Kebo v Republic (Criminal Appeal E024 of 2024)
[2025] KEHC 10552 (KLR) (Crim) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL APPEAL E024 OF 2024

SC CHIRCHIR, J

JULY 17, 2025

BETWEEN

HAMISI KEBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment of 19th December 2022 by Hon. E. Tsimonjeru (SRM) in Isiolo MCCR/E503/2024)

JUDGMENT

1. Hamisi Kebo (the Appellant) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No, 3 of 2006.9(The Act) The particulars of the offence were that on the 7th day of October 2018 at [Particulars Withheld] area in Isiolo county within Eastern region intentionally and unlawfully caused his penis to penetrate the vagina of RA a child aged four years. He faced an alternative charge of having an indecent act with a child contrary to Section 11(1) of the Act. He was convicted of the main charge and sentenced to 40 years in prison.

2. He was aggrieved by the trial court's finding and moved to this Court.

Petition of Appeal

3. The Appellant filed a Petition of Appeal and later supplementary grounds. I have noted that the Appellant was unrepresented and thus for clarity, the grounds are hereby consolidated and paraphrased as follows:

    1. That the trial Magistrate erred by failing to note that the evidence adduced could not sustain a conviction.

2. That the prosecution evidence was marred with contradictions and inconsistencies.

3. That the testimony of the Complainant was not corroborated.

4. That the trial Court erred by admitting the evidence of the Complainant as well as that of her mother and yet the mother had testified as an intermediary of the Complainant.

5. That key witnesses were not called to testify.

6. That Section 200 of the *Criminal Procedure Code* was not complied with.

7. That the sentence was harsh and excessive.

8. That there was no compliance with the provision of Section 333(2) of the *Criminal Procedure Code*.

4. The Appeal proceeded by way of written submissions.

Appellant's submissions

5. The Appellant submits that allowing the child's mother testify as an intermediary, and as an independent witness went against Section 31 of the criminal procedure code.

6. It is also submitted that the trial Magistrate erred by disallowing the hearing to start afresh as provided for under Section 200(3) and (4) of the *Criminal Procedure Code*. That he was not informed of his rights under the same section and that failure rendered the proceedings a mistrial.

7. It is further submitted that the children who were allegedly playing with the Complainant were not called to testify. He further contends that the trial Court failed to consider his defence which, had it been considered, would have earned him an acquittal.

8. The Appellant finally submits that while passing the sentence, the trial Court failed to comply with Section 333(2) of the *Criminal Procedure Code*.

Respondent's Submissions

9. On the trial court's failure to comply with Section 333(2) of the *Criminal Procedure Code*, the Respondent concedes to this ground of appeal.

10. The Respondent submits that failure to call the other children who were reportedly with the Complainant at the time of the incident was not fatal to their case; that the requirement in law is to call such number of witnesses as are sufficient to prove the charge. On corroboration, it is submitted that the same was not necessary as long as the Court was convinced that the witness was consistent and truthful.

11. On the Accused's Application to have the hearing start de novo, the Respondent submits that the right is not absolute; but is subject to certain considerations. That in the present case, the age of the child, and that of the case were some of the considerations and therefore there was reasonable grounds to deny the Appellant's Application.

12. The parties have relied on a number of Authorities which I have considered.

Analysis and determination

13. This court, as the first Appellate Court, is mandated to review the evidence , evaluate it and arrive at its own determination. This court must however make allowance for the fact that the trial court had

the advantage of hearing and seeing witnesses first-hand. (see: Gitobu Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)

14. I have considered the trial court record; the grounds of Appeal and parties' submissions and I have identified the following issues for determination:

    a). Whether there was a defect in the proceedings

    b). Whether the trial should have started de novo.

    c). Whether the Prosecution proved its case.

    d). Whether vital witnesses were left out.

    e). Whether Section 333(2) was complied with.

Whether there was a defect in the proceedings.

15. The Appellant's complaint is that allowing the Complainant's mother to testify independently, and, as an intermediary, was fatal to the case and a mistrial should be declared.

16. The role of an intermediary is well settled. In the case John Kinyua Nathan v Republic [2017] KECA 793 (KLR) , the court of Appeal stated: "The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable, to the victim, while at the same time according the victim the protection from unfamiliar environment and hostile cross-examination; to maintain the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties".

17. In the present case, the record shows that on 7/1/2019, the prosecutor made an Application to have the Complainant testify through the mother. The court declared the Complainant vulnerable and allowed the Application.

18. The Complainant's mother, ME, (PW1) took the stand .She told the court, RA was her daughter. She was 5 years old at the time of trial. On 7/10/2018, she was in the forest fetching firewood and returned home at 7pm. As they were going to bed, the child started crying, and told her she was feeling pain in her private parts. She inspected the child's genital area and saw a wound and sperm. They went to the police station and was referred to Isiolo General Hospital for treatment. The child told her that "Hamisi had done the Act". PW1 further told the court that they were neighbors with the accused; that he used to work at the next plot. She produced the Complainant's birth Notification, clothes and treatment notes.

19. On cross- examination by the accused, she stated that she had left the child with her grandmother ; that she did not witness the incident and that it is the complainant who told her what happened.

20. The next witness was the Complainant (as PW2). After the voir dire examination, the court directed that she would give unsworn statement. She told the court that R (PW1) was her mother. She knew Hamisi(the Appellant); that Hamisi did bad on her; that he did it at the iron- sheet house; that he removed his clothes and hers. that he did "tabia" here (points at her genital area) He is there (points at the accused). I was taken to the hospital on that day.

21. On cross-examination by the Accused, she stated that the iron sheet place had a gate. That when her mother carried her, some people were there. That she was with K when the incident occurred.

22. What the above Testimonies show therefore, is that despite the earlier directions by the court, the Complainant did not testify through the intermediary, the mother. Each gave different testimonies. A look at the charge sheet shows that the mother too was listed as a witness. Further the testimonies of the Complainant and her mother are not repeat testimonies. It is not therefore true to state that the complainant's mother testified as an intermediary.

23. The fact that the earlier directions by the court were not acted upon, whether as a case of an oversight or not, is inconsequential to the outcome. In other words, the fact that the Complainant ended up presenting her testimony on her own as opposed through an intermediary, did not prejudice the Appellant. This ground of Appeal therefore has no merit.

Whether the hearing should have started denovo

24. Section 200 of the criminal procedure code provides as follows:

> " 200.
>
> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -
>
> (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right"

25. The mandatory obligation placed on the court by the above Section is to inform the Accused of his rights under the Section, and failure to inform the Accused of this right is fatal to the proceedings. In the case of Joanes Oketch Ongoro v Republic [2014] KECA 63 (KLR), the court considered failure by the trial court to inform the accused of his rights under section 200(3) "a miscarriage of justice" and proceeded to quash the conviction.

25. In the present case however, the record shows that the Appellant was informed of his rights under the aforesaid section when the new Magistrate took over. Thus, the Appellant's submission that Section 200(3) of the *Criminal Procedure Code* was not complied with, is not true.

26. The Appellant on being informed of his right under the section,, applied to have the case begin afresh. This was denied. Unlike the right to be informed, the right to have the case begin afresh is not absolute. As correctly pointed out by the Respondent it is subject to certain considerations. In the case of Abdi Adan Mohamed v Republic [2017] KECA 517 (KLR) cited by the Respondent, the court of Appeal

held: " It must, however be remembered that it is the demand by the accused persons to re-summon witnesses, in circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts .To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking Section 200 include, whether it is convenient to commence the trial de novo, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

27. In declining the Appellant's Application , the trial Magistrate noted that the victim was a 4 year old child and having her retake the stand and relive the experience would be traumatizing to her. He also observed that the case had already been heard by three different magistrates , including himself and a further delay would mean that the case may end up in the hands of a 4th magistrate .The record indeed shows that the magistrate who was delivering the ruling in this regard was the 3rd one. The observation about the risk of further trauma on the minor Complainant was also valid.

28. Further, I note that the Application for the case to start denovo was being made during the defence case as the prosecution had already closed its case. Thus the trial was almost coming to a close. It must also be considered that an accused person is constitutionally entitled to a speedy trial. The appertaining circumstances therefore did not favour a fresh hearing. This ground of appeal is also without merit.

Whether the prosecution proved its case beyond reasonable doubt.

29. In a charge of defilement, the prosecution must prove: the age of the victim, the identity of the perpetrator and penetration.

The Age of the victim

30. The Appellant was charged under Section 8(1) as read with 8(2) of the Act. Under this Section, the prosecution needed to prove that the victim of defilement was under 11 years. A birth notification was produced showing that the Complainant was born on 4th March 2014 and was thus 4 years old at the time she was defiled. I further note that the age of the Complainant was not an issue, either in the trial court or in this Appeal.

The identity of the perpetrator

31. The Complainant identified the perpetrator as Hamisi who used to " live with them". She identified him in court by pointing at him. PW1, her mother, testified that the Appellant was their neighbour. These facts were not contested or rebutted by the Appellant. Indeed in his defence, he stated that he lived in [Particulars Withheld]which was the same place where PW1 and PW2 lived.

32. I further note that the identity of the perpetrator was not an issue during trial or in this Appeal. This was therefore a case of identification by way of recognition which mode of identification has been described as "more satisfactory, more assuring and reliable than identification of a stranger" (see: Reuben Taabu Anjononi & 2 others v Republic [1980] KECA 23 (KLR)

33. I am therefore satisfied that the Appellant was positively identified as the perpetrator of the crime.

Penetration

34. Section 2 of the Act defines penetration as "The partial or complete insertion of the genital organs of a person into the genital organs of another person."

35. It is the Appellant's submission that the Complainant's evidence was not corroborated. Corroboration of the evidence of a child of tender years is a requirement under Section 19 of the *Oaths and Statutory Declarations Act* 9 cap 15 Laws of Kenya).

36. However, contrary to the Appellant's assertion, the evidence of the Complainant was corroborated by her mother (PW1) and the Clinical Officer (PW3). PW1 told the court when they were about to go to bed the Complainant cried and complained of pain in her vagina. PW1 checked the child's vagina and noticed that she had a wound and what appeared to be sperm. The child's clothes were also stained with blood. PW3 on the other hand testified that upon examination, he found bruises on the Complainant's labia majora, and the hymen was freshly broken. The treatment notes produced and P3 form affirmed PW3's testimony. Thus, penetration was proved beyond reasonable doubt.

Whether vital witnesses were omitted.

37. In regard to the omission of some witnesses, the Appellant has made reference to a child who was reported to have been with the complainant at the time of the incident, as well as the child's grandmother who was allegedly left with the child, when PW1 went to look for firewood.

38. Section 143 of the *Evidence Act* provides as follows, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for proof of fact". What this provision implies is that even one witness's testimony, if that testimony proves the facts in place , suffices. It is true that the complainant mentioned that there was a child was playing with the her at the time but there was no indication that the said child witnessed the incident. There was no indication either that the grandmother was an eye witness.

39. Nevertheless, the all imperative question is whether the testimony of the other witnesses sufficiently proved the offence of defilement. My answer to this question is in the affirmative as aforesaid.

Whether the Appellant's defence was considered

40. Though this issue was raised as a ground of appeal, the same was not argued. A perusal of the judgement showed that the trial court did not consider the Appellant's defence. This complaint is therefore valid. Turning to the said defence, which consisted of unsworn statement, he told the court that on the material date, he was at his home and that on 11/10/2018, he was arrested by unknown people. He denied the events of 07/10/2018 and denied committing the offence.

41. The above defence in my view did not water-down the prosecution's case in any way. Further his statement was unsworn. While an unsworn statement is a right of an accused person, in terms of Section 211(1) of the *Criminal Procedure Code*, it is trite law that such a statement has no probative value. In the case of Mercy Kajuju & 4 others vs. Republic (2009) KEHC 2951 (KLR) Justice Emukule cited with approval the decision in the case of Amber May vs. Republic (1999) KLR 38 where the high Court held : "that notwithstanding the provisions of Section 211(1) of the *Criminal Procedure Code*, an unsworn statement has no probative value. On appeal against the decision and reported as May vs. Republic (1981) KLR/29 the court of Appeal held that unsworn statement is not strictly speaking evidence and the rules of evidence cannot be applied to unsworn statement. It has no probative value, but it should be considered in relation to the whole of the evidence. Its potential is persuasive rather than evidential. For it to have value, it must be supported by evidence rendered in the case." The judge went on to state: ".....unsworn statement are not in evidential sense, facts which either go to prove or disprove a point alleged by one party and disputed by another. Facts in issue must be proved and unsworn statements are inappropriate subject of evidence".

42. I need not say more about the value of the Appellant's unsworn statement.

Sentence

43. The Appellant has complained that the sentence was excessive.

Section 8(2) of the Act prescribes a sentence of life imprisonment for defilement of a child under 11 years. The child herein was a 4 year- old toddler. She barely knew what was happening to her. From her testimony it appears that all that she comprehended was the fact that what was being done to her was bad. The Appellant took advantage of one of the vulnerable members of society, and taking advantage of a vulnerable member of society is an aggravating factor. Further considering the minimum sentence of life, against the sentence of 40 years meted out, the sentence cannot be said to be excessive so as to warrant the intervention of this court. This ground of Appeal is devoid of merit.

44. On the provisions of Section 333(2) of the *Criminal Procedure Code*, it is evident that there was no compliance. The record shows that the Appellant was arrested on 12/10/2018 and was released on bond on 13/1/2021 and thus he was in custody for about 2 years 3 months. This ground of appeal is merited.

45. In conclusion, I hereby proceed to make orders as follows:

a) The Appeal against conviction is hereby dismissed, and the findings of the court below upheld.

b). The sentence is hereby varied to the extent that the 40 years is hereby reduced by 2 years, 3 months.

DATED SIGNED AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY 2025.

S.CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant

Hamisi Kebo- The Appellant

Mr. Ngetich for the Respondent.