



**Wang'uru v Republic (Criminal Appeal E034 of 2022)
[2024] KEHC 16045 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E034 OF 2022
DKN MAGARE, J
DECEMBER 20, 2024**

BETWEEN

KENNEDY NDERITU WANG'URU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Karatina CMSO Case No. E020 of 2021)

RULING

1. This is an appeal from the conviction and sentence of Hon. V. S. Kosgei (SRM) in Karatina CMSO Case No. E020 of 2021. The Appellant was tried and convicted to an offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*.
2. The particulars were that on 31/7/2021 at around 1800 hours in (Particulars withheld) village in (Particulars withheld) sub-location within Mathira west sub-county, the appellant caused his penis to penetrate the vagina of JMM, a child aged 12 years.
3. There was an alternative count, which is not of relevance to this appeal. The appellant was found guilty and sentenced to 30 years imprisonment. He then appealed, on what on the face of it appears to be an appeal on conviction and sentence. However, the grounds were all on conviction. The grounds were: -
 - a. The trial court erred in both law and fact in failing to consider that the medical evidence was not proved in a required standard for instance, the DNA analysis was not done to prove the pregnant (sic).
 - b. The trial court erred in both law and fact in failing to consider that the prosecution failed to avail essential witnesses, for example the village elder to withstand this allegation.
 - c. The trial court erred in both law and fact in rejecting my defence which was not challenged by the prosecution.



- d. Court convicted the Appellant on his own plea of guilty. The court then fined the Appellant a sum of Ksh. 50,000/- in default one year imprisonment.
4. The Appellant expressed his wish to be present during the hearing. This was so. He then abandoned an appeal on conviction. He sought that the conviction and the entire sentence be set aside. This basically meant that his appeal was on conviction only. He withdrew the same and there is nothing to hear.
5. Appeals to the high court are set out in Section 350 of the Criminal Procedure Code as follows:
 - (1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.
 - (2) A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:
 - i. subject to the provisions of paragraph (ii), where, within five days of the date of the judgment or order appealed against, the appellant or his advocate has applied to the subordinate court which passed the judgment or made the order for a copy of the record of the proceedings before that court, and where the appeal is entered within the period of limitation prescribed by section 349 but before receipt by the appellant or his advocate of the copy of the record, the petition of appeal may be amended on notice in writing to the Registrar of the High Court and to the Director of Public Prosecutions and without leave of the High Court, within seven days of the receipt by the appellant or his advocate of the copy of the record applied for;
 - ii. the provisions of paragraph (i) shall not apply where the petition of appeal is signed by an advocate who represented the appellant in the proceedings before the subordinate court appealed from;
 - iii. where a copy of the record of the proceedings before the subordinate court appealed from is applied for by the appellant or his advocate, the date of the receipt thereof by the appellant or his advocate shall be certified to the High Court by the subordinate court, and shall for the purposes of this subsection be deemed to be:
 - a. if the copy of the record is delivered otherwise than by post, the date of delivery; and
 - b. if the copy of the record is delivered by post, the date on which it is shown, on an advice of the delivery of a registered postal article issued under regulation 37(3) of the East African Postal Regulations, or any provision of law amending or replacing that regulation, to have been delivered, and no such copy of a record shall be delivered by post otherwise than by registered post;
 - iv. save as provided in paragraph (i), a petition of appeal may only be amended with the leave of the High Court and on such terms and conditions, whether as to costs or otherwise, as the High Court may see fit to impose;



- (v) notice in writing of an application for leave to amend a petition of appeal shall be given to the Registrar of the High Court and to the Attorney-General not less than three clear days, or such shorter period as the High Court may in any particular case allow, before the application is made; and an application for leave to amend a petition of appeal shall be made either at the hearing of the appeal or, if made previously, by way of motion in open court.

6. It is abundantly clear that an appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal. The grounds in the appeal are all on conviction. The court has no jurisdiction to deal with sentence when no issue is raised therein. In any case an appeal on sentence has to be specifically set out and a complaint be made on the same.
7. Section 252(2) provides for summary rejection of the Appeal. In this case, the appeal as admitted was on conviction. The withdrawal of the same leaves the court without a ground upon which to interrogate the appeal. The said section provides as follows:

Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint

8. 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.
9. 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.”



10. 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.”

11. In the case of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (supra) [the Supreme Court continued as follows:-

6. The right to fair trial was not just a fundamental right. It was one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of *the Constitution* elevated it to a non-derogable right which could not be limited or taken away from a litigant. The right to fair trial was one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse.

12. In this matter, the Appellant removed all the grounds of appeal that were in court. There is therefore no appeal to hear. Before summarily dismissing the appeal, I direct that the Appellant do address the court on which grounds address the issue of sentence. This is informed by two aspects. First, the Appellant withdrew the ground on conviction and was not given time to address the remaining grounds. I am cognizant of the fact that as regards sentence, this is the last appeal. I am also cognizant of the fact that the appeal is indicated as to be against sentence and conviction.

13. The right to fair trial under Article 25(c) of *the Constitution* cannot be derogated nor be limited. In *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), the Supreme Court had this to say about the right of an accused person to a fair trial:

37. The rights of an accused person to a fair trial is provided for under article 50(2) of *the Constitution*. That right is absolute as it is one of the rights which cannot be limited pursuant to article 25(c) of *the Constitution*.

14. In other words, before I send the Appellant away, in any case, empty handed, I need to hear him. Secondly, I note that he is in person and the matters raised are of great consequence to him. To avoid breaching his right to fair trial, I shall vacate the judgment date and list the matter for directions before me early in the new term to be addressed on the said point.

Order

15. The consequence upon the foregoing is that I make the following orders:

a. I vacate the judgment date and list the matter for directions in view of his withdrawal of the appeal on conviction.



b. The matter be listed for directions in the new term.

**DATED, SIGNED AND DELIVERED AT NYERI ON THIS 20TH DAY OF DECEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Appellant – present

Court Assistant – Jedidah

