



REPUBLIC OF KENYA



**Wangonde v Republic (Criminal Appeal 120 of 2016)
[2023] KECA 1595 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1595 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 120 OF 2016
W KARANJA, J MOHAMMED & LK KIMARU, JJA
OCTOBER 27, 2023**

BETWEEN

JOSEPH MWAURA WANGONDU APPELLANT

AND

REPUBLIC RESPONDENT

(Judgment (Being an appeal against the judgment of the High Court of Kenya at Nyeri (Mshila, J.) dated 10th March, 2016 in High Court Criminal Appeal No. 71 of 2010))

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya at Nyeri (Mshila, J.).
2. A background of this appeal is that the appellant was charged before the Chief Magistrate's Court at Nyeri in Sexual Offence Case No. 8 of 2008 with the offence of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 24th June, 2008, at Nyeri District, within Central Province, the appellant intentionally and unlawfully did an act of penetration to M. K. M., a child between the ages of 8 years and 15 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act. The particulars of the charge were that on the same day and in the same place, the appellant intentionally and unlawfully committed an indecent act with M. K. M. by causing his genital organ to touch her sexual organ. The appellant denied both counts prompting the trial in which the prosecution called a total of four (4) witnesses. When put on his defence, the appellant chose to exercise his right to remain silent.
3. The brief facts of the case according to the prosecution are that the complainant (PW1), aged eight (8) years old, lived with her grandmother, NN(PW2), in Nyeri. On 24th June 2008, at 5.00 p.m., she was on her way back to her grandmother's house after fetching some milk from Mama Nyaguthii's house, when someone approached her from behind. The complainant identified the appellant as the person



- who approached her. He asked her if she knew him and she answered in the affirmative. She told him that she knew him as Mwaura. The appellant then tied a piece of cloth over her eyes, and another over mouth. He carried her to a nearby slaughter house and placed her on the ground behind a door.
4. PW1 testified that the appellant removed her trouser and underwear, and inserted his penis into her vagina. The complainant stated that she was still gagged and blindfolded at this point in time. She felt pain. Soon thereafter, the appellant left. PW1 stated that she pulled down the blindfold and saw the appellant running away from the scene. She saw her trousers and bottle of milk next to a door. She dressed up and went home. PW1 stated that she did not tell her grandmother what had transpired that day as she was in pain. She did not want to talk to anyone. The following day, she told Wambui, a neighbour, what the appellant had done to her. Wambui informed her grandmother. She was then taken to hospital. The incident was reported to the police.
 5. PW2 told the court that when PW1 came back home after fetching the milk, she was crying, but would not say what was bothering her. PW2 stated that on the following morning, PW1 was still crying of pain while holding her stomach. PW2 sent Wambui to check on PW1 and inquire what was wrong. Wambui informed PW2 that PW1 told her that Mwaura had defiled her. PW2 instructed her son, P, and Wambui to take PW1 to hospital. PW2 stated that she visited the scene of crime together with PW1 on the following day and saw that the nappier grass at the scene appeared disturbed. The appellant, who PW2 claimed lived 200 metres from her house, was later arrested by police officers.
 6. PW3, Dr. Dindi Keith, produced PW1's P3 Form on behalf of Dr. Ajevi who was at the time indisposed. PW3 stated that PW1 was referred to Nyeri Provincial General Hospital by the police on 2nd July 2008, following a report that she had been sexually assaulted. The P3 Form indicated that PW1's pubic area was super tender. She felt pain on the area above her pelvis. There were lacerations on her labia minora and her hymen was broken. No discharge, spermatozoa or pus cells were seen. PW3 stated that PW1 had initially been examined and treated on 25th June, 2008 at a nearby Health Centre
 7. PW4, Senior Sergeant Daniel Mwaniki, based at Githira Police Post, Nyeri, investigated this case. He told the court that on 25th June, 2008, at about 8.00 a.m., PW1 was brought to the police post by her uncle who reported that she had been defiled the previous evening. PW4 interviewed PW1 who informed him that the appellant accosted her on her way home, took her to a nearby farm and defiled her. PW4 stated that PW1 was first examined at Gichira Health Centre, after which she was referred to Nyeri Provincial General Hospital. The appellant was arrested on 2nd July, 2008 and later charged with the offence that he was later convicted of.
 8. On his part, the appellant exercised his right to remain silent and did not tender any evidence in defence. The learned trial Magistrate upon assessing and analyzing the evidence tendered before the court found the appellant guilty of the offence in the main count, convicted him and sentenced him to life imprisonment. The appellant, aggrieved by this decision, filed an appeal before the High Court. The learned Judge, after re-evaluation of the record of the trial court and the evidence tendered before the court, saw no reason to disturb the finding on conviction and sentence made against the appellant by the trial court.
 9. The appellant is now before this Court seeking to overturn the decision of the High Court, and has proffered, in total eight (8) grounds of appeal. The appellant took issue with the fact that the learned Judge upheld his conviction, which was based on the evidence of a single witness. He faulted the learned Judge for upholding his conviction, yet the age of the complainant was not conclusively determined. He was aggrieved by the decision of the High Court, stating that the evidence by the prosecution witnesses was doubtful and inconsistent. He was aggrieved that the High Court failed to re-analyze the entire trial record afresh as legally required, and complained that the learned Judge failed to adhere to



the provisions of Section 169 (1) of the Criminal Procedure Code in rendering her decision. He stated that the sentence meted out by the superior court was excessive and based on wrong principles of law. He faulted the learned Judge for upholding his conviction, yet the trial court failed to verify his mental capacity, and failed to acknowledge the fact that he was tongue-tied, and could therefore not be able to defend himself during the trial.

10. The appeal was canvassed on the basis of written submissions filed by both the appellant and respondent. The appellant explained his grounds of appeal in his submissions. He submitted that it was not logical that not a single person witnessed the alleged incident, noting that it was not yet dark when the incident was alleged to have taken place. The appellant urged the Court to consider the fact that the distance from PW2's house to where the complainant was said to have gone to fetch milk was less than 100 metres. He asserted that the sentence meted by the trial court and affirmed by the High Court was excessive. He invited the Court to interfere with the same. In support of his submission, the appellant cited the cases of *Samuel Githua Njoroge v R Nakuru Criminal Appeal No. 53 of 2006* (unreported), *Diego v R* [1985] KLR 621 and *James v R* [1950] 18 E.A.C.A. 147.
11. As regards the assertion that the trial magistrate ought to have considered the fact that the appellant was tongue-tied and was not able to defend himself, the appellant relied on the English case of *Pett v Greyhound Racing Association* [1968] 2All E.R 545, where the court held that a person who cannot ably defend himself ought to be accorded legal representation. The appellant submitted that he could not express himself due to his poor education background, and therefore did not put up a proper defence, hence his Constitutional right to a fair trial was violated.
12. In rebuttal, learned State Counsel, Mr. Ngetich, submitted that the trial court explained to the appellant the options available to him in exercise of his right to defend himself under Section 211 of the Criminal Procedure Code and the appellant, when placed on his defence, elected to remain silent. He explained that the appellant's right to a fair trial was not violated as the right of an accused to remain silent is provided by *the Constitution* under Article 50 (2) (j). On sentence, Mr. Ngetich submitted that Section 8 (2) of the *Sexual Offences Act* provides a life imprisonment sentence for persons convicted of defiling minors below the age of 11 years. He stated that the life sentence meted on the appellant was provided in law. There was no reason for this Court to disturb the same. The learned State Counsel invited us to dismiss the appeal in its entirety.
13. This is a second appeal. By dint of Section 361 (1) of the Criminal Procedure Act, the mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters that they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In *Dzombo Mataza v Republic* [2014] eKLR, this Court expressed itself in the following terms:

“As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong.”

14. In the case of *Karingo vs Republic* (1982) KLR 213 at page 219 this Court stated thus:

“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 rest to be applied on second appeal is whether there was any evidence on which the trial court found as it did (Reuben Karoti S/O Karanja versus Republic (1956) 17 EACA 146.”

15. We have carefully considered the record, judgments of both the trial and first appellate courts, the grounds of appeal and the rival submissions set out above, in light of this Court’s stated jurisdiction. The issues arising for determination by this Court are whether:
- i. the age of the minor was conclusively established by the prosecution;
 - ii. the prosecution proved their case to the required standard of proof beyond any reasonable doubt;
 - iii. the appellant’s right to fair trial was violated;
 - iv. the sentence meted by the trial court and affirmed by the High Court was excessive, and whether it is grounded in law.
16. One of the grounds of appeal argued by the appellant was that the prosecution failed to provide documentary evidence to conclusively establish the age of the complainant. Proof of a victim’s age is a key ingredient to prove in an offence of defilement, given that the penalty to be meted is dependent on the complainant’s age. This Court sitting at Mombasa stated as follows in Hadson Ali Mwachongo v Republic [2016] eKLR:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009* (Kisumu). This Court stated as follows:

‘In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)’.”

17. In the instant appeal, the particulars of the charge detailed that the complainant was aged between eight (8) and fifteen (15) years at the time the offence was committed. The complainant in her testimony told the court that she was eight (8) years old at the time she testified before the trial court. She also stated that she schooled at [Particulars withheld] Primary School and was in class three. The complainant’s grandmother, PW4, did not state the complainant’s age. She however corroborated the complainant’s evidence that she was a pupil at [Particulars withheld] Primary School. No age assessment test was done to ascertain the complainant’s actual age. However, the P3 Form indicated that the estimated age of the complainant was eight (8) years old at the time of medical examination. The trial magistrate, who had the benefit of seeing the complainant testify, assessed the complainant’s age to be that of a child. This is evident since the trial Magistrate deemed it necessary to conduct a *voire dire* examination on the complainant before proceeding to take her evidence.
18. This Court in *Moses Nato Raphael v Republic* [2015] eKLR observed as follows:

“On the challenge posed by the uncertainty in the complainant’s age, this Court had occasion to deal with a similar issue in *Tumaini Maasai Mwanya v. R*, Mombasa CR.A. No. 364 of 2010, where we held that proof of age for purposes of establishing the offence of defilement



which is committed when the victim is under the age of 18 years should not be confused with proof of age for purposes of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age. As long as there is evidence that the victim is below 18 years, the offence of defilement will be established. The age, which is actually the apparent age, only comes into play when it comes to sentencing.”

19. Further, in *Evans Wamalwa Simiyu v Republic* [2016] eKLR, this Court while sitting at Nairobi pronounced itself as follows:

“As to whether the appellant’s age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant’s mother did not offer any useful evidence in this regard as she did not say anything about the complainant’s age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children’s Act “age” where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years.”

20. There is no doubt that the prosecution did establish beyond reasonable doubt that the complainant was a child within the meaning of Section 2 (1) of the *Children Act*, which defines a child as any human being under the age of eighteen years. Though the complainant’s actual age was not proved, her apparent age was established to be eight years old, from her evidence as well as the medical evidence in form of a P3 Form which was produced in evidence.

21. On the second issue, and as properly observed by the trial Judge, other than the age of the complainant, the prosecution was required to establish the elements of penetration and identification so as to conclusively prove the charge of defilement against the appellant. The appellant faulted the trial Judge for failing to analyze the trial court record afresh, and for upholding his conviction based on the evidence of a single witness. The law on the need for corroboration of the evidence of a victim in sexual offence cases is well settled. Section 124 of the *Evidence Act*, Cap 80, Laws of Kenya stipulates 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.”

22. The complainant’s testimony that she was defiled was supported by the medical evidence adduced by the prosecution. The P3 Form indicated that upon medical examination on 2nd July, 2008, it was established that the complainant experienced super pubic tenderness and pain above the pelvis region. This evidence corroborated the evidence by the complainant that after the sexual assault, she was in



pain. PW4 also told the court that the complainant was crying while holding her stomach. The P3 Form further indicated that the complainant had lacerations on her labia minora, and that her hymen was broken. These injuries proved and corroborates the element of penetration as adduced in court by the complainant in her testimony.

23. On the issue of identification, we agree with the concurrent findings of the trial court and the High court, that the appellant was properly identified as the perpetrator by the complainant. As observed by the trial Judge, the offence occurred at about 5.00 p.m. The appellant was known to the complainant. She testified that she knew the appellant's home, and often saw him herding cows. PW2 told the court that the appellant lived about 200 metres from her house.
24. The complainant told PW4 that it was Mwaura who had defiled her. She identified the appellant by his name. She identified him before he blindfolded her, and afterwards when she saw him running away from the scene. The incident occurred in broad day light. It was at around 5. 00 p.m. We find that the conditions for a positive identification were conducive in present appeal, and the appellant's identification as the perpetrator by the complainant, which was by recognition, was watertight and free from the possibility of mistaken identity. The two courts below were satisfied that the complainant's evidence was consistent and truthful. She knew the appellant well prior to the sexual assault. She could not have mistaken him for another person. We see no reason to depart from this concurrent finding.
25. The appellant submits that he was not accorded a fair trial. The appellant faulted the learned Judge for upholding his conviction without considering that the trial magistrate ignored the fact that the appellant was not in a position to ably defend himself during the trial. He submitted that he was not able to properly defend himself during trial as he was tongue tied, had a poor education background, and was therefore not able to properly express himself when he was placed on his defence. It was his contention that failure by the trial court to accord him legal representation violated his right to a fair trial enshrined under Article 50 of *the Constitution*.
26. A perusal of the appellant's grounds of appeal and written submissions thereof before the High Court reveal that the appellant did not raise this issue before the first appellate court. It, can, therefore, not be a basis for vitiating the decision of the High Court. Be that as it may, the trial court record shows that the appellant's trial was conducted prior to the promulgation of the 2010 Constitution. The trial was concluded on 30th June, 2009, and the judgment by the trial court was rendered on 17th March, 2010.
27. Section 77 (2) of the repealed Constitution provided thus:
 - (2) "Every person who is charged with a criminal offence:
 - d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;"
28. Section 77 (14) went on to stipulate that:

"Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense."
29. This is different from the current Constitution, which, under Article 50 (2), provides that:

"Every accused person has the right to a fair trial, which includes the right:
 - g. To choose, and be represented by, an advocate, and to be informed of this right promptly;



- h. To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;” (emphasis ours)

30. This court in *David Njoroge Macharia v Republic* [2011] eKLR

observed thus:

“Under the new Constitution, state funded legal representation is a right in certain instances... We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.

As we have indicated before, in so far as the appellant before this Court is concerned, his trial took place under the old Constitution, and he would not have been entitled to free legal representation during the first trial. His appeal is therefore dismissed”.

31. In the instant appeal, the appellant informed the Court that he was ready to proceed with the case. He actively participated in the trial and cross-examined all the witnesses. The argument in his written submissions that he did not examine the prosecution witnesses is, therefore, incorrect. The record further shows that the trial court explained to the appellant the effect of Section 211 of the Criminal Procedure Code. He elected to exercise his right to remain silent, and therefore did not put forth any defence. The record also indicated that an interpreter was availed all throughout the trial and the proceedings were translated to the appellant in his preferred choice of language; Kikuyu. It is, therefore, not apparent to the Court that the appellant suffered any prejudice or any substantial injustice as he alleges. Further, since his trial was conducted under the repealed Constitution, he would not have been entitled, at the time of his trial, to legal representation at the expense of the State. This ground of appeal must therefore fail.
32. In the circumstances, we are satisfied that the High Court addressed itself correctly on the law and that there are no grounds for interfering with the concurrent findings of fact for the reason stated above. We are satisfied that the appellant was properly convicted.
33. On the issue of sentence, the charge sheet indicated that the complainant was aged between eight (8) and fifteen (15) years. Though her actual age was not established, her apparent age was determined to be eight years old. It is our view that in the interest of justice, the appellant ought to have been sentenced under Section 8 (3) of the *Sexual Offences Act* which provides for the penalty for persons convicted of defiling minors below the age of fifteen years. The said section provides that an accused person found guilty of defiling a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
34. In the end, the life imprisonment sentence meted by the trial court and affirmed by the High Court is hereby set aside, and is substituted with a sentence of twenty (20) years imprisonment. Since the appellant was out on pre-trial bail during the pendency of his trial, his sentence shall commence from the date the trial court delivered its judgment, that is, 17th March, 2010.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023.



W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

