M'Itiri v Republic (Criminal Appeal 103 of 2020)
[2025] KECA 1685 (KLR) (24 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 103 OF 2020

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 24, 2025

BETWEEN

PETER MUGENDI MI'ITIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Meru (R. N. Sitati, J.) delivered on 25th September, 2018 in HCCR.A. No. 51 of 2017)

JUDGMENT

Background

1. Peter Mugendi M'Itiri [the appellant] challenges the judgment of the High Court [R.N. Sitati, J.], which upheld his conviction and varied the sentence imposed by the trial court from ten [10] years' imprisonment to life imprisonment.

2. The appellant was charged with three [3] offences. Under Count I, he was charged with the offence of rape, contrary to Section 8[1][a][c] as read with subsection [3] of the *Sexual Offences Act*. Under Count II, he was charged with committing an indecent act with an adult, contrary to Section 11[b] of the *Sexual Offences Act*. Under Count III, the appellant was charged with the offence of causing grievous harm, contrary to Section 234 of the Penal Code.

3. The prosecution called three [3] witnesses in support of its case. The complainant [PW1], her mother [PW2], and a clinical officer [PW3] testified in corroboration of the charges.

4. The complainant [DK] PW1 testified that on the material day at about 7:30 p.m., she was accosted by the appellant. It was her evidence that when he accosted her, she recognized him and called him by his name "Mugendi". It was her further evidence that the appellant raped her and beat her thoroughly and that she was unable to move until about 2.00am when she went home and informed her mother, DK

[PW2] who corroborated PW1's testimony. Seberina Kaimatheri [PW3], a clinical officer, produced a P3 Form and confirmed that PW1 had sustained multiple physical injuries arising from sexual and physical assault. She assessed the degree of injury sustained by PW1 as grievous harm.

5. The appellant gave sworn testimony. He admitted to knowing PW1 and claimed that she was his former girlfriend. He conceded that he hailed from the same village as PW1. It was his testimony that he was charged with rape instead of assault.

6. The trial court evaluated the evidence and found that the prosecution had proved all three charges beyond reasonable doubt.

7. Aggrieved, the appellant appealed to the High Court, citing, inter alia, that he was charged under the wrong sections of the *Sexual Offences Act*; failing to note that the evidence tendered by the prosecution did not prove that the appellant was the perpetrator of the alleged ordeal; failing to note that the exhibits produced during the trial did not link the appellant to the alleged ordeal; failing to note that the investigating officer did not avail himself to court to testify how he or she conducted the investigations concerning this matter; and failing to note that the evidence by the medical expert was inconclusive.

8. The High Court dismissed the appeal on conviction and enhanced the sentence of imprisonment of 10 years meted by the trial court to life imprisonment.

9. Aggrieved by the High Court's decision, the appellant preferred a second appeal on grounds that the trial court erred in law : by failing to note that the testimonies of the prosecution's witnesses was riddled with contradictions; failing to examine the evidence adduced prior to convicting him; failing to note that the prosecution conceded the appeal on the ground that the appellant and the complainant were lovers; failing to note that the complainant informed the court during trial that she wished to withdraw the case against the appellant; in considering extraneous matters in the case occasioning prejudice to the appellant; in rejecting the appellant's defence without giving cogent reasons; in exercising her discretion injudiciously in sentencing the appellant for life; that the sentence meted out to the appellant was harsh and excessive.

Submissions by Counsel

10. The firm of Gori, Ombongi & Co. Advocates represented the appellant and filed their submissions. Counsel for the appellant submitted that from the onset there was a mistrial as the complainant tried to withdraw the case but the trial court refused to accede to the request. That the respondent conceded the first appeal but the High Court considered extraneous matters and sentenced the appellant to life imprisonment. That the charge sheet was defective in that the appellant was charged for the offence of rape under Section 8 of the *Sexual Offences Act* instead of Section 3 of the *Sexual Offences Act* thus occasioning the appellant great injustice. That the defect was not curable under Section 382 of the Criminal Procedure Code. That in the circumstances, the evidence produced was threadbare and the prosecution did not prove its case beyond reasonable doubt.

11. Counsel further submitted that a crucial witness, being the Investigating Officer was not called. Counsel asserted that as such, the threshold required under the law was hardly met by the prosecution and an adverse inference should be drawn on the prosecution. Counsel urged this Court to allow the appeal, quash the conviction and set aside the sentence.

12. Ms. Nandwa, the learned prosecution counsel opposed the appeal and had filed her written submissions. Counsel submitted that the prosecution proved its case against the appellant for the offence of rape and grievous harm beyond reasonable doubt. That the evidence of PW1 was believed to be truthful and was corroborated by PW3's evidence. That as regards the offence of grievous harm,

counsel submitted that the injuries sustained by PW1 were grievous and of serious nature. Counsel emphasized that the appellant affected PW1 both physically and mentally as a result of the assault and rape. That there was no inconsistency in the prosecution evidence. The medical evidence of PW3 regarding the injuries that PW1 sustained corroborated PW1's evidence. Counsel emphasized that the appellant was positively identified by PW1 as the assailant. That the appellant was PW1's neighbour and the appellant confirmed knowing PW1 by stating that she had been his girlfriend.

13. Counsel submitted that the prosecution proved its case against the appellant of the offence of rape beyond reasonable doubt. Counsel relied on the case of Nicholas Kiprotich Rono v Republic [2022] eKLR regarding the ingredients of the offence of rape:

> " The main ingredients of the offence of rape created in section 3
>
> 1. of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent in the case of Republic v Oyier [1985] KLR 353 the Court of Appeal held that;
>
> > " 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
> >
> > 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
> >
> > 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

14. Counsel further submitted that the trial court believed the evidence of PW1 to be truthful and consistent. Counsel asserted that in the circumstances, Section 124 of the *Evidence Act* is applicable in this matter. Counsel relied on the decision of Stephen Nguli Mulili v Republic [2014] eKLR where this Court stated as follows regarding section 124 of the *Evidence Act*:

> " With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

15. On the ingredients of the offence of grievous harm, counsel relied on Section 234 of the Penal Code which provides as follows:

> " Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

16. Section 4 of the Penal Code defines grievous harm in the following terms:

> " grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely so to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense;"

17. Counsel relied on the persuasive authority of the High Court in Pius Mutua Mbuvi v Republic [2021] eKLR which states as follows:

> " a. Victim sustained grievous harm.
>
> b. Harm was caused unlawfully.
>
> c. Accused caused or participated in causing the grievous harm."

18. The court went on to state at paragraph 16 the specificities of grievous harm in the following terms:

> " The specificities of "grievous harm" therefore are; [1] in the case of grievous harm, the injury to health must be permanent or likely to be permanent, whereas, to amount to bodily harm, the injury to health need not be permanent [2] a mental injury may amount to grievous harm but not to bodily harm [3] the injury must be "of such a nature as to cause or be likely to cause" permanent injury to health."

19. Counsel asserted that PW1 testified that the appellant brutally assaulted her. PW2 testified that she saw the injuries sustained by PW1, which was also confirmed by the medical evidence of PW3. PW3 produced the P3 form, which indicated that PW1 sustained injuries of a grievous nature, and that PW1 was affected both physically and mentally as a result of the assault and rape by the appellant.

20. On the ground that the prosecution evidence was inconsistent and contradictory, counsel submitted that the prosecution evidence was clear, consistent and concise. That there was no contradiction with regard to the evidence adduced against the appellant. Further, that the evidence of PW1 is well corroborated by that of PW3 regarding the injuries that she sustained from the rape and assault.

21. Regarding the identity of the perpetrator, counsel submitted that PW1 properly identified the appellant; that PW1 testified that the appellant was a person well known to her as he was her neighbour; and that the appellant confirmed that he knew PW1 and that she was his girlfriend. Counsel further submitted that the appellant assaulted PW1 for a duration of over one hour and she therefore had adequate time to identify him and it was, therefore, not a case of mistaken identity. Counsel relied on the case of Mamush Hibro Faja v Republic [2019] eKLR which stated as follows:

> " We are therefore minded of crucial questions that we must consider while looking at PW1's testimony. These include; whether the appellant was known to the witness; the nature and frequency of their interaction; the lighting conditions including the intensity and brightness of the mobile phone torch; the position of the witness and the appellant at the time the light was being shone; and the witness' description of the appellant and the scene of the crime."

22. Counsel submitted that the appellant's defence was an afterthought and that the same did not arise during the course of the trial. That there was no reason for PW1 to frame the appellant with the offences of rape and grievous harm. Counsel asserted that the trial court found PW1 to be truthful and that her evidence placed the appellant at the scene of crime.

23. Regarding the enhancement of the sentence by the High Court, counsel submitted that the same was based on the evaluation of the case by the High Court, which took into account the permanent mental and physical injuries sustained by PW1. That the 1st appellate court found that the sentence imposed by the trial court was lenient in the circumstances of the case that the appellant brutally and mercilessly assaulted PW3. Counsel asserted that the enhancement of the sentence setting aside the 10 years imprisonment imposed by the trial court was done within the law. Counsel urged this Court to dismiss the appeal.

Determination

24. We have considered the record of appeal, the submissions, the authorities cited and the law. This is a second appeal. Section 361[1] of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of Karani v Republic [2010] 1 KLR 73 the Court stated as follows:

> " This is a second appeal. By dint of the provision s of Section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, In which case such omission or commission would be treated as matters of law."

25. We discern four [4] issues for determination in this appeal; whether there was a mistrial taking into account the complainant's wish to withdraw the case; whether the prosecution proved its case beyond reasonable doubt that the appellant committed the three offences for which he was charged; and whether the enhanced sentence was lawful.

26. Counsel for the appellant submitted that there was mistrial in that the complainant [PW1] presented her wish to have the case withdrawn but the trial court declined and proceeded with the hearing of the case. Further, that during the hearing of the first appeal, the respondent [prosecution] conceded the appeal on reliance of the affidavit sworn by the complainant enclosed in her letter dated 20th March, 2013 addressed to the ODPP seeking withdrawal of the case. The contents of the affidavit were highlighted by the High Court as follows:

    1. ...
    2. ...
    3. That in the year 2014 of thereabout, I informed court of my decision to withdraw the complaint against the accused person
    4. That my decision was informed by the fact that the issue between me and the accused person had been settled amicably and I did not wish to pursue it further
    5. That I confirm that I still maintain the position that I have reconciled with the accused person and is desirous of having the charges facing him dropped unconditionally
    6. That I have not arrived at this decision due to any forms of duress or threats or undue influence or promise of any financial gain.

27. The High Court noted from the record that the trial court had referred the complainant to comply with the procedure under the *Sexual Offences Act* in withdrawing the case. That the matter was

adjourned to give the parties time to comply with the withdrawal procedure. From the record, the prosecution did not adduce further evidence in this regard and the prosecution closed its case.

28. The Criminal Procedure Code provides as follows:

> " 204. If a complainant, at any time before a final order is passed in a case under this Part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused."

The *Sexual Offences Act*, 2006 provides under Section 40 that:

> " 40. The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney General".

29. The appellant was charged with three counts; under count 1 and II he faced sexual offence of rape and committing indecent act with an adult while count III was causing grievous harm. We shall begin with the offence under count III. From the complainant's affidavit, she signified to the trial court that she had reconciled with the appellant and wished to have the matter withdrawn.

The trial court directed the parties to comply with the procedure under the *Sexual Offences Act* on withdrawal of charges. From the record, the appellant and the complainant were granted time to reconcile. On 8th March 2017 the trial court stated as follows:

> " There is no record indicating that the charges were withdrawn. The last time the accused person was in court was on the 3/5/16. He has not been able to explain why he has not come to court thereafter. In the circumstances his bond is hereby suspended. Matter to proceed while he is in custody."

30. On the issue of the withdrawal of the charges, the High Court stated as follows:

> " The truth of the matter is that neither the appellant nor the complainant had the authority to withdraw or force withdrawal of the case against the appellant. In any event, and contrary to the appellant's contention that case against him was never withdrawn at any stage of the proceedings. There was only a wish that the case be withdrawn, further, even if such an order had been made the same was a proper candidature for being overturn [sic]."

31. As regards the sexual offences under counts I and II, the procedure for withdrawal is under the power of the ODPP pursuant to Section 40 of the *Sexual Offences Act* as read with Article 157 of *the Constitution* that vested the prosecutorial power and the authority to discontinue a prosecution to the ODPP. From the record, there was no evidence that the appellant and the complainant followed the required procedure for the withdrawal of the charges against the appellant, despite being granted sufficient time to do so. Consequently, the prosecution case proceeded and the appellant was convicted and sentenced to 10 years imprisonment. This ground of appeal therefore fails.

32. On the question whether the prosecution proved the case against the appellant to the required standard, the appellant was charged with the offence of rape. Section 3[1][a][c] & [3] of the *Sexual Offences Act*. The said provision provides as follows:

> " A person commits the offence termed rape if –

a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

b. the other person does not consent to the penetration; or

c. the consent is obtained by force or by means of threats or intimidation of any kind.

[3] A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

33. PW1 testified that the appellant raped and assaulted her. This evidence was corroborated by the evidence of PW3 who found that PW1 had been physically and sexually assaulted and that there was injury in her genital canal caused by sexual activity. PW1 submitted that she did not consent to the penetration. It is notable that PW3 testified that the degree of injury inflicted on PW1 was grievous harm.

34. Regarding the identity of the perpetrator, PW1 testified that the appellant brutally assaulted her and raped her. The appellant and PW1 were together for a considerable period of time. PW1 and PW2 both testified that the appellant was their neighbour. PW1 further testified that she lived about 400 meters from the appellant and that she led the police to the appellant's house where he was arrested. The appellant in his defence testified that PW1 had been his girlfriend. The identification of the appellant by PW1 and PW2 was therefore by recognition.

35. We therefore find that the prosecution proved its case against the appellant for the offence of rape and causing grievous harm to the required standard.

36. On the effect of the failure by the Investigating Officer to testify, this Court in PM & 2 others v Republic [2014] eKLR stated as follows:

> "Failure to call a witness can only be construed against the prosecution if it can be demonstrated that had such a witness been called, his/her evidence would have been against the prosecution. The question that ponders our mind is whether the evidence of the investigating officer would be prejudicial to the appellants. We think not, the investigating officer would collect, collate and repeat what PW1, PW2, PW3 and PW4, PW5 and PW6 as well as other prosecution witnesses stated. We are of the considered view that failure to call the investigating officer and other witnesses was not fatal to the prosecution case. In all cases, the investigating officer is not an eye witness and in the instant case, the testimonies of the eye witnesses was sufficient to convict the appellants."

37. By parity of reasoning, we find that in the instant appeal the prosecution evidence adduced was sufficient to prove the case against the appellant to the required standard. The failure by the prosecution to call the Investigating Officer was therefore not fatal to the prosecution case.

38. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We therefore find that the appellant's conviction was safe.

39. On the issue of sentence, the trial court in passing sentence stated as follows:

> "Mitigation considered. Accused person is sentenced to serve 10 years imprisonment. Since Count 11 of grievous harm was committed at the same time of sexual assault the sentence to

serve both counts... It is my considered view that the above stated reasoning by the learned trail magistrate was not sound...in the instant case, the injuries sustained by DK during the sexual assault on her by the appellant seriously injured her health. The trial court should have so found; and the fact of these serious injuries may explain the appellant's desperate attempts to get out of the trap. It is my finding that since the offence of grievous harm was proved beyond any reasonable doubt, the correct sentence that ought to have been meted out was life imprisonment as by law provided."

40. The High Court concluded as follows:

> "In the case of the offence of grievous harm, I am unable to accept a sentence of 10 years imprisonment, whether the offence was committed in the course of committing another offence or not. This therefore means that this court must interfere with [sic] trial court's sentence in respect of Count 111[Not count 11 as recorded by the trial magistrate]. The sentence of 10 years is set aside and lieu thereof, I sentence the appellant for life imprisonment. The sentences shall run concurrently."

41. The appellant takes issue that the High Court enhanced the sentence from 10 years imprisonment to life imprisonment. The appellant was convicted for the offence of rape which carries a sentence of 10 years. The appellant was also convicted for the offence of causing grievous harm in respect of which the sentence is life imprisonment.

42. This Court in Samwel Mbugua Kihwanga v Republic Cr. App. No. 239 of 2011 explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal.

43. This Court in EGK v Republic [2018] eKLR observed as follows:

> "...we note that the first appellate court enhanced the appellant's sentence from 40 years' enhancement to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354[3] of the Criminal Procedure Code. In our view, the trial magistrate has no jurisdiction to sentence the appellant to 40 years as opposed to a sentence of life imprisonment...in our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant."

44. Further, in JJW v Republic [2013] eKLR this Court stated as follows:

> "The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

45. In H.O.W. v Republic Criminal Appeal No. 326 of 2010 this Court expressed itself as follows:

> " The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next course of action on the matter in view of the warning."

46. In the instant appeal, there was no cross-appeal by the prosecution for enhancement of the sentence before the High Court nor was the appellant warned that the sentence imposed on him by the trial court could be enhanced. Guided by the judicial pronouncements enunciated above, we find that in the circumstances of this case, the High Court erred in enhancing the sentence meted out on the appellant by the trial court. In the absence of a cross-appeal, notice, or warning, we find that the High Court had no jurisdiction to enhance the sentence as it did.

47. In the circumstances, the appeal against conviction fails while the appeal against sentence succeeds to the extent that the sentence meted by the High Court is hereby set aside and in lieu thereof, the sentenced imposed by the trial court is restored. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF OCTOBER, 2025

W. KARANJA

JUDGE OF APPEAL

JAMILA MOHAMMED

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL