Wanjala v Republic (Criminal Appeal 205 of 2019)
[2025] KECA 543 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 543 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 205 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 21, 2025

BETWEEN

JOHN JUMA WANJALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Bungoma (S.N. Riech, J.) dated on 20th May, 2019 in HCCRA No. 42 of 2017)

JUDGMENT

1. John Juma Wanjala, the appellant herein, was charged before the Chief Magistrate Court at Bungoma with defilement contrary to Section 8[1] as read with Section 8[2] of the *Sexual Offences Act*. The particulars of the charge being that on 22nd January 2014 at Sirare Location, Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of L.W[1]. a child aged 9 years.

2. 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*.

3. The appellant pleaded not guilty on both the main and the alternative charges and the matter proceeded to full trial with the prosecution calling six witnesses in support of its case. The appellant gave sworn evidence and called six witnesses. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted, and sentenced to life imprisonment.

4. Aggrieved, he appealed against both the conviction and sentence before the High Court at Bungoma, which appeal was unsuccessful, prompting this second appeal against conviction. The appellant faulted the learned judge for failing to find that the ingredients of the offence were not proved, failing to evaluate the evidence, and disregarding the appellants' defence.

[1] Initials used to protect her identity

5. Briefly, the prosecution evidence presented to the trial court, and which the High Court analysed and evaluated on appeal, was that on 22nd January 2014, the complainant was at her aunt E's[2] home and left to go back to her grandmother's home where she lived and arrived there at 9.30 p.m. On the way home, she met the appellant whom she knew as a kuka (the word for grandfather in the local dialect), as he was a brother to her grandmother. He carried her to his single-roomed house, in which there were two beds, a table, and chairs and removed her panties, lay on her, and threatened her with death if she screamed. The appellant inserted his 'thing' in hers, she felt pain and cried loudly.

6. After he finished, he escorted her to the grandparent's home where he found both grandparents, but the complainant did not report what had happened, due to fear. She started having pains in her lower abdomen and when passing urine, she was given medicine by her grandmother RW[3] who later took her to Bungoma Hospital. The complainant told the grandfather about the incident after 3 days saying that it was dark when the appellant carried her to his house, but there was a little moonlight.

7. Dr. Mansur Ramzan of Bungoma Hospital, who testified as PW4, produced the P3 form filled by Dr. Shinu. On physical examination, the doctor found the labia majora and minora to be normal, the hymen was perforated with a foul-smelling vaginal discharge but no spermatozoa was present save for yeast cells and epithelial cells. The complainant's age was assessed as 9 years and she was treated for pelvic inflammatory infection due to the defilement. The doctor opined that the perforation may have been due to the infection or penetration.

8. Placed on his defence, the appellant testified that on 22nd January 2014, he left home at 7.00 a.m. for Kitale to visit Kasembe Watila and Josephat Namasaka to discuss the recording of music about him. He stayed there till 5.00 p.m. and on the way home, he got information that his wife was sick. He went to Wanjala's place where his sick wife was and he spent the night there. The next day, he took the wife to Kitale Hospital. He denied meeting the complainant on 22nd January 2014 or 23rd January 2014, but stated that he met the complainant's father on 24th January 2014 while taking Busaa. He bought him some but the latter demanded for more and the appellant gave him Kshs.50/=. The complainant's father was dissatisfied and started abusing him that he was not sired by the grandfather and that he would use all means to get part of his land. He was surprised to be arrested on 4th February 2014.

9. Carolyne Juma, the appellant's wife who testified as DW2, stated that the appellant left for Kitale on 22nd January 2014 at 7. 00 a.m. and did not come back till 23rd January 2014. It was her evidence that he had gone to take his brother to hospital at Lugulu and that she was not with him.

10. The appellant's brother Collins Wanjala Sichangi, DW3 who lived in Kitale from 2013 June to December, 2014 stated that on 22nd January 2014, the appellant went to his home in Kitale with one Kasemba Watila, but left at 5.00 p.m. and he did not know where he went.

11. DW4, Joseph Simiyu Wanjala, an elder brother to the appellant recalled that he was sick on 22nd January 2014, and called his brother (the appellant) to take him to hospital at about 3.00 p.m. The appellant said he was away in Kitale but would come later and he did come at 7.00, took him to hospital the next day, and left for home at 10.30 p.m. hence could not have been at Sirare.

12. DW5, Moses Wekesa, a resident of Sirare told the trial court that on 24th January 2014, DW4 asked him to escort him to take busaa and that the appellant arrived at the busaa den at 5.00 p.m., bought busaa, and left at 6.15 p.m. David asked the appellant for money and was given Kshs.50/= but complained that it was little. An exchange ensued between them and he had not heard about PW1 being defiled.

[2] Initials used to reduce the possibility of exposing the complainant's identity, and compromising her right to privacy

[3] Initials used for the above stated reason

13. Luka Watibiri a Clinical Officer at Lugulu Hospital who testified as DW6, told the trial court that on 23rd January 2014, Josephat Simiyu (DW4), was treated at Lugulu Hospital and that he went there accompanied by John Wanjala, the appellant herein.

14. In support of the appeal, the appellant submits that penetration was not established and that the medical evidence relied on indicated that the hymen was not missing but was only perforated. Further, that upon examination of the complainant, the nurse noted vaginal discharge which was foul smelling with no spermatozoa seen. It is his argument that the learned judge erred when he failed to note clinical findings showed that the complainant had an infection, yet he was not examined.

15. The appellant faults his identification and states that the complainant identified him as Mzee, a name that none of the witnesses recognized. It is further submitted that the learned judge erred in failing to consider the appellant's alibi defence that he had left for Kitale, which evidence was corroborated by his wife who stated that at the time of the alleged offence, the appellant had left for Kitale. Further, the learned judge overlooked the appellant's submissions and the existence of the family disputes.

16. In reply, the respondent submitted that the prosecution case was proved beyond all reasonable doubt. The age of the complainant was proved as 9 years and corroborated by the evidence of PW2, PW3, and Dr. Ramzan, who produced her age assessment report. Relying on the case of Richard Wahome Chege vs. Republic Criminal Appeal No. 61 of 2014 and Francis Omironi vs. Uganda Criminal Appeal No. 2 of 2000 the respondent submitted that the age of the minor was proved beyond reasonable doubt.

17. Regarding penetration, it is submitted that the findings on the P3 form were that there was proof of penetration. In his evidence, the doctor stated that the physical examination indicated that the labia minora was perforated with a foul- smelling vaginal discharge, and no spermatozoa was seen. A high vaginal swab showed pelvic inflammation due to defilement, which she was treated for.

18. On identification, the respondent submitted that the appellant was not a stranger to the complainant as he was a relative to the complainant's grandmother and thus the complainant's grandfather.

19. As to whether there were inconsistencies in the prosecution's evidence, the respondent submits that the issue was addressed by the High Court, where the learned judge noted the likelihood of a mix-up of dates which the judge found to be not serious contradictions. Relying on Richard Munene vs. Republic (2018) eKLR the respondent maintained that there were no serious contradictions to prejudice the appellant. And if at all there were any, the same were minor and did not go to the root of the prosecution's case as to be prejudicial to the appellant.

20. Lastly on sentence, the respondent submitted that the appellant was sentenced to life imprisonment which sentence is within the law. The sentence imposed and upheld by the High Court is the minimum sentence, and was fair and just in the circumstances. In upholding the sentence, the learned judge considered the aggravating circumstances and the physical and mental injuries the victim suffered and declined to interfere with the trial court's discretion.

21. Having considered the appeal, the rival submissions, the authorities cited and the law, in view of the mandate of this Court on a second appeal, we are guided by Section 361(1)(a) of the *Criminal Procedure Code* that mandates the Court to deal with issues of law only, and which section provides that severity of sentence is a matter of fact unless an issue of law arises therefrom.

22. For instance, in Stephen M'Riungu and 3 Others vs. Republic [1983] eKLR this Court explained that:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the

findings of fact as holdings of law or mixed finding of fact and law, and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

Similar sentiments were also expressed by this Court in Njoroge vs. Republic [1982] KLR 388.

23. In our considered view, the main issue that falls for determination is whether the offence of defilement was established beyond a reasonable doubt.

24. In a case of defilement, the prosecution must prove three key ingredients: the age of the victim, that there was penetration, and the identification of the perpetrator.

25. On the question of the age of the complainant, the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR , stated as follows in respect of proving the age of a victim in cases of defilement:

> "...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 documents, evidence such as a birth certificate, baptism card or by 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 forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

26. From the evidence on record the age of the minor in this case was proved to be 9 years old. This was stated by the complainant, her father, and grandmother and was proved by the production of her age assessment report which indicated that she was 9 years old at the time of the commission of the offence. The prosecution proved that the complainant was aged 9 years old at the time of the commission of the offence.

27. The second issue to be addressed is whether the element of penetration was proved. On this issue, the appellant's counsel stated that the evidence on record confirmed the presence of hymen which was only perforated. The doctor concluded that the perforation of the hymen may have been due to infection, and did not wholly confirm penetration as the cause.

28. Be that as it may, the complainant was clear on what transpired on the material day. She clearly described her meeting with the appellant while on her way to her aunt's place and how he carried her to his house where he removed her pants and defiled her. The complainant's testimony was corroborated by medical evidence produced by Dr. Ramzan a clinical officer who upon examination, noted a normal labia majora and minora, the hymen was perforated with a foul-smelling vaginal discharge and no spermatozoa save for yeast and epithelial cells. He concluded that there was penetration.

29. Proof of defilement is not solely dependent upon medical evidence. Whether or not a sexual offence was committed is essentially proved by the evidence of the victim who is the one who has experienced the sexual violation and narrates the ordeal at the trial. That is the essence of the proviso to section 124 of the *Evidence Act*, which allows the court in a criminal case involving a sexual offence where the only evidence is that of the alleged victim of the offence to receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. There is no reason to depart from the unanimous conclusion of the trial Court and the first appellate Court as to the truthfulness of the complainant.

30. Turning to the last element of identification of the appellant as the perpetrator of this offence, the appellant was well known to the complainant. She identified him as John and referred to him as Mzee

and that the appellant is related to her grandmother. The complainant's evidence corroborated the evidence of R.W the complainant's grandmother. The appellant was a person who was well known to the complainant and the identification was one of recognition, as opposed to the identification of a stranger. Recognition is more satisfactory, reassuring, and more reliable because it depends upon personal knowledge of the assailant in some form or another. See Anjononi & Others vs. Republic [1980] KLR 59.

31. We are in agreement with the two courts that all the ingredients of the offence of defilement were established to the required standard and the concurrent findings of the two courts below were based on credible evidence.

32. In his defence, the appellant denied the events as presented by the prosecution. The appellant offered an alibi to the effect that on the material date he had traveled to Kitale where he stayed up to 5:00 pm. This was corroborated by his wife DW2 who stated that the appellant left home on 22nd January 2014 at 7:00 am and came back on 23rd January 2014. DW3 stated in his evidence that the appellant was at his place on 22nd January 2014 between 10:00 am and left at 5:00 pm and could not tell where he went after 5:00 pm. DW6 a clinical officer at Lugulu Hospital confirmed that one Josephat Simiyu visited the facility on 23rd January 2014 in the company of the appellant and he attended to him. On cross-examination, he confirmed that the facility does not record people accompanying patients.

33. Amongst the grounds of appeal raised by the appellant is that both the 1st appellate court and the trial failed to consider his defence and submissions. Even though the alibi was not raised during the prosecution of the case, nonetheless the court had a duty to consider it which it did. In rejecting that defence, the learned judge observed as follows;

> " The offence is alleged to have occurred on the evening of 22nd January 2014. DW2, the appellant's wife said that the appellant left for Kitale on 22nd January 2014 and did not come back till 23rd January 2014 contending that he took the brother to hospital at Lugulu. DW2 could not tell where the appellant was on the evening of 22nd January 2014. DW3 Collins Wafula, a resident of Kitale did confirm that indeed the appellant went to his home in Kitale on 22nd January 2014 at 10.00 a.m. but left at 5.00 p.m. DW3 could not tell where the appellant went thereafter.DW4 the appellant's brother told the court that on 22nd January 2014 he called the appellant to go and take him to hospital and that from Kitale, DW1 arrived at his home at 7.00 p.m. and took him to hospital the next day.
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> ...
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> On 14th November 2014, DW1's counsel applied to recall DW1 after all the other defence witnesses had testified. In his second statement, DW1 totally contradicted the contents of his earlier statement cited above and stated that on 22nd January 2014 when he left Kitale, he went to take his brother, DW4 to hospital. I agree with the trial magistrate's finding that DW1 sought to make a second statement in order to cure what DW2 had said. DW2 denied that she was sick on 22nd January 2014 or that DW1 ever took her to hospital on 23rd January 2014.
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> DW6 a Clinical Officer at Lugulu told the court that DW4 attended the Hospital on 23rd January 2014 and that DW4 was accompanied by DW1. DW6 admitted that he does not keep records of people who accompany patients to hospital. He did not explain how he was able to tell that DW1 accompanied DW4 to hospital on 23rd January 2014. In the end, I found the alibi defence was contradictory and was just made up to try and help out the

appellant. The alibi did not dislodge the prosecution evidence which placed the appellant at the scene of crime. I find the defence to be a sham and dismiss it."

34. In light of the overwhelming evidence adduced against the appellant, his denying having committed the offence and the defence of alibi was properly rejected. There is no error on the part of the trial Court and the first appellate Court in the manner in which they appreciated the evidence on record in light of the applicable legal principles and rules of evidence. His conviction was therefore sound.

35. In the instant appeal, the appellant did not raise any issue with the sentence. This Court is aware that the issue of sentence is not within its purview unless the sentence meted upon the appellant violates the law. Upon reviewing the sentencing proceedings, it is clear that the trial Court properly exercised its discretion in imposing upon the appellant a sentence of life imprisonment. Therefore, there is reason to enter that arena. The appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR