> PW3, as stated earlier, was treated by the Court and the prosecution as a refractory witness, and we stated earlier that evidence of such a witness needs to be treated with circumspection because of her conduct. In some instances, however, such evidence may be accepted as corroborative of other evidence if the Court is satisfied that it cannot be but true and is consistent with other evidence adduced and which the Court has accepted. Although PW3 was initially refractory, she appears to us to have accepted to co-operate, and her testimony was clearly consistent with what PW2 had testified on."

44. The Court of Appeal also summarized the applicable law in Abel Monari Nyanamba & 4 others v Republic [1996] eKLR as follows:

> " In Coles v. Coles, (1866) L.R. 1P. &D. 70, 71, Sir J.P. Wilde said:-
>
> "A hostile witness is one who, from the manner in which he gives evidence, shows that he is not desirous of telling the truth to the court.'
>
> In Alowo v. Republic [1972] EA page 324, the predecessor of the Court said:-
>
> "The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible.'

Again, in Batala v Uganda [1974] EA 402, the said Court at page 405 said:

"The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile, and it can be given little, if any, weight."

The evidence of a hostile witness is indeed evidence in the case, although generally of little value. Obviously, no court could find a conviction solely on the evidence of a hostile witness because his unreliability must introduce an element of reasonable doubt.

The inevitable conclusion after PW4 had been declared a hostile witness was that he became an unreliable witness whose evidence would be rejected as untrustworthy. He was discredited thoroughly. In our view, PW4 was substantially an unreliable witness, and all parts of his evidence should have been rejected. It must follow, therefore, that nothing PW4 said in Court could be accepted against any of the appellants."

45. My understanding would then be that once a witness is declared hostile, their evidence becomes almost worthless and is of no value to either the prosecution or the defense. In the Act of recanting before the Court, the evidence given to the police only shows that the witness is unreliable. In such a situation, the Court is called upon to look elsewhere in the search for the truth.

46. In the instant case the corroboration was being sought in the inadmissible statement of the appellant which he recanted. The provisions of section 25 and 26 of Cap 80 of *Evidence Act* bar admission of such evidence without strictly relying on the stipulations set therein.

47. . Section 25A provides as follows:

> " (1) A confession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible and shall not be proved as against such person unless it is made in Court before a judge, a magistrate, or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of e person's choice.
>
> (2) .....
>
> section 26 of the *Evidence Act* provides as follows:
>
> "Aconfession or any admission of a fact tending to the proof of guilt made by an appellant person is not admissible in a criminal proceeding if the making of the confession or admission appears to the court to have been caused by

any inducement, threat or promise having reference to the charge against the appellant person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the appellant person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

48. The statement was not made made in Court before a judge, a magistrate, or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the suspect person's choice. The trial court went ahead to ignore the above mandatory dictates of the law and went ahead to rely on such material contrary to the said law on the inadmissible statement and even convicted the appellant on such faulty and invalid material.

49. On perusal on trial court proceedings, I note various injustices which buttresses the view that fair trial in the instance matter was compromised. On page 10 to 11 a police officer alleged that the mother of the victim was hiding her and that it was appellant person parents who always say that the child be hidden. Without hearing neither the appellant nor the said Mother of the child or even appellant advocate, or even substantiation by officer being established, the trial court ordered both the appellant and mother of the child to be locked up in jail as the IO tracks the minor. On page 13 to 15 of the appeal record, the victim gave adverse testimony on oath contradicting her statement to police. The prosecution alleged that the victim was colluding with the defence thus she was declared a hostile witness.

50. During cross-examination, she stated thus:

> "I love Jackson. I did not want him arrested. I am the one who decided to frame up the appellant person because Jackson disappeared. I recorded the statement involuntarily. Police had taken a cane for me, that is why I decided to record this statement. The appellant person has never asked me to hide and not come to Court. I do not even see the appellant person. My mother does not ask me to hide. I do not want to come to Court because I recorded a false statement. I came to ask the appellant person for forgiveness; framing up a person is not good. I will not frame someone else".

51. The prosecution applied for her to be locked up and she was locked up and further date for hearing date fixed. This time round, the victim, her mother and the appellant were locked up and their freedom to the liberty right violated without a hearing or legal justification.

52. The court apparently together with the prosecution were apparently in concert defeating justice and intimidating the incarcerated persons thus prejudicing fair trial. Hostile witnesses are not jailed but treated as the law dictates.

53. The legal missteps in the trial impugned herein runs a foul with the provisions of the fair trial set out in article 50 and guaranteed by article 25 that declares same absolute right.

54. Article 50 constitution of Kenya states that; Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every appellant person has the right to a fair trial, which includes the right—(a) to be presumed innocent until the contrary is proved;

55. Article 25 of *the Constitution* of Kenya is part of the Bill of Rights in Chapter Four, and it establishes certain fundamental rights and freedoms that cannot be limited such as; (c) The right to a fair trial. These rights and freedoms cannot be limited.

56. A fair trial is a court proceeding that is fair and effective, regardless of the outcome. It includes a number of requirements, such as: Impartiality: The court must be independent and impartial. Equality of arms: Both parties must have a fair balance of opportunities. Innocence: The defendant is presumed innocent until proven guilty. Participation: The appellant must be able to participate in the trial.

57. In view of the court findings aforesaid, the trial court committed multiple legal and constitutional errors in the instant trial that the entire trial amount not only to a mistrial but also untenable in law. Thus the conviction and sentence cannot stand and therefore are quashed.

58. Retrial

59. Having quashed the conviction and set aside the sentence, the issue to be considered is whether I should order a retrial. The principles governing whether or not a retrial should be ordered were stated in Fatehali Manji v Republic (1966) EA 343 by the East Africa Court of Appeal as follows:

> " In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the appellant person."

60. In Mwangi v Republic (1983) KLR 522 the Court of Appeal also held thus:

> " We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. …."

61. From the above cited authorities, it is pertinent that a trial will only be ordered where the interests of justice so require. Each case must depend on its particular facts and circumstances. In this case the initial facts the prosecution had to treat victim as hostile and get same witness mother and the appellant locked up to testify.

62. The evidence relied on to corroborate victim forced testimony was inadmissible statements of the appellant. The order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the appellant person.

63. In the instant case, I find no justice will be served to order for a retrial. The victim herself who is now an adult may be subjected to similar injustices so is the appellant. The victim had been traumatised enough and may retraumatised again for insisting she was forced to implicate appellant and stood by that until when she was unlawfully detained for turning hostile in her testimony. This court is not prepared to sanction such scenario in the name of a retrial. Thus, the court makes the orders;

    i. The upshot is that the appellant is acquitted and sentence set aside. I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT, DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS4TH DAY OF DECEMBER 2024

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CHARLES KARIUKI

JUDGE