Juma v Republic (Criminal Appeal E021 of 2023)
[2024] KECA 1206 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1206 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E021 OF 2023

KI LAIBUTA, GWN MACHARIA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

ALI SAID JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Malindi (Nyakundi, J.) dated 20th July 2022 in Criminal Appeal No. E030 of 2020)

JUDGMENT

1. Ali Said Juma, the appellant, is before this Court on a second appeal, the first appeal having been dismissed in its entirety by the High Court sitting at Malindi (Nyakundi, J.) in a judgement dated and delivered on 20th July 2022. The appellant's appeal before the High Court was against his conviction and sentence meted to him before the trial court (Hon. S. K. Ngii, SRM), for the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.

2. The particulars of the main charge were that, on 22nd January 2018, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of P.S.N., a child aged 13 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* in that he indecently touched the vagina of PSN, a child aged 13 years with his penis.

3. After considering the evidence on record, Hon. S. K. Ngii, SRM found the appellant guilty of the offence of defilement. He convicted and sentenced him to the mandatory minimum sentence of 20 years as provided for under section 8 (3) of the *Sexual Offences Act*. He acquitted him of the alternative count of indecent act.

4. Aggrieved, the appellant filed an appeal in the High Court premised on five grounds of appeal. The learned Judge opined that the singular issue for determination was whether the prosecution proved its

case against the appellant to the required standard, beyond reasonable doubt. The learned Judge, upon examining the evidence adduced before the trial court, arrived at a finding that all the three elements of the offence of defilement, to wit, identification of the perpetrator, penetration and the age of the victim were established beyond reasonable doubt. In particular, he noted that the appellant did not dislodge the prosecution's case that he had sexual intercourse with PSN. On those grounds, the appellant's appeal before the High Court was dismissed and the conviction of the trial court upheld.

5. Further aggrieved by the decision of the High Court, the appellant is now before this Court on a second and, perhaps, the last appeal. He appeals against both the conviction and sentence hinged on 5 grounds of appeal in an undated home-made document christened 'Supplementary Grounds of Appeal' which we reproduce as follows:

   i. That the first appellate court Judge erred in law and in fact by failing to find that the matters on which the prosecution witnesses stated against the appellant when they testified in court are not matters they had recorded in a statement to the police.

   ii. That the 1st appellate court Judge erred in law and fact by failing to find that the appellant had not been informed in advance of the kind of evidence the prosecution witnesses were going to adduce against him thus denying him of the right to a fair trial.

   iii. That the 1st appellate court Judge erred in law and fact by failing to find that the victim's evidence was not so consistent after all because of the fundamental disparities in the evidence of the victim and the doctor regarding a material fact in the case cast a reasonable doubt on the veracity of her evidence.

   iv. That the 1st appellate court Judge erred in law and fact by failing to find that the mandatory minimum 20-year sentence was manifestly harsh and excessive in the circumstances of this case due to the mystery of growing up, which is a process and not a series of disjointed leaps.

   v. That the 1st appellate court Judge erred in law and fact by failing to put into consideration the time spent in remand custody prior to conviction and sentence as provided for in section 332 (2) of the Criminal Procedure Code.

   1. We will briefly rehash the evidence as it emerged in the trial court.

7. PSN, the victim, testified that she was 13 years old, a standard seven student at [Partgiculars Withheld] Primary School. She stated that, on 22nd January 2018, she went to the appellant's home who in turn asked her to remove her clothes and had sexual intercourse with her. After the incident, she went back home and informed her siblings who, thereafter, told their mother. The appellant was then summoned by the victim's parents and later on the victim was taken to the police station from where she was escorted to Mariakani sub-District Hospital for treatment.

8. PW2, KKN, the victim's mother, recounted how her other children told her that their sister told them that she had just had sexual intercourse with the appellant. She then summoned the appellant who admitted that he defiled the victim but asked for forgiveness. She and her son escorted the appellant to the police station.

9. PW1 was examined and treated at Mariakani sub-District Hospital on 29th January 2018 by PW4, Brrington Charop, a Clinical Officer. His observation was that vaginal hymen was missing and PW1 had a tear on the lower part of her vagina. She also had blood-stained discharge from her genitalia, all these being consistent with defilement. He filled the P3 Form, which he adduced in evidence together with the treatment notes. He also identified PW1's Birth Certificate which indicated that she was born on 9th July 2006.

10. PW3, PC Sofia of Mariakani Police Station took over the investigation of the case from her colleague, one Jedida, who had since been transferred to another police station. She basically summed up the evidence of other prosecution witnesses, and, in addition, adduced PW1's Birth Certificate in evidence. It was her further evidence that the appellant was culpable as medical examination of PW1 showed that she had been defiled.

11. At the close of the prosecution case, the trial court ruled that the prosecution had established a prima facie case to warrant the appellant being put on his defence. The appellant opted to give an unsworn defence and did not call any other witness. His brief defence was that he dropped out of school at the age of 14 years after his parents died. He stated that, on 27th (this date is not complete in the typed proceedings but we presume that it was meant to be 27th January 2018) at about 7.00 p.m., three people arrested him without indicating the reasons for the arrest; and that he was taken to the police station where he was charged with the offence of defilement, which he denied.

12. We heard this appeal on 12th June 2024. The appellant was in person and appeared before us virtually from the Shimo La Tewa prison. Learned counsel Ms. Nyawinda appeared on behalf of the respondent.

13. In his undated submissions, the appellant underscored the constitutional requirement that an accused person is to be informed of the evidence that the prosecution intends to rely on, and to have reasonable access to that evidence as provided for under Article 50(2) (j) of *the Constitution*. The appellant submitted that the role and duty of the trial court as specified under Articles 50(1) and 25(c) of *the Constitution* is to be independent and facilitate a fair trial respectively.

14. He contended that he was not informed in advance of the evidence the prosecution intended to rely on, and did not have reasonable access to that evidence; and that he was not supplied with witness statements of PW1, PW2, PW3 and PW4. In this regard, he relied on the High Court's decision in Kazungu Kitsao Yaa vs. Republic App No. 106 2017 where the court was of the view that failure to furnish the appellant with the evidence of the complainant prior to the hearing was prejudicial to the appellant. It suffices to note that the appellant neither provided a copy of this decision nor were we able to find it on the online Kenya Law Platform as reported.

15. The appellant further submitted that the prosecution adduced conflicting evidence on when defilement took place. According to him, the charge sheet indicated that the incident occurred on 22nd January 2018, but that the Clinical Officer, PW3, stated that the victim was defiled on 26th January 2018. He contended that, had the courts below taken time to scrutinise the evidence, they would have noticed the inconsistency, and thus cast doubt on the veracity of the evidence. He further took issue with the reliability of the evidence of PW2, the mother to PW1 who worked as a cleaner at Mariakani sub County Hospital where PW1 was examined. To him, PW2 could not be considered as an independent witness.

16. On sentence, the appellant submitted that the imposition of the minimum mandatory 20 years' imprisonment was harsh and excessive in the circumstances. He submitted that the victim was 13 years old while his age was assessed to be 18 years. Hence, the victim and himself had reached an age of maturity to be able to make intelligent and informed decisions on what they wanted to do. Urging us to substitute the sentence with a more lenient one, he relied on this Court's cases of Sospeter Mwamachi *Mwanjahi vs. Rep KCA No. 77 of 2022* and *Manyeso vs. Republic (Criminal Appeal 12 of 2021*) (2023) KECA 827 (KLR) (7 July 2023) (Judgment) where the Court opined that minimum mandatory sentences take away the discretion of the trial court in sentencing. We again observe that the former decision has not been supplied to us and neither has it been reported at the online Kenya Law platform. We cannot therefore confirm whether the holding in that decision is as the appellant would

want us to believe. The only decision reported with parties litigating under the same names, is the decision rendered in the High Court by Majanja, J. and is reported as Sospeter Mwamachi Mwanjahi vs. Republic (2018) eKLR.

17. The appellant also urged us in considering the sentence imposed, to take into account the time already served in custody since he was arraigned in court as provided by section 333(2) of the Criminal Procedure Code; and that we allow the appeal.

18. The respondent relied on submissions dated 6th June 2024, and condensed the issues for determination into two, namely whether the case was proved beyond reasonable doubt; and the propriety of the sentence imposed.

19. On proof of the case, it was the respondent's submission that all the three ingredients necessary for proof of the offence of defilement, namely the age of the victim, penetration and proper identification of the perpetrator, were met. As to the age of the victim, it was submitted that, apart from PW1 and PW2 testifying that PW1 was 13 years old as at the time of defilement, the Birth Certificate adduced in evidence by PW3 confirmed that PW1 was born on 9th July 2006, thus placed her age at 13 years.

20. On penetration, it was submitted that, on 22nd January 2018, the victim went to the appellant's house where they had sexual intercourse. Although the appellant in defence denied committing the offence, the medical records attested that the hymen was missing, presence a tear on the lower part of the vagina and bloody discharge from the genitalia, all of which were consistent with penetration.

21. On the identification, it was submitted that both the victim and PW2 confirmed that the appellant was their neighbour, a person well known to them, and this was not disputed by the appellant. Indeed, they all lived on the same plot.

22. On sentence, it was submitted that, although the trial court imposed the mandatory minimum sentence of 20 years imprisonment as prescribed under section 8(3) of the *Sexual Offences Act*, the first appellate court failed to address its mind on the excessiveness of the sentence. We were invited to be guided by this Court's decision in the case of Dismas Wafula Kilwake vs. Republic (2019) eKLR and accordingly exercise our discretion and reduce the sentence, more so considering that the appellant is an orphan and was only aged 18 years as at the time of the incident. We were nonetheless urged to uphold the conviction.

23. This being a second appeal, we are to confine ourselves to matters of law only by dint of section 361(1) of the Criminal Procedure Code. On very rare occasions do we find ourselves considering matters of fact. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held thus:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R, [1984] KLR 611."

24. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law. The appellant is challenging both his conviction and sentence. We have arrived at a conclusion that only two issues arise for determination, namely whether the prosecution proved its case beyond reasonable doubt; and the propriety of the sentence meted.

25. Before we delve into determining the two issues, it is paramount that we address our minds to a legal issue which the appellant raised. He submitted that he was not furnished with prosecution witness

statements prior to the hearing, thus denying him a chance to know in advance the evidence which the prosecution intended to rely on.

26. Under Article 5 (2) (j) of *the Constitution*, an accused person should be informed of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. On the other hand, Article 25 underscores the fundamental rights and freedoms that cannot be derogated from, one of which, under sub-article (c), is the right to a fair trial. To this extent, the prosecution should furnish the accused person in advance with all the witness statements and exhibits which it intends to rely on in their evidence so as to accord an accused person sufficient time to mount a defence. Courts must therefore be steadfast and remain the guardian against any infringement against the right to a fair trial, a right which must not be violated.

27. With great due respect, it is notable that the issue of the appellant not being supplied with the evidence which the prosecution intended to rely on, was never one of the grounds of appeal raised by the appellant, nor was it canvassed in the first appellate court. The predecessor of this Court in Visram & Karsan vs. Bhatt (1965) EA 789, held that where an issue which has not been pleaded or canvassed is raised for the first time on appeal, it should not be allowed to be argued unless the evidence establishes beyond doubt that the facts, if fully investigated, would have supported the plea of the party seeking to raise the new issue. The same principle applies when an issue is being raised for the first time in a second appeal. Be that as it may, we will examine the merit of the appellant's complaint, more so on account that it touches on a violation of his constitutional right.

28. This Court in Thomas Patrick Gilbert Cholmondeley vs. Republic (2008) eKLR, a decision rendered prior to the promulgation of the 2010 Constitution, stated categorically that:

> "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under Section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

29. The Supreme Court explained an accused person's minimal obligations to ask for the witness statements in Hussein Khalid & 16 Others vs. Attorney General & 2 Others (2019) eKLR in the following words:

> "...Indeed, it is salutary practice for the trial Court to satisfy itself that an accused person has all the reasonable facilities for his defence and the prosecution discloses all documents before commencement of trial. However, an accused person has an obligation to bring it to the attention of the Court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. This minimum obligation on the accused person triggers the court's duty to ensure the documents are supplied before commencement of the trial."

30. We have thoroughly considered the trial court proceedings. As it can be gleaned therefrom, on 12th February 2018, the trial court directed that the appellant be supplied with copies of the witnesses' statements, charge sheet and documents to be relied on. On 12th March 2018, the appellant stated that he had not been supplied with statements and the trial magistrate directed that he be supplied with copies of witnesses' statements and charge sheet.

31. The prosecution case proceeded partly on 9th August 2018 and the appellant stated that he was ready to proceed. However, and for good measure, the victim was stood down to allow her to get composure.

The next time the appellant asked for witness statements was on 4th October 2018 for reasons that his earlier copies of witnesses' statements got damaged. The trial court ordered that he be supplied with the witnesses' statements. The prosecution case proceeded on 6th November 2018 and up until its closure, the appellant did not raise the issue of the witnesses' statements. In fact, the appellant cross examined all the witnesses. Thus, by proceeding with the prosecution's case to its finality and even giving his defence, the appellant implicitly confirmed to the trial court that he had all the witnesses' statements. Therefore, the issue of not being supplied with witnesses' statements cannot be substantiated, and we find no merit in the appellant's complaint.

32. Turning to the main issues for determination, and as regards proof of the case, the common ground is that the appellant was convicted of the offence of defilement contrary to section 8(2) of the *Sexual Offences Act*. It is now well settled that, to convince the trial court that an offence of defilement has been committed, the prosecution bears the burden to prove the age of the victim, penetration and the identity of the perpetrator.

33. On the issue of age, the incontrovertible evidence is that the victim was 13 years of age at the time of commission of the offence. The Birth Certificate, adduced as an exhibit, was produced to confirm this fact. Likewise, the issue of penetration is not questionable. The medical evidence of PW4 confirmed that there was penetration in that P1's hymen was missing; and that there was a tear on the lower part of the vagina and the genitalia oozed blood-stained discharge.

34. In as much as the appellant submitted that there was no corroboration to the evidence of PW1 as PW2 could not be trusted as a credible witness, by dint of the proviso to section 124 of the *Evidence Act*, the victim's evidence is to be admitted if the court is satisfied that the victim is speaking the truth. In other words, there need not be corroboration of the victim's evidence if the court is of the view that the victim was speaking the truth. In this instance, the compelling evidence which confirmed the victim's testimony that she was defiled, and thus, there was penetration, is the medical records. The trial and first appellate courts found the victim's narrative compelling. We too have no doubt in the evidence of both PW1 and PW4.

35. On the element of the identity of the perpetrator, the identification of the appellant was forthright in equal measure. The appellant was well known to PW1 as both lived in the same plot. The appellant took advantage of the acquaintance between the two, lured her into his house where he defiled her. To silence her not to speak out, he gave her Kshs. 60. But as fate would have it, PW1 told her siblings who in turn disclosed the ordeal to their mother, PW2. The issue of mistaken identity cannot arise in the circumstances. Indeed, this was a case of recognition and not of identification of a stranger.

36. On the issue of recognition, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR had this to say:

> "…. This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

37. This Court in Peter Musau Mwanza vs. Republic [2008] eKLR expressed itself as follows:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time,

is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

38. The appellant was PW1's neighbour, a person well known to her and to her siblings and their mother. Accordingly, we concur with the decisions of the trial and the first appellate courts that the prosecution proved beyond reasonable doubt that the appellant was culpable. We have no reason to upset the concurrent findings of the two courts below that the three elements of defilement had been proved beyond reasonable doubt.

39. On the issue of contradicting evidence, the appellant's argument is that there were contradicting dates on when the offence took place. It was submitted that the victim testified that it took place on 22nd January 2018 whereas PW4 testified that it took place on 26th January 2018. It is true that, on cross examination, PW4 stated that the victim told him that she was defiled on 26th January 2018. However, the difference on the dates does not negate the fact that the victim was defiled, notwithstanding which date the incident took place. In our view, the discrepancy in the dates given is technical and curable under section 182 of the Criminal Procedure Code.

40. On the sentence imposed, the victim was 13 years old. Under section 8 (2) of the *Sexual Offences Act*, a person who defiles a child between 12 and 15 years is liable to imprisonment for a term of not less than 20 years. In as much as the respondent urged us to exercise our discretion and mete out a more lenient sentence, having regard that the appellant is a young man, our view is that the sentence imposed is legal and we find no reason to upset it.

41. Be that as it may, under section 333 (2) of the Criminal Procedure Code, the period that the accused has been in custody should be taken into account whilst computing his sentence. He was arrested on 29th January 2018 and was never released on bail or bond. As such, the sentence should start running from 29th January 2018.

42. In the upshot, the appellant's appeal against conviction fails, but minimally succeeds as against the sentence to the extent that his sentence shall start running from the date of arrest, which is 29th January 2018. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this a true copy of the original.

Signed

DEPUTY REGISTRAR