Wanyama v Republic (Criminal Appeal 39 of 2017)
[2025] KECA 382 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 382 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 39 OF 2017

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

MOSES WANJITALA WANYAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (M. Odero, J.) dated 10th April 2017 in HCCRA No. 135 of 2013)

JUDGMENT

1. This is a second appeal against the conviction and sentence upheld by the 1st appellate court. The appellant, Moses Wanjitala Wanyama, was in Naivasha CM Criminal Case (S.O.) No. 2027 of 2012, charged with two counts of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. In count I, the particulars of the offence were that on 5th July 2012 at [Particulars withheld] estate Naivasha Municipality Nakuru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VNW, a girl aged 8 years old. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. The particulars of the offence were that on the same day and in the same place, the appellant intentionally and unlawfully touched the vagina of VNW, a child aged 8 years old, with his penis.

2. In count II, the particulars of the offence were that on 6th July 2012 at [Particulars withheld] estate Naivasha Municipality Nakuru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VNW, a girl aged 8 years old. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally and unlawfully touched the vagina of VNW, a child aged 8 years old, with his penis.

3. When the appellant was arraigned before the trial court, he pleaded not guilty to the offences that he was charged with. Upon full trial, the appellant was convicted of the offences of defilement and was sentenced to life imprisonment. Dissatisfied, the appellant lodged an appeal before the High Court. Upon re- evaluating the evidence, Odero, J. dismissed the appeal, upheld the conviction and affirmed sentence. It is those findings that have precipitated the filing of the present appeal.

4. The appellant has filed an undated notice of appeal but titled "memorandum of appeal". He also filed undated grounds of appeal and an undated supplementary memorandum of appeal. The appellant challenged the findings of the High court on the following grounds: the conviction was based on evidence that violated his constitutional rights; the evidence of the complainant as well as the medical evidence were unreliable; the first appellate court failed to make its own findings on the evidence and instead wholly adopted those of the learned magistrate; crucial witnesses were not availed to testify; the learned judge erred in upholding the sentence of life when the ingredients to a charge of defilement were not proved to the required standard; and that the sentence meted out was illegal and unconstitutional. In view of the foregoing, the appellant urged this Court to allow the appeal, quash the conviction, set aside the sentence and that the appellant be set at liberty.

5. When this appeal was heard on 22nd January 2025, the appellant was present and appeared in person while learned counsel for the state Mr. Omutelema represented the respondent. The parties wholly relied on their written submissions.

6. In his undated written submissions, the appellant submitted that the ingredients to the defilement charges namely the age of the complainant, the aspect of penetration and the identification of the perpetrator were not proved to the required standard. On the complainant's age, the appellant argued that since no documentary evidence demonstrated her age, this ingredient was not proved.

7. The appellant submitted that the sentence meted out was harsh, excessive, failed to conform to the provisions of section 216 and 329 of the *Criminal Procedure Code* as well as the 2016 sentencing policy guidelines and furthermore, flouted the holding of the High Court in *Philip Mueke Maingi & 5 others v the Director of Public Prosecutions and another* [2022] KEHC 13118 (KLR). He urged this Court to allow his appeal.

8. The respondent on its part relied on its written submissions, case digest and list of authorities all dated 23rd February 2024 to submit that it had discharged its burden of proof to the required standard. Consequently, the appellant was properly convicted and lawfully sentenced. It prayed that the appeal be dismissed.

9. As a second appellate Court, our jurisdictional mandate is set out in section 361 of the *Criminal Procedure Code* and is confined to consideration of matters of law. In *Karingo v Republic* [1982] KLR 213, the Court stated:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

10. We therefore find it prudent to set out the abridged facts of the case giving rise to this appeal as per the record. PW1 VNM, the complainant testified that she was eight years old at the time of her testimony and was a class two student at [particulars withheld] Academy. She added that she lived with her mother PW2 DN.

11. On that fateful day, that is 5th July 2012, the appellant walked into their home at around 5:00 p.m. While she was washing clothes, the appellant spotted her, approached and grabbed her, lay

her on the bed, removed her clothes and proceeded to sexually assault her. During the ordeal, PW1 screamed catching the attention of Mama Placy who reprimanded him. The appellant walked out. PW1 complained of pains in her private parts after the offence had been committed. She also noticed that the appellant had transferred dirt to her body. For those reasons, PW1 took a bath. When PW2 returned home from work, PW1 was unable to inform her about what had transpired as the appellant had threatened her.

12. The following day, PW1 reported to school. During lunch hour, PW1 was at home all alone having lunch. The appellant took advantage of her forlorn presence. He walked into their home holding a knife. He lifted up her school uniform, removed her underwear and sexually assaulted her. When PW1 screamed, the appellant threatened her. They were once again caught red handed by Mama Placy who asked the appellant never to return to that house home.

13. On her return home that evening, PW1 met the appellant who laughed on seeing her. While in school, PW1 was found with a drawing depicting a man and a woman having sexual intercourse. PW1's teacher PW3 LNL found the drawing and interrogated her. She then disclosed to her teachers namely PW3, C, J and the headmaster she had been sexually assaulted. PW3 informed PW2 who took the complainant to Naivasha District Hospital for treatment. PW1 recognized the appellant as one of their neighbors. Following the incident, PW1 and her family moved out.

14. PW2's evidence was that on 10th July 2012, PW3 and teacher C informed her that her daughter PW1, born in September 2003, was caught in school with a drawing of a man and a woman having sexual intercourse. When PW1 was questioned, she broke into tears and later revealed to her teachers that the appellant had defiled her. PW1 informed her that she was unable to disclose to her what had occurred because the appellant had threatened her. PW2 took PW1 to Naivasha District Hospital where she received treatment. Thereafter, the incidents were reported at the police station. She also knew the appellant as his neighbor and was arrested in his home.

15. PW3, a teacher at [particulars withheld] Academy testified that on 10th July 2012 at 2:00 p.m., laughing class two students caught her attention. On inquiry, she discovered that her students were laughing at the fact that PW1 had drawn a man and a woman having sexual intercourse. PW3 confiscated the book bearing the drawings and took PW1 to the director. While at the director's office, PW1 broke down. It was here that she revealed that she had been sexually assaulted.

16. PW3, accompanied by teacher C, escorted PW1 when she went home. They revealed to PW2 what they had been told. She recalled that PW1 struggled to reveal the identity of the perpetrator of the offence but after persuasion, she was able to disclose who he was.

17. PW4 PC Patrick Ndambuki based in [Particulars withheld] police patrol base testified that on 12th July 2012, he was then instructed to arrest the appellant. In the company of his colleague, PW4 found the appellant in his home, arrested him and had him detained at Naivasha police station.

18. PW5 CPL Audrey Cherono, the investigating officer in this case received the complaint. She then interrogated the witnesses, recorded their witness statements and collected the evidence. She then had the appellant arrested having been positively identified by PW1. The appellant was then arraigned in court to answer to the charges levelled against him.

19. PW6 Dr. Dennis Wamalwa produced the P3 form recorded by his colleague Dr. Gichane dated 11th July 2012. Having established that he has known him, his signature and handwriting for a couple of years, PW6 testified that PW1 was seen six days after the offences had been committed. On physical examination, PW1's private parts were reddish. Her hymen was broken. She had bruises and

lacerations. Her injuries were classified as grievous harm. PW6 also produced PW1's age assessment form establishing that she was eight years old at the time of the offence.

20. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was put on his defence. His unsworn testimony was that 12th July 2012, he had returned home when unknown persons came to visit him. He was then arrested at around 7:30 p.m. and charged on 16th July 2012. He denied committing the offence stating that the charges preferred against him had not been proved to the required standard of proof. In his view, he had been framed.

21. Individualistically looking at the ingredients of a charge of defilement, the two lower courts stated as follows: on the age of the complainant, both courts found that the evidence of the age assessment form and from the observation of the minor at trial that the minor was eight years old at the time of the offence. On the aspect of penetration, both the trial court and the High court relied on the evidence of PW6 and PW1 to establish that it had been proved beyond reasonable doubt. Regarding the identification of the offender, the High Court adopted the findings of the trial court as to find that the appellant was positively identified as the defiler. We find that the findings of facts arrived at in the two courts below were concurrent and based on the evidence adduced. We will therefore not interfere with those findings. The totality of the evidence on record, points to the conclusion, that the appellant was properly and correctly identified, age and penetration proved to the required standard.

    The evidence was credible, cogent and overwhelming against the appellant.

22. The appellant was sentenced to life by dint of section 8 (2) of the *Sexual Offences Act*. The circumstances under which this court can interfere with a sentence were set out by the court in *S. v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

23. We have noted that section 8 (2) of the Sexual Offences Act gives a mandatory sentence. In, *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), our Supreme Court held that the mandatory sentence prescribed under section 8 (2) was lawful and is binding on all courts leaving no room for the exercise of discretion.

24. We therefore find that the sentence meted out was lawful and we cannot interfere with the same. Ultimately, the appellant has not demonstrated that his rights were violated under the Constitution or that any issues of law arising warranted our interference. Accordingly, we come to the conclusion that the appeal herein lacks merit and it is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR