Moturi v Republic (Criminal Appeal E011 of 2024)
[2025] KEHC 13311 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E011 OF 2024

WA OKWANY, J

SEPTEMBER 25, 2025

BETWEEN

BRIAN GICHANA MOTURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence delivered in the Chief Magistrate's Court at Nyamira in Criminal Case (SO) No. 42 of 2020 by Hon. W.C. Waswa on 29th September 2021)

JUDGMENT

Introduction

1. The Appellant herein, Brian Gichana Moturi, was charged with the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 12th day of June 2020 at [Particulars Withheld] in Nyamira South Sub-County within Nyamira County in association with another not before the court, intentionally and unlawfully caused his genital organ penis to penetrate the genital organ vagina of M.M. (particulars withheld), a child aged 15 years.

2. In the alternative, he faced a charge of committing an indecent act with the same child contrary to Section 11(1) of the Act.

3. He was further charged with the offence of robbery contrary to Section 296(1) of the Penal Code and handling stolen property contrary to Section 322(1) of the Penal Code. The particulars were that on the 12th day of June 2020 at [Particulars Withheld] in Nyamira South Sub-County within Nyamira County robbed George Morara Mose off a mobile phone make Techno T. 349 valued at Kshs. 1,500/= and immediately before the time of such robbery used actual violence to the said George Morara Mose.

4. He pleaded not guilty to all the charges and at the close of the trial, the court convicted him of gang defilement and substituted the charge of handling stolen goods with stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. He was sentenced to life imprisonment for the first count, while the sentence on stealing was left in abeyance.

5. Dissatisfied with the conviction and sentence, the Appellant lodged this appeal wherein he raised four main grounds of appeal as follows:-

    1. That the trial court erred in both law and fact in convicting the Appellant without proving the ingredients of the offence beyond reasonable doubt.

    2. That the trial court erred in law in not making a finding a that the minimum mandatory nature of the sentence under Section 8 (2) is unconstitutional and manifestly excessive.

    3. That the trial court erred in both law and in facts in not appreciating the Appellant's defence which overwhelmed the Prosecution's case.

    4. That the trial court erred in law in breaching the Appellant's right to a fair trial.

6. The Appeal was canvassed by way of written submissions which I have considered.

The Duty of the Court

7. As the first appellate court, this court is required to re-evaluate, reconsider, and analyse the entire evidence presented before the trial court afresh with a view to arriving at its own independent findings while bearing in mind the fact that it did not have the advantage of observing the witnesses as they testified. In David Njuguna Wairimu vs. Republic [2010] eKLR where it was held thus: -

> " The duty of the first appellate court is to analyse 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."

(See also Okeno vs. Republic [1972] EA 32).

Summary of the Evidence

8. The prosecution called called a total of six (6) witnesses whose evidence can be summarized as follows: -

9. PW1, G.M.M. (particulars withheld) the complainant's father, testified that that he had on 12th June 2020, taken his daughter, M.D. (PW4) (particulars withheld), to Nyamira Hospital at around 6pm. He testified that he first saw Brian (the Appellant) in the company of Zablon who had given the Appellant the motor cycle they had boarded to ferry them home. He stated that while on their way home, Appellant told them that the motorcycle had run out of fuel and they alighted and began walking home only to meet the Appellant again at the river at about 8pm after he used another route. PW1 stated that he was able to identify the Appellant using the torchlight from his phone. He explained that the Appellant, who was in the company of another man, assaulted him, stole his Techno T349 phone, food, and his daughter's shoes. He further testified that the attackers took his daughter (PW4) down the river to a bush. He added that even though he did not witness the actual defilement, he later

found PW4 at the scene crying. He reported the incident to Nyagachi AP Post and later to Nyamira Police Station. He confirmed that PW3 was, at the time, aged 15 and was diabetic.

10. PW2, Samuel Nyaboga Getara a boda-boda rider, testified that he heard screams emanating from River Nyando that night. The following morning, he was informed by other riders and his aunt that the Appellant had been involved in defiling PW1's daughter. Acting on this information, he, together with others, went to his brother Augustino's house where the Appellant was found drunk and locked inside by his younger brother, Ondicho. PW2 stated that Ondicho revealed that the Appellant had given him a Techno phone before asking to be locked inside. The Appellant was arrested and taken to Nyagachi AP Post. PW2 later recovered the stolen phone from the Appellant's father's house and handed it to the police.

11. PW3, Simon Mabire, also a boda-boda rider, confirmed that the Appellant had been given a motorcycle by one Zablon to ferry PW1 and his daughter home, since the Appellant did not own a motor cycle. Later that evening, he heard screams from the river area. He identified the passengers ferried by the Appellant as PW1 and the complainant. He stated that information later reached them that the Appellant had "fallen down" with the customers, but they never saw him again that night.

12. PW4 M.D. (particulars withheld) the complainant, minor aged 15 testified that she was on the material day on her way from the hospital in the company of her father (PW1) when they were accosted by the Appellant who was in the company of another man known to her as "Babu" (her cousin), who pretended to be police officers. They robbed her father, tore her clothes, removed her shoes and stockings, and forcibly raped her in turns by the riverside. She testified she knew the Appellant well as a neighbour and boda-boda rider who often came to their home. She stated that she clearly identified the Appellant with the help of her father's torchlight.

13. PW5, Nyakundi Hesbon, a Clinical Officer based at Nyamira County Hospital examined the complainant on the night of 12th June 2020 and found no external injuries but observed spermatozoa, epithelial cells, and red blood cells in her vaginal samples. The findings confirmed recent penetrative intercourse and trauma to the vaginal lining. He noted that the hymen was already broken and healed. He produced the P3 Form, laboratory request forms, and treatment notes in evidence.

14. PW6, PC Rukia Shabar testified that she took over investigations on 13th June 2020. From the statements, she established that the Appellant had ferried the complainants before the attack. She recounted that the complainant and her father positively identified the Appellant. Members of the public recovered the complainant's blood-stained blue dress, black tights, and a condom wrapper from the scene, which she produced in court. She also confirmed recovery of PW1's stolen phone which was traced back to the Appellant. She produced the complainant's birth certificate which confirmed that she was 15 years old at the time of the attack.

Defence Case

15. The Appellant gave an unsworn statement in which he admitted ferrying PW1 and the complainant on a motorcycle but claimed the motor cycle ran out of fuel after which he handed them over to another motorcyclist. He denied any involvement in the offences and alleged that the complainants falsely implicated him because they boarded another rider's motorcycle. He did not call any witnesses.

Issues for Determination

16. I have carefully considered the Record of Appeal and the parties' written submissions. I find that the following issues fall for determination: -

a. Whether the prosecution proved the offence of gang defilement beyond reasonable doubt.

b. Whether the Appellant's defence was adequately considered.

c. Whether the sentence imposed was lawful and constitutional.

d. Whether the Appellant's right to a fair trial was infringed.

Analysis

Proof of the Offence

17. Section 10 of the *Sexual Offences Act* as follows: -

> 10. Gang Rape
>
> Any person who commits the offence of rape or defilement under this Act in association with another or others or any other with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of the offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen (15) years but which may be enhanced to imprisonment for life."

18. Section 2 of the Act further defines 'gang' as: -

> " gang" means two or more persons;

19. In Charles Wamukoya Karani vs. Republic (2015) eKLR the court held that in proving the offence of gang defilement, in addition to the aspect of the offence being committed by more than one person, the Prosecution must prove the following: -

i. Minor Age of the victim

ii. Proof of Penetration

iii. Positive Identification

iv. Commission of the offence by more than one person.

20. In Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 it was that a birth certificate is one of the ways in which the age of a victim in sexual offences cases may be proved. The court held, inter alia, thus:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

21. In this case, it was not disputed that the victim was 15 years old at the time she was defiled. Indeed, the victim's Birth Certificate was produced and it confirmed that she was born on 9th December 2006.

22. On the second ingredient of penetration, Section 2 of the Act stipulates as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

23. The victim testified, in part, as follows on penetration: -

> " ...I was walking home with my father... They found us on the road...I was raped at the river by the accused. The accused took my rubber and stocking (witness cries in court). The accused tore my pants and raped me. Babu was also present as I was being raped. The accused raped me and after he finished, Babu raped me at the same venue. The accused pushed me and made me to lay down. The accused removed his clothes as well. Babu had worn a trouser and the accused was in a sweater and trouser..."

24. I find that the victim was consistent in her testimony and that she gave a vivid account of what happened to her on the fateful evening. PW6 the Investigating officer also produced her blood-stained blue dress and stockings which confirm her evidence of the sexual assault on the said date.

25. The victim's testimony was further buttressed by the medical evidence presented by the Clinical Officer PW5 who stated that he examined her on the same day after her ordeal and found that she had spermatozoa cells and epithelial cells together with red blood cells lining her vaginal wall which were indicative of injury. PW5 formed the opinion that there was forceful sexual penetration.

26. Turning to identification, I note that the Appellant was well known to the victim and her father PW1 who identified him by name, as their neighbour and a boda-boda rider. I am satisfied that the Appellant's identification was full proof as not only had he ferried the duo on boda-boda that evening, but PW1 also explained that he was able to see him clearly using the light from his torch. Furthermore, the recovery of PW1's stolen phone in circumstances linking it to the Appellant further corroborated the testimonies.

27. I find that the ingredients of the offence of gang defilement under Section 10 of the *Sexual Offences Act* were therefore proved beyond reasonable doubt.

28. I will now turn to consider the charge on the third count of handling stolen property which was substituted with the offence of stealing and the Appellant convicted. The offence of handling stolen goods is provided for under Section 322 (1) as read with Section 322 (2) of the Penal Code which provide as follows: -

> 322. Handling stolen goods
>
> (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
>
> (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

29. In its judgment, the trial court held as follows: -

> " This court opines that the evidence on record proves the offence of stealing contrary to Section 268 (1) as read with section 275 of Penal Code and not the offence of handling stolen goods...
>
> The law allows a court to convict an accused person for an offence that he or she was not charged with if the evidence on record proves that offence. However, the offence must be a minor one than what an accused person has been charged with...."

30. From the above extract of the trial court's judgment, the question that arises is whether the offence of stealing is minor to the offence of handling stolen property.

31. I have equally considered the elements of the offence of handling stolen goods as outlined in the case of Mungai vs. Republic (2006) 2 KLR 262 as follows: -

> " Under section 322(1) of the Penal Code (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so."

32. This court has already found that the Appellant was in possession of PW1's phone immediately after he lost it during the ordeal. It can therefore be held that the Appellant was not merely handling stolen property but was the person who took the said phone from PW1. The facts of this case point to the offence of stealing under the definition of Section 268 of the Penal Code. I therefore arrive at the same findings as the trial court.

33. I have considered the law governing conviction of an accused person for an offence other than the offence he was initially charged with as stated under Section 179 of the Criminal Procedure Code. The offences must belong to the same class or genus such that the ingredients of the minor offence can be subsumed into those of the more serious offence for which an accused person has already faced trial. Section 179 provides as follows: -

179. When offence proved is included in offence charged

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

34. In Robert Mutungi Mumbi vs. Republic Criminal Application No. 5 of 2013 the Court of Appeal explained the application of Section 179 as follow: -

> " 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."

35. I note that Section 275 provides for imprisonment for a term of not more than three years where an accused person is convicted of the offence of stealing and a punishment not exceeding 14 years where an accused person is convicted for the offence of handling stolen goods contrary to Section 322 (1) and (2) of the Penal Code.

36. It is clear that the charge of handling stolen goods is more serious than the offence of stealing going by the severity of the punishment that it attracts. It is therefore my finding that the trial court was not off

the mark when it substituted the offence of handling stolen property with that of stealing. I therefore uphold the trial court's finding on the offence of stealing. I am guided by the definition of cognate offences in Black's Law Dictionary which explained the same as:-

> " A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."

37. In the upshot, I find that the conviction on the charge of stealing was safe and I therefore uphold it.

Consideration of Defence

38. I find that the Appellant's unsworn statement consisted of mere denial that did not dislodge the otherwise watertight evidence that was presented by the prosecution witnesses. It is my finding that the trial court properly considered the Appellant's defence but found it outweighed by the strong and consistent prosecution case. I find no error in the trial court's analysis of the evidence.

Fair Trial

39. The record shows that the Appellant was duly informed of the charges levelled against him, he ably cross-examined the prosecution witnesses and, when placed on his defence, gave his evidence. I am unable to find that there was any breach of the Appellant's Article 50 rights.

Sentence

40. I have considered the punishment for the offence of gang defilement as stated under Section 10 of the *Sexual Offences Act* which provides for imprisonment for a period of not less than 15 years which may be enhanced to life. I note that the trial court passed the sentence of life imprisonment after considering the pre-sentence report and upon noting that the victim was 14 years old at the time of the offence and was diabetic.

41. This court notes that the victim was from the hospital on account of her said illness on the night that she was gang defiled. The trial court also found that a deterrent sentence was appropriate punishment for the said offence.

42. I am cognizant of the principles governing courts on when to interfere with the sentences passed by a trial court as were expressed in the case of R vs. Mohamedali Jamal (1948) 15 EACA 126, where the Court of Appeal for Eastern Africa held thus:-

> " It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

43. I find that the heinous nature of the crime committed against the victim herein being gang defilement of a minor coupled with the violence meted out on the minor justify the life sentence. I find no reason to interfere with the trial court's exercise of its discretion during sentencing.

44. In sum, I find that the instant appeal is not merited and I therefore dismiss it.

45. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER 2025.

W. A. OKWANY

JUDGE