Wanjala v Republic (Criminal Appeal 216 of 2019)
[2024] KECA 1119 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1119 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 216 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

ISAAC WANJALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, Written and Signed at Kapenguria, (Sitati, J.) dated and Delivered at Bungoma, (Riechi, J.) on 14th May, 2019inHCCRA No. 68 of 2018)

JUDGMENT

1. Isaac Wanjala, the appellant herein, was tried and convicted by the SRM's Court at Sirisia of the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. It was alleged that he had defiled MAN, a child aged six years.

2. Following the trial in which four witnesses testified for the prosecution, including the child and her mother, and the appellant gave a sworn statement and called no witness, the trial magistrate found the appellant guilty, convicted him of the offence and sentenced him to life imprisonment.

3. The appellant lodged an appeal in the High Court, and the High Court, (Sitati, J), having heard the appeal, found that the charge of defilement was proved against the appellant, and that his alibi defence was properly rejected. The learned Judge therefore dismissed the appeal and affirmed the sentence that was imposed on the appellant.

4. The appellant is now before us with a second appeal in which he has appealed against both conviction and sentence. The grounds raised include the High Court having misdirected itself in failing to find that the minor could have been injured by some other object; failing to note that there were crucial witnesses who were not called to testify; and also failing to consider the appellant's defence and

mitigating factors. In addition, the appellant contends that the mandatory sentence imposed against him is null and void, and that the life sentence contravenes Article 50(2) of *the Constitution*.

5. The appellant has also filed written submissions in which he argued that the prosecution failed to adduce scientific evidence that could prove the case against him; and that the trial court erred in convicting him on the evidence of the child, without looking for corroboration. He submitted that the age of the child was not established as the document tendered was a dedication card which was not produced by the marker, and that the doctor who testified did not identify himself using his registration pin, nor were the appellant and the complainant escorted for medical examination as required by law.

6. Further, the appellant submitted that the Judge did not address the issue of breaking or missing hymen. He argued that the mere fact that the hymen was missing or broken, did not confirm that sexual intercourse had taken place, as the same could be the result of other factors including vigorous physical activities. He argued that the evidence of identification was not sufficient to implicate him with the offence. He maintained that the charge against him was malicious and false and that the sentence imposed upon him was harsh and excessive, and that the imposition of the mandatory minimum sentence denied him the right to a fair trial under Article 50 of *the Constitution*. He urged the Court to set aside the indefinite life imprisonment sentence that was imposed upon him, and instead substitute it with a term sentence that would give him the opportunity to reform and socially readapt after his prison term.

7. The respondent did not file any written submissions but during the plenary hearing, Mr. Oyiembo from the Office of the Director of Public Prosecution (ODPP) represented the respondent and made oral submissions. He opposed the appeal urging that the appellant was properly convicted as the ingredients of defilement were established; that the child was six years old as confirmed from the dedication card and the assessment done by the doctor. He submitted that the sentence was proper as the offence was serious and the appellant deserved a deterrent sentence.

8. We have carefully considered the record of appeal, the submissions and the law. This being a second appeal, the jurisdiction of this Court is limited under Section 361(1) of the Criminal Procedure Code to matters of law only. As stated in Kariongo v R [1982] KLR 213 at page 219:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The text to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja v R. [1956] 17EACA 146)"

9. The appellant was tried and convicted of the offence of defilement of a six-year-old child. The issue for determination before us is whether the appellant was properly convicted of this offence. Penetration is a critical ingredient of the offence of defilement. The two lower courts made concurrent findings that there was penetration of the child's sexual organs. This was because the clinical officer who examined her noted bruises on the external part of the labia majora, and also noted that the cervix was swollen and the hymen was not intact. In addition, there was a foul-smelling discharge from the vagina.

10. The appellant maintained that the evidence that was adduced did not necessarily implicate him with the offence, however the trial magistrate who assessed the demeanor of the child was of the view that she was speaking the truth that she was defiled by the appellant. The trial court was satisfied that the child knew the appellant and identified him by recognition as a neighbor who had visited their home before and this was corroborated by the child's mother. The trial court was satisfied that the child was speaking the truth.

11. Under the proviso to Section 124 of the *Evidence Act*, a trial court can convict for a sexual offence under the *Sexual Offences Act* on the evidence of a complainant alone without corroboration. In William Sowa Mbwanga v Republic [2016] eKLR, the Court of Appeal stated as follows:

> "The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in George Kioji v Republic, CR. APP. NO. 270 of 2012 (Nyeri):
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> "Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

12. The learned Judge of the 1st appellate court agreed with the findings of the trial court and found that the appellant was properly recognized by the child as the assailant, and that the child gave his name to her mother. The child also gave a descriptive explanation of exactly how the appellant inserted his "urinating thing into her urinating thing."

13. On our part we are satisfied that there was sufficient evidence confirming penetration and implicating the appellant as the perpetrator of the offence. The evidence was not simply anchored on the absence of the hymen as the appellant would want us to believe. In the circumstances, the appellant's purported alibi defence could not stand.

14. As regards proof of the child's age, as was stated by this Court in *Richard Wahome Chege v Republic, Criminal Appeal No. 61 of 2014* (UR), age is not necessarily proved by production of a birth certificate, the evidence of the mother of a child may be sufficient. In this case apart from the child herself giving her age as six years, the doctor who examined her using her dental formula assessed her age as six years. In addition, a copy of the dedication certificate was also produced to confirm the child's age. In the circumstances, we are satisfied that there was sufficient evidence that the child was six years old. Thus, all the ingredients of the offence were established and the appellant was properly convicted of the offence of defilement.

15. As regards the sentence, Section 8(2) of the *Sexual Offences Act* which is the penal section under which the appellant was charged provides for a mandatory sentence of imprisonment for life, where the child violated is aged eleven years or less. The trial Judge having considered the appellant's mitigation noted that the sentence provided was a mandatory sentence, and thereby sentenced the appellant to life imprisonment. The learned Judge of the first appellate court dismissed the appeal against both conviction and sentence.

16. The appellant has argued before us that the mandatory sentence imposed upon him was severe and excessive, and that it violated his constitutional rights. We note however, that in his appeal before the High Court, much as the appellant stated that his appeal was against conviction and sentence, the appellant did not raise any grounds against the sentence. The constitutionality of the indeterminate sentence of life imprisonment under Articles 28 and 29(f) of *the Constitution*, which is different from challenging the constitutionality of minimum sentences under the *Sexual Offences Act*, for fettering

the discretion of the sentencing court, was not, therefore, raised or preserved as an issue that could be argued before us. In accordance with the Supreme Court decision in Gichuki Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curio) [2024] 34KLR, the issue of the constitutionality of the indeterminate sentence is not open to us for consideration at this stage.

17. Finally, under Section 361(1) (a) of the Criminal Procedure Code, severity of sentence is a matter of fact which is not open for our consideration as our jurisdiction is restricted to matters of law only. We come to the conclusion that this appeal has no merit; it is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR