Ibrahim v Republic (Criminal Appeal 187 of 2017)
[2025] KECA 1523 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1523 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 187 OF 2017

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

ALI MOHAMMED IBRAHIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment and decree of the High Court at Nanyuki (M. Kasango, J.) dated 6th December 2017 in HC CRA. No. 9 of 2016)

JUDGMENT

1. Under section 361(1) of the Criminal Procedure Code, our mandate on second appeal is restricted to points of law only. In Dzombo Mataza v Republic [2014]eKLR, this Court observed as follows:-

> " 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."

2. The appellant, Ali Mohammed Ibrahim, 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). The particulars of the charge were that, on 6th July 2015 in Wiyumiririe in Laikipia County he intentionally caused his penis to penetrate the vagina of SM (PW 2) a child of 8 years. He denied the charge. After trial by the Principal

Magistrate at Nanyuki, he was found guilty of the charge. He was convicted and sentenced to serve life in jail.

3. The appellant was aggrieved by the conviction and sentence, and appealed to the High Court at Nanyuki. The grounds were that the complainant (PW 2) had been beaten to disclose that she had been defiled; the prosecution's case had contradictions; the alleged blood-stained underwear worn by PW 2 had not been produced in evidence, which had cast doubt on her evidence; the prosecution had failed to call vital witnesses; the age of PW 2 had not been proved; the appellant had been denied the opportunity to cross-examine the investigating officer and that the appellant had been detained longer than *the Constitution* allowed.

4. The first appellate court (M. Kasango, J.) re-evaluated the evidence and, after considering the submissions of either side, concluded that the appellant had been convicted on sufficient evidence, and that the sentence meted out was lawful. She dismissed the appeal on conviction and sentence.

5. The appellant has come before us on second appeal. The grounds were that the High Court had erred by finding that the evidence of PW 2 was sufficient under section 124 of the *Evidence Act* without considering that the words 'tabia mbaya' or 'bad manners' had not proved penetration; that the evidence of PW 2 was influenced, and that her age had not been proved by either a doctor or by the production of a birth certificate; that it had not been considered that vital witnesses had not been called; and that the appellant's defence had been improperly rejected. In the supplementary grounds, the appellant complained that there was bad blood, malice and vendetta between him and PW 2's mother (PW 1) and that the mother had coached her; that first appellate court had incorrectly relied on section 124 of the *Evidence Act* when the PW2's evidence was riddled with contradictions and inconsistency; the defence had not been properly reconsidered; and that, in all, the first appellate court had failed in its duty to re-evaluate the entire evidence before dismissing the appeal.

6. The prosecution evidence, according to the record, was that PW 1 (HW) was the mother of the complainant (PW2). She (PW 1) gave evidence that PW 2 was aged 8, having been born on 2nd June 2008. PW 2, following voire dire examination, testified while not sworn and stated that she was aged 8 and in class three. PW 1 prepared PW 2 and her two siblings, one of whom was in nursery school, to go to school in the morning on 6th July 2015. At about 8.30am the headmaster of the school called to report that PW 2 had arrived in school late. When the children returned from school in the evening, the child in nursery reported that PW 2 had given them snacks while in school. PW 1 sought to know from PW 2 from where she had got the snacks. This is when PW 2 disclosed that she had been bought the snacks by the appellant who had also defiled her; that he had given her Kshs.500/= and taken her to the shop and bought her snacks after the incident. He had threatened to kill her if she disclosed what had happened, she told the mother.

7. PW 2 gave evidence that, on the way to school they met the appellant who was going to the shop. The appellant held her by the hand and asked her to accompany him to his home. He did not say why he wanted her to go to his home. He is their neighbour and they know him as Uncle Ali. He took her to his house, locked the door. He removed his underwear after he lay her on his bed. He removed her underpants. He smeared jelly on his penis and on her private part. He did "tabia mbaya" by putting his penis into her private part. After this, he took her to the shop and bought her bread, juice and biscuit. He gave her Kshs.500/=. She bought bread and sweets. The appellant had threatened to cut her with a panga if she disclosed what had happened. She went to school, having put the balance of the money in her bag. It was late and she was sent back home to bring her parents. She came home and got her father who took her back to school. She did not tell him what had happened. In the evening PW 1 asked her where she had got the money for snacks from. This is when she narrated to her what had happened. She stated that she found that the money she had put in her bag had been stolen.

8. PW 1 testified that when she checked PW 2, she had discharge in her private parts and had blood stains. They got the appellant arrested and taken to police station. PW 2 was examined at Nanyuki Sub-County Hospital on 7th July 2015 by Doctor Joseph Karimi (PW 4) who found bruises on her private parts. She was bleeding from her vagina and her hymen was broken. He completed her P3 Form which was produced as an exhibit in the case.

9. The appellant gave sworn defence and did not call witnesses. According to him, he had been framed because of the relationship he had with PW 1; that PW 1 had asked for Kshs.2,000/= from him. He had not given her and that was why he had been framed. He denied that he had defiled PW 2 or given her money. He stated that at the police station, both him and PW 2 were taken to hospital and examined. The results were negative. The P3 Forms had not been produced in court.

10. This is the evidence that the trial court considered, and the first appellate court reconsidered before reaching the conclusion that the prosecution had established the guilt of the appellant on the charge beyond reasonable doubt.

11. Before us, the appellant was unrepresented. The State was represented by learned counsel Mr. Naulikha. Each side had filed written submissions.

12. In the submission by the appellant, there was the contention that the first appellate court had failed to properly re-evaluate the prosecution evidence which he indicated was contradictory and not consistent. He submitted that the initial P3 reports indicating that he had not defiled PW 2 had not been produced in court. He submitted that PW 1 had framed him when he failed to give her the Kshs.2,000/= she had requested from him. Lastly, he submitted that the non-calling of PW 2's siblings, PW 2's father and the headmaster of PW2's school was a vital omission that ought to have been considered by the two courts and a presumption made in his favour.

13. According to learned counsel Mr. Naulikha, we should be cautious in dealing with factual findings on which the two courts below had concurred. These were the age of PW 2, the finding on penetration, the non-calling of witnesses and the alleged framing of the appellant by PW 1. It was submitted that the appellant had been properly convicted and lawfully sentenced.

14. Having considered the appeal, the impugned judgment and the rival submissions, we are of the view that the issue for our determination is whether the first appellate court properly re- evaluated the evidence adduced before the trial court before arriving at its decision.

15. Regarding the appellant's complaint on the issue of PW2's age, we consider that the two courts below agreed that the child was 8 years old at the time of the incident. We cannot interfere with this concurrent finding of fact. We should only reiterate that the age of a complainant in a defilement can be established by the testimony of the parent who knows when the child was born. It has been settled that the age of the victim of the sexual assault under the *Sexual Offences Act* can be proved by a birth certificate, baptismal card or by the oral evidence of the child, if it is sufficiently intelligent, or the evidence of the parents or guardian, or medical evidence, among other credible forms of evidence (See Mwalango Chichoro Mwanjembe v Republic, Mombasa Criminal Appeal No. 24 of 2015). In this case, PW 1, being the mother of the child, stated that PW 2 was aged 8, having been born on 2nd June 2008. PW 2 herself stated that she was aged 8 and in class three in a school whose name she gave. Then the P3 form indicated PW'2 age to be 8. There was, in our view, consistent and irrefutable evidence regarding PW 2's age.

16. On penetration, PW 2 narrated how the appellant led her to his house, lay her on the bed, removed his innerwear and her underpants, applied jelly on his male organ and her female organ and inserted his

organ into her organ. When PW 1 observed her in the evening the private parts had blood stains and had a discharge. The medical evidence by PW 4 revealed that PW 2 had bruises on her private parts, was bleeding from her vagina and her hymen was broken. To our mind, the prosecution led consistent and overwhelming evidence of penetration. We have no reason to fault the two courts below in their finding.

17. We consider that the appellant was well known to PW 1 and PW 2. The appellant supplied this family with milk, and he was known to PW 2 as "Uncle Ali". The issue that the appellant was framed by PW 1 because of a previous dealing was considered by trial court and the High Court and was rejected, correctly in our view. We shall not interfere with these concurrent findings of fact.

18. As to whether the sole evidence of PW 2 was sufficient to found a conviction, the law on the issue is settled. Section 124 of the *Evidence Act* has a proviso that permits the reliance on the evidence from a victim without corroboration in sexual offences only. It provides as follows:-

> " Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15). Where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

19. All that the trial court needed to do was to warn itself of the danger of convicting on the evidence of the single evidence of PW 2, who was a minor. If the court was satisfied that PW 2 was telling the truth, and recorded the reasons for the satisfaction, then it was entitled to go ahead and convict on the evidence. The record shows that the trial court set out in its judgment its observation of PW 2 in the following terms:-

> " In this case, I saw the complainant (SM) testify and observed her demeanor. I have no reason whatsoever to doubt her testimony. The complainant was calm and confident. I must admit that she struck me as a truthful witness. She maintained her calmness and gave clear and consistent evidence even under intense cross- examination by the accused person "

The first appellate court reconsidered this and accepted it. We reject the appellant's contention that the two courts below misapplied the provisions of section 124 of the *Evidence Act*.

20. The last material issues that concerned the appellant were in regard to alleged inconsistencies and contradictions in prosecution case, and the claim that material witnesses had not been called. Both issues, we find, were ably dealt with by the appellate court and rejected. One, the stated contradictions and inconsistencies did not go to the root of the prosecution case, which was otherwise clear and straightforward. (See Phillip Nzaka Watu v Republic [2016]eKLR). Secondly, under section 143 of the *Evidence Act*, the prosecution is granted the discretion on the number of witnesses it should call to prove its case. The prosecution is under no obligation to call any particular number of witnesses so long as they call such witnesses as will help it prove its case to the required standard. (See Collins Akoyo Okwemba & 2 Others v Republic [2014] eKLR). The only rider being that, if the prosecution fails, without explanation, to call a material witness, the presumption would be that such a witness

was not called because he held evidence that was unfavorable to it. (See Alora & Daltanyi – Reginam [1956] 23 EACA 49).

21. Once it was proved that the victim of the appellant's sexual assault was 8 years old, the lawfully provided sentence under section 8(2) of the *Sexual Offences Act* was life imprisonment.

22. In the end, we find no merit in the appeal by the appellant in regard to conviction and sentence. The appeal is hereby dismissed.

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

S. Ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR