Wepukhulu v Republic (Criminal Appeal 23 of 2019)
[2025] KEHC 1146 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 23 OF 2019

AC MRIMA, J

FEBRUARY 28, 2025

BETWEEN

PATRICK WAMALWA WEPUKHULU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. V.W. Wandera (CM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 97 of 2017 delivered on 11th March 2019)

JUDGMENT

Background:

1. Patrick Wamalwa Wepukhulu, the Appellant herein, was charged with the offence of defilement contrary to Section 8(2) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on the 17th day of August 2017 at [Particulars Withheld] – section 6 within Trans-Nzoia County, intentionally caused your penis to penetrate into vagina of M.A a child aged 6 years.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were that on the17th day of August 2017 at [Particulars Withheld] – section 6 within Trans-Nzoia County, intentionally caused your genital organ, namely penis contact the genital organ namely vaginal of A.M a child aged 6 years.

3. The Appellant pleaded not guilty on both counts. A total of five witnesses testified on behalf of the prosecution. R.A, the complainant's Aunt was PW1, AM, the complainant, testified as PW2. Pharis Sitati, a Community Oral Health Officer at Kitale County Hospital was PW3. John Koima, a Clinical Officer at Kitale County Hospital was PW4 and No. 81682 PC Esther Nolari, the Investigating Officer testified as PW5.

4. Upon close of prosecution's case, the trial Court made the finding that a prima facie case had been established against the Appellant. Accordingly, was put on his defence. He gave sworn evidence and did not call any witness. At the close of the defence case, the Court rendered its judgment where the Appellant was found guilty of the offence of defilement and was convicted. He was subsequently sentenced to life imprisonment.

The Appeal:

5. The Appellant was dissatisfied with his conviction and sentence. Through an undated amended petition of appeal, he urged that his conviction be quashed and sentence set aside on the following grounds;

    1. That the learned trial magistrate erred in both law and fact by failing to note that eh Appellant's absolute rights were violated, infringed and contravened before being produced in court by holding him in police custody for long without cogent reasons.

    2. That the trial magistrate erred in both law and fact by basing conviction and sentence on the evidence that was largely inconsistent and contradictory.

    3. That the learned trial magistrate erred in both law and fact by failing to note that one of the crucial witnesses was not availed to court to give his evidence.

    4. That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the Appellant side yet failed to note that the crucial exhibit mentioned by the prosecution were not availed before the Court.

    5. That the learned trial magistrate erred in both law and fact by failing to consider mitigation and defence of the Appellant before sentencing.

    6. That the Appellant prays for further mitigation during the hearing and determination of the Appeal.

6. In his written submissions, the Appellant asserted that he was arrested on 18th August 2017 and was held in custody until 21st August 2017 when he was arranged in Court for plea taking, a period of more than 24 hours allowable under *the Constitution*.

7. Regarding inconsistent and contradictory evidence, the Appellant pleaded that whereas PW1's evidence was that she found a white fluid which she concluded were sperms, the evidence of the Clinical Officer was to the effect that there were no traces of spermatozoa upon conducting a high vaginal swab.

8. The Appellant claimed that the he ought to benefit from the contradictions as per the dictates of section 198(1) of the *Criminal Procedure Code* (CPC).

9. With respect to failure to avail crucial witnesses, the Appellant submitted that Mr. Kagumo and Zainab, persons who interviewed the complainant after the alleged incident, ought to have been availed before Court to speak to it pursuant to section 150 of the CPC that requires persons mentioned by the prosecution to testify as witnesses.

10. Similarly, the Appellant submitted that he ought to benefit from the omission by the prosecution to avail crucial exhibits among them the torn pant of the complainant which had white yellow stains.

11. His defence that he was at Lessos primary school for purposes of voting ought not be interpreted as a mere, untrustworthy denial, the Appellant pleaded. He urged the Court to make the finding that

the prosecution did not proffer any evidence to countermand that position as would be required of it under section 212 of the CPC.

12. In mitigation, the Appellant stated that he was remorseful, had a family that depended on him and was a first offender.

13. The prosecution challenged the appeal through written submissions dated 20th June 2023. It was its case that it proved the ingredients of age, identity of the perpetrator and penetration to the required standard. The Respondent stated that the complainant's Age Assessment Report produced as P Exh. 3 by PW3 confirmed her age to be 6 years. To that end, the decision in Omur*oni -vs- Uganda, Criminal Appeal No. 2 of 2000* was relied upon where it was held that;

> ... the age of a victim can be determined by medical evidence and other cogent evidence". In the case of Francis Omuroni -vs- Uganda, the Court of Appeal Criminal Case No. 2 of 2000, it was held thus; in defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim.

14. Regarding the identity of the perpetrator, the Respondent submitted that the complaint's evidence to the effect that she used to see the Appellant at home where he had a house established. As such she knew him and there was no error of mistaken identity.

15. With respect to penetration, the Respondent submitted that the law does not envisage absolute penetration into the genitalia or the release of spermatozoa or screening of the male organ for the act of penetration to be complete. To that end, the Court was referred to the decision in Daniel Wambugu Maina -vs- Republic.

16. The Respondent drew the Court's attention to the evidence of the Complainant and the expert testimony of PW4 as well as the treatment notes and asserted that penetration was proved beyond reasonable doubt.

17. Further to the foregoing, the Respondent urged the Court to make the finding that there was no instant at which the burden of proof shifted to the Appellant as the prosecution proved all the elements of defilement which he (the Appellant) had the burden to disprove.

18. On the aspect of being held in custody for more than 24 hours, the Respondent urged this Court to be guided by the case of Julius Kamau Mbugua -vs- Republic, where the Court observed that it is not the duty of the trial Court or an appellate Court to go beyond the scope of the criminal trial and adjudicate on violations of rights to personal liberty.

19. In the end, the Respondent urged the Court to dismiss the appeal, uphold the conviction and the sentence affirmed.

Analysis:

20. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings. (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, ought to make due allowance as was so held in Ajode v. Republic [2004] KLR 81.

21. Before delving into the merits of the appeal, there is a preliminary issue for resolution raised by the Appellant to the effect that there were constitutional infractions of his right to be produced in Court

within 24 hours of arrest. It is his case that he was held longer than that prescribed timeline and as such the trial was unconstitutional and the appeal be allowed and he be released.

22. This Court takes the position that the resolution of that issue is not within the ambit of this Court at this appellate level and in the circumstances of this appeal. It is a distinct issue whose resolution resides in a constitutional Court unless it is clearly demonstrated how the trial was vitiated as a result of the delay and the issue was raised before the trial Court in the first instance. The Appellant did not raise the issue before the trial Court and did not also demonstrate how the trial was compromised to the extent that he was prejudiced. The objection, therefore, fails. I will now deal with the main appeal.

23. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

24. It is established by law and judicial precedents that the offence of defilement carries three components. The Prosecution must prove the age of the victim, penetration and identity of the perpetrator. I will interrogate each in turn with reference to the evidence.

Penetration:

25. The Appellant was charged under Section 8(2) of the *Sexual Offences Act* which provides as follows: -

    8.

        (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

26. RA (PW1) testified that on 17th August 2017, she left home at about 4pm to attend her sister's farewell party. She left the complainant at home to take care of her baby aged 1 year and 6 months. Half an hour later, she returned to her house where she found her baby sleeping with the complainant. She then left again to her sister's house and at about 6pm, the complainant brought her baby to her sister's house. It was her evidence that when they were walking back home, she noticed that the complainant was not walking normally. She walked with her lags wide apart. Upon inquiring from her what had happened, the complainant said that Patrick had taken her to her uncle's house where he tore her pant and sat on her. She further stated that he closed her mouth.

27. PW1 stated that she took the complainant to her bed to examine her whereupon she found white fluid which she concluded to be sperms. She took her to Kitale District Hospital the same night where the Doctor examined and treated her and were referred to Ampath the following day where the complainant was issued with P3 Form and treatment notes. It was her further evidence that Patrick, their Watchman, was arrested that night and taken to the police station.

28. On cross examination, it was her evidence that she did not hear the complainant screaming. She stated that when left home that evening, she left the watchman in the compound and he was the only man inside the plot.

29. The complainant was PW2. Upon being subjected to voir dire examination, it was her evidence that she stays with her aunt at a place called Section 6 in Kitale and that she was in middle class at Little Bird Academy. She stated that on the material date, she was with a child by the name Utheifa when soldier came, closed her mouth using his hand and took her to her uncle's house where he tore the trousers she was wearing, dropped his trouser to knee position and then sat on her. She stated that soldier made her lie on the bed while facing upwards then lay on her and sat on her private part which she uses to urinate. She claimed that she felt pain when the soldier sat on her but could not scream because he had shut his mouth using his hand. She further stated that Soldier asked her not to tell anybody that he

had done 'tabia mbaya' to her. It was her evidence that there was no one else in the house at the time soldier did bad manners to her and that when he finished, he went to his house. It was her evidence that she used to see the soldier at their home.

30. On cross-examination, she stated that the soldier pulled her from their house and took her to her uncle's house and did 'bad manners' to her. She refuted the claim that the solider had gone to the hospital on that day since he is the one who did bad manners to her.

31. The term 'penetration' is defined by Section 2 of the said Act in the following way;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

32. This position was fortified in Mark Oiruri Mose vs R (2013) eKLR when the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

33. Later the Court of Appeal, then differently constituted, in Erick Onyango Ondeng -vs- Republic (2014) eKLR held as such on the aspect of penetration: -

> ..... In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

34. From the outset, the comprehensive voir-dire examination conducted on the complainant revealed the values instilled in her. Her understanding on the importance of telling the truth came out clearly and leaves no doubt in the mind of this court as to her truthfulness. The occurrence of penetration can be traced back to the point PW1 noticed the change in the manner the complainant walked. As they headed back home that evening, she noticed that the complainant walked with her legs wide apart. She examined her and found white fluid in her genitalia.

35. The complainant's own testimony was coherent and detailed as to what happened on the fateful day. Her recollection on how the appellant pulled her to her uncle's house and how he gagged her using his hand was elaborate. Further, the manner in which she described what the Appellant did in the house; dropping his trouser to knee height and lying on her and doing 'tabia mbaya' in the place she uses to urinate, an act she said was painful, speaks to the occurrence of defilement.

36. The examination by the Clinical Officer, PW4, fortified what had befallen the complainant. The Medical Examination Report which he filled and was produced in evidence indicated that the complainant's trouser was soiled with a whitish dry substance. Regarding the physical state of and any injuries to genitalia, the Medical Report was conclusive proof that indeed there was defilement. The observation made was that it had purulent whitish discharge, with tenderness and erosion of the vulva, a hyperaemic labium, a partially torn hymen and the increase in white blood cells.

37. The Appellant's claim that there was contradiction and inconsistent evidence is an unsubstantiated claim. As a matter of fact, the Complainant's and the Clinical Officer's claim are complementary. Considering the provision of section 2 of the *Sexual Offences Act* and what constitutes penetration as

was decided in Erick Onyango Ondeng -vs- Republic (2014) eKLR, this Court's is satisfied that the penetration was proved to the required standard.

Age of the complainant:

38. Pharis Sitati (PW3), a Community Oral Health Officer testified that she deals with treatment of dental cases and age assessment using a dental formula. It was her evidence that, on 21st August 2017, she examined the complainant in the dental clinic and found that she was of mixed dentition (primary and secondary). She established that her lower permanent incisors had erupted and all first permanent molars had erupted. It further was her testimony that from her radiographic examination, she assessed the complainant's age to be six years old. She produced the Age Assessment Report as an exhibit. On cross-examination, it was her evidence that the complainant had started shedding teeth (exfoliating milk teeth), a process that starts at the age of six.

39. Having gone through the Age Assessment Report and since there was no meaningful objection thereto, this Court settles the age of the complainant to be 6 years old. It estimated the complainant's age to be six years at the commission of the offence.

Identity of the perpetrator:

40. The complainant's evidence pointed to that of recognition of the Appellant. She was categorical that the person that forced her into her uncle's house and did tabia mbaya to her was their soldier whom she had known for a long time.

41. In his own evidence, the Appellant did not refute working as a soldier at the very place. Further PW1 stated that she had left the Appellant as the only male person in her compound as she proceeded to the function. PW5, No. 81682 PC. Esther Nolari, the investigating officer, stated that on 18th August 2017 at around midnight, he received a phone call from report office personnel informing him that there was a suspect who had been brought to the station by members of the public on allegation of defilement. The suspect turned out to be the Appellant.

42. The Appellant stated that the case was planted on him in view of his strict work procedures. He stated that he would ordinarily refuse to let anyone into the plot when late and would insist on inspecting their cars; acts which offended the residents, hence, harboured grudges against him.

43. In this case, the only witness to have had a firsthand account of what transpired was PW2. Therefore, the evidence incriminating the Appellant was by a single witness. The Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi vs Republic [1986] KLR 198:
>
> 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the Court emphasized that:

> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

44. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

45. In Wamunga vs Republic (1989) KLR 426 the Court of Appeal stated as under: -

> .... It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

46. In Anil Phukan vs. State of Assam (1993) AIR 1462 the Court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

47. Deriving from the foregoing, it is the legal position that the evidence of a single identifying witness can be sufficient to positively settle the issue within the permissible legal parameters. In this case, PW2 lived within the compound in which the Appellant worked as a watchman. PW2, therefore, knew the Appellant and even referred him to 'soldier' and readily gave out the name to PW1 and the police. There was no doubt the Appellant was at work on the date in issue. That was confirmed by PW1, PW2, PW5 and the Appellant himself.

48. The incident as narrated by PW2 was simple, clear and straight-forward. She stated exactly what happened with clarity and ease. This Court is not slightly persuaded that PW1 was mistaken on whom she dealt with. The defence by the Appellant that he was being framed in the case due to his strictness at work does not really convince this Court. I say so since there were no reported cases of any controversy between the Appellant and any of the residents in the plot. Therefore, by taking into account the above caution and parameters, this Court finds that indeed the identification of the Appellant by way of recognition was not in error. The defence is unbelievable and did not cast any doubt on the prosecution's case. The Court finds and hold that it was the Appellant who carnally assaulted PW2.

49. There was also the issue that the Respondent failed to avail some other witnesses and exhibits. In Julius Kalewa Mutunga -vs- Republic [2006] eKLR, the Court of Appeal held that: -

> ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

50. There was no obscure motive that was demonstrated by the Appellant buttressing the need for the additional witnesses and evidence. In any event, given the discretion given to the prosecution on the number of witnesses to call, the evidence already on record was sufficient. The ground is unmeritorious.

51. From the foregoing, the offence of defilement was proved. The conviction was proper and the appeal against it cannot stand.

52. On sentencing, the Appellant was committed to a life imprisonment. The sentencing Court rightly considered mitigations and also appreciated the mandatory nature of Section 8(2) of the *Sexual Offences Act*, a position this Court is obliged to uphold in view of the Supreme Court direction in Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi. Since the Court did not have discretion to alter the life imprisonment prescribed in law, the appeal equally fails.

Disposition:

53. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

54. In the premises, the appeal is wholly without merit and is dismissed. The conviction and sentence are hereby upheld.

Orders accordingly.

DELIVERED , DATED AND SIGNED AT NAIROBI THIS 28 TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Patrick Wamalwa Wepukhulu, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.