Karenju v Republic (Criminal Appeal E062 of 2024)
[2025] KEHC 4967 (KLR) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4967 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E062 OF 2024

DKN MAGARE, J

APRIL 28, 2025

BETWEEN

SAMUEL KANYI KARENJU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence of Hon. V. S. Kosgei (SRM) in Karatina CMSO Case No. E004 of 2022. The Appellant was tried and convicted to an offence of attempted defilement contrary to Section 9(1) as read with 9(2) of the *Sexual Offences Act*.

2. The particulars were that on 19.07.2022 at [Particulars withheld] village, in Mathira east sub-county, the appellant intentionally attempted to cause his penis to penetrate the anus of CD, a child aged 5 years.

3. There was an alternative count of committing an indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on 19.07.2022 at [Particulars withheld] village, in Mathira East Sub-County, the appellant intentionally touched the anus of CD, a child aged 5 years with his penis.

4. On 21.07.2022, the appellant was arraigned in court and pleaded not guilty. He was not released on bond. The court directed that the bond was to be considered after the minor had testified.

5. The evidence taking started on 26.09.2022. PW1 was the mother of the minor herein. The minor was said to have been born on 26.07.2017. She was in the house on 19.07.2022 when the minor called out but the witness ignored him. The minor came shivering, to state that he was at the Appellant's house where he was anally defiled. She did not check the child but took him to Karatina hospital. She stated that no other man was in the compound except the Appellant.

6. On cross-examination, she denied ever screaming. She stated that the appellant locked himself in the house to avoid the wrath of the neighbors. She stated that the doctor stated that it is the appellant who committed the offence.

7. PW2 was a minor. The court carried out voire dire on the minor. The court found that the child does not understand the meaning of the oath. His evidence is to be taken without being sworn. The minor stated that the appellant asked him to lie facing upwards and did bad manners to him. He stated that nothing was inserted into him. He said nothing else was done to him. He stated on cross-examination that the Appellant did bad manners. Whatever bad manners mean, the court cannot fathom, in the absence of anything being inserted or attempted to be inserted into him.

8. PW3, Dr. Stephen Nderitu was a medical doctor based at Karatina sub-county hospital. He testified that he had worked with Dr. Maina Ngaru for 5 years and was conversant with his handwriting. He was stood down for the doctor who filled the P3 to come to court.

9. PW4 Inspector Dennis Sohera, testified that a boy had closed himself in the house. He stated that the appellant was being lynched by the members of public. On cross-examination, he stated that he did not investigate grudges between the two families. He concentrated on the defilement. On reexamination, he recanted his earlier testimony and stated that the Appellant never told him of the grudges. Such testimony is of no use to the court in determining the ends of justice.

10. PW5 Dr. Nguru Maina examined the minor on the same day. He had his clothes on. The report was in favour of the Appellant. He concluded based on his observation. He stated that many things could cause the lacerations. He requested the court to make a finding on the evidence.

11. The Appellant was placed on his defence. He gave sworn evidence and was not cross-examined. He stated that he was in his house when the minor came. He gave the minor a phone. After 5 minutes, neighbours were baying for his blood that he had defiled the minor. They called the Chief and the police. He stated they had family issues. Earlier, when he went to greet the complainant's family, they told him not to welcome them as he was a bastard. He stated that he was framed. He was not cross-examined. I shall revert to his aspect.

12. The P3 form did not indicate any form of defilement. A laceration was noted on the left side of the anal orifice. There was no discharge. The allegation of the PRC was that there was actual defilement. However, on examination, the external genitalia was normal.

13. He was convicted and sentenced to serve 10-years imprisonment. He then appealed on what appeared to be an appeal on conviction and sentence.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and

reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

16. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated as follows on the duty of the court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

17. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

18. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence

of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

19. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

20. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 that:-

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

21. Section 9 of the *Sexual Offences Act* provides as follows:

9.

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. Acts which cause penetration or indecent acts committed within the view of a family member, child or person with mental disabilities. Defilement. Cap. 92 *Act No. 8 of 2001*. Attempted defilement. *Sexual Offences Act* No 3 of 2006 8.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

(3) The provisions of section 8(5),(6),(7) and (8) shall apply mutatis mutandis to this section.

22. Section 124 of the *Evidence Act* provides for the treatment of evidence of sexual victims. The same provides 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.

23. The evidence of the minor does not show any attempted penetration. The minor stated he was not penetrated. There was no indication whatsoever of an attempt to commit an offense. The evidence of PW2 is even more confusing. She went straight to report instead of checking the extent of the alleged injury; she called the villagers to lynch the Appellant before ascertaining the state of the minor.

24. The police evidence was of no use. The Appellant stated there was a family grudge which the police did not rule out. It is the duty to investigate both inculpatory and exculpatory evidence. The court in Thuita Mwangi and 2 Others v Ethics and Anti-corruption Commission and 3 Others [2013] Petition 153 of 2013 consolidated with Petition 369 of 2013 stated as follows:

> The right to be provided with material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

25. The issue of the grudge remained central to the case. The prosecution did not displace the defence raised. The Appellant gave cogent evidence on his defence. He stated that the minor was in his house as usual and was browsing. The parents did not like him because he was a bastard. None of this facts were disputed or challenged on cross-examination. The court had no reason to disbelieve them. The effect of not cross-examining the Appellant was to underscore the truth of what he was saying. In other words, the defense was uncontroverted. In Jairus Mukolwe Ochieng v Republic [2013] eKLR, the Court of Appeal posited as hereunder:

> " An adverse inference can only be raised if the evidence in support of the charge is barely sufficient. In the instant case, the evidence against the appellant is overwhelming. The evidence of PW1 and 2 was largely unrebutted as they were not subjected to any cross-examination. There were no unbridgeable gaps in the prosecution case that would have warranted the testimony of the investigating officer. Similarly, we do not think that evidence of the boy who witnessed the robbery would have added anything new to the prosecution case other than just perhaps buttressing prosecution case."

26. The court in Jairus Mukolwe Ochieng v Republic [supra] continued to underscore the need for cross-examination. Though it referred to an accused, this principle is equally applicable to the state.

This is not a mere procedural slip. Rather, it implicates the fair trial right of an unrepresented accused person who is facing a capital charge upon conviction for which the ultimate sentence may be imposed. The trial court cannot in such situations play a merely passive role unconcerned whether the accused understands the essence and importance of cross-examination. In this case it was an omission so egregious on a charge so serious that we consider it to have caused the appellant some in justice.

27. Having perused the entirety of the evidence, I find and hold that the court erred in law in finding that the offence was proved. The evidence of witnesses was shaky and unreliable. The defence was rock solid and uncontroverted. The prosecution failed to discharge the burden of proof on them. I find and hold that the evidence on record is consistent with the charge being a frame-up rather than reality.

28. On sentence, the sentence meted out was a minimum sentence. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment), the supreme court stated as follows:

> 56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

29. The sentence could not be disturbed had the offence been proved. However, given that the conviction has given way, both sentence and conviction are thus set aside.

Orders

30. The consequence of the foregoing is that the court makes the following orders:

    a. The appeal is allowed. The conviction and sentence are set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

    b. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 28TH DAY OF APRIL, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Appellant, pro se – present

Court Assistant – Michael