**Lonyangareng v Republic (Criminal Appeal E008 of 2022)**
**[2024] KEHC 1793 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1793 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KAPENGURIA**

**CRIMINAL APPEAL E008 OF 2022**

**AC MRIMA, J**

**FEBRUARY 28, 2024**

**BETWEEN**

**JOSHUA LONYANGARENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising out of the conviction and sentence of Hon. B. O. Ondego, (Senior Principal Magistrate) in Kapenguria Senior Principal Magistrate's Court Sexual Offences Case No. E041 of 2021 delivered on 11th April, 2022)***

**JUDGMENT**

## Background

1. Joshua Lonyangareng, the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 16th October, 2021 at around 0900hrs at West Pokot County, the Appellant intentionally and unlawfully caused his penis to penetrate into the vagina of M.M. L., a child aged eleven (11) years old.

2. The Appellant faced an alternative charge of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally and unlawfully touched the buttocks, anus, vagina of M. M. L., a child aged eleven (11) years old.

3. The Appellant pleaded not guilty to the offences. He was tried and subsequently convicted on the main charge of defilement. He was sentenced to life imprisonment.

**The Appeal:**

4. Aggrieved by the conviction and sentence, the Appellant lodged the instant appeal. He raised four main grounds impugning the conviction and sentence. He claimed that his rights were violated for having been held by the police for 7 days in contravention of Articles 20, 25, 27, 47, 49 and 50 of *the Constitution*. He also claimed the offence was not proved, that his defence was not considered and that the life sentence was manifestly severe.

5. In the premises, the Appellant prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.

6. Parties disposed of the appeal by way of written submissions. According to the Appellant's undated submissions filed on 1st February, 2023, the Appellant expounded on the above grounds.

7. The Respondent on its part relied on its written submissions dated 31st October, 2023. It opposed the appeal in arguing that the offence was properly founded. He urged for the dismissal of the appeal while submitting that the Court is at liberty to revisit the life sentence since the Court held that it was the only sentence provided in law.

**Analysis:**

8. 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, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

9. 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.

10. However, before discharging the said duty, it is crucial to review the evidence adduced at the trial. On this, the Court wishes to point out that the trial Court summarized the evidence quite well, and the same will be part of this decision by way of reference.

11. In a snapshot, the prosecution called a total of seven witnesses to establish that the Appellant committed the offence that he was convicted of. They were the Clinical Officer who testified as PW1, the complainant who testified as PW2, the mother to PW2 who testified as PW3, the father to PW1 who testified as PW4, an elder sister to PW1 who testified as PW5, a neighbour to the Appellant who testified as PW6 and PW7 who was the investigating officer attached to Alale Police Station.

12. PW5 and PW2 testified on how they were ambushed by thugs on their way to see their other sister who had delivered a baby. In the ordeal, PW2 was abducted and carried away into the forest. PW4 raised alarm in vain. She then reported the matter at home.

13. PW2 narrated what befell her in the forest for 2 days. While she managed to escape from the thugs who had abducted her, she again fell in the hands of the Appellant, whom she knew well, and who was on the other side of the forest. Believing that she had found refuge, the Appellant instead detained her in the forest for two nights and severally had sexual intercourse with her. There was no food either. PW2 managed to waylay the Appellant and found their way home. As the Appellant waited for PW2 to ask for some water from a certain village, PW2 found her way to her home and reported what had befell her to her parents.

14. The parents mobilized the villagers to arrest the Appellant, but he had escaped. A search party was organized and the Appellant was eventually arrested and handed over to the police.

15. PW1 confirmed that PW2 had injuries on her limbs and that her vagina had been penetrated.

16. On completion of the investigations, PW7 preferred the charges against the Appellant.

17. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.

18. He gave an unsworn defence and called no witnesses. He denied committing the offence. He recalled how he was arrested and handed over to the police.

19. The Appellant urged the Court to find him not guilty as charged and be released.

20. It is on the above evidence that the Appellant was found guilty of defiling PW2, convicted and sentenced.

21. For the prosecution to establish the charge of defilement, it must establish the following crucial ingredients: -

    a. Age of the Complainant;

    b. Penetration and;

    c. Identification of the perpetrator.

22. A look at the ingredients of the offence of defilement now follows.

**Age of the Complainant**

23. The prosecution relied on an Age Assessment Report in proof of PW2's age. According to the Report dated 28th February 2022, PW2 was 11 years old. The age assessment was conducted around 4 months after the ordeal.

24. The Report was not challenged in any way and the trial Court did not find any reason to impugn that medical evidence.

25. This Court, therefore and likewise, finds that PW2 was a child within Section 2 of the *Children Act*.

**Penetration:**

26. The evidence of penetration was by three witnesses; PW1, PW2 and PW4. As said, PW2 was the victim. She described the ordeal with the assailant who detained her in the forest for two nights and severally had sex with her. PW3, who was the mother to PW2, examined PW2 on her return home and noted that PW2's vagina was swollen and inflamed.

27. It was PW1 who medically examined PW2. That was 12 days after the ordeal. PW1 observed that the hymen was torn, but was not fresh. There was also a whitish discharge in the vaginal canal which was quite unusual to a child of such an age.

28. The combined evidence of PW1, PW2 and PW4 leaves no doubt that indeed a penis was inserted into PW2's vagina. That was proof of penetration.

**Identity of the perpetrator:**

29. The evidence on the identity of the assailant was led by PW2. It was, therefore, a single witness evidence. PW2 contended that she recognized the assailant who had lived in her neighbourhood and used to plough just next to their farm. That, the incident took 2 days and that was ample time for PW2 to confirm the identity of the assailant. PW2 also readily gave the name of the assailant to her parents and the police.

30. As the evidence was largely on recognition, Courts have discussed how Court's ought to treat such evidence. The evidence of recognition was held by the Court of Appeal in Anjononi & Others vs. Republic [1989] eKLR to be 'more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the person's knowledge of the assailant in some form or other'.

31. Courts have, also and severally, held that a conviction can be based on the evidence of a single witness. As early as 1967, the Court of Appeal of Eastern Africa held in Chila vs. R [1967] EA 722 at 723, as follows: -

> The law of East Africa on corroboration in Sexual Offences is as follows: -
>
> The Judge should warn the assessors and himself of the danger of acting on the uncorroborated evidence testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given then the conviction will normally be set aside unless the Appellate Court is satisfied that there has been no failure of justice. In this case, as earlier stated, the trial Magistrate after concluding that "I have assessed the minor and I find her fit to proceed with this trial. She can be sworn." In her assessment of the Prosecution's evidence, she stated. The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the Accused person as the perpetrator of the offence.

32. The import of Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya on sexual offences has also been judicially considered. The Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR held that: -

> As to whether the sole evidence of the child was sufficient to found a conviction, the law on this issue is well settled. Section 124 of the *Evidence Act*, Cap 80, Laws of Kenya provides a proviso that permits admission of evidence from a victim without corroboration in sexual offences cases only. Section 124 of the *Evidence Act* 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." (emphasis ours)
>
> All the Court needed to do was warn itself of the danger of convicting on the evidence of a single witness, who is also a minor. The learned Judge did this in her re-evaluation of the

evidence and was satisfied that the child knew the appellant very well before and she could not have mistaken him for another person.

33. The legal principle discussed above has been applied in many other decisions including; S C N v Republic [2018] eKLR, G O A vs. Republic [2018] eKLR, Martin Okello Alogo vs. Republic [2018] eKLR among many others.

34. The analysis of Section 124 of the *Evidence Act* establishes a thread running through the decisions. The legal principle is that as long as the trial Court is satisfied that the single witness is telling the truth, a conviction based on such evidence will be allowed to stand.

35. Further, in R v Turnbull & Others [1973] 3 ALL ER 549, which English decision has been generally accepted and greatly used in our judicial system, the Court addressed the considerations to be made when the only evidence turns on identification by a single witness. The Court rendered 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 reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

36. Returning to the case at hand, PW2 and the Appellant were at one time neighbours. PW2 stated that they used to cultivate adjacent farms and that the Appellant lived in the village. She had seen him many a times before. There was also the issue of the time the two were together in the forest; a period of 2 days and nights.

37. The trial Court analyzed the aspect of identification by way recognition. It was satisfied that the single witness, PW2, was telling the truth and believed her testimony. It then found that the Appellant was positively recognized as the assailant.

38. From the evidence, PW2 was quite consistent and well oriented of the events as they took place. She described how the incident occurred and who the intruder was. PW2 knew the Appellant well.

39. While reviewing the evidence, this Court must remain alive to the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect. (See Ajode v. Republic [2004] KLR 81. Therefore, unless on very convincing and congent grounds, the trial Court's analysis and belief ought to be upheld.

40. On a careful review of the evidence, this Court finds that the totality of the evidence placed the Appellant as the perpetrator. He was positively identified as such visually. The prosecution's evidence was, therefore, cogent and believable.

41. The upshot is that the prosecution discharged its burden to the required standard of proof and that the trial Court, rightly so, found the Appellant guilty and convicted him.

42. Coming to the end of the discussion on this issue, this Court notes that the Appellant raised two more issues worth consideration. The first one was the alleged infringement of his fair trial rights by having been arraigned before Court seven days post arrest.

43. The Appellant did not raise the issue before the trial Court. In such a case, there is no way this Court can ascertain whether the alleged infringement, if any, affected the trial. The Appellant has the option of pursuing the matter through a constitutional petition, if need be.

44. The second issue was the contention that the defence was not considered. That is not correct. The trial Court dealt with the aspect of the defence in its judgment. The Court did not find the defence holding in any way and it was satisfied that it could not stand on the way of the prosecution's evidence.

45. This Court has also considered the defence. It is true the same centered on how the Appellant was arrested and did not cast any reasonable doubts over the prosecution's evidence. The defence is, hence, for rejection.

46. Having considered all the issues raised by the Appellant challenging the conviction, this Court finds that the Appellant's encounter that the offence of defilement was not proved fails.

47. Consequently, this Court finds that the appeal against the conviction lacks merit and is hereby dismissed.

**Sentence:**

48. The Appellant was sentenced to life imprisonment. The trial Court considered the mitigations as well as the facts of the case.

49. The Appellant submitted that life imprisonment was extremely severe and that the sentence ought to be set-aside and he be sentenced to the period already served.

50. Whereas the State submitted that the trial Court erred in asserting that the life sentence was the only sentence provided in law for the offence of defilement, it urged this Court to hand down an appropriate sentence.

51. This Court is alive to the decisions of superior Courts on the unconstitutionality of minimum and mandatory sentences. (See Francis Karioko Muruatetu & another v Republic [2017] eKLR among others).

52. Having said so, this Court is also alive to the diametrically opposite twin positions taken by the Court of Appeal on the constitutionality of the life imprisonment. In Criminal Appeal No. 104 of 2021 at Nairobi Onesmus Musyoki Muema vs. Republic, the Court of Appeal held that life imprisonment was constitutional. The decision was rendered on 4th August, 2023.

53. Earlier, on 7th July, 2023, the Court of Appeal, differently constituted, in Manyeso v Republic [2023] KECA 827 (KLR) found the life imprisonment unconstitutional.

54. This Court has carefully considered the two decisions from the Court of Appeal. Whereas the matter calls for urgent resolution by the Supreme Court, this Court ought to carefully weigh the rival decisions. After consideration of the said decisions, this Court finds favour in the finding that life sentences are unconstitutional to the extent that they are indeterminate.

55. Unlike the decision in Manyeso v Republic, the latter one did not consider the issue in light of the various provisions of *the Constitution*, prevailing judicial pronouncements from the Supreme

Court including Francis Karioko Muruatetu & Another v Republic case (supra) and comparative jurisprudence world-over.

56. Manyeso v Republic had a robust exposition of the relevant constitutional provisions coupled with appropriate legal reasoning which is in tandem with the transformative 2010 Constitution.

57. It is, hence, the finding of this Court that life sentences are unconstitutional to the extent that they are indeterminate. This Court, therefore, upholds the Court of Appeal decision in Manyeso v Republic case (supra).

58. Having found as such, the life sentence imposed on the Appellant is hereby set-aside.

59. In considering an appropriate sentence this Court is guided by the statement in Manyeso v Republic case (supra) when the Court was considering the sentence. The Court stated as follows: -

> 27. ..... We are also alive to the fact that he [the Appellant] was convicted for defiling a child of 4 years and of the likely ramifications of his actions on the child's future. We are therefore of the view that while the Appellant should be given the opportunity for rehabilitation, he also merits a deterrent sentence. We, therefore in the circumstances, uphold the Appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefore a sentence of 40 years in prison to run from the date of his conviction.

60. Given the age of the victim in this case and the manner the Appellant executed his ill-motives, and in consideration of the mitigations, this Court finds that a stiffer penalty is called upon as a deterrent measure.

**Disposition**

61. Drawing from the above discussion, it is apparent that the appeal fails on the conviction, but succeeds on sentence.

62. In the end, the following orders do hereby issue: -

a. The appeal against the conviction fails and is hereby dismissed.

b. The appeal against the life imprisonment succeeds. The life imprisonment imposed upon the Appellant is hereby set-aside.

c. The Appellant is now sentenced to serve 35 years in prison. The sentence shall start running from 27th October, 2021 when the Appellant was charged.

d. The file is marked as Closed.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 28TH DAY OF FEBRUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of: -**

**Joshua Lonyangareng, the Appellant in person.**

**Mr. Mokaya, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.**

**Juma/Hellen – Court Assistants.