Wangila v Republic (Criminal Appeal 177 of 2018)
[2023] KECA 493 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 493 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 177 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

MAY 12, 2023

BETWEEN

JOSEPH JUMA WANGILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the judgement of the High Court at Kitale (Chemitei. J) dated 10th May, 2018 In HCCR Appeal No. 66 of 2016)

JUDGMENT

1. This second appeal of Joseph Juma Wangila (the appellant) attempts to overturn the judgement of Chemitei. J dated May 10, 2018. The appellant was charged in the Magistrate's Court with defilement of a child contrary to Section 8 (1) of the *Sexual Offences Act* as read with Section 8(2) of the same Act. He was tried, found guilty as charged and was sentenced to life imprisonment as provided by the law.

2. The particulars of the offence were that on September 30, 2016 at [Particulars withheld] village within Trans-Nzoia County the appellant intentionally caused his penis to penetrate, the vagina of ANW a child aged 6 years.

3. The appellant pleaded not guilty to the charge and as a result, the prosecution presented five witnesses to prove their case.

4. A summary of the prosecution case was that on September 30, 2016, ANW (PW1), a six years old girl was playing with her friend D , when the appellant called her into his house. While in his house the appellant put her on his bed, removed his 'thing' and swiped it on her thighs, vagina and buttocks. He then lay on her and inserted his 'thing' that, according to the child, looked like a stick in to her vagina. She felt pain in the chest. Meanwhile D was a silent witness of the ignoble deed as she stood by the wall in the house and watched. When the appellant was done, he wiped ANW with a rag and

warned her not to tell anybody what he had done. The child however, found her mother, EW (PW2) and immediately told her what the appellant had done to her.

5. PW2, EW the mother, confirmed that PW1 was aged six years old and that on the material day, PW2 was washing the dishes when she asked PW1 to go and fetch D who had gone towards the road. She confirmed that she saw and heard the appellant from where she was washing the dishes, calling PW1 to his house but thought nothing of it since the appellant was her neighbour. PW1 presently came back to where PW2 was and she appeared ill at ease. She immediately told PW2 that the appellant 'ako na tabia mbaya' (the appellant was bad-mannered) and explained what the appellant had done to her. PW2 examined the child and found semen on her. She reported the matter to one G, the Village Elder and he accompanied her to the appellant's house to confront him. The appellant confirmed that PW1 was in his house but denied having defiled her. The child was taken to Kiminini Police Station where a report was made and to Matunda Hospital for treatment and later still, to Kitale District Hospital for further treatment.

6. Linus Likare (PW3), the doctor at Kitale District Hospital examined PW1 on October 3, 2016 and concluded from the recently torn hymen that she had been defiled. He filled a P3 form in that regard. An Age Assessment Report on behalf of PW1 prepared by Dr Mukira and produced in court by Dr Pharis Solali (PW4) a Dental Officer from Kitale District Hospital, put the child's age at six years. At the close of the investigations, Mary Mmoi, (PW5) the investigating officer preferred the stated charges against the appellant.

7. The appellant in his unsworn statement in his defence, denied the charges and called no witnesses. He told the court that on the material day, he was working on his farm in Mbai village when three people came for him on a motorbike under the pretense that they wanted him to assist them to cut maize stalks. They instead took him to Kiminini Police Station where he learnt of these allegations.

8. The learned Magistrate, P Biwott (SPM) considered the evidence before him and found that it was sufficient. He found the accused guilty as charged, considered his mitigation and sentenced him to life imprisonment.

9. Aggrieved by the above judgement the appellant filed an appeal in the High Court alleging that: the evidence of the prosecution witnesses was uncorroborated; the complainant's age was not ascertained; crucial witnesses were not called and that his defence was rejected without cogent reasons.

10. The learned Judge considered the appeal before him, found that it had no merit and dismissed it in its entirety, hence this second appeal. The appellant's grounds in this second appeal are that:

    a. Crucial witnesses, D and the Doctor from Matunda hospital did not testify,

    b. The defilement was intercepted hence the sentence should be reduced,

    c. The age of the complainant was not proved beyond reasonable doubt,

    d. The voire dire examination was brief and inconclusive on the intelligence and truthfulness of the minor.

    e. That the courts below erred by rejecting his defence

11. This appeal was disposed of by way of written submissions which were orally highlighted during plenary in the virtual hearing. The appellant was in person while the respondent was represented by Senior Assistant Director of Public Prosecution, Ms Jacklyne Kiptoo,

12. The appellant submitted that sexual activity could not have happened in the presence of D , as claimed by the complainant: that the time PW2 sent the complainant to call D was too short for any active sex to take place and that since the intention was not complete due to interruption by D and PW2, this Court should substitute the conviction to attempted defilement and sentence him accordingly.

13. Next, the appellant urged that the sentence meted upon him is bad in law as it tied the hands of the Judge and denied him discretion to award a less severe sentence, even where there was mitigation, and the circumstances of the case warranted lesser sentence.

14. The appellant further faulted the prosecution for failing to avail D and the clinical officer who examined the complainant initially when she was taken to Matunda clinic, and who were crucial witnesses. His contention was that the prosecution is duty bound to make available all the witnesses necessary to establish the truth.

15. On the age of the child, the appellant faulted the prosecution for failing to avail the doctor who conducted the age assessment, since no birth certificate was produced to prove her age beyond reasonable doubt. He submitted that it was necessary for him to cross-examination the doctor on how he arrived at the conclusion that PW1 was 6 years old. He was not satisfied with the testimony of PW4 Dr Mukira, who did not assess PW1.

16. It was also his submission that when the complainant was asked under voire dire examination 'what happens when you do a mistake at home?' she said nothing. On that basis the appellant desires this Court to construe that PW1 was not intelligent or truthful.

17. In rebuttal, Ms Kiptoo urged in her submissions dated November 29, 2022 that the age of the minor was proved to be 6 years old upon assessment by PW4. On proof of penetration, counsel pointed to the testimony of PW1 that: 'the appellant took his thing and swiped it here (she points her thigh, vagina and buttocks) removed his thing that looks like a stick and put it here (points at her vagina)' as he lay on top of her. In addition, counsel urged that PW3 examined PW1 and observed that her hymen was recently torn and, concluded that she had been defiled. On identification counsel stated that PW1 knew the appellant and there was therefore, no danger of mistaken identity. As such, counsel urged that all the elements for the offence of defilement were proved beyond reasonable doubt.

18. Counsel added that the records indicate that the appellant gave an unsworn statement of defence and in *Amber May vs the Republic (1999) KLR 38*, the Court held that an unsworn statement has no probative value notwithstanding the provisions of section 211(1) of the *Criminal Procedure Code*.

19. We have considered the record of appeal, the parties' arguments and the law applicable. Our duty as the Court of second appeal is limited to consideration of matters of law only. In this respect, section 361 of the Criminal Procedure Code provides that –

> ' 361.
>
> (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.'

20. The Court in *Karingo v Republic (1982) KLR 213* elucidated the duty of the Court on second appeal 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 they are 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 Karori S/O Karanja versus Republic (1956 17 EALA 146).'

21. From the rival arguments above the issues that arise for our determination are:

a. Whether the voire dire examination was conducted in a proper way,

b. Whether the prosecution left out crucial witnesses,

c. Whether all the elements of defilement were proved beyond reasonable doubt,

d. Whether the appellant's defence was considered, and

e. Whether the sentence meted upon the appellant was constitutional.

22. Voire dire examination is predicated on Section 19 (1) of the *Oaths and Statutory Declaration Act* which provides that:

> ' Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.'

23. In *Maripett Loonkomok v Republic [2016] eKLR* this Court pronounced itself on this issue thus;

> ' Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth. So long as that evidence, though not on oath, is taken down in writing, it amounts to a deposition under section 233 of the Criminal Procedure Code. The Code does not prescribe the precise manner of ascertaining and determining whether the child witness understands the nature of the oath or is possessed of sufficient intelligence or even his or her ability to understand the duty of speaking the truth.'

24. Further, in *Japheth Mwambire Mbitha v Republic [2019] eKLR*, relying on the decision of this Court in *Johnson Muiruri vs Republic [1983] KLR 445*, the purpose of voire dire examination was outlined as follows:

1. 'Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.'

25. The applicant argued that the voire dire examination was not conducted properly in this case to enable the court arrive at a conclusion that PW1 would tell the truth. The State did not submit on this point. In the record before this Court, the voire dire proceedings were recorded as follows:

> ' Where do you study? I am in nursery in top class.
>
> Do you go to church? Yes, it is called Agape. I go to Sunday school I do not recall my teacher's name.
>
> What happens when you do a mistake at home? Nothing. Your parents do not do anything? Yes.'

26. In the end the court recorded that PW1 did not understand the nature of an oath and would therefore give unsworn evidence. We find no reason to fault the court for the manner in which the voire dire examination was conducted, or the conclusion that the court drew there from, because a child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath, apart from the ordinary social duty to tell the truth.

27. The next issue for consideration was whether the prosecution failed to call crucial witnesses. The appellant contended that the prosecution left out two crucial witnesses being a child called D who witnessed the incident, and the medical officer who conducted the age assessment on PW1. Again, the State did not submit on this.

28. The issue of which, or how many witnesses should have been called, was squarely addressed in the case of *Bukenya v Uganda [1972] EA 549*, where it was stated that:

> ' It is well established that the Director has discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. First, there is a duty on the Director to call or make available all witnesses necessary to establish the truth even though

their evidence may be inconsistent. Secondly, the Court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.'

29. As has been stated many times in this Court, there is no stated number of witnesses that the prosecution must call to prove its case. The Director of Public Prosecutions has the discretion to decide who are the material witnesses to prove their case and whom to call to testify. The High Court addressed itself to the issue of the witnesses that were not availed as follows:

> ' I do agree that the absence of D who was allegedly with PWI was crucial. However, the evidence as presented by PW1 did not indicate that she doubted what has taken place or that she had mistaken the perpetrator'

30. The two courts below assessed the evidence tendered by the prosecution which did not include the witnesses adverted to and found that it was sufficient to sustain a conviction. We have examined the record and find no reason to depart from the finding of the two courts.

31. The next issue for determination is whether all the elements of defilement were proved beyond reasonable doubt. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the SOA. Section 8 (1) of the SOA provides:

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

32. 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.'

33. The appellant argued that the age of the PW1 was not proved to the required standard, and that PW4 was not the doctor who examined PW1 and the appellant could not question him how he arrived at the age of six years. On the other hand, the State argued that the age of the appellant was proved to the required standard by the testimony of the mother buttressed by the assessment report produced in court by PW4. The High Court pronounced itself on this issue as follows:

> ' In the case at hand the dental age assessment report produced corroborated the evidence of PW2 the minor's mother. The doctor found that she was 6 years old, a fact not controverted by the appellant'

34. We note that there was no evidence on record that the appellant doubted that the complainant was anything other than a child of tender years, as stated by the mother and confirmed by the doctor who first attended her even apart from the report of the doctor who assessed her age. There is also no

evidence that the appellant specifically requested for the doctor who did the age assessment to be called for cross - examination.

35. The question of proof of age in sexual offence cases will always take center stage since it has a direct correlation to the sentencing regime. In *Edwin Nyambogo Onsongo v Republic (2016) eKLR* this Court 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 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'

We therefore hold that the two courts below properly found that the age of PW1 was proved to the required standard, based on the evidence availed.

36. On penetration, the appellant contended that the act of penetration was interfered with by PW2 and D , therefore he was not able to complete the act. On the other hand, the State submitted that PW1 gave evidence on how the appellant defiled her, which was further corroborated by the medical evidence of PW3. The superior court held the following on penetration:

> ' The child was able to explain how the appellant defiled her. The missing of the hymen which appeared recent goes to prove that there was defilement. The examination was done on October 3, 2016 about 4 days after the incident. PW3 said that he had relied on the card filled at Matunda Hospital which was the first medical centre the complainant visited.
>
> Did the appellant defile the minor? The chain of events was not broken. It appears that once the child was released and called by her mother, and she realized that she was not walking well, she called G and informed him of what had happened. The appellant who appeared apparently still around denied the same. The minor was taken to the Hospital for treatment.
>
> In my view therefore, everything happened or flowed naturally. I have tried to examine if the complainant despite her age lied but I do not find any of such untruthfulness.'

37. PW1 gave such graphic details of how the appellant defiled her that we have no basis to assign it to the fertile imagination of a six year old. In addition, the evidence of PW3 corroborated her testimony as did the mother's observance of the child when she reported to her. The mother also testified that prior to the child reporting the assault to her, she had heard the appellant call the child to his house. As such, we find no fault with the concurrent findings of the two courts below that this element was proved to the required standard.

38. On identification, the appellant was a neighbour to PW1. PW2 testified that their houses were close to each other. Identification was therefore by recognition. This Court in *Rotich Kipsongo v Republic [2008] eKLR* held:

> ' This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya Vs Republic Criminal Appeal NO 375 OF 2006 (Unreported) where it said,
>
> 'On our own re-evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court,

recognition is more satisfactory more assuring and more reliable than identification of a stranger – see Anjononi V Republic [1980] KLR 59.'

We have analyzed the record and hold that the conclusions of the two courts below, that this element was also proved beyond reasonable doubt was sound.

39. The next ground that the appellant latched on was that his defence was not considered although he did not submit on it. The State on the other hand submitted that the appellant's defence was considered and found not to dislodge or cast doubt on the firm and consistent prosecution case.

40. The Judge of the High Court did not find much to consider in the defence and observed thus:

> ' The appellant's defence did not assist much. He did not afford the prosecution the opportunity to cross examine him'

41. The appellant's unsworn defence is found on page 23 of the Record of Appeal and is as follows:

> ' On the September 30, 2016 I was working in my farm in Mbai village. I started from 11.00 a.m. three people came and picked me to assist to cut maize into steaks. They carried me on motorbike. They were new to me. They took me to Kiminini Police Station instead. From there I was brought to Kitale Police Station. From kitale these allegations were labelled against me. I was surprised. I had done no wrong. That is all'

42. This being a criminal case it was the appellant's right in law to give an unsworn statement, or to elect to remain silent and leave it to the court. However, having elected to testify, his evidence must be assessed in the context of the rest of the evidence on record. His unsworn evidence was however incapable of being tested through cross-examination for veracity, and accordingly has low probative value.

43. In the decision of *May v Republic [1979] eKLR*, the Court of Appeal for East Africa held that:

> ' With reference to Section 1(h) of the Criminal *Evidence Act*, 1898, which preserved the right of an accused person in England to make a statement without being sworn, Shaw LJ said:
>
> 'The section makes a clear distinction between the position where an accused person elects to assume the role of a witness in his defence and the situation where he makes an unsworn statement. In the latter case, he is not a witness, and he does not give evidence what is said in such a statement is not to be altogether brushed aside; but its potential value is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proved facts and the inferences from them in a different light. In as much as it may thus influence the jury's decision, they should be invited to consider the content of the statement in relation to the whole of the evidence. It is perhaps unnecessary to tell the jury whether or not it is evidence in the strict sense. It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and not tested by cross-examination has less cogency and weight than sworn evidence.'

44. It is evident that the appellant's defence was considered by the courts below in the context of the rest of the evidence tendered and it did not debunk the prosecution case.

45. The last issue for consideration was whether the sentence meted upon the appellant was constitutional. The appellant argued that the mandatory nature of the sentence was unconstitutional since it does not give the court an opportunity to exercise discretion, especially considering the appellant's mitigation. The State did not submit on this and since it was not a ground of appeal in the High Court the learned

Judge did not pronounce himself on it. Be that as it may, we considered the constitutionality of the sentence.

46. The sentence provided for under section 8 (2) of the *Sexual Offences Act* is as follows:

> ' A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction to imprisonment for life'

47. Sentence is a matter that is in the discretion of the trial court and on appeal, the appellate court will not easily interfere with it unless, it is manifestly excessive in the circumstances of the case. This Court in *Bernard Kimani Gacheru vs Republic [2002] eKLR* had this to say on sentencing:

> ' 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.'

48. In *Joshua Gichuki Mwangi vs Republic; Criminal Appeal No 84 of 2015*, this Court revisited the mandatory nature of life sentences meted upon sexual offence offenders and observed as follows:

> ' 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;
>
> '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) eKLR.) 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'

49. In the case before us the appellant's mitigation was as follows: 'I have children relying on me'. The learned magistrate considered his mitigation and held that: 'though accused is a parent, he failed to respect other children like the complainant herein. My hands are restricted by the law. I sentence accused to serve life imprisonment'.

50. We find that the appellant perpetrated a heinous act against a child of tender age who was a neighbor and expected his protection. Even at that tender age she knew something bad had been done to her as evinced by her report to her mother that; 'ako na tabia mbaya' (he has bad manners) in reference to the appellant. As a result, we hold that the sentence meted upon him was commensurate with his action. Ultimately, this appeal is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023

F. SICHALE

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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