**Langat v Republic (Criminal Appeal 4 of 2019)**
**[2024] KECA 1851 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1851 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 4 OF 2019**

**MA WARSAME, JM MATIVO & WK KORIR, JJA**

**DECEMBER 20, 2024**

**BETWEEN**

**ROBERT KIPKOECH LANGAT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nakuru (L.N. Mutende, J.) dated 13th December 2018 in HCCRA No. 175 of 2016)***

## JUDGMENT

1. The appellant, Robert Kipkoech Langat, was charged, tried, and convicted for the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge stated that on 15th August 2022 at (particulars withheld) Estate in (particulars withheld) District of the then Rift Valley Province, the appellant unlawfully and intentionally inserted his penis into the vagina of E.O., a child aged 5 years. Upon conviction, the appellant was sentenced to life imprisonment. He unsuccessfully challenged the judgment and sentence of the trial court before the High Court.

2. The appellant is now before us on a second appeal raising six grounds of appeal. Upon review of the memorandum of appeal, the appellant's complaints can be condensed as follows: that the trial court erred in convicting him based on the evidence of a single witness; that the learned Judge erred in relying on unsubstantiated evidence of a used condom; that his defence was not considered; and that his mitigation was not considered.

3. In a nutshell, the evidence at trial was that on 16th August 2012, the appellant invited E.O (PW1) to his house and defiled her through the anus. It was the prosecution's case that on that day, the appellant used a condom to defile PW1 and that there was another instance when she was defiled through the

vagina. After the act, the appellant gave the child, 5 shillings, who nevertheless, went ahead and told MM of her ordeal.

4. Upon L.A. (PW2), the mother of PW1 being alerted of the incident by the neighbour, she immediately inspected the complainant's private part and saw some discharge. The complainant confirmed the report to her which prompted her to visit the appellant's home. While there, the appellant denied the offence. The following day, PW2 escorted the child to Njoro Health Center where upon examination, Jacob Chelimo (PW3) observed a freshly perforated hymen and lacerations of the anus. There was also the presence of epithelial cells and pus cells confirming infection. The P3 form and treatment card were produced as exhibits.

5. It was the prosecution's case that PW2 witnessed the recovery of a used condom from the appellant's house at the time of his arrest. As per the evidence of PW5 Henry Kiptoo Sang, a Government Analyst, the spermatozoa in the recovered condom matched the deoxyribonucleic acid, of the appellant. PW2 testified that PW1 was born on 31st August 2006. This was confirmed by the immunization card that was produced by PC Abduba (PW6) as an exhibit.

6. The appellant denied ever meeting PW1 on 15th August 2012 stating that he was at work from 6.00 am until 5.00 pm. He also stated that he never gave the police any used condom at the time of his arrest. His testimony was supported by Esther Wairimu (DW2) who stated that the appellant worked in her farm, cutting grass for her cows the whole day and only left at 6.00 pm. On her part, the appellant's mother Rael Chelangat (DW3) testified that on the material day, the appellant spent his day at work while she stayed home alongside the appellant's brother Daniel Langat (DW4). Her testimony was that her house was close to that of the appellant and she never saw the appellant or the complainant. DW4 stated that he spent part of the afternoon at their mother's house but never saw his brother (the appellant).

7. When this appeal came up for hearing on the Court's virtual platform on 2nd July 2024, learned counsel, Mr. Omari was present for the appellant while learned State counsel, Mr. Omutelema appeared for the respondent. They both opted to fully rely on their filed written submissions.

8. Through the submissions dated 1st July 2024, learned counsel for the appellant submitted that the first appellate court abdicated its duty to independently re-evaluate the evidence on record. According to counsel, the failure on the part of the first appellate court resulted in the upholding of a conviction based on uncorroborated evidence of PW1. Consequently, counsel invited us to reconsider the evidence to avoid a travesty of justice.

9. It was also the contention of counsel that the appellant's alibi defence cast doubts on the prosecution's case but it was unfairly and unlawfully dismissed by the learned Judge. Counsel relied on *Picot v R*., 2013 NBCA 26 (CanLii) to submit that improper disclosure of an alibi defence can only weaken the defence but does not exclude it and that the learned Judge erred in dismissing the appellant's defence.

10. Regarding sentence, counsel relied on *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR and *Dismas Wafula Kilwake v Republic* [2019] eKLR, to urge that the appellant's mitigation should be considered and a determinate sentence imposed in place of the life sentence.

11. In opposing the appeal, the learned state counsel relied on submissions dated 2nd April 2024. He referred to sections 2 and 8(1) of the *Sexual Offences Act* to point out the definition of penetration and the elements of the offence of defilement. Counsel proceeded to rehash the evidence on record and submitted that the prosecution discharged its burden of proof against the appellant.

12. Rejecting the appellant's assertion that the trial magistrate erred in convicting him based on the uncorroborated evidence of PW1, counsel referred to section 19 of the Oaths and Statutory Declarations Act, section 124 of the Evidence Act and the case of *Maripett Loonkomok v Republic*

[2016] eKLR, to submit that the evidence of the victim of a sexual offence needs no corroboration. According to counsel, the evidence of PW1 was in any event, corroborated by the evidence of other witnesses.

13. Finally, counsel submitted that the appellant's defence and mitigation were considered.

14. In response to the appeal against sentence, counsel was of the view that the circumstances of the case called for a severe determinate sentence.

15. Before us is a second appeal and by dint of section 361 (1) (a) of the *Criminal Procedure Code* our jurisdiction is limited to matters of law unless the decision of the two courts below is based on a perversion of the facts of the case. This statement of the law has been reiterated in several decisions of this Court, including *Alfayo Gombe Okello v Republic* [2010] eKLRwhere it was held that:

> "In view of section 361 of *Criminal Procedure Code*, only issues of law may be raised for consideration as this Court has stated times without number that it will not interfere with concurrent findings of fact by the two courts below unless such findings were made on no evidence at all or on a perversion of it, or if no tribunal properly directing itself on the evidence would make such findings. In such a case the decision would be said to be bad in law. See for example *M' Riungu v Republic* [1983] KLR 455."

16. In our view, this appeal raises the following issues for determination: whether the first appellate court lived to its mandate; whether the evidence of PW1 was corroborated; whether the offence was proved to the required standards; and whether the appellant's mitigation was considered. Only if the conviction is upheld, will we consider the question as to whether the appellant has made out a case for our interference with the sentence.

17. Starting with the question of the duty of the first appellate Court, the appellant contends that the learned Judge merely considered the evidence with a view of arriving at a similar conclusion as the trial court. The Court has previously underscored the duty of the first appellate court in the case of *David Njuguna Wairimu v Republi*c [2010] eKLR, where it stated:

> "In *Okeno v R* [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

18. We have carefully reviewed the judgment of the High Court (L. N. Mutende, J). We wish to reiterate that even though there is no specific yardstick on how the duty of the first appellate court should be discharged, what however must be done is a succinct re-evaluation of the evidence as against the applicable principles and statutory provisions concerning the matter at hand. It is only after doing so that the first appellate court can be said to have arrived at its own independent decision. Upon review of the judgment of the first appellate court and the whole record, we are satisfied that the first appellate court discharged its mandate as was required of it. The court restated and reviewed the evidence, conducted its own independent analysis of the evidence and the law and came to its independent conclusion.

19. We will address the question of corroboration of the evidence of PW1 and that of the proof of the offence simultaneously. The appellant contended that the learned Judge relied on the uncorroborated evidence of PW1. Additionally, the appellant argued that the offence was not proved and that his evidence was not considered.

20. The starting point is section 124 of the *Evidence Act* which provides as follows:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall 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." [Emphasis ours]

21. It follows that the proviso to section 124 of the *Evidence Act* permits a court, where it is satisfied that the victim is truthful, to base a conviction on the evidence of a single witness where the criminal case involves a sexual offence. What is required of the trial court is to record the reasons why it is satisfied that the victim is telling the truth. We must add that it is the trial court that is best placed and tasked with conducting such an assessment as to the victim's truthfulness because it has the advantage of seeing and hearing the witness. In this case, the trial court conducted voir dire examination of PW1 and concluded that she was intelligent enough to give evidence but not under oath. The court went further to conclude that she was a trustworthy witness. The first appellate court also arrived at a similar conclusion and there is therefore no basis upon which this Court can hold otherwise.

22. On a similar vein, the appellant contended that the evidence of PW1 was not corroborated. We must first reiterate that the proviso to section 124 of the *Evidence Act* permits a conviction solely based on the evidence of the victim of a sexual offence. Be that as it may, in the circumstances of the appeal before us, we note that the evidence of penetration was corroborated by PW2 and PW3. Whereas PW2 was not a medical practitioner, she inspected the victim before escorting her to the hospital and saw a discharge. PW3 on the other hand assessed the complainant as an expert and reached the conclusion that the complainant was indeed defiled. Interestingly, the observations made by PW2 on the appearance of the anus of the complainant corresponded with that of PW3. It was also the testimony of PW1 that the appellant had used a condom during the defilement. Further corroboration of penetration is therefore found in the evidence of PW5 who testified that a deoxyribonucleic acid, analysis conducted on the fluid in the condom, matched the deoxyribonucleic acid, sample extracted from the appellant's blood. In the circumstances, the evidence of the complainant in this regard was corroborated. As it was held in *Karanja & Another v Republic* [1990] eKLR:

> "It is of course not necessary to have confirmation of all the circumstances of the crime. Corroboration of some material particular tending to implicate the accused is enough and while the nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged, it is sufficient if it is merely circumstantial evidence of his connection with the crime."

23. The offence with which the appellant was charged required that the prosecution prove penetration, the age of the victim, and the identity of the perpetrator of the crime. The corroboration we have

highlighted is only with respect to penetration. On the identity of the appellant, the victim testified that on "15/8/2012 Robert called me took off my trousers and also removed his and did "tabia mbaya" to me...This is Robert...He lives near our home place." The testimony was not shaken under intense cross- examination by the defence counsel as the child went ahead to confirm that the appellant lived with his mother, a fact confirmed by DW3. Indeed, when PW2 was informed of the incident by her neigbour, it was clear that PW1 had named Robert as the defiler. PW2 did not hesitate in confronting the appellant. Based on the stated evidence, we find no reason to disagree with the conclusion by the two courts below, that it was the appellant who defiled the complainant.

24. On the third element of the age of the complainant, an immunization card was produced as an exhibit to establish her age. Additionally, PW2, the complainant's mother testified that the child was born on 31st August 2006. This set of evidence was sufficient to establish that the complainant was under 11 years at the time of the commission of the offence. Indeed, the appellant never questioned this aspect of the prosecution evidence. In the circumstances, we reach the same conclusion with the trial court and the first appellate court that all the three ingredients of the charge of defilement were therefore proved by the prosecution.

25. The appellant took issue with the evidence that a condom was found in his house. He denied ever having or using a condom. However, the evidence of PW1 was that the appellant wore a condom when he defiled her. PW2 confirmed that a condom was recovered in the appellant's house. PW5 conducted a deoxyribonucleic acid, analysis and concluded that the fluid in the condom was of the same deoxyribonucleic acid, profile as that of the blood sample extracted from the appellant. The appellant's denial in the circumstances could not dislodge the evidence of the prosecution that the condom had been used by the appellant. In the circumstances, his denial of the existence and use of the condom was correctly rejected by the two courts below.

26. There was the submission by the appellant that his evidence was not considered. On the contrary, we note that in the judgment, the learned Judge referred to the case of *Karanja v Republic* [1983] KLR 50 to elucidate the principles underpinning the consideration of an alibi defence. The Judge proceeded to dedicate paragraphs 27, 28, and 29 of the judgment to considering the appellant's evidence and that of his witnesses. As already demonstrated in this judgment, the evidence adduced by the prosecution clearly linked the appellant to the offence. We therefore find no reason to fault the learned Judge for rejecting

the appellant's defence. Flowing from the foregoing analysis, we find that the appellant's appeal against conviction lacks merit.

27. Turning to the appeal against sentence, the appellant attacks the sentence of life imprisonment on the ground that his mitigation was not considered. Upon review of the record, it is evident that the appellant was accorded an opportunity to mitigate. The defence counsel informed the trial court that the appellant was remorseful and had cooperated during the trial. It was also indicated that he was a first offender. The trial court and the High Court, however, correctly observed that the sentence provided was mandatory in nature. That position aligns with the decision of the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR), that the minimum sentences provided in the *Sexual Offences Act* remain legitimate until and unless they are challenged through a constitutional petition properly initiated at the High Court. Additionally, we find that the circumstances under which the offence was committed could not attract any mercy. The complainant who was hardly out of her diapers was defiled not once but twice by a neighbour known to her and the family. It is also not in dispute that the sentence provided under section 8(2) of the *Sexual Offences Act* is in mandatory terms. We therefore do not find merit in the appeal against sentence.

28. Having found that the offence was proved as charged and that the sentence was legal, the logical conclusion is that this appeal lacks merit and is hereby dismissed.

**DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF DECEMBER 2024.**

**M. WARSAME**

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**JUDGE OF APPEAL**

**J. MATIVO**

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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**