Kanusu v Republic (Criminal Appeal 202 of 2020)
[2024] KECA 288 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 288 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 202 OF 2020

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

STAIL SAYA KANUSU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (W.A. Okwany, J.) delivered and dated 19th December, 2018 in HCCRA No. 85 of 2014)

JUDGMENT

1. The appellant, Stail Saya Kanusu, is before us on a second appeal being dissatisfied with the outcome of his first appeal before the High Court. In respect to this appeal the appellant's first encounter with the court system was when he was presented before Kapsabet Senior Principal Magistrate's Court to face a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 28th February 2013 in (name redacted) Location within Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of ZM, a child aged 9 years. He also faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. We do not find it necessary to reproduce the particulars of the alternative count as the appeal relates to the appellant's conviction and sentence in respect to the main count.

2. The appellant pleaded not guilty to the charges and a trial ensued whereby the prosecution called 5 witnesses while the appellant was the only defence witness. At the conclusion of the trial, the appellant was found guilty on the main count and sentenced to life imprisonment. Dissatisfied with the judgment of the trial Court, the appellant appealed to the High Court, raising 10 grounds of appeal. The first appellate Court dismissed his appeal in its entirety.

3. Through his undated supplementary grounds of appeal, the appellant is now before us challenging the decision of the High Court on the grounds:

> "i. That the learned judge erred in law by failing to appreciate that the age assessment conducted on the appellant proved that he was over 18 years, however the court failed to realize that at the time of the appellant's arrest on 2nd May 2013, he was a minor below the age of 18 years;
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> ii. That the learned appellate judge erred in law by failing to find that the prosecution did not prove its case beyond reasonable doubt;
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> iii. That the learned appellate judge erred in law in failing to appreciate that the appellant's right to fair trial was violated since he was not provided with witness statements and other documentary exhibits which the prosecution intended to rely on;
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> iv That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case."

4. In summary, ZM testified as PW1 stating that on the material day at around 6.00 pm she was herding cows in the company of other children when the appellant invited her to his mother's house. He then locked the door, put her on the bed and removed her underpants. He then pulled his trouser and inserted his penis in her vagina. All the while, the appellant who was wielding a panga threatened to kill her if she screamed. She only managed to escape when the appellant's mother and her own mother started admonishing the appellant for locking her in the house. ZM. also testified that she was in class 3 at the time and she had known the appellant since she was in class 2.

5. TM testified as PW2 stating that on 28th February 2013 at about 6.00 pm he was in his house when a boy went and informed him that the appellant had held the complainant's hand and taken her to his (appellant's) grandmother's house. PW2 proceeded to the scene and found the door to the kitchen of the appellant's grandmother locked from the inside. After people made noise, the appellant emerged from the kitchen wielding a panga in his hand while the complainant closely followed him from behind. When questioned as to what he was doing with the complainant in the locked kitchen, the appellant menacingly stated that he was off to cut grass and went away. PW2 also saw the complainant walking with difficulty. The complainant disclosed that the appellant had defiled her.

6. CA (PW3), a village elder, testified that on 28th February 2013 at about 6.00 pm, he was at home which was about 100 metres from the scene. He heard the complainant's mother making noise from the locus in quo and when he checked, he saw the appellant standing at the door. As PW3 was moving towards the scene, the appellant left with a panga in his hand. He also saw the complainant emerge from the kitchen and run away. The next day, he was informed that the complainant had not spent the night at home. He later arrested the appellant and escorted him to a nearby AP Post.

7. PW4 (IK), a clinical officer, testified that on 2nd March 2013, he attended to the complainant at (name redacted) Sub-County Hospital. He noted that the complainant had a white stained foul-smelling underwear. He also observed that the complainant's labia minora was reddish as a result of friction or penetration and the vagina was open with the hymen raptured. There was a jelly like discharge from the vagina which could not be tested because the laboratory was not functional. The approximate age of the injuries was 18 hours. He reached the conclusion that the complainant had been defiled. He filled a P3 form to that effect and produced it as an exhibit.

8. Police Constable E. G. took the stand as PW5 and recalled that on 2nd March 2013 at around 11.00 am, the complainant's father made a report of defilement of his daughter who had also been attended to at the local medical facility. He issued them with a P3 form which was filled and taken back to him. He investigated the matter and upon being presented with the complainant's birth certificate, he preferred the charges against the appellant. He produced in evidence the complainant's birth certificate which showed that she was born on 1st October 2003 and was therefore nine years old at the time of the defilement.

9. In his defence the appellant stated that on 29th February 2013 he was weeding onions when he was arrested and taken to the AP Post. He was there for 6 days after which he was escorted to the Police Station where he again stayed for one (1) week before being taken to court and charged.

10. When the appeal came up for hearing before us, the appellant and the respondent's counsel had filed their written submissions. They opted to rely on the written submissions to prosecute the appeal.

11. On his contention that the trial Court erred by convicting him notwithstanding that he was a minor at the time of the commission of the offence, the appellant submitted that on several occasions he raised the issue of his age but the same was disregarded by the trial Court. The appellant further submitted that once the issue of his being underage was raised, it was incumbent upon the trial Court to investigate the matter in order to ascertain his age. He further submitted that despite the trial Court making a suo moto order for his age to be assessed, the report was never produced and neither were its contents divulged. The appellant argued that the age assessment report ought to have been produced as it fell into the category of expert evidence as defined in section 48 of the Evidence Act. In conclusion on this point, the appellant submitted that the sentence imposed upon him was therefore irregular as the trial Court did not address the question of his age before sentencing him.

12. Turning to his assertion that learned Judge of the first appellate Court erred in law by failing to find that the prosecution did not prove its case beyond reasonable doubt, the appellant urged that the prosecution failed to prove the element of penetration in this case. He also argued that the evidence tendered by the prosecution's witnesses, specifically PW1 and PW2, was contradictory and marred with inconsistencies. He relied on the cases of *Philip Nzaka Watu v Republic* [2016] eKLR and *Ruwala v Republic* [1957] EA 570 to urge that contradictions and inconsistencies are fatal to the prosecution's case.

13. Moving to another ground of appeal, the appellant submitted that his right to fair trial was violated by the failure by the prosecution to issue him with witness statements and documentary exhibits as well as the failure by the trial Court to inform him of his right to legal representation. He relied on the case of *Joseph Ndungu Kagiri v Republic* [2016] eKLR to buttress this submission.

14. With regard to the final ground of appeal, the appellant argued that the trial Court failed to consider his mitigation thereby handing him a harsh and excessive sentence. It was his ultimate submission that we should allow his appeal, quash the conviction and set aside the sentence.

15. For the respondent, learned counsel Ms. Kitheka relied on submissions dated 21st December 2022. As to whether the elements of the offence of defilement were proved, counsel submitted that because the appellant was charged with a sexual offence, the proviso to section 124 of the *Evidence Act* permitted the trial Court to convict him, if the evidence of the victim (PW1) was believable. Counsel additionally submitted that the evidence of PW1 was in any case corroborated by that of PW2, PW3 and PW4. Counsel relied on the decision in *J.W.A v Republic* [2014] eKLR in support of the submission that the evidence of victims of sexual offences need no corroboration.

16. With regard to the complainant's age, counsel referred to the case of *Richard Wahome Chege v Republic* [2014] eKLR to urge that the birth certificate was sufficient evidence of the complainant's age.

17. On the issue of penetration, counsel referred to the definition of "penetration" in section 2 of the *Sexual Offences Act* and the decision in *Mark Oiruri Mose v Republic* [2013] eKLR to submit that penetration need not be complete as long as there is an attempt. She, however, urged that in the present appeal, the evidence of PW4 confirmed that there was penetration of the complainant's vagina.

18. As for the appellant's identification, counsel referred to the case of *Robert Onchiri Ogeto v Republic* [2004] eKLR to contend that identification can be proved by the evidence of a single witness so long as care is taken to ensure the cogency of such evidence. Counsel submitted that the appellant who was not a stranger to the complainant was postively identified.

19. Counsel closed her submissions by stating that the appellant's defence was considered even though it related to events that occurred on 29th February 2013 and not 28th February 2013 when the offence was committed. In the end, counsel urged us to dismiss the appeal in its entirety.

20. This being a second appeal, the scope of our mandate is as provided under section 361(1) of the *Criminal Procedure Code*. It is limited to addressing matters of law. In essence, facts are to remain as established by the two courts below unless the conclusions made are based on the wrong application of the law or are not supported by the evidence on record. This duty was expressed by the Court in *Adan Muraguri Mungara v Republic* [2010] eKLR as follows:

> "As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

21. Alive to our mandate, we have reviewed the memorandum of appeal, the record of appeal and the submissions of the parties and we are of the opinion that the issues for determination are: whether the appellant was under 18 years at the time of the commission of the offence; whether the appellant was accorded a fair trial; whether the elements of defilement were proved; and, whether issues of law have been raised in respect to the sentence.

22. Starting with the question of the appellant's age at the time of the commission of the offence, we note that the first time the appellant was presented in Court was on 6th March 2013. It is only on 1st July 2013 that he informed the trial Court that he was 18 years old. Indeed, before sentencing the appellant, the trial Magistrate took cognizance of this issue and on more than one occasion held the sentencing in abeyance to await the production of a birth certificate, a probation report or an age assessment report. It is only the age assessment report that had been availed by the time the appellant was being sentenced and the report indicated that the appellant was over 18 years. It is also observed that when the appellant told the trial Court on 9th April 2014 that he was born on 16th April 1995 his sentencing was postponed to give him an opportunity to produce his birth certificate which he had indicated was at home. The matter was adjourned twice thereafter and the Probation Department was even involved in an attempt to secure the appellant's birth certificate but without success.

23. Before the first appellate Court, the appellant raised this issue as the 6th point in his amended grounds of appeal. However, the same was not considered by the first appellate Court. We are therefore inclined to render ourselves on this question. The Constitution, the Sexual Offences Act and the Children Act,

2022 all recognize that a child is a person under the age of 18 years. Section 2 of the *Children Act*, 2022 defines age as:

> "the actual chronological age of the child from conception or the child's apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable."

24. Further, section 166 of the same Act provides for presumption and determination of age thus:

> "(1) Where a person appears before any Court for the purpose of giving evidence, and it appears to the Court that the accused, the victim or complainant to whom the proceeding relates is under eighteen years of age, the Court shall inquire as to the age of the accused, victim or complainant, and shall take such evidence, including medical evidence for the purpose of determining his or her age.
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> 2. The age presumed or declared by the Court under subsection (1) to be the age of any person appearing before it shall, for purposes of this Act, be deemed to be the person's age unless the contrary proof is adduced before Court.
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> 3. A certificate duly completed and signed by a medical practitioner as to the age of a person under eighteen years of age shall be produced and admitted in evidence in any proceeding before the Court, unless the Court otherwise directs."

25. Section 166 of the *Children Act* therefore allows the Court to make an inquiry into the age of the accused, victim or complainant and make determination on the issue. Once a Court seized of a matter has reached a conclusion on a person's age, such presumed age is deemed to be the person's age unless evidence is adduced to the contrary. In other words, section 166(2) of the *Children Act*, 2022 preserves a conclusion arrived at by a Court as to age of a person unless the contrary is proved.

26. In this case, the question of the appellant's age was brought up before the trial Magistrate on 1st July 2013 when the appellant stated that he was 18 years old. We wonder why the trial Court did not move to ascertain the appellant's apparent age immediately the appellant raised the issue. The Court waited until 16th April 2014 to make an order of age assessment when the appellant now indicated that he was 19 years old. Be that as it may, we are aware that without any documentary evidence to prove the appellant's age, the trial Court had only the appellant's physical appearance and, perhaps, reasoning and conduct during the trial as the basis of presuming that the appellant was above 18 years old. Additionally, from the proceedings, the appellant had ample time including during his defence to secure, adduce and produce evidence of his age to contradict the conclusion arrived at by the trial Court. This, he did not do. Instead, the trial Court only had the age assessment report which confirmed the trial Court's observation that the appellant was over 18 years of age. This Court, having observed the appellant almost a decade later, must approach this matter with caution and deference to the record which confirms that the appellant was an adult at the time he was charged. In the end, it is our conclusion that the conduct of the trial Court in this regard cannot be faulted, and its conclusion that the appellant was an adult, is hereby upheld.

27. The second issue for determination is whether the appellant was accorded a fair trial. The appellant in this appeal has raised two issues in this regard; first, that he was not issued with witness statements and second, albeit through submissions, that he was not informed of his right to legal representation. Article 50(2)(j) of the *Constitution* guarantees an accused's right to "be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence."

28. From the record, the appellant took plea for the first time on 6th March 2013 while the hearing commenced on 23rd July 2013. We also note that the trial Court during that period never made an order for the appellant to be issued with witness statements. We further note that the appellant, on 23rd July 2013 informed the Court that he was ready to proceed with the matter. Also, on the date the appellant first appeared in court he was warned of the severity of the sentence he would face were he to be found guilty. During hearing, he participated and actively cross-examined the prosecution witnesses. Additionally, in his defence, he informed the Court that he understood the nature of the charges brought against him. At no point during the trial did the appellant raise the issue of being in the dark with regard to the offence he was facing. In these circumstances, we are not convinced that the lack of an express order on the record that the appellant be supplied with witness statements occasioned a miscarriage of justice to warrant setting aside the trial proceedings. We, however, must reiterate the duty placed upon the prosecution to issue witness statements to an accused person as well as a trial Court's duty to breathe life into this right.

29. The other complaint by the appellant is that he was not informed of his right to legal representation. From the record, there is no indication that the appellant was informed of his right to legal representation. However, we do not find this failure to be so grave as to justify the quashing of the trial Court's decision. To this end, we associate with and adopt the reasoning of this Court in *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic* [2022] KECA 23 (KLR) that:

> "It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. The Constitution demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court, from the way the appellant cross examined the prosecution witnesses and from his general conduct during the trial, it is not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2)(g) and 50(2)(h) of the *Constitution*. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial."
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> In any event, this particular issue was only raised by the appellant in his submissions and not as a ground of appeal.

30. The next issue we address is whether the evidence on record established all the elements of the offence of defilement against the appellant. As is often stated, the elements of the offence defilement are proof of penetration, proof that the complainant is a child (that is a human being under the age of 18 years) and proof of the appellant's identity. The appellant's complaint in this regard concerned proof of penetration as well as inconsistencies in the evidence. Regarding inconsistencies, the appellant contends that the evidence of PW2 and PW3 was contradictory as to the complainant's style of walking when she left the house where she had been defiled. In our view, this contradiction was not material to the facts in issue. Even if the same related to proof of penetration, the evidence of PW4 cleared any doubt as he confirmed that the complainant was indeed defiled. In essence, the alleged contradictions did not pass the test set by this Court in *Sigei v Republic* [2023] KECA 154 (KLR) that:

> "In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case."

In the end, we find that the alleged contradictions were not fatal to the prosecution's case and were therefore of no consequence.

31. With regard to proof of penetration, we find no error in the manner in which the evidence of PW1 and PW4 was recorded. Though corroboration was not mandatory, the evidence of PW4 corroborated that of PW1 that indeed, there was penetration. We find no reason to depart from the concurrent findings of the two courts below that the appellant was penetrated. This ground of appeal therefore fails.

32. Although the appellant never raised any question about his identity, we find that he was well-known to PW1 as well as PW2 and PW3 who saw him emerge with PW1 from the scene of crime. The charge of defilement was therefore proved beyond reasonable doubt and the appellant's appeal against conviction must therefore fail.

33. The final issue we render ourselves on is whether the appellant has raised matters of law in respect to the sentence imposed on him. The appellant specifically took issue with the manner in which the sentence of life imprisonment was passed. We agree with him that the sentence was handed down in its mandatory nature hence his appeal raises issues of law. Even so, we cannot apportion any blame to the trial Court and the first appellate Court as their decisions were respectively rendered in 2014 and 2018. At the time, the jurisprudence had not changed to make the mandatory nature of the majority of the sentences in the *Sexual Offences Act* unconstitutional. However, currently, the jurisprudence is in favour of the courts exercising their discretion in sentencing, hence moving away from imposing mandatory minimum sentences, save for deserving cases. As already stated, it is on this basis that we enter the arena of sentencing.

34. In this case, the mitigating factors were that the appellant was a first offender. When called upon to mitigate, he denied committing the offence and stated that he was a student. On the other hand, the aggravating factors were the fact that a child lost her innocence at the behest of being cut with a panga. Notwithstanding the appellant's youthfulness, this is a case deserving of incarceration and removal of the offender from the society so that he can reflect on his criminal actions and hopefully reform. In the circumstances, a 30 years' imprisonment suffices.

35. Flowing from the aforementioned reasons, the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence partially succeeds. The sentence of life imprisonment is hereby set aside and substituted with a sentence of 30 years in prison. There being no evidence of the appellant ever having been out on bond during his trial, and in conformity with the proviso to section 333(2) of the *Criminal Procedure Code*, the sentence shall run from 6th March 2013 when the appellant was first presented before the magistrate's court for trial.

36. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR