Wafula v Republic (Criminal Appeal 110 of 2019) [2023] KECA 131 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 131 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 110 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

JOTHAM WATOYO WAFULA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision (H.K. Chemitei J) delivered on the 21st day of September 2017 In HCCRA 55 OF 2016)

JUDGMENT

1. This is the second appeal brought by Jotham Watoyo Wafula the appellant herein. He was first convicted in the magistrate's court for the offence of defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. At the close of the trial, the magistrate Hon. C.C. Kipkorir, convicted the appellant on the main charge and sentenced him to life imprisonment.

2. The appellant was dissatisfied with the above decision and he filed an appeal in the High Court advancing five grounds. The five grounds were first, that key witnesses did not testify, second, that the prosecution evidence was not corroborated, third, that the appellant's defence was rejected without cogent reason, fourth, that the age of the complainant was not supported by any document and lastly, that the medical report did not connect the appellant with the alleged offence.

3. Upon considering the grounds of the appeal, the submissions and the law, the learned Judge found that the appeal had no merit. He dismissed it in its entirety and affirmed both the conviction and sentence of the lower court.

4. The appellant did not give up. He filed the instant appeal to this Court and filed the grounds on 3rd October, 2017. He later filed supplementary grounds on 4th December, 2020. The sum of the two sets of grounds is that: there were numerous contradictions in the evidence; crucial witnesses did not testify; the medical report did not connect him to the alleged offence; the prosecution evidence was

hearsay; the appellant's right to a fair trial was violated; penetration was not conclusively proven, and the mandatory nature of the sentence imposed against him was unconstitutional.

5. A brief synopsis of this case is that the appellant was charged with defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge are that on 14/12/2014 at [Particulars Withheld] village within Trans-nzoia County, the appellant intentionally caused his penis to penetrate the vagina of VW a child aged 9 years.

6. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* the particulars being that on 14/12/2014 at [Particulars Withheld] village within Trans-nzoia County, he intentionally caused contact between his penis and the vagina of VW a child aged 9 years.

7. Eight witnesses testified for the prosecution. VW (PW1), the complainant testified that she was 9 years old and a class 4 pupil at [Particulars Withheld] school. She told the court that on the material day, she was playing outside her grandparents' house when the appellant called her to his house on the pretext of sending her to go and buy him cigarettes. The appellant lived close to her grandparents' house, with a distance of about 2 meters between the two houses. Her grandparents were not at home on the ill-fated day.

8. It was her testimony that when she got in to the appellant's house, the appellant told her to sit on a mattress. When she resisted and tried to go back home the appellant held by the leg, lifted her skirt and defiled her. She screamed, and the appellant let her go when those screams attracted members of the public to his house. She told the members of the public what had happened, whereupon they set upon the appellant, beat him up, and took him to the police station.

9. AAI (PW2), the complainant's grandfather, testified that he was called from work at about 11a.m on the material day by his neighbor and told that the complainant had been defiled. He went to the police station and found the appellant already in the cells and the complainant waiting at the reception. The complainant narrated to him what had happened and he took her to the hospital. He confirmed that the appellant is their neighbour.

10. Linus Ligare (PW3), a clinical officer at Kitale District Hospital, examined the complainant for the purpose of filling the p3 form issued by the officer in charge of Matisi Police Post. Upon examination he found that the complainant's hymen had a fresh tear and there was pus and red blood cells in the urine test, which he said indicated the presence of a disease caused by sexual interaction. The tests for HIV and syphilis were negative. Treatment notes by Dr. Gekote who first attended to the minor and the age assessment report by Mr. Silali were also produced in evidence.

11. PW4 was No. 101923 PC, Theophilis Mutei the Investigating Officer, who issued the p3 form to the complainant and visited the scene of the crime. PW5, No. 43860 P.C Mbarak Mwashamba, confirmed that he rearrested the appellant from the members of the public who brought him to the police station on 14/12/2014 on allegations that he had defiled a child.

12. The appellant, in his unsworn testimony, narrated how he was arrested on 13/12/2014 when he came home from work. He stated that he did not know the offence for which he was arrested and neither was he told.

13. The appeal was canvassed by way of written submissions. Both the appellant who was in person, and learned State Counsel Mr. Murithii who represented the State, filed their undated written submissions.

14. The appellant appears to have abandoned the main grounds and submitted only on the supplementary grounds of appeal. He submitted first, that the court failed to inform him of his right to legal

representation as provided by Article 50(2)(g) and (h) of the *Constitution*. He urged that he was charged with an offence which carries a severe sentence of life imprisonment upon conviction, but he was not accorded legal representation as required by law. That there was substantial injustice against him and the court should have, at the very least, informed him of this right.

15. The appellant argued further that the mandatory duties imposed on trial courts by section 43 (1) of the *Legal Aid Act* and Article 50 of the Constitution were not complied with, and in the circumstances the trial proceedings were conducted in a manner that was prejudicial to the appellant and which caused grave injustice to him.

16. Secondly the appellant asserted that the evidence of PW1 did not reveal penetration, be it partial or complete and as such, the prosecution's case was not proved beyond reasonable doubt.

17. Lastly, the appellant submitted that section 8(2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of life imprisonment and hence denies the court the opportunity to consider the appellant's mitigation and employ its discretion in sentencing. Further, that Article 159 of the *Constitution* vests judicial authority in the courts. To make his point the appellant relied on several authorities both foreign and local, among them this Court's decision in *Evans Wanjala Wanyonyi vs Republic* (2019) eKLR where the appellant's mandatory minimum sentence of 20 years was reduced to 10 years.

18. In opposition, the respondent submitted on all the grounds advanced by the appellant. The respondent argued that the evidence presented by the prosecution witnesses was not contradictory to the extend that was fatal to the prosecution's case. The respondent relied on the decision of *Twehangane Alfred v Uganda* (Criminal Appeal No 139 of 2001) as quoted in *AHM v Republic* (Criminal Appeal No E043 of 2021 2022 KEHC 12773 (KLR) to buttress this position.

19. On defilement, the respondent submitted that the complainant testified that she was defiled on 14/12/2014, and the p3 form which was filled 2 days later indicated that the hymen had a fresh tear. That this was a clear indication that defilement had occurred recently and therefore the medical evidence that was produced corroborated the victim's testimony.

20. The respondent contended that the age of the victim, and the fact of penetration having been proved and the victim having identified the appellant by recognition as the perpetrator, the prosecution discharged its burden appropriately.

21. The respondent urged that the right to a legal representative is a fundamental one and should be zealously protected by courts. However, that it is not an absolute right and is subject to reasonable limitations. Nevertheless, they contended that this ground was not raised in the first appeal. Further, that the courts provide legal representation for suspects charged with offences that carry the death sentence upon conviction. In their view the sentence imposed upon the appellant was proper and should not be disturbed.

22. We have considered the record of appeal, the submissions of the parties, the authorities relied on and the law. This being a second appeal, our mandate is circumscribed under section 361(1)(a) and (b) of the *Criminal Procedure Code*, which limits the scope of that mandate to issues of law as set out below:

> "
>
> "(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section

—

a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

The confines of the Court's jurisdiction under section 361 (1)(a) and (b) were reiterated by this Court in *Karingo vs. R* [1982] KLR 213 as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test 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 - vs- R (1956) 17 EACA 146)"

23. It is not disputed that under Article 50 (2) (g) and (h) of the *Constitution* the appellant is entitled to choose, and be represented by an advocate, to be informed of this right promptly and to have an advocate assigned to him by the state at the expense of the state, if substantial injustice would otherwise result.

24. Be that as it may, we note that the appellant is raising this issue for the first time in this second appeal. It was not an issue that was placed before the High Court for consideration in the first appeal, for a decision to be made thereon. This Court grappled with a similar situation where grounds that were raised in the second appeal, were not available in the first appeal for consideration in *John Kariuki Gikonyo v Republic* [2019] eKLR, and held as follows:

> "(17) ....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:
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> > ".... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."
>
> (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

The failure of the trial court to inform the appellant of his right to legal representation as provided by Article 50(2)(g) and (h) of the *Constitution* was not brought before the Judge in the first appeal. We are therefore, disinclined to address new issues introduced for the first time on a second appeal.

25. Bearing the above principles in mind, the only issues falling for determination therefore are:

    i. Whether the Judge assessed the weight of the evidence properly, to find that it was sufficient to sustain the conviction,

    ii. Whether the mandatory minimum sentence meted upon the appellant was unconstitutional.

    We therefore assessed the analysis of the weight of the evidence by the two courts below, to establish whether there was any misdirection of law by either court.

26. The appellant was charged with defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. Section 8(1) provides that:

    > " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

27. In *John Mutua Munyoki v Republic* (2017) eKLR this Court held that:

    > " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:
    >
    > i. The victim must be a minor
    >
    > ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

28. The age assessment form from Kitale District Hospital, produced in evidence as Exhibit No. 3 estimated the age of the complainant to be nine years old at the time of the incident. In *Edwin Nyambogo Onsongo v Republic* (2016) eKLR this Court had this to state concerning proof of age:

    > " ...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 documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent, or the evidence of the parents or guardians, or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

    It is clear from the evidence on record and the analysis of the two courts that the age of the complainant was proved to the required standard.

29. On penetration, the complainant explained to the court how the appellant called her to his house, under the guise of sending her to buy him cigarettes. She walked the court through how he pinned her down when she tried to leave, lifted her skirt up and did what she called "bad manners" to her. She told the court that she felt pain and screamed, attracting the attention of alarmed members of the public. As a result, the appellant let her go. The clinical officer who examined her two days later found a hymen that had a fresh tear, and pus and red blood cells in the urine test, an indication of infection caused by sexual interaction.

30. Corroboration is not a requirement in sexual offences. A conviction can be founded on the evidence of a single witness if the court finds that witness to be credible and records the reason or reasons for so holding. Section 124 of the *Evidence Act* provides that:

> "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."

31. The latitude provided by section 124 of the *Evidence Act* is not unlike what the Supreme Court of Uganda adverted to in *Bassita v Uganda* S.C Criminal Appeal No. 35 of 1995, when it said:

> "Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt"

32. In the case before us the clinical officer corroborated the complainant's evidence. As a result, we find that the two courts below correctly accepted the evidence of penetration of the complainant's genital.

33. Regarding identification, the complainant was the only witness who identified the appellant as the perpetrator. The court of appeal for East Africa discussed the danger of relying on the evidence of one witness in identification. In *Roria versus Republic* (1967) EA 583 at page 584 it was observed that:

> "a conviction resting entirely on identity invariably causes a degree of uneasiness...
>
> That the danger is of course, greater when the only evidence against the accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification"

34. The trial court in the appeal before us observed as follows on the identification of the appellant as the perpetrator:

> "Was it proved that the accused was a perpetrator? I opine in the affirmative. He was a neighbor of the complainant. This was also the import of PW2's evidence from the description she gave, he was well known to her prior to that date. The defilement occurred during the day and that made it easier for her to recognize the accused."

35. The High Court also pronounced itself as follows on the issue of identification:

> "Was the appellant the perpetrator? The evidence of the minor in my view was clear and unchallenged. She clearly described the plot where they lived as well as the appellant's house which she stated that;
>
> > "There are 7 houses following each other .....it's a single roomed house. There was a plastic container, mattress, blanket, box and basin. There were no seats..."
>
> She was vivid and clear in her testimony. Her evidence does not in my view suggest that she made up the story. The appellant was a person known to her as they lived in the same compound literally"

36. As it was held in this Court's decision in *Reuben Taabu Anjononi & 2 Others v Republic* [1980] eKLR relied on by the respondent:

> " ....recognition of assailants is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of an assailant in one form or another "

37. We agree with the two courts below. Identification was by recognition of a person well known to the minor and her grandfather, the offence occurred in broad day light and the complainant was vivid in her description. These were sufficient reasons to believe the complainant.

38. The appellant denied any knowledge of the offence in his defence. It is trite law that the legal burden of proof in a criminal case rests throughout, with the prosecution. There was no burden whatsoever, on the appellant to prove his innocence. In *Woolmington v DPP* (1935) AC462, the court held:

> " But while the prosecution must prove the guilt of the prisoner, there is no such laid down on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt, he is not bound to satisfy the jury to his innocence. Throughout the web of the English Criminal Law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners guilty."

39. The prosecution having however, made out a *prima facie* case against the appellant, the onus was upon him to raise a reasonable doubt in the prosecution case, whose benefit the he could enjoy. After careful analysis of the record of appeal, we find that the two courts below correctly found that there was no error in the evidence of the identification of the appellant as the perpetrator and that the age of the victim and the fact of penetration had been proved to the required standard.

40. On the second issue the appellant argued that the mandatory minimum sentence imposed by section 8(2) of the *Sexual Offences Act* Contravened Article 159 of the *Constitution*, since judicial authority is vested in the Judiciary and not the legislature. The respondent conceded that the mandatory nature of the sentence is what is unconstitutional, but urged the Court to find that the sentence imposed upon the appellant was proper.

41. The learned magistrate noted the appellant's mitigation and stated that:

> " considering the content of my judgment and provisions of section 8 (2) of the *Sexual Offences Act* No.3 of 2006. I will sentence the accused to serve life"

The first appellate court affirmed this sentence.

42. We agree with both parties herein that the mandatory nature of sentences imposed by section 8(2) of the *Sexual Offences Act* is unconstitutional. In *Joshua Gichuki Mwangi v. Republic* Criminal Appeal No. 84 of 2015, this Court faced with the issue of the unconstitutional nature of mandatory minimum sentence observed that:

> " We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the *SOA* due to the heinous nature of the crimes committed. And they will continue to be appropriately punished as was pronounced in *AThanus Lijodi Vs. Republic* [2021] eKLR;
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> > "on the issue of sentence, we reiterate that the life sentence imposed by the trial magistrate and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases Muruatetu's case (Supra) notwithstanding. This Court has on many occasions invoked the Muruatetu decision to reduce sentences that were hitherto deemed as minimum sentences, (see for instance *Evans Wanjala Wanyonyi v Republic* (2019) e KLR. Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited"

43. Having considered the circumstances of this case and the appellant's mitigation, we are inclined to reduce the sentence of the appellant from life to 30 years imprisonment. In the premise this appeal is allowed only as far as the sentence is concerned.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR