Wachira v Republic (Criminal Appeal 144 of 2019)
[2025] KECA 417 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 417 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 144 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

ELIJAH MUTUGI WACHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kerugoya (L.W. Gitari, J.) dated 26th March 2019 in Criminal Appeal No. 10 of 2017)

JUDGMENT

1. Elijah Mutugi Wachira, the appellant, was charged in Baricho Senior Principal Magistrate's Court for the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, the particulars being that on 1st July 2016 in Mwea West sublocation within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of F.W., a child aged 6 years.

2. He denied the charge and the matter proceeded to full hearing following which he was found guilty, convicted and sentenced to life imprisonment.

3. A brief background of this matter will be help place the appeal in perspective. PW1, F.W. the minor after voire dire examination testified that her mother was H.W. and her father was Jacob. She stated that one night her parents left her in the house and the appellant did bad manners to her and it was very painful. She stated that when her father came, he lit a torch and the appellant dressed up and that she saw and identified the appellant who she said used to cook "kangumu" in Kandongu.

4. She testified that her father locked the door from outside to stop the appellant from escaping but the appellant escaped through the window. That her father took her to the police at Sagana and also to hospital.

5. PW2, (J.M.) testified that he was FW's father. He said the child was 6 years old. He testified that on 30th June 2016 he had left home to go and irrigate his rice and that he had left his wife and F.W. in the house but at about 9.00pm he received a call from his wife informing him that she had also left the house to go and attend a funeral meeting at her grandmother's house and that he should go back home as F.W. had been left alone in the house. He arrived home at 1.00am and noticed that the door ajar yet his wife had said that she had locked it.

6. He said that on entering the house, heard the sound of a belt buckle coming from the bedroom and he saw the appellant with his trouser down to his ankles and that F.W. was lying on the bed on her back, naked.

7. He testified that the appellant quickly jumped out of bed and off FW as soon as he saw the light and that he grabbed him and they wrestled. He testified that the appellant grabbed the torch but he held him tightly and he screamed.

8. He testified that he managed to push the appellant backwards then rushed to the door and locked it from outside as he went to seek help from neighbors. Unfortunately, the intruder is said to have escaped through the window, leaving behind a cap which he said he had seen the appellant wearing before that date in Kandongu area.

9. PW3, (AW) testified that she was FW' s mother and that FW was six (6) years old having been born on 7th November 2009, she stated that she has never applied for her birth certificate.

10. PW4, Nahashon Muremi Muiruri, a clinical officer at Sagana Sub- County Hospital testified that the estimated age of F.W. was 5 years. That on genital examination, no abnormality was noted on the labia majora and labia minora. No abnormality was detected on the vaginal wall. That her hymen was broken and it was fresh. That there was no discharge and that the high vaginal swab she underwent no spermatozoa were seen. He stated that the approximate age of injuries was 10 hours and he concluded that there was evidence of defilement as the hymen was freshly broken.

11. PW7 No 42381 PC Nathan Nyaga, an officer attached Sagana Police Station re-arrested the appellant who was taken to the police station by an officer from Kandongu AP post. He started investigations and escorted the child to Kerugoya County Hospital on 11th November 2016 for age assessment and she was assessed by a Dr. Maina who estimated her age to be 7 years. The age assessment report and health card were produced in court as exhibit. He stated that he charged the appellant with defilement.

12. The appellant's defence was that the case was a frame-up by F.W.'s father who had accused him of having an illicit affair with F.W.'s mother. He said that he was in his "mandazi" shop where he spent the night from 11.00 pm to 5.00am, and denied being anywhere near the child's home.

13. The trial court, having considered both the prosecution and appellant's case, was satisfied that the ingredients of the offence of defilement had been proved and sentenced the appellant to life imprisonment. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (L.W. Gitari, J.) agreed with the findings of the trial court and dismissed the appeal in its entirety.

14. Still aggrieved, the appellant filed this appeal. The grounds of appeal as set out in the memorandum of appeal, are among others, that the learned Judge: erroneously failed to appreciate that the mandatory voire dire examination was not adhered to hence occasioning prejudice to the appellant's case; in not putting into consideration that the critical elements in defilement in regard to penile penetration and identification in light of the difficult circumstances abiding at the alleged time of incident did not corroborate the evidence; in not considering that there existed a grudge (bad blood) between the alleged

victim's father and the appellant over a suspected love affair with his wife (PW3); in failing to consider and appreciate that section 150 of the *Criminal Procedure Code* and Section 146(4) of the *Evidence Act* were contravened occasioning prejudice and that the sentence of life as meted was and remains harsh and manifestly excessive, and had occasioned prejudice to him.

15. The appeal before us was argued by way of written submissions with brief oral highlights. The appellant appeared in person at the plenary hearing while Ms. Kibiti, learned Prosecution Counsel, represented the respondent.

16. This being a second appeal, we are mindful that this Court's remit is confined to points of law; and this Court will not interfere with concurrent findings of fact by the two courts below, unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others -vs- Republic [1982] KLR.

17. The issues of law that we discern for our consideration are, whether the learned Judge properly discharged her duty as a first appellate court of re-considering and re-analysing the evidence that was adduced before the trial court; whether the evidence on appellant's identification was safe to rely on; whether there was sufficient evidence to support the finding that the charge against the appellant was proved to the required standard; and whether the mandatory life imprisonment sentence imposed on the appellant was harsh and unconstitutional.

18. The appellant took issue with the voire dire examination stating that the same was not conducted. We can confirm at this stage that this is indeed not true because as noted from the record on 14th September 2016 voire dire was conducted by the trial court before FW testified in accordance with section 19(1), Oaths & Statutory Declarations Act. This Court in Maripett Loonkomok -vs- Republic [2016]eKLR elaborated that there is no required format for conducting and recording a voire dire. The only test is whether the trial court performed voire dire in a manner that satisfies an objective observer that the court obtained sufficient material to make a determination whether the minor witness understood the nature of an oath or had sufficient intelligence and understood the duty to tell the truth. We are satisfied, from our reading of the record, that the trial court acted correctly when conducting the voire dire.

19. The appellant also took issue with the complainant's age arguing that there were contradictions, as the charge sheet indicated the the child was 5 years, while F.W. testified that she was 3 years old. PW3 testified that F.W. was 6 years old while the clinical officer testified that she was 7 years old. The appellant poses the question as to whether the complainant's actual age was proved and argues that due to this variance, we should resolve the issue in his favour to the extent that a key ingredient in proving the offence was not proved.

20. On our part, we note that the child's age was established by the testimony of her mother who testified that she was 6 years old, further the health card and age assessment form produced in court indicated that FW was born on 24th November 2009 and she was 6 years old at the time of the incident. The age assessment conducted at Kerugoya county Hospital on 11th November 2016 by Dr. Maina estimated her age to be 7 years. At the time of the incident, she was about 6 years, 8 months old, thus placing her in the category of a child below the age of eleven years when the offence was committed; and the appellant had been properly charged. We note that all these ages fall within the same band for purposes of sentencing under section 8(2) of the *Sexual Offences Act*. We reiterate this Court's findings in the case of Mwalango Chichoro Mwanjembe -vs- Republic (2016)eKLR where the Court held that:

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card

or by the oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible form of proof..."

21. Our finding on this issue is that the child's age was proved to the required standard.

22. In regard to penetration, the appellant submits that the evidence did not prove penetration. We note, however, that the trial court found that penetration was proved through the child's evidence which was corroborated by the medical evidence produced in court. That finding was confirmed by the High Court on appeal.

    We find no reason to deviate from those concurrent findings of fact by the two courts below. In the circumstances, we find that penetration was proved to the required legal standard of proof.

23. As regards the identity of the perpetrator, the evidence adduced before the trial court was that the victim, and her father who found the appellant in the act knew the appellant well before the date in question. Although the offence was committed at night, the minor had no difficulty recognizing the appellant when her father PW2 shone torch to the appellant's direction. PW2 had also wrestled with the appellant and that was proximate enough for him to see and identify the appellant positively. Immediately after, the incident PW2 reported the matter at the Administration Police Post that it was the appellant who had defiled F.W. The next day in the morning the appellant was arrested from Kandongu Market.

24. We note that the learned Judge considered the issue regarding identification, and in upholding the finding stated thus:

> "He was not a stranger and it is trite that recognition is better than identification of a stranger."

25. Again, we confirm that the learned Judge analysed and re- evaluated the evidence; and paid heed to legal principles in drawing a conclusion which had a similar outcome to that of the trial court. We find no fault with the findings of the learned Judge.

    We find all the elements of the ingredients of the offence of defilement were proved beyond reasonable doubt.

26. The next issue raised by the appellant is that there was a grudge between him and F.W.'s father. We note that whether there existed a grudge or not was essentially a matter of fact. We also note that the issue was not raised before the High Court. In a second appeal

    we are generally bound by the concurrent findings of fact by the courts below unless it is shown to have been based on no evidence or are perverse to the evidence adduced. It is against this long held principle that we must reject this ground as having not been raised before the High Court, we are unable to interrogate the same on a second appeal.

27. In regard to severity of sentence, the life sentence imposed on the appellant was the mandatory sentence as provided in section 8(2) of the *Sexual Offences Act*. The issue as to whether the courts had discretion to reduce sentences prescribed under the *Sexual Offences Act* has been quite fluid with some courts extrapolating the decision of the Supreme Court in Francis Karioko Muruatetu & Another -vs- Republic, Petition No. 15 of 2015 [2017] eKLR, while others stuck to the letter of the *Sexual Offences Act*. This position has now been made clear in the Supreme Court decision Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curiae) [2024] KESC 34 (KLR).

28. The learned Judge considered the appellant's appeal against sentence and concluded that the sentence was both legal and appropriate. In view of the Republic -vs- Mwangi case(supra), we have no

jurisdiction to interfere with the sentence as confirmed by the High Court. In the circumstances, the appeal both on conviction and sentence fails, and is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a the true copy of the original.

Signed

DEPUTY REGISTRAR