Alelo v Republic (Criminal Appeal 23 of 2018)
[2025] KECA 1578 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1578 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 23 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

EKAI ALELO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Chitembwe, J.) delivered on 18th January, 2018, in Criminal Appeal No. 70 of 2016)

JUDGMENT

1. Ekai Alelo (the appellant) was arraigned before the Principal Magistrate's Court at Isiolo, and charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 29th August 2015, at (Particulars Withheld)) Area, Isiolo County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of M. A., a child aged 11 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on the same date and place, the appellant intentionally and unlawfully touched the vagina of M. A., a girl aged 11 years old, with his penis.

3. The appellant denied the charges. During trial, the prosecution called seven (7) witnesses. The complainant (PW1) gave evidence to the effect that on 27th August 2015, at about 4.00 pm, she was heading home in the company of other children, when the appellant started following them. She stated that the appellant waylaid her, threw her to the ground and proceeded to defile her. It was her testimony that the other children, on witnessing the appellant tackle her to the ground, ran away. She stated that the appellant, who was unknown to her, was wearing a T-shirt bearing the word "Kenya", and a dark

kikoi which was black in colour. She testified that she was able to identify him as the incident occurred in broad daylight at about 4.00 p.m.

4. It was the complainant's further testimony that after the appellant had defiled her, he threatened to kill her if she told anyone what had happened. The complainant stated that she met with her brother and informed him what had happened. Her mother, Maria Ekwara (PW2), took her to the hospital for medical attention. PW2 told the court that the complainant's clothes were dirty and bloodstained, and that she informed her that the person who had defiled her was wearing a T-shirt labelled "Kenya", and had a kikoi tied around his shoulders. She was assisted by PW6, Ekono Koret Michael, the Chairman of Nakupatt Gotu Conservancy, to transport the complainant to Isiolo Police Station, and later to Isiolo District Hospital.

5. PW4, CL, who was in the company of the complainant on the material date, told the trial court that the appellant, who was wearing a T-shirt written "Kenya" and was covered in a kikoi, started following them as they were walking home. She stated that he grabbed the complainant by her chest and threw her to the ground. He then lay on her. It was her evidence that she ran away and informed her cousins, who chased the appellant and arrested him. She stated that the complainant was unable to walk properly after the ordeal.

6. PW5, JN, the complainant's brother, told the court that on the material date, at about 4.00 p.m., he was at home when PW4 ran towards him, and informed him that someone had attacked the complainant. He recalled that PW4 told him that the person was wearing a green T-shirt labelled "Kenya" and was covered in a kikoi. PW5 called two people and they started walking towards the road where the ordeal was said to have taken place.

   They met with the complainant who was crying. She informed them that she had been defiled, and pointed them to the direction where the assailant had escaped to. They caught up to the appellant and arrested him.

7. PW3, Karaiyu Jillo, a Senior Clinical Officer at Isiolo District Hospital produced the complainant's P3 Form, on behalf of his colleague, Daudi Dabaso, who filled the same. It was his evidence that the complainant was examined at the said hospital on 3rd September, 2015. He stated that her clothes were bloodstained, and that she experienced tenderness on her neck, abdomen and upper limbs. Upon examination of her genitalia, it was discovered that her hymen was torn and that she was bleeding, and had a whitish discharge. The examining clinical officer formed the opinion that there were signs of forceful penetration.

8. The case was investigated by PW7, PC Cyrus Wahome, who at the time was based at Isiolo Police Station. It was his evidence that on 29th August, 2015, at about 7.00 p.m., the complainant was brought to the station in the company of her parents. The complainant reported that on the same day, at about 4.00 p.m., she and other children were on their way home from the shops when they met with the appellant. She stated that the appellant grabbed her, took her to some nearby bush and defiled her. PW7 stated that the complainant and the appellant were escorted to the hospital for medical examination, after which he recorded statements from the witnesses. PW7 produced the complainant's immunization card in evidence, which indicated that she was born on 22nd October, 2004.

9. When the appellant was placed on his defence, he opted to exercise his right to remain silent.

10. At the conclusion of the trial, the learned magistrate determined that the complainant's evidence was corroborated by the medical evidence, as well as the evidence by PW4, who positively identified the appellant as the person who waylaid the complainant and defiled her. The learned magistrate formed the opinion that the evidence by the prosecution proved beyond any reasonable doubt that the

complainant was defiled, and that the appellant was positively identified as the assailant. The appellant was found guilty on the main charge of defilement, and upon conviction, he was sentenced to life imprisonment.

11. The appellant, aggrieved by this decision, filed an appeal before the High Court. He challenged his conviction and sentence on grounds that: the trial court relied on inconsistent and uncorroborated evidence in convicting him; the evidence of identification was insufficient to support his conviction; the learned trial magistrate relied on the evidence of minors, who did not understand the nature of taking an oath, thereby offending the provision of Section 124 of the *Evidence Act*; the medical evidence was not conclusive; and that the prosecution failed to prove its case beyond reasonable doubt.

12. The first appellate court, after re-evaluating the record of the trial court, and the evidence tendered before it, determined that the prosecution had sufficiently established all the elements of the offence of defilement. The learned Judge upheld the appellant's conviction and sentence by the trial court.

13. The appellant is now before us seeking to overturn the decision of the High Court. He has advanced four amended grounds of appeal. According to the appellant, the learned Judge erred in law: by failing to note that an identification parade ought to have been conducted to prove beyond reasonable doubt that the appellant was the assailant; by affirming a sentence that was harsh and excessive; by failing to acknowledge that the evidence by the complainant was contradictory; and, by rejecting the appellant's defence without giving cogent reasons.

14. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that since the identifying witnesses, that is the complainant and PW4, told the court that the assailant was a stranger to them, and that they were only able to recognize him by the clothes he was wearing, it was paramount that an identification parade be conducted to ascertain this evidence of identification. He asserted that the complainant's evidence of identification amounted to dock identification. Regarding the contradictions in the prosecution's evidence, it was his submission that the clinical officer (PW3) testified that the appellant was not subjected to any medical examination, yet the complainant's mother (PW2) gave evidence to the effect that the appellant's sperm and blood samples were found when the complainant was examined at the hospital. He further submitted that the complainant and PW2 gave evidence to the effect that the complainant's clothes were torn during the alleged incident, yet PW3 testified that the complainant's clothes were not torn. He pointed out that the complainant and PW2 gave contradicting evidence on the date the alleged incident was said to have occurred. It was his view that these inconsistencies ought to be resolved in his favour. Regarding the sentence, the appellant submitted that the life sentence was declared unconstitutional by this Court in the case of Julius Kitsao Manyeso v Republic [2023] KECA 827 (KLR). In the end, he urged as to allow his appeal, quash his conviction and set aside the sentence awarded by the first appellate court.

15. In rebuttal, learned prosecution counsel, Ms. Nandwa, was of the view that the prosecution proved its case against the appellant beyond any reasonable doubt. It was her submission that the complainant's age was sufficiently established by the immunization card adduced in evidence. She averred that the element of penetration was proved through the evidence of the complainant, PW3 and PW4. With respect to identification, Ms. Nandwa explained that the complainant gave a description of her assailant, which was corroborated by the evidence of PW4, who was with her when she was waylaid by the appellant. She asserted that the incident occurred in broad daylight, and therefore the identifying witnesses were able to have a good look at the appellant and identify him, and further, that PW5 arrested the appellant immediately after the incident occurred. She maintained that there was no chance of a mistaken identity, and that the appellant was positively identified as the assailant.

16. It was her submission that the evidence by the prosecution witnesses was concise and consistent. She pointed out that when the appellant was placed on his defence, he elected to remain silent, and therefore his argument that his defence was not considered was unfounded. On sentence, learned prosecution counsel urged that the life sentence was not harsh but commensurate to the offence committed, as the appellant had the intention to defile the complainant, who was only eleven years old at the time. In the end, she invited us to dismiss the appeal in its entirety.

17. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

18. We have considered the record of appeal, the submissions made, and the law. The issues arising for our determination can be summed up as follows:

    i. Whether the evidence of identification by the prosecution was sufficient to sustain a conviction;

    ii. Whether the evidence by the prosecution witnesses was contradictory;

    iii. Whether the appellant's defence was considered; and,

    iv. Whether the awarded life sentence is sound in law.

19. As regard the first issue, whether the appellant was properly identified, two witnesses testified, that is, the complainant and PW4. They both testified that on the material day at about 4.00pm, they were walking home from the nearby shops. They were accosted by a man who grabbed the complainant, took her to the nearby bush and then sexually assaulted her. Both the complainant and PW4 testified that the man wore a green T-Shirt, emblazoned with the word 'Kenya'. He was also wearing a kikoi which he had placed on his neck. As the complainant was undergoing the ordeal, PW4 ran home and informed PW5, who rushed to the scene and found the complainant crying. She was pointed to the direction that the man had escaped to.

    Accompanied by others, PW5 was able to apprehend the appellant and later handed him over to the police. The appellant complains that this identification cannot be relied on by the Court because both the complainant and PW4 testified that he was a total stranger to them at the time the complainant was sexually assaulted. The appellant stated that an identification parade should have been held to confirm the identity of the perpetrator. On their part, the prosecution was adamant that the appellant had been properly identified at the scene of crime.

20. We have assessed the evidence that was adduced with regard to identification in light of the submissions that were made in this appeal. It was clear to us that although the appellant met the complainant and PW4 for the first time on the material day, their description of the appellant was such that there was no doubt that he was the one who defiled the complainant. What is the possibility that more than two persons wearing the clothes that were described by the complainant and PW4 be at the same place and at the same time? It is our holding that such possibility was remote. The fact that the appellant

was arrested a few moments after the sexual assault of the complainant, and fitted the description given by the complainant and PW4 is sufficient proof that the appellant was properly identified as the perpetrator of the sexual assault. There was no need for an identification parade to be held since the appellant was apprehended near the scene of crime.

21. We agree with the concurrent findings made by the two courts below in regards to the appellant's identification. The trial court was able to see the said witnesses as they testified, and assessed their respective demeanors, and reached the finding that indeed the two witnesses were credible and had properly identified the appellant. We find no merit with the assertion made by the appellant that he was not properly identified.

22. The second issue for determination is whether the conviction of the appellant should be impeached due to contradictory evidence allegedly adduced by the prosecution witnesses. We have assessed the evidence and agree with the prosecution that the evidence adduced by the prosecution witnesses unerringly pointed to the appellant as the perpetrator of the sexual assault of the complainant. Any discrepancy in the evidence adduced by the prosecution witnesses is easily attributable to the fact of life that no two people can see the same thing and describe it in the same manner. In all the critical aspects of the evidence, the evidence adduced supported the prosecution's case that it was the appellant who defiled the complainant.

23. Was the appellant's defence considered? As observed by the two courts below, the appellant chose to exercise his right to keep silent when he was called upon to adduce evidence in his defence. That is an option the appellant chose after being advised of his rights under section 211 of the Criminal Procedure Code. It was therefore the appellant's decision not to offer any evidence in his defence that deprived the trial court and the first appellate court the opportunity to assess whether his defence was credible and displaced the prosecution's case before he was convicted. In the circumstances therefore, we hold that the first appellate court reached the correct decision when it upheld the prosecution's case as having been proved to the required standard of proof in the absence of any defence offered by the appellant.

24. As regards sentence, in Republic v. Mwangi, Initiative for Strategy Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) the Supreme Court held that sentences meted under the *Sexual Offences Act* are constitutional and are legal sentences enforceable by courts. In this appeal, the minimum sentence prescribed for the offence that the appellant was convicted of is life imprisonment. It was a legal sentence. This Court, just like the two courts below, cannot interfere with the same.

25. It is clear from the foregoing that the appellant's appeal on conviction and sentence lacks merit and it is for dismissal. It is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR