Wasi v Republic (Criminal Appeal E061 of 2022)
[2024] KEHC 1851 (KLR) (27 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E061 OF 2022

A. ONG'INJO, J

FEBRUARY 27, 2024

BETWEEN

BENARD MTSUMI WASI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. D. ODHIAMBO (SRM), on 29th July 2022 in Shanzu SPMC Sexual Offence Case No. 34 of 2019, Republic v Benard Mtsumi Wasi)

JUDGMENT

Background

1. The Appellant, Benard Mtsumi Wasi,was charged with the offence of defilement contrary to Section 8(1) and Section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

2. The Particulars of the offence are that Benard Mtsumi Wasion the 11th February 2019 within Mombasa County unlawfully and intentionally caused his penis to penetrate the vagina of JN a girl aged 6 years.

3. The accused person also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

4. The appellant was found guilty and convicted for the offence defilement and sentenced to serve life imprisonment.

5. The trial magistrate considered the evidence of 5 prosecution witnesses as well as the appellant's defence and concluded that the appellant was guilty of the offence of defilement and he was convicted and sentenced to serve life imprisonment.

6. The appellant was aggrieved by the conviction and sentence, and in his amended grounds of appeal filed on 3.10.2023, he contended: -

1. That the learned trial magistrate erred in law and fact by failing to see that the main charge of defilement was not proved.

2. That the learned trial magistrate erred in law and fact by failing to record a conviction for the lesser charge of indecent act under Section 179 of the Criminal Procedure Code.

3. That the learned trial magistrate erred in law by dismissing my alibi defence off hand despite its capability to displace the prosecution's case.

4. That the learned trial magistrate erred in law and fact by failing to see that the medical evidence was incompatible with the particulars of the charges levelled against me.

5. That the learned trial magistrate erred in law and fact by failing to consider my mitigation address that I the appellant was a first offender.

6. That the learned trial magistrate erred in law and fact by failing to take into account the pre-trial period in my sentence.

7. The Appellant sought that the appeal be allowed, sentence reviewed and the time spent into remand custody taken into account.

Prosecution's Case

8. PW1, Dr. Said Bulu produced the P3 Form filled by Dr. Nafisi on 30th September 2010 in which it was established that the complainant's vagina had healed abrasions but the hymen was intact. He also produced the PRC Form as an exhibit.

9. PW2, the complainant, was subjected to voire dire examination but she looked timid and did not know the names of her uncles and aunt who were in court and the court decided that she was not going to testify without being sworn. The 6-year-old child said that the appellant put his dudu, his fingers on her buttocks and then licked her then removed his dudu and put it on her buttocks. She said that she was sleeping when the appellant removed her panties.

10. Ms. Oseko Advocate then came on record for the accused and applied for PW1 to be recalled for cross examination but the court declined due to the age of the complainant.

11. PW3, the mother of the complainant testified that on 11th February 2019, the appellant who is the uncle to her husband went to her house and started making advances at her. That she told him to go and sit where she had given him a seat and when she went to buy vegetables, she came back and noticed that the appellant looked unsettled and worried and he told her that he had given the child Kshs. 10/ = to buy chips and that as she continued washing dishes, the appellant went and touched her waist while his trouser zip was open and he removed his penis. That she went and locked herself in the house with the child. That when she was bathing the child, the child told her that she was feeling pain in her private parts as the uncle had removed his penis and put it in her private parts.

12. PW3 said that she tried to call her husband but she did not reach him and at 4.00 am, the appellant again went and knocked on her door that he wanted her to open for him to sleep. PW3 made a phone call and reported the matter to the husband and the husband called the appellant and he went away. When PW3's husband came, the matter was reported at Kiembeni Police Station and the child treated at Coast General Hospital.

13. PW4, the father of the complainant who said that he got a report at 5.00 am from the wife, PW3, who told him that the appellant had been disturbing them since the previous night and that there were things which he had done. That when he went home, the complainant told him that the appellant gave

her Kshs. 20/= to remove her panty, to lick her private parts and put his dudu in her private parts. PW4 also said that the appellant had indecently touched his wife on the buttock and asked her to sleep with him. That they reported the matter at Kiembeni Police Station and treated the child at Coast General Hospital. PW4 said that his wife and daughter were alone at home and it would not have been possible to hear what was happening.

14. PW5, PC Elizabeth Mwinyi, from Kiembeni Police Station gender desk received a report that the complainant had been defiled on 11.2.2019 by a person well known to her. The child had been taken to hospital and a PRC Form filled. PW5 arranged for P3 Form to be filled and recorded statements of the complainant's parents before arresting the appellant. She also obtained birth certificate of the minor and said that the appellant was related to the complainant's family and the minor was able to identify him as the person who defiled her. PW5 said she visited the scene in Chembeni in Vikwatani. She said that the house in which the offence was committed was on a separate plot from the other neighbours. She said that the accused person was traced in Rabai and accosted.

Defence Case

15. When placed on defence, he said the father of the complainant was his nephew and that on 11th February 2019, he was at his home in Port Reitz and not the complainant's home. That the complainant and her mother lied in court as he neither touched the complainant nor touch her private parts. That when the doctor was testifying, he only had a PRC Form and that is why he did not cross examine the doctor. The appellant also said that he was not in good terms with the complainant's mother and that is why they framed him with the offence herein. He said that next to the complainant's home, there is a drinking den that he used to frequent and that is where he saw that the complainant's mother was having an affair with another man whose name he did not know. He said that he did not report the affair to the husband of the complainant's mother or any other person and that he felt bad that the incident happened to the child.

16. This appeal was filed by the appellant in person but on 21st June 2023, Mr. Lewa Advocate appeared in court and indicated he was representing the appellant and sought for time to peruse the records of appeal and possibly file amended grounds of appeal. On 5th July 2023, when the matter came up again, Mr. Lewa Advocate confirmed that he had been furnished with the records of appeal and sought to file amended grounds of appeal but also proposed that the appeal be heard by way of written submissions and that he would be able to file the submissions and amended grounds within 21 days. Directions were therefore taken where leave to file amended grounds of appeal concurrently with submissions within 21 days was granted to the appellant subsequently, upon service of amended grounds of appeal and submissions, the Respondents were also to have 21 days within which to file their submissions.

17. The matter was fixed for mention on 20th September 2023 and on the said date, the appellant's advocate was absent and the matter was fixed for 6th October 2023 when it was confirmed that the appellant had filed amended grounds of appeal and submissions in person. Up to the time that this judgment was being written, the Respondents had not filed their submissions and the judgment herein is based on this court's reevaluation of the records of appeal and judgment of the trial court as well as the amended grounds of appeal and the appellant's submissions.

Appellant's Written Submissions

18. The appellant in his submissions said that there is nowhere in the entire testimony of the complainant where she mentioned that he had defiled her and that the trial magistrate's finding was an inference from what the complainant had said that he had defiled the complainant despite the fact that the complainant never mentioned the word defilement. The appellant said that the complainant's

testimony was unclear when she said putting his dudu in mine and pointing to her buttocks. The appellant relied in the holding of Hamisi Bakari & Another v Republic (1987) KLR where it was held: -

> We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear.

19. He said that the ingredient of penetration was not proved and if any of the three ingredients had not been proved then the charge has not been proved to the required standard of beyond reasonable doubt and on that basis conviction that is lacking proof of one of the ingredients cannot stand and should be vitiated in totality. The appellant said that the complainant pointed twice to her buttocks according to the trial proceedings which fact entitles anyone concerned to infer that she may have been referring to the part of her body that had been indecently touched. He said that the complainant gave evidence that created a reasonable doubt that should have been resolved in his favour particularly considering that she adduced unsworn evidence.

20. The appellant also submitted that the trial magistrate had an obligation to invoke Section 179 of the Criminal Procedure Code and record a conviction for the charge of indecent act which does not require the ingredient of penetration.

21. In support of his position, the appellant cited James Maina Njogu v Republic, Cr. Appeal No. 38 of 2004 (Nyeri) where the Court of Appeal stated as follows regarding Section 179 of the CPC: -

> It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.

22. He also cited the authority in Robert Mutungi Muumbi v Republic, Cr. Appeal No. 5 of 2013 where it was held: -

> An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted.

23. The appellant contended that immediately after the complainant had testified, the prosecution prayed for a mention date to amend the charge sheet and that later, he was informed that an amendment of the charge sheet had been made an it was not revealed to him that an amendment had been made and he had to hire the services of an advocate to assist in defending him. He argued that the trial magistrate denied the application to recall PW1 when his advocate applied for the same on account of the age of the witness when the witness is a medical officer who produced the P3 Form. He said that he was denied the right to fair trial under Article 50 (2) (k) of *the Constitution* to adduce and challenge evidence. He said that the decision to decline the request to recall PW1 was intended to protect the prosecution from explaining the inconsistency in the evidence of PW2 to the effect that she was touched on the

buttocks as against the evidence of the PW1 that the complainant's hymen was intact but she had vaginal abrasions.

24. The appellant also argued that the trial magistrate erred in law by only evaluating the prosecution's evidence with a view of ensuring that conviction is sustained even when evidence was contradicting in all material aspects. He cited the authority in Bogere & Another v Uganda, Cr. Appeal No. 1 of 1997 (SC) where the Supreme Court of Uganda gave guidelines of what the prosecution has to prove in cases where an accused person adduces a defence of alibi and said that he explained his movements on the day of the alleged offence and it was erroneous for the trial magistrate to base his findings on the bare statement of the minor victim that she had been touched on her buttocks and record a conviction of vaginal defilement without giving consideration to the appellant's defence of alibi which remains unshaken by the prosecution's evidence.

25. The appellant argued that it was erroneous for the trial court to evaluate the prosecution evidence in isolation from that of the defence and turning a blind eye to the clear fact that the complainant was far from a truthful witness considering that her allegations were inconsistent with the findings of medical examination. He said that his conviction was less that sound and unjustifiable because the trial magistrate did not record the reasons as to why the minor was telling the truth contrary to Section 124 of the *Evidence Act*.

26. The appellant further claimed that the medical examination done on the complainant were incompatible with the allegations of the complainant that the alleged incident occurred on 11th February 2019 and yet PW1 said that the injuries inflicted on the victim were approximately 7 months old. He said there was discrepancies in the evidence of the prosecution as to the age of the injuries compare to the date of the alleged offence and the date when the complainant was treated. He submitted that the prosecution's case was marred with defaults which points towards the shoddy manner in which the court handled his case to his detriment.

27. On sentence, the appellant argued that the trial court ought to have taken into consideration his mitigation submissions but it is a mockery by the trial court when it proceeded to impose upon him the sentence of life imprisonment. He said that his mitigation was not factored in the sentence and the trial magistrate did not exercise his discretion to impose a proportionate sentence. He faulted the trial court for failing to adapt the current jurisprudence with regard to sentencing of offenders charged under mandatory penal laws of the *Sexual Offences Act* and cited the authority in S v Malgas 2001(s) SA 1222 SCA 1235 PAR 25 as follows: -

> What stands out clearly is that courts are a good deal freer to depart from the prescribed sentences that has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular are such as to justify a departure. However, in doing so they are to respect, and not merely pay lip service to the legislature's view that the prescribed periods of punishment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed.

28. He also cited Petition No. E017 of 2021, Philip Mueke Maingi & 5 Others v Republic.

... having said that the ultimate decision as what ought to be done must remain that that of the legislature. Ours is to simply align the legislation that were in existence before the promulgation of *the Constitution* of Kenya 2010 with the letter and spirit of *the Constitution* ... having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows: To the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose such sentences fall

foul of Article 28 of *the Constitution*. However, the courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

29. He also cited the decision in the Court of Appeal in Malindi, Julius Kitsa Manyeso which declared life imprisonment unconstitutional.

30. He cited Yusuf Dahar Arog V Republic, High Court Criminal Appeal No. 110 of 2006 where Ojwang, J. (as he then was) observed: -

> A court should exercise judicial principles such as taking into account the ordinary life span of a human being, the general circumstances surrounging the commission of the offence, the possibility that the culprit may reform and become law abiding, the goals of peace and mutual tolerance, and accommodation among people.

31. The appellant urged the court that in the unlikely event that his conviction is confirmed, his mitigation circumstances should be considered to adjust his sentence and the period of 3 years and 5 months spent in remand custody should be factored in his sentence.

Analysis and Determination

32. This being the first appellate court, it is guided by the principles in David Njuguna Wairimu v Republic (2010) eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

33. After considering the grounds of appeal, records of the trial court and the submissions, main issues for determination are as follows: -

1. Whether the evidence tendered by the prosecution proved the offence of defilement or indecent act
2. Whether the appellant's defence of alibi was considered by the trial magistrate
3. Whether medical evidence was compatible with particulars of the charge against the appellant
4. Whether the appellant's mitigation as a first offender was considered
5. Whether the remand period during trial was factored in the appellant's sentence

Whether the evidence tendered by the prosecution proved the offence of defilement or indecent act

34. Section 8 (1) of the *Sexual Offences Act* provides for the ingredients of the offence of defilement as follows: -

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

35. Ingredients of the offence of defilement were stated in the case of George Opondo Olunga v Republic [2016] eKLR to include identification or recognition of the offender, penetration and the age of the victim.

36. Identification or recognition of the offender and the age of the victim are not in dispute. What is in dispute is whether the prosecution proved the ingredient of penetration. The appellant argued that the ingredient of penetration was not proved and that the offence that was proved was indecent act.

37. Section 2 of the *Sexual Offences Act* defines indecent act as follows: -

> " indecent act" means any unlawful intentional act which causes: -
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> b. exposure or display of any pornographic material to any person against his or her will;

38. Section 2 of the *Sexual Offences Act* defines penetration to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

39. According to the evidence of PW1, Dr. Said Bulu as was filled in the P3 Form by Dr. Nafisa, the vagina had healed abrasions and the hymen was intact, and the probable type of weapon causing injury was a blunt human penis.

40. The appellant submitted that the evidence of the minor may have proved the offence of indecent act but the main charge of defilement was not proved, and that the trial magistrate had the obligation of recording a conviction for the charge of indecent act.

41. The complainant clearly explained that she was sleeping when the appellant removed her panty and put his fingers in her buttocks. He then licked her and then removed his dudu and put it on her buttocks. When the complainant's mother was bathing her, the complainant told PW3 that she was feeling pain in her private parts and she also told her mother that the appellant had put his penis on her private parts. The complainant was taken to Coast General Hospital and on examination it was found that her vagina had abrasions. Complete penetration may not have taken place but the abrasions were caused by friction exerted on the complainant's private parts with the intention of defiling the complainant.

Whether the appellant's defence of alibi was considered by the trial magistrate

42. The appellant submitted that he gave a very explicit account of his whereabouts on the day of the alleged incident. That on 11.2.2019, he was at home in Port Reitz and that he was called by the father of the complainant on the said date informing him of the death of his cousin and that the appellant told him that he was at home in Port Reitz.

43. The trial magistrate at paragraphs 21 to 24 analysed the appellant's defence of alibi and while referring to the authorities in Republic v Sukha Singh (1939) 6EACA 145, Victor Mwenda Mulinge v Republic and Karanja v Republic said that the accused brought the defence of alibi towards the tail end of the trial. He found that the defence did not shake the prosecution's case.

44. A reevaluation of the evidence on record shows that the appellant did not raise the defence of alibi with the investigation or the prosecution witnesses to give them an opportunity to interrogate the same.

He did not also bring any witnesses to confirm that he was at Port Reitz and not at the complainant's home at the time that he is alleged to have committed the offence.

Whether medical evidence was compatible with particulars of the charge against the appellant

45. The PRC Form shows that the complainant was taken to Coast General Hospital on 13.2.2019 and it was found that her vagina had abrasions although her hymen was intact. The history that she gave was that her grandfather licked her private parts and then put his penis in her vagina. The offence herein was committed on 11.2.2019 and the P3 Form filled on 30.9.2019. The injuries were therefore 7 months as at the date that the P3 Form was filled and not the date when the complainant was being treated. There was therefore no discrepancy as to the age of the injury.

Whether the remand period during trial was factored in the appellant's sentence

46. The appellant prayed that court takes into account the period of 3 years and 5 months that he spent in custody during pendency of the trial. However, upon perusal of the proceedings, this court establishes that the appellant was first arraigned in court on 25.2.2019 and bond was approved on 4.4.2019. That on 21.5.2021, the bond was cancelled and the accused arrested for absconding court where he stayed in custody until his sentencing on 29.7.2022. The period within which the accused stayed in custody translates to 1 year, 2 months and 18 days.

Whether the appellant's mitigation as a first offender was considered

47. The appellant submitted that the trial court purported to have considered his mitigation but proceeded to impose a sentence of life imprisonment.

48. Section 8 (2) of the *Sexual Offences Act* provides: -

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

49. The sentence by the trial magistrate was therefore lawful save that in Julius Kitsao Manyeso v Republic, Criminal Appeal No. 12 of 2021 in the Court of Appeal at Malindi, Nyamweya, Lesiit and Odunga, JJA. held that: -

> " ... we are of the view that the reasoning in Francis Karioko Muruatetu & Others v Republic (2017) eKLR equally applies to the imposition of a mandatory indeterminate life sentence namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28..."

50. The Court of Appeal having declared life imprisonment unconstitutional, this court hereby sets it aside and substitutes thereof 20 years imprisonment.

51. In conclusion, this court finds that the appeal on conviction has no merit and the same is dismissed. The appeal on sentence is allowed and life imprisonment set aside and substituted thereof with 20 years imprisonment less 1 year 2 months and 18 days which period the appellant was in remand custody during trial pursuant to Section 333(2) of the Criminal Procedure Code. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 22ND DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE