Lalpei v Republic (Criminal Case E048 of 2023)
[2025] KEHC 571 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 571 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL CASE E048 OF 2023

AK NDUNG'U, J

JANUARY 30, 2025

BETWEEN

MOSES SANYA LALPEI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM's Sexual Offences Case No.E001 of 2023– Hon. Masivo – SRM)

JUDGMENT

1. The Accused, MSL, was charged with Defilement contrary to Section 8 (1)as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 30th day of December 2022 at [Particulars Withheld], Laikipia County intentionally caused his penis to penetrate the vagina of B.N.N, a child aged 17 years. After trial he was sentenced to serve 20years imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant has filed this appeal based on the following Amended grounds of Appeal;

    i. That the trial magistrate erred in matters of law and by not finding the medical evidence that was produced in court did not conclusive prove that there was penile penetration.

    ii. That the trial magistrate erred in matters of law and fact by failing to observe that the evidence adduced was contradictory and inconsistence and it was dangerous to have relied on that evidence to convict.

    iii. That the trial magistrate erred in matters of law and fact by failing to comply with Article 50(2) (g) of *the Constitution*.

iv. That the trial magistrate erred in matters of law and fact by not observing that the ingredients of the offence herein were not proved as required in law.

v. That the conviction to be quashed and sentence set aside.

3. The appeal was canvassed by way of written submissions.

4. The summary of the evidence as recorded at the trial court is as follows. PW1 testified that she was 17 years old. She identified her birth certificate. On the 30/12/22 she was herding goats when the Appellant drove them to the bushes. When PW1 persued the goats into the bushes, the Appellant grabbed her, gagged her, lifted her dress and forcefully inserted his penis into her vagina without her consent. The Appellant did not use protection. When she was freed she ran to a nearby homestead where she was assisted with a phone and she called her father. The matter was reported at Ngaringiro police station and they were referred to Nanyuki police station. PW1 was examined the next day and PRC and P3 forms were filled. PW1 identified the clothes she wore on the material day in court.

5. PW2, PW3 and PW4 responded to the distress call by PW1. They helped take her to the police station and to hospital. PW3 found the Appellant at the scene and he escorted him and they met police officers.

6. PW5 produced the P3 and the PRC forms filled by his colleague, FM. He had worked with the said M for 3 years and was familiar with her handwriting and signature. The production was unopposed as the Appellant is recorded as having had no objection to the production. The findings were that there was laceration on the labia minora. The hymen was freshly broken. She had a whitish non-foul smelly vaginal discharge. There was thus evidence of penetration.

7. PW6 was the investigating officer. She received PW1 and the Appellant at Nanyuki police station. Both were treated. P3 and PRC forms were filled. PW6 produced the birth certificate in respect of PW1 as evidence. She also produced photographs of the scene, a torn red and white inner wear of the victim, skirt, lesso and white blouse.

8. When placed on his own defence, the Appellant gave an unsworn statement. He stated that on 30/12/22 he woke up as usual. He went to work. He was picked up by the police at 11.00 a.m. He was taken to the police station then told he was required at Nanyuki police station. He was held for 3 days then strange charges were read to him. He denied the offence.

9. In his submissions, the Appellant urged that the prosecution did not prove that there was penetration. He stated that the available evidence showed that PW1 was beaten and not defiled. He added that the medical evidence did not prove penetration. He maintained that a hymen can be broken through other means. He relied on the decision in P.R.W. vs Republic [2012]eKLR.

10. He submits that voir dire ought to have been undertaken and that his rights on representation under Article 50(2)(g) was violated. It is his case that the evidence adduced was laced with contradictions and inconsistencies.

11. For the respondent, it is submitted that defilement is an offence against minors and the prosecution ought to prove the age of the victim.

12. In respect of penetration its further submitted Section 2 of the *Sexual Offences Act* defines 'penetration' as: 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

13. It is the prosecution's case that penetration was proved through the evidence of PW1 and PW5, the clinical officer.

14. On whether Article 50 (2)(G) of *the Constitution* was complied with, Article 50 (2)(G) of *the Constitution*, provides that ''every accused person has a right to a fair trial which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.''

15. It is submitted that During the entire trial, the appellant was afforded the chance to fully participate. He was given time to prepare for his defence and was able to cross examine all the witnesses presented by the state. At no point during the trial did the Appellant indicated that he wanted to be represented by an advocate. Reliance was placed on the case of Ndemba v Republic (Criminal Appeal E033 of 2023) [2024] KEHC 7809 (KLR)(27 June 2024).

16. In this particular case, the Appellant proceeded with the trial without ever having asked that the trial court to give him time to instruct counsel who would represent him. This court thus came to the firm conclusion that this constitutional and fundamental right to fair trial had not been breached merely because the trial court did not inform of his right of legal representation under Article 50 (2)(G) of *the Constitution* of Kenya.''

17. Lastly, on sentence it is submitted whether the sentence imposed was proper; the Appellant has taken issue with the sentence as imposed on him by the learned trial magistrate following conviction. It is their case that the sentence imposed by the court was proper, justified and lenient taking into consideration the nature other offence and provisions of minimum mandatory sentence.

18. It is urged that in sentencing, the trial court is called upon to weigh between the mitigating factors put forth by the accused, vis -a- vis the aggravating circumstances on the complainant/victim's side. Reliance is placed on the case of Bernard Kimani Gacheru vs Republic (2002) eKLR.

    14. I have considered this appeal, submissions, decisions cited and the law. I have also read the record of the trial court and the impugned judgment. The issues for determination are 2;

        1. Whether the prosecution's case was proved to the required legal threshold.

        2. Whether the sentence meted out is legal and appropriate.

19. This being the first appeal, it is by way of a retrial and parties are entitled to this court's reevaluation, reanalysis and reconsideration of the evidence and its own decision on that evidence. The court should however bear in mind that it did not see the witness testify and give due allowance for that. (See Okeno v Republic [1972] EA 32).

20. This principle is buttressed in the decision in Kiilu & Another v Republic [2005]1 KLR 174, where the Court of Appeal held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

21. As the court reviews the evidence, an important consideration is the who bore the burden of proof at trial. The burden of proof in criminal cases is well settled. In Philip Nzaka Watu v Republic [2006] eKLR, it was held that to for a conviction to lie in a Criminal case, the trial court has to be satisfied

of the accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in Stephen Nguli Mulili v Republic [2014] eKLR:

> " [I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa V R, [2013] eKLR."

22. In the famous case of Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

23. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

24. The three main ingredients that must be proved for a conviction to lie in a charge of defilement are established by law. These are the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under Section 8(1) of the *sexual Offences Act* No. 3 of 2006. (see George Opondo Olunga vs. Republic [2016] eKLR.)

25. While age and identification pose no difficulties in clarity, what constitutes penetration requires definition and Parliament in its wisdom provided the same in section 2 of the Act to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person.

26. Section 8 (1) of the Act provides;

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".
>
> The Act provides different sentences based on the section a person is charged.

27. The relevant Section for the purposes of this appeal is Section 8(4). It provides;

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years".

28. The question of age of the victim is not contested. In any event there is clear evidence on this issue by way of production of a birth certificate.

29. As regards penetration the Supreme Court of Uganda in Bassit*a v Uganda S.C. Criminal Appeal No. 35 of 1995* which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR gives useful guidance on how penetration can be proved. The Court stated,

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the 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."

30. In the instant appeal the fact of penetration is anchored on the evidence of PW1 and the medical evidence produced by PW5. The evidence of PW1 is clear on what was done to her. She described how the assailant after gagging her inserted his penis by force into her. This evidence is materially corroborated by the evidence of PW5 whereby the P3 and PRC forms produced showed that the victim suffered laceration of the labia minora and the hymen was freshly broken. This is evidence of an independent and neutral expert with nothing to gain from the outcome of the proceedings. There no doubts whatsoever that PW1 was penetrated.

31. The next issue to ponder is whether the Appellant was identified as the perpetrator of the act. The incident happened in broad daylight. The Appellant was known to PW1 before. This was evidence of recognition. PW1 had no particular reason to frame the Appellant.

32. In rebuttal to this evidence, the Appellant raised an alibi defence in an unsworn statement. That alibi is raised belatedly and did not feature at all in the cross examination of witnesses. In light of the evidence on record, the Appellant's statement cannot possibly be true.

33. It would be remiss of this court to fail to look at the probative value of an unsworn statement of defence. Emukule J addressed the issue in the case of Mercy Kajuju & 4 Others v Republic [2009] eKLR where he stated as follows:

> " I also discussed at some length the nature and value of unsworn statement, and on authorities held that unsworn statements have no probative or evidential value unsworn statements are not in evidential sense, facts which either go prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence
>
> There are of course constitutional issues to overcome for instance Section 77 of *the Constitution* on fundamental rights and compulsion to give evidence. There is need to study these provisions and ss.211 and 306 of the Criminal Procedure Code, for the better

enforcement of the law in relation to the criminal justice system and eliminate these unsworn statements as they add no value to the system and if any they confuse the accused who are mostly ignorant of their effect, and thereby obfuscate the system all together....

"Although it is an accused person's right to remain silent, or not to give a statement, or evidence on oath, but whenever an accused person elects to make an unsworn statement he gains one major advantage over the prosecution, his statement cannot be tested as to its veracity or truthfulness by way of cross examination whose purpose directed-

(1) to test the credibility of the witness;

(2) to the facts to which he has deposed in-chief including the cross examiners version thereof, and

(3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose,

(4) failure to cross examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

In addition, the estimation of the value of evidence in ordinary cases, the testimony of a witness who swears positively to a fact may receive credit in preference to one who testifies to the negative. For instance, evidence as to what has not been seen would not carry the same weight as evidence as to what has been seen. Little weight will consequently be given to an unsworn statement. That is the disadvantage in an accused person electing to make an unsworn statement. A few cases will illustrate the point.

34. In Amber May Vs The Republic [1999] K.L.R. 38, the High Court held that unsworn statement has no probative value notwithstanding the provisions Section 211(1) of the Criminal Procedure Code. On Appeal against that decision and reported as May Vs The Republic [1981] KLR. 129, the court of Appeal inter alia held-

"1. That unsworn statement is not, strictly speaking evidence and the rules of evidence, cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value it must be supported by evidence recorded in the case.

2. No adverse inference can be drawn against the appellant for electing to make an unsworn statement as she was exercising her right conferred by Section 211 (1) of the Criminal Procedure Code (Cap 75, Laws of Kenya)"

35. In Maitanyi vs Republic, (1986) KLR 196 the court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:-

''Subject to well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilty, from which a judge or jury can reasonable conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.''

36. Flowing from the above the Appellant unsworn statement fails to displace the prosecution's evidence. The victim's identification of the appellant was very clear, as the same was through recognition. The incident happened during the day and the appellant and the victim had an altercation before the incident giving the victim a great opportunity to recognize her perpetrator. There was therefore no doubt in her mind that the appellant was the one who had defiled her. Am satisfied that the Appellant was properly identified.

37. On whether Article 50 (2)(G) of *the Constitution* was complied with, Article 50 (2)(G) of *the Constitution*, provides that "every accused person has a right to a fair trial which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

38. My understanding of the above provision is that the court ought to inform an accused person of the right to choose and be represented by an advocate and to be informed of this right promptly. In fact, in circumstances falling under Article 50(h), a person is entitled to have an advocate assigned to them by the state and at state expense. This right is not absolute and even where the person is not promptly informed of his right to counsel, that is not enough to vitiate criminal proceedings unless real prejudice is demonstrated. In the present appeal, the Appellant fully participated in the trial, cross examined witnesses and gave his defence.

39. In David Macharia Njoroge vs R (2011) eKLR the court held thus: -

> " State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
>
> 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." (emphasis added).

40. In the same vein am not persuaded that the failure to inform the appellant of the right to counsel would result in an automatic order for a retrial or in the extreme lead to the quashing of a conviction.

41. In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's case as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It is also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation.

42. The Appellant has challenged the sentence imposed. Section 8(4) *Sexual Offences Act* provides for the penalty for persons convicted of the charge of defilement as follows:

> ''A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less that fifteen years.''

43. In Bernard Kimani Gacheru vs Republic (2002) eKLR, the Court of Appeal stated that:-

> ''It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 stats is shown to exist.''

44. In exercise of the court's discretion in sentencing and as can be gleaned from the ruling on sentencing, the court considered relevant factors being mitigation by the Appellant and aggravating factors. The appellant's mitigating factors were;

    a. He has never been visited in custody

    b. He seeks leniency.

    c. He was a first -time offender.

    d. The accused person is at his youthful stage.

45. On the other hand, the aggravating factors considered were as follows;

    a. The appellant took advantage of the child.

    b. The trauma that the child underwent.

    c. The child lost her dignity.

    d. The appellant choked the child while defiling her.

    e. He assaulted her in the process.

46. It is clear that the law placed a minimum sentence of 15 years. The court upon considering all factors found the sentence of 20 years appropriate in the circumstances. The exercise of discretion was not tainted with illegality or consideration of irrelevant factors. Neither was the sentence excessive. The court factored in the remand period during the pendency of the trial. This court has no basis at all upon which to interfere with the sentence.

47. With the result that the appeal herein lacks merit and is dismissed in its entirety.

DATED SIGNED AND DELIVERED THIS 30TH DAY OF JANUARY, 2025.

A.K. NDUNG'U

JUDGE