Kiogora v Republic (Criminal Appeal E085 of 2023)
[2025] KEHC 4834 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4834 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E085 OF 2023

AK NDUNG'U, J

APRIL 24, 2025

BETWEEN

PATRICK R KIOGORA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E041 of 2022– B. Mararo, SPM)

JUDGMENT

1. The Appellant, Patrick R Kiogora was convicted after trial of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. The particulars were that on the 24/06/2022 at about 0610hrs at Buuri West subcounty Meru County intentionally attempted to penetrate the vagina of AM a child aged 10 years. On 21/07/2023, he was sentenced to fifteen (15) years imprisonment.

2. The Appellant appeal is on both conviction and the sentence. He filed amended supplementary grounds of appeal and he is challenging the conviction and the sentence on the following grounds;

    i. The learned magistrate erred convicting and sentencing him by relying on the evidence of the minor without a voir dire examination thus contravening Section 19 of *Oaths and Statutory Declarations Act*.

    ii. The learned magistrate erred convicting and sentencing him while relying on a defective charge sheet contrary to Section 214 of the *Criminal Procedure Code* thus rendering the entire charges and proceedings fatally defective in law.

    iii. The learned magistrate erred convicting and sentencing him without weighing his defence statement against the prosecution's case.

iv. The learned magistrate erred convicting and sentencing him by failing to note that the case was not proved beyond reasonable doubt.

v. The learned magistrate applied the wrong principle during sentencing by meting out a mandatory minimum sentence and failure to comply with the provision of section 33(2) of the CPC on the time he spent in custody.

3. The Appellant filed written submissions. He argued that the minor, PW1 was sworn without being subjected to voir dire examination and the trial court recorded no information on her demeanour after she gave evidence. Guided by the case of Lord Justice Bridge vs Lai Khan (1981) 73 Cri. App. R190 among other cases, he submitted that failure by the trial court to subject PW1 to voir dire examination was a grave error and omission that rendered PW1's evidence null and void and of diminished probative value. He submitted that his rights to a fair trial were violated in that the charge sheet was amended after all prosecution's witnesses had testified and he was not given a chance to cross examine the prosecution's witnesses after the amendment of the charge sheet and he was not informed of his right to recall critical witnesses which was an abdication of the trial court's duty as the protector and guarantor of the trial process. He was unrepresented hence the court had a heightened duty to safeguard the trial process to avoid miscarriage of justice.

4. He argued that the trial court ignored his defence since it was not corroborated based on the fact that the complainant testified that she was able to see his face. That PW4 testified that he responded to the complainant's scream and he was able to chase him and nabbed him raising the question on how credible PW4 was and how credible was PW1's identification of the assailant. That the complainant testified she did not know him prior to the incident whereas in examination in chief, she testified that she saw Dominic ahead of her which shows that the man she saw was called Dominic. She testified that the man had a shopping bag which he placed on a tree raising the question why PW4 did not mention a shopping bag that was left on a tree.

5. That there was no evidence of attempted defilement as there was no evidence that her dress was either lifted or torn as she testified that he tried to remove his clothes. That there was no evidence that the assailant unleashed his manhood or tried to remove her inner wear. That since she was in school uniform, she would not have forgotten details of the assailant trying to undress her. That for attempted defilement, the victim must be led to describe the exact steps the assailant took to execute the offence so that the mens rea and actus reus can be established by evidence. Further, PW1 gave vague description of her attacker as she testified that she was hit and fell on her back and could not see his face and PW3, the clinical officer gave no information of her physical condition as there was expected to be signs of bruises as she testified that she fell backward. That PW1 knew her assailant as Dominic and she never mentioned other school going children who were alleged to have ran away when she was attacked.

6. He submitted that PW4's evidence was in variance with PW1 in that PW1 did not mention that she was in company of her schoolmates whereas PW4 testified that he met two school children who said one of them had been held. PW4 testified that he left a lady to look after PW1 whereas PW1 did not mention such a person. PW4 claimed that he chased and nabbed him all alone and did not mention any other member of public. That on cross examination, he testified that he did not know him but could identify him now which meant that he did not recognise him at the scene and this was a mere dock identification. That no identification parade was conducted yet it is evident that he was a stranger to the prosecution's witnesses. That identification was important for PW1 to identify him as PW2 testified that when she found PW1 at the scene, she was hysterical and a hysterical and traumatised victim has more chances of mistaken identification of their assailants than a calm one. Further, his defence was

not weighed vis-à-vis the prosecution's case as required because no effort was made by the prosecution to challenge and rebut his alibi defence as required by section 212 and 309 of the CPC.

7. In rejoinder, the Respondent's counsel submitted that the appeal was time barred as the Appellant was convicted on 21/07/2023 and the petition of appeal was filed on 10/10/2023 which was almost three months past the timelines stated in Section 349 of the *Criminal Procedure Code*. No leave of the court has been alluded to, hence the appeal is bad in law for being time barred and ought to be struck out.

8. He further submitted that the case was proved to the required standard in that age was proved through her birth certificate, Pexhibit 1 and through PW2's evidence. On attempt to penetrate, he submitted that according to Section 388 of the *Penal Code*, an overt act suggestive of intention to commit a certain crime, though by itself the act would not complete the offence, is enough to infer an attempt to commit the said offence. The respondent disagrees with the Appellant's contention that beyond trying to remove his clothes, he must also have removed his manhood in order to attract an inference of attempted defilement. That PW1 testified that he lay on top of her and tried to remove his clothes which are overt acts that betray no other intention other than the one to cause penetration because under no other circumstances would an accused person try to remove his clothes other than in a scenario where one is desirous of engaging in sexual intercourse. Further, PW3 produced the P3 and PRC forms as Pexhibit 2 and 3 respectively which revealed that there was dry blood on the nose and bruises on the knees which injuries the clinical officer opined were consistent with the victim trying to defend herself.

9. As to identification, it is submitted that the same was very clear as it was through recognition. The incident was in the morning and the Appellant was at close range with the victim as he was lying on top of her. Further PW4 testified that he heard screams and he responded and when the Appellant saw him, he ran away and he chased him into the bush and managed to arrest him. Identification was not challenged during cross examination hence all elements of attempted defilement were proved.

10. Counsel submitted that though voir dire was not conducted, there was independent evidence to support the fact that the offence was committed as there was evidence of an eye witness, PW4 who rescued PW1 and chased the Appellant after responding to PW1's screams. There was evidence of PW3 who testified that PW1's sustained injuries that were consistent to a struggle. Therefore, failure to conduct voir dire does not vitiate the conviction. As to noncompliance with Section 214 of the *Criminal Procedure Code* and violation of Article 50 of *the Constitution*, he submitted that as per the record, the charge sheet was amended and he was called upon to plead to the amended charges. Further, the recall of witnesses is done upon request by the accused person as per Section 214(ii) and nowhere was it recorded that the Appellant applied to recall a witness and the same was declined. Furthermore, the amendment was in respect of the alternative charge and he was convicted of the main charge which was not amended. Thus, the amendment would not have required the calling of different evidence hence diminishing any prejudice for failure to recall witnesses. Therefore, there was no failure of justice and if there was any defect in the amendment, the same was curable under Section 382 of the CPC.

11. Commenting on the defence, it is submitted that the Appellant did not put it to any witnesses that he was not at the scene of crime. Further, an alibi defence ought to be corroborated and he did not call any witness to corroborate that he was at work at the particular date hence his defence was an afterthought and a mere denial. He did not name the place of work or who he was working with in his unsworn defence hence the prosecution had no way of getting the details regarding his alleged place of work in order to rebut the same as he suggested in his submissions.

12. In regard to the sentence, it is submitted that the sentence was proper, justified and lenient taking into consideration the nature of the offence and provision of minimum mandatory sentences. Further, the trial court considered both the mitigating and aggravating factors.

13. This court is the first appellate court. I am alive to duties bestowed on a first appellate court as were stated in Okeno vs. Republic (1972) EA 32 where the Court of Appeal for Eastern Africa held that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination [Pandya V R (1975), 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 junction 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 1978) E.A. 424."

14. But then, first things first. The Respondent has raised a preliminary issue that is capable of disposing this appeal and which, in that regard, needs to be disposed of at the earliest.

15. Of determination is the preliminary point whether the appeal herein was time barred and should be struck out.

16. The Appellant was convicted on 21/07/2023 and the petition of appeal was filed on 16/10/2023 which was almost three months past the timelines provided in section 349 of the *Criminal Procedure Code*. The section provides;

> 349. An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:
>
> Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor."'

17. I have carefully considered the issue of the competency of this appeal. The record clearly shows that the appeal was filed out of time and no leave was sought and granted to file the appeal out of time.

18. The statutory provision in Section 349 of the *Criminal Procedure Code* is couched in mandatory terms.

19. This court had occasion to consider this issue in SWK v Republic (Criminal Appeal E059 of 2023) [2025] KEHC 395 (KLR) (22 January 2025) (Judgment) Neutral citation: [2025] KEHC 395 (KLR) where it stated;

> " The Supreme Court in SC Application No. 38 of 2014 between TSC Vs Simon Kamau and 19 Others, adopted its earlier decision in Nicholas Kiptoo Arap Korir Salat Vs the IEBC & Others SC Application No. 16 of 2014 and stated:
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> > ''No appeal can be filed out of time without leave of Court. Such filing renders the ''document" so filed a nullity and of no legal consequences. Consequently, this court will not accept a document filed out of time without leave of the court."

The SC further held that a document filed out of time without leave of court is irregular and unknown in-law and the same should be struck out.

Although the above decision related to civil litigation, the principles applicable are same in criminal cases. A party who is convicted and sentenced to serve prison sentence and who proceeds to serve that prison sentence must if he/she so wishes to challenge the decision of the court, file, at the earliest opportunity, an appeal or if for good reason they delayed in filing of the appeal, then they must first seek for leave extending the 14 days period. This is not the case here.

In Moses Mwicigi and 14 Others Vs Independent Electoral and Boundaries Commission and 5 Others Supreme Court Petition No. 1 of 2015 the Court held:

> ''This court has on a number o occasions remarked upon the importance or rules of procedure, in conduct of litigation. In may cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.''

12. What have the courts said in so far as an infraction in respect of Section 349 of the *Criminal Procedure Code* is concerned? In the case of Samson Owiti Otambo v Republic (2018) e KLR the judge stated:

> " The Jurisdiction of this Court to hear and determine the appeal is determined by the appeal being filed within the statutory period or within the enlarged period of time with leave of Court."

20. My Sister and brother judges Aburili and Gikonyo take a similar view in the following cases. In the case of Michael Onyango Owala v Republic [2018] eKLR, RE Aburili J held that;

> " Where an appeal is filed outside the statutory period and no effort is made to seek to validate such an appeal by seeking and obtaining an order under the proviso to Section 349 of the *Criminal Procedure Code* to enlarge the time for filing of such an appeal or to have the appeal as filed out of time deemed to be duly filed, such an 'appeal' is no appeal at all. It is incurably and fatally incompetent and amenable to be rejected without delving into the merits thereof. Such is not a procedural error. It is an error that goes to the root of the appeal as it is the leave that would accord this court the jurisdiction to hear and determine an appeal that is filed out of time.

21. In PS v Republic [2021] eKLR F Gikonyo (J) held that;

> " No leave has been obtained to file the appeal out of time. An appeal filed out of time without leave of the court is incompetent and the court cannot lawfully exercise jurisdiction on such appeal. Limitation of actions is a substantive matter of law. It serves a noble objective to

ensure finality of litigation. Thus, failure to obtain leave to file proceedings out of time is not a mere technical omission but a substantial lapse that goes to the root of the proceeding itself."

22. The Court of appeal addressing the issue in Faisal Mohamed Ali alias Feisal Shahbal -v- Republic (2015) e KLR stated:

> "Accordingly the Court cannot exercise its adjudicatory powers conferred by law or *the Constitution* where the appeal is incompetent and that an incompetent appeal divests a court of jurisdiction to consider factual or legal controversies embodied in the relevant issues."

23. That being the position in law, the appeal before the court is incompetent and is one for striking out.

24. With the result that the appeal herein is incompetent and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE