**JAN v Republic (Criminal Appeal 29 of 2019)**
**[2024] KECA 1653 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1653 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 29 OF 2019**

**HM OKWENGU, HA OMONDI & JM NGUGI, JJA**

**NOVEMBER 15, 2024**

**BETWEEN**

**JAN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the Judgment of the High Court of Kenya at Kisii (J.R. Karanja, J.) dated 28th February 2017 in HCCRA No. 20 of 2015)***

## JUDGMENT

1. JAN, the appellant herein, was charged at Ogembo magistrate's court for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*; and in the alternative the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 22nd June 2011 at Nyamache District within the County of Kisii, the appellant defiled MM[1] aged 8 years old. In the alternative, the appellant allegedly committed an indecent act with the said complainant by touching her vagina with his hands. He denied the charges, and the prosecution called a total of seven (7) witnesses in the ensuing trial. The appellant was placed on his defence which he conducted by giving sworn testimony and did not call any witnesses.

2. At the conclusion of the hearing, in a judgment delivered on 19th February, 2015, the trial court acquitted the appellant on the alternative charge but held that the main charge had been proved beyond reasonable doubt and convicted the appellant. The trial court, then, sentenced the appellant to life imprisonment.

3. The appellant was aggrieved by the conviction and sentence by the trial court, and appealed to the High Court. In a judgment delivered on 28th February 2017, the High Court (J.R. Karanja, J.) dismissed the appeal against conviction and upheld the sentence. Aggrieved by the judgment of High Court, the appellant proffered this second appeal.

FOOTER

[1] Initials used to protect the minor's identity

4. This being a second appeal, this Court is mindful of its duty as a 2nd appellate court, that a 2nd appeal must only be confined to points of law, and this Court will not interfere with concurrent findings of 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] eKLR.

5. We revisit briefly the evidence as set out before the trial court, and which evidence was subjected to a fresh analysis and re- evaluation by the High Court so as to set matters in perspective. MM[2], who testified as PW1, was a primary school pupil living with her parents, JON, PW2 and TB, PW3. She knew the appellant who was her uncle. On the material date the complainant was standing by the roadside when she was spotted and called by the appellant, her uncle, who was also their neighbour. The appellant took her to his house where she was given ugali and milk; thereafter, the appellant led her to lie on a bed, removed her clothing including underwear and defiled her.

FOOTER

[2] Initials used to protect her identity

She bled and felt pain after the episode. The appellant then told her to leave lest his wife finds her. The complainant then went home and reported the incident to her aunt, GG, PW6, who examined her and noted bleeding from her private parts.

6. PW2, the complainant's father, who was not at home at the time of the incident, later arrived at his home, only to find that the complainant had been taken to hospital. He gave her age as 8 years, saying she was born on 28th April 2004, as per the birth certificate which she had. He also confirmed that the appellant was his brother with whom he had never had any differences before the incident.

7. PW3, the complainant's mother, testified that on returning home she found the complainant with PW6 who briefed her on what had transpired. PW3 also noted that the complainant was bleeding from her private parts. She reported the matter to the area chief and was referred to hospital.

8. Wycliff Atambo, PW4, a clinical officer at Gucha Level 4 hospital, tendered the medical report and P3 form on behalf of his colleague Benjamin Okioma. The report confirmed that the complainant had been defiled and had bruises on the vaginal wall; and the said injuries were caused by insertion of penis.

9. PW5, investigated the matter, recorded the necessary statements and preferred the charges against the appellant who was arrested on 12th July 2011, by PW7. PW5 confirmed and corrected that the date of reporting of the offence was in error and should have read 24th June 2011; that the complainant had already been treated on 22nd June 2011, and the P3 filled before reporting to the police hence the discrepancies in dates.

10. The appellant described himself as a clan elder, an educator on HIV/Aids who was HIV positive and charged with the role of creating awareness; as such he could not defile the complainant and, and he denied the offence. He lamented that he was arrested for no reason; saying on the material date that he was away dispensing nets at Nyachenge dispensary from 21st June 2011 to 24th June 2011; he attributed his plight to the animosity his brothers and sisters had against him as he publicly disapproved of their cattle rustling tendencies; and he also had differences with MM's mother.

11. 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 by the prosecution. PW1 gave a clear

testimony describing in graphic detail what the appellant did to her which amounted to penetration. The fact of penetration was corroborated by PW6, PW3 who saw the complainant bleeding from her genitalia and the medical testimony of PW4, as evidenced by the P3 form and medical report. On the issue of whether or not penetration took place, the court found that penetration took place placing reliance on the testimony of the Clinical Officer PW4.

12. With regard to the identity of the perpetrator, the trial court was satisfied that the identification was proper as the incident took place during the day. The appellant was well known to the complainant as her uncle and the complainant had no reason to lie.

13. With regard to the complainant's age, the trial court noted that the complainant's father testified and produced a birth certificate showing complainant's date of birth as 28th April 2018 making her 8 years at the time of the incident.

14. On the appellant's defence that he did not know the complainant, the trial court noted that the appellant was not a stranger to PW1, being an uncle as was confirmed by the other family members who testified as PW2, PW3 and PW6.

15. The appellant's defence which was that there was animosity between the appellant and his siblings, was considered and rejected as not holding any water.

16. On appeal, the High Court ((J.R. Karanja, J) in dismissing the appeal, found that the ingredients of the offence had been proved by the evidence of the complainant PW1, her mother PW3, the Clinical Officer PW4 and her aunt PW6. The learned Judge summed it up as follows:

> " This Court totally agrees... that there was credible evidence from the complainant (PW1) placing the appellant at the scene of the crime at the time that it occurred in broad daylight. Further, the appellant was well known to the complainant. He was her uncle and there was no plausible reason as to why she should have implicated him if at all he did not commit the offence. Not even his allegation that he was HIV positive and an educator on HIV/ Aids could have saved him from the credible and cogent evidence against him by the child complainant. The trial court saw and heard the complainant and believed her. This Court did not have that advantage for it to interfere with the findings of the trial court based on the credibility of the witnesses among other factors... Ultimately, this Court must also hold as did the trial court, that the appellant was the person responsible for defiling the complainant, his own niece. His grounds of appeal and the supporting written submissions are therefore without merit and/or substance. The evidence against him was credible and devoid of hearsay. He was not denied his right to legal representation and was generally accorded a fair trial leading to his conviction and sentence."

17. That outcome forms the basis for the present appeal, where the appellant raised the fifteen grounds of appeal:

> that the charge sheet had no 0B number as required by the law; the prosecution witnesses adduced contradictory evidence in court; section 43(1)(2) and (3) of the *Sexual Offences Act* 2006 was ignored; the trial magistrate and the first appellate court judge relied on prosecution case which was not proved beyond any reasonable doubt; the prosecution witnesses' evidence was incredible and untrustworthy; the complainant's age was not proved in age assessment; the complainant's clothes had been washed and not taken to court as exhibits; the P3 for had contradictions that was not explained nor clarified; the P3 form was signed on 21st June 2011 while the case was reported on 24th June 2011, the victim was sent

hospital on 22nd June 2011, the treatment note was not produced as exhibit in court; the appellant's name on the charge sheet was different... as in the national identity card; the trial magistrate and the first appellate judge erred in law by relying on documents produced by the prosecution which were not stamped; this was a framed-up case from family differences; the prosecution was not watertight; the two courts below erred in law by rejecting his alibi defence which was coherent and truthful.

18. The appellant thus prays that this appeal be allowed on its entirety, conviction quashed, sentence set aside and he be set at liberty or be given a determinate sentence that does not defeat the penal objectives of individual transformation and reintegration back to the society.

19. Arguing his appeal through the written submissions, the appellant contends that the charge sheet was defective as it had no Occurrence Book (OB) number indicated on it as required by law; and therefore did not qualify to be in evidence. It is not clear to us what prejudice was occasioned to the appellant by the omission he refers to, and the least we can say is that this argument is a non starter which dies on arrival.

20. The appellant also took issue with the complainant's age arguing that there were contradictions, as the charge sheet indicated the minor to be 8 years old, yet in court she claimed to be 7 years old; and later said on page 6 line 22 she stated "I am 9 years old now". The appellant poses the question as 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.

21. The response to this is that the survivor's age was established by her own testimony as well as her father who testified and produced her birth certificate showing her date of birth as 28th April 2004; that at the time of the incident, she was therefore 8 years 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.

22. On this limb, we acknowledge that this Court, differently constituted, in the case of Mwalango Chichoro Mwanjembe vs. Republic (2016) 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa vs. R, Cr. Appeal No.19 of 2014 and Omar Uche vs. R, Cr.App. No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni vs. Uganda, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

23. On our part we acknowledge that the record shows that the trial court after having considered the evidence in its totality concluded that on the date of the incident, the complainant was only aged seven (7) years, pointing out that her age was duly proved by the production of her birth certificate which indicated that she was born on 28th April 2004, thus confirming she was 7 years at the time of the incident and 8 years at the time she gave evidence in court. The minor's parents, PW2 and PW3, told the trial court at the time of testifying on 21st November 2012 that the child was 8 years old, indeed referring to the time of testifying in the present tense, as demonstrated by her mother's testimony:

"MM is my daughter. She is 8 years old", and fortified this with the birth certificate which showed the date of birth as 28th April 2004. We confirm the record shows that on 30th April 2012 when the hearing begun, the trial magistrate indicated that she had interviewed the minor who had informed her that she was 7 years old, but when she took the stand, she told the trial court that: "I am 9 years old now."

24. Certainly, under the *Sexual Offences Act*, age of the survivor plays a critical component as it determines the nature of custodial sentence that a court will mete out. From the evidence by the parents, as well as the birth certificate we hold the view the correct age of the complainant was 7 years at the time of the offence. Even though she said she was 9 years, in terms of Section 8(2) of the *Sexual Offences Act*, a defilement committed against a child aged eleven years or less attracts life imprisonment upon conviction. Therefore, whether the complainant's age was given as 7 years, 8 years or 9 years, that contradiction is not fatal as it does not negate the material particulars of the offence; and certainly, does not affect the sentence which remains life imprisonment. We find no error on application of the law or legal principles by the learned judge; and this limb therefore has no leg on which to stand, and fails.

25. The appellant submits that the evidence did not prove penetration, and the injuries that were detected both by the minor's relatives as well as the medical officer were remnants of the circumcision process PW1 had undergone, borne by her own testimony that she had been recently circumcised, and had not fully healed from the mutilation. In opposing the appeal on this limb, the respondent submits that the ingredients of the offence have been proved, drawing from this Court's decision in John Mutua Munywoki vs. Republic (2017) eKLR which held that for the offence of defilement to be proved to have been committed the prosecution must prove each of the following ingredients:

    i. The victim must be a minor and

    ii. There must be penetration of the genital organ,

    iii. By the accused and such penetration need not be complete or absolute, partial penetration will suffice.

26. The respondent points out that the survivor's description of what she had undergone was corroborated by the evidence of PW3 and PW6 who gave a description of her physical state soon after the encounter; as well as the medical clinical findings presented by PW4 who confirmed that the victim had been penetrated.

27. As regards the identity of the perpetrator, the respondent submits that the victim in the instant appeal knew the appellant as her uncle whom she knew by name; the offence was committed during the day and the minor had no difficulty recognizing the appellant. It is also pointed out that they stayed together for a reasonable period and the possibility of a mistaken identity would not occur. Immediately after the incident PW2 was called by his sister GG and informed that his brother JAN (appellant) had defiled the daughter- a further confirmation that the victim properly knew who violated her.

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

> " This Court totally agrees for reason that there was credible evidence from the complainant (PW1) placing the appellant at the scene of the crime at the time that it occurred in broad daylight. Further, the appellant was well known to the complainant. He was her uncle and there was no plausible reason as to why she should have implicated him if at all he did not commit the offence...

> The trial court saw and heard the complainant and believed her. This Court did not have that advantage for it to interfere with the findings of the trial court based on the credibility of the witnesses among other factors. Indeed, a first appellate court cannot interfere with those findings of the lower court which are based on the credibility of witnesses unless no reasonable tribunal could make such findings or where it is shown that there existed error of law (see, Republic vs. Oyier)"

29. 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; From the record, this Court finds no fault with the findings of the learned judge, all the elements of the ingredients of the offence of defilement were proved by the prosecution beyond reasonable doubt.

30. The appellant was sentenced to life imprisonment; he is seeking reduction of that sentence lamenting its severity, and unconstitutionality as it denies courts discretions. In support of this argument, he refers to the case of *Evans Wanjala Wanyonyi vs. Republic, Eldoret Criminal Appeal No 312 of 2018*; and Paul Ngei vs. Republic, Kisumu Criminal Appeal No. 332 of 2015. He also argues that section 39(2) of the *Sexual Offences Act* grants the court judicial discretion to conditionally release an offender after serving part of the sentence.

31. It is apparent the appellant draws his arguments from the past wave of jurisprudence which had swept through the pages of several appeals inspired by what courts perceived to be the Supreme Courts liberal approach decision regarding the constitutionality of the mandatory minimum sentence in the murder charge involving Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR, and which was applied mutatis mutandis in setting aside mandatory minimum sentences in other offences; Two aspects must be addressed one is with regard to the severity of sentence - Section 361 of the Criminal Procedure Code (CPC) is unequivocal that a second appeal to this Court on severity of sentence is a matter of fact and is not to be entertained by the Court. The circumstances under which we can interfere with sentence and the applicable principles were set out by the court in Bernard Kimani Gacheru vs. Republic [2002] eKLR as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

Consequently, this Court can only interfere with sentence if it is demonstrated that there has been a material misdirection with regard to the sentence.

32. In the present case, the circumstances as confirmed by the concurrent findings of the two lower courts established that the survivor was under 11 years of age; the medical evidence revealed that he not only penetrated the sexual organ of the complainant but also caused her injuries; and the matter was aggravated by the fact that the appellant was actually aware that he was HIV positive. We have no hesitation in holding that under these circumstances, the appellant deserved a severe and deterrent sentence and there was no misdirection by the High Court in confirming the sentence as appropriate.

33. The second issue relates to the unconstitutionality of the minimum mandatory sentences in sexual offences. This has been duly settled by the Supreme Court in Republic vs. Joseph Gichuki Mwangi (Petition No. E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), the Supreme Court has held that the mandatory minimum sentences in the Sexual Offences Act, are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory sentences in sexual offences.

34. The apex Court held:

> 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence...
>
> 57. In the Muruatetu case, this Court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."
>
> We defer to the doctrine of stare decisis, therefore the decision by the Supreme Court is binding on us and overrules any decisions of this Court holding otherwise.

35. In the present case, the appellant was convicted under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is life imprisonment; and we must consequently find that the sentence was legal and not unconstitutional. We are conscious the emerging jurisprudence regarding the indeterminate nature of life imprisonment. In Evans Nyamari Ayako vs. Republic Kisumu (Court of Appeal) Criminal Appeal No. 22 of 2018, we considered the issue of life imprisonment and concluded that the indeterminate nature of life imprisonment falls afoul of the provisions of Article 27 and 28 of the *Constitution*. However in the present instance we take note that the appellant did not raise the argument at the High Court in the first instance. As per Gichuki Case (supra), the Court has not jurisdiction to address any constitutional issues not first raised at the High Court, The Supreme Court summed it up as follows:

> (64) The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against the *Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional."

Consequently, the appeal fails and is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 2024.**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL

**JOEL NGUGI**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**