Mbaabu v Republic (Criminal Appeal 168 of 2017)
[2025] KECA 1575 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1575 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 168 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 3, 2025

BETWEEN

NICHOLAS GITHINJI MBAABU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Meru (Chitembwe, J.) delivered on 29th November, 2017, in Criminal Appeal No. 64 of 2016)

JUDGMENT

1. This is a second appeal from the judgment of the trial court dated 26th July 2016, where the appellant (Nicholas Githinji Mbaabu) was charged with the offence of defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*. The particulars of the offence were that on 1st October 2013, at Kathera Location in Imenti South Sub County, within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GK, a child aged 14 years.

2. He was also charged, in the alternative, with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which were that on the same day and in the same location, he intentionally touched the vagina of GK, a child aged 14 years, with his penis.

3. The appellant pleaded not guilty to the charges. The trial court heard the evidence of four prosecution witnesses, as well as the appellant's sworn defence. After assessing the evidence placed before it, the trial magistrate found the appellant guilty as charged in the main charge of defilement, and upon conviction, sentenced him to serve twenty (20) years' imprisonment.

4. Dissatisfied with the findings, the appellant lodged an appeal before the High Court against his conviction and sentence, on grounds that: the medical evidence failed to prove the offence; the prosecution failed to avail essential witnesses; the learned magistrate failed to consider that there

existed a grudge between the appellant and the school principal; the prosecution's evidence was inconsistent; and that the appellant's defence was rejected without cogent reasons. The first appellate court (Chitembwe, J.) having heard the appeal, dismissed his appeal on conviction and sentence.

5. The appellant is now before us on second appeal. The appellant's original appeal was against conviction and sentence. He appeared in person. During the hearing, the appellant informed us that he had not filed written submissions in support of his appeal, and that he wished to abandon his appeal against conviction. His appeal therefore is against sentence only. He challenges his sentence on the basis that the period he spent in remand custody was not considered when his sentence was computed, pursuant to Section 333(2) of the Criminal Procedure Code. Learned Prosecution Counsel, Miss Nandwa, conceded that the time spent by the appellant in remand custody was not considered by the trial as well as the first appellate court.

6. This being a second appeal, the mandate of this Court is limited by Section 361(1)(a) of the Criminal Procedure Code. This mandate was defined by this Court in the case of Peter Osanya v Republic [2016] eKLR as follows:

> " Section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong v Republic [1984] KLR 611, Ogeto v Republic [2004] KLR 14 And Koingo v Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced:
>
> > "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)."

7. It is trite law that sentencing is at the discretion of the trial court, and on second appeal, we cannot interfere with this exercise of discretion, unless it is shown that the court awarded an illegal sentence. (See Bernard Kimani Gacheru v. Republic [2002] eKLR).

8. Section 333(2) of the Criminal Procedure Code provides as follows:

> " Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

9. The appellant was arrested on 18th October, 2013 and arraigned before the trial court on 22nd October, 2013. Upon his conviction by the trial court, he was sentenced to serve twenty (20) years imprisonment, which sentence was affirmed by the first appellate court. He spent approximately two years and nine months in remand custody prior to his conviction and sentence by the trial court. A perusal of the court record shows that this period was not considered by the two courts below in computing the appellant's sentence. The trial court was silent on this matter even though it formed part of the appellant's mitigation statement.

10. We find that the appellant's appeal on sentence is merited and is hereby allowed. The appellant shall serve the custodial sentence of twenty years imposed upon him by the trial court, and affirmed by the first appellate court, which sentence shall commence from his date of arrest, 18th October, 2013.

11. Orders accordingly.

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

W. KARANJA

....

JUDGE OF APPEAL

JAMILA MOHAMMED

....

JUDGE OF APPEAL

L. KIMARU

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR