KENYA LAW
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Athman v Republic (Criminal Appeal E081 of 2023) [2025] KECA 54 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 54 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E081 OF 2023

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

DHIDHA JARHA ATHMAN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgement of the High Court of Kenya at Garsen (R. Nyakundi, J.) delivered on 15th December 2021 In HCCCRA NO. 34 of 2019)

JUDGMENT

1. The appellant, DJA, was charged with defilement contrary to section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that, between 3rd August 2018 and November 2018 at [Particulars Withheld] within Tana River County, the appellant intentionally caused his penis to penetrate the vagina of MMK, PW1, a child aged 13 years.

2. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars being that, between 3rd August 2018 and November 2018 at [Particulars Withheld] village, the appellant intentionally touched the vagina of MMK, a child aged 13 years.

3. The appellant pleaded not guilty and the matter proceeded to hearing where the prosecution called 4 witnesses.

4. PW1, MMK, the complainant, told the court that, in August 2018, while at her aunt's place, the appellant came to visit and wanted to speak to her, but she did not respond. On her way back to her home, the appellant followed her and told her that he loved her. She told him that she would respond later but, before she left, he proceeded to touch her breasts and thighs.

5. On 3rd August 2018, the appellant sent his friend with a phone to her as he wanted to talk to her. He sent 4 messages (SMSs) requesting her to go to his house. In the evening, she went to his house and agreed to be his girlfriend. Upon confirmation, the appellant told her that he wanted to have sex with her and ushered her to his bed. She stated of the appellant that, "alichukua tupu yake ya mbele akaingiza kwenye tupu yangu ya mbele" meaning that the appellant inserted his penis into her vagina. She again visited the appellant and they again had sexual relations. A month later, she missed her period and the appellant told her to wait until the next month. In December 2018, she again missed her month's periods and informed the appellant. He advised her to inform her mother, PW2, who took her to hospital where it was confirmed that she was pregnant. PW2 stated that the complainant told her that the appellant was responsible. The matter was reported to the Childrens' officer who referred the matter to the police station. PC Mwanaharusi Ali No. 93411, PW4, based at Hola police Station was the investigating officer. He stated that he took the complainant to hospital for examination. He also produced her birth certificate. He investigated the matter and, based on the evidence, he arrested the appellant and charged him with the offence. Ismail Hirsi, PW3, a clinical officer at Hola County Referral Hospital, examined the complainant. He produced the treatment notes and the P3 Form that indicated that the complainant was pregnant.

6. When placed on his defence, the appellant told the court that he was summoned by the Childrens' officer who informed him that he had impregnated a girl. He dismissed it as a fabrication stating that the complainant had mentioned that another boy from upcountry who was harvesting mangoes was responsible.

7. DW2, the complainant's father, supported the appellant's defence and stated that he had separated with the complainant's mother. When he was informed that his daughter was pregnant, he had summoned her and asked who was responsible; and that the complainant informed him that someone from upcountry was responsible, but did not mention his name.

8. RH, DW3, also told the court that the complainant stated that a boy from upcountry was responsible, but did not give his name.

9. Upon considering the evidence, the trial magistrate convicted the appellant of the offence and sentenced him to serve 20 years imprisonment.

10. Aggrieved, the appellant filed an appeal to the High Court on the grounds that the learned trial Magistrate was in error in both law and fact in failing to consider that the prosecution did not prove its case; in failing to consider that no certified copies of the treatment notes or the P3 form dated 21st February 2019 or the birth certificate were produced in evidence by PW1 in compliance with section 64 and 66 of the *Evidence Act*; in failing to consider that the mandatory minimum sentences in section 8(3) of the *Sexual Offences Act* contradicted the provisions of section 216 and 329 of the *Criminal Procedure Code* and denied judicial officers their legitimate right to exercise their discretion in sentencing; in not considering the mitigating circumstances prior to imposing the sentence in breach of Article 27(1)(2)(4) of the *Constitution*; and that, therefore, the sentence imposed on the appellant was unlawful.

11. Upon considering the appeal, the High Court dismissed it for want of merit and upheld both the conviction and sentence.

12. Dissatisfied, the appellant has filed an appeal to this Court on grounds that: the learned trial magistrate and the 1st appellate court failed to consider that visual identification of the appellant was reached on coaxing and cajoling the complainant; in failing to find that the prosecution did not prove the offence to the required standard; in failing to find that the charge sheet was fatally defective as the words "intentional" and "unlawful" were not supported by the evidence on record; in failing to appreciate

that the prosecution's case was riddled with contradiction and inconsistencies; in failing to evaluate the evidence; in failing to take into account the appellant's severity of the mandatory minimum sentence imposed and which was declared unconstitutional; and in failing to consider the appellant's defence.

13. The appellant filed written submissions and, when the appeal came up for hearing on a virtual platform, the appellant, who appeared in person, relied on his written submissions where it was submitted that the complainant was forced by her mother to identify him as the person responsible for the pregnancy, yet she had initially mentioned another man from upcountry to his father; that therefore, her evidence was doubtful as to the identity of her assailant.

14. It was also submitted that penetration was not proved, as the complainant did not behave like a child when she accepted to be his girlfriend, and also did not report the alleged incident to her mother, but rather, it was her mother who found out that she was pregnant. Finally, it was submitted that, the sentence was unconstitutional harsh and excessive.

15. On their part, learned prosecution counsel for the State, Ms. Fuchaka, maintained that the prosecution proved its case to the required standards, and that the evidence against the appellant was overwhelming. It was submitted that penetration was established by the evidence of PW1 and by the fact that she was pregnant which was corroborated by the medical evidence. Further, that there were no inconsistencies in the prosecution's case as all the witnesses gave credible and consistent evidence. Counsel submitted that, in his defence, the appellant gave an unsworn statement and called two witnesses where he denied the charges; that though he stated that the complainant had initially told the Childrens' officer and the police that she was impregnated by another person from the upcountry, his unsworn defense could not be tested through cross examination for veracity; and that, for this reason, it was of low probative value; that the trial Court and the 1st appellate court considered his defence and rightly concluded that the defense was too weak to dislodge the prosecution's case.

16. This being a second appeal, under section 361 of the *Criminal Procedure Code*, this Court's jurisdiction is limited to considering matters of law only. The Court's jurisdiction was succinctly set out in the case of *Karingo v R* [1982] KLR 213 as follows:

> "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 based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja v R* (1956) 17 EACA 146)."

17. See also *Karani v R* [2010] 1 KLR 73 wherein this Court expressed:

> "This is a second appeal. By dint of the provisions 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."

18. Having considered the record, the grounds of appeal and the submissions of both parties, and the issues that arise for determination are: i) whether the elements of defilement were proved beyond reasonable doubt; ii) whether the charge sheet was fatally defective as the words "intentional" and "unlawful" were not supported by the evidence in record; iii) whether there were inconsistencies in the prosecution's

case; iv) whether the trial court considered his defence and whether the High Court evaluated the evidence; and v) whether the mandatory minimum sentence was unconstitutional, harsh and excessive.

19. Beginning with whether defilement was proved beyond reasonable doubt, the appellant was convicted under section 8(1) and (2) of the *Sexual Offences Act* which provides:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> "Penetration" is defined under section 2 of the *Sexual Offences Act* as, "the partial or complete insertion of the genital organs of a person, into the genital organs of another person." In effect, for the offence of defilement to be established, the elements to be proved are; i) that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant; ii) that the minor complainant was a child under eleven years of age; and iii) that the appellant had been positively identified as the person who committed the act of penetration.

20. Regarding the element of penetration and whether it was established in this case, the trial court had this to say;

> PW1 was alone with the accused person when the alleged act of defilement took place. It is public knowledge that such acts are done in privacy and therefore we do not expect other witnesses on this specific issue. Indeed, Parliament in its wisdom had foreseen this and provided section 124 of the *Evidence Act* to avoid miscarriage of justice. PW1 was candid in her testimony as to what took place between her and the accused person. She went on to explain her fears in her testimony and why she was hesitant in naming the accused person in the first instance. I find her evidence to be credible.

21. The High Court, upon reanalysing the prosecution's evidence on the issue of penetration, concluded that this was proved.

22. The record is clear that the complainant went to the appellant's house where she had sexual relations with him on different occasions as a result of which she became pregnant. Her evidence was corroborated by the medical reports adduced by the clinical officer, which indicated that she was pregnant. Given the concurrent findings of the trial court and the High Court, we too are satisfied that penetration was proved.

23. Turning to the issue of identification, our consideration of the record shows that, the trial court carefully analyzed the complainant's evidence and, upon finding her to be an honest and credible witness, was satisfied that together with the rest of the prosecution's case, the appellant was proved to have been properly identified as the perpetrator.

24. And in addressing whether the appellant was identified, the High Court had this to say:

> " I have evaluated the evidence on record; the complainant accepted in cross examination that she mentioned another boy but whose name was not given since she was afraid and reluctant

> to do so. She told the court that she decided to reveal that the Appellant was responsible, when she found out that her education had been destroyed. She was adamant that she had slept with the appellant and she never slept with any other person.
>
> Additionally, the trial magistrate weighed the evidence of the prosecution against that of the appellant and found that the evidence was watertight and did not rebut the prosecution's case".

25. However, the appellant's complaint is that he was not properly identified as the perpetrator. He further denied being responsible for the pregnancy and asserted that, since the complainant did not identify him as the perpetrator in the first instance, and instead stated that an upcountry boy was responsible, both the trial court and the High Court wrongly concluded that he was the complainant's assailant; that the courts below failed to appreciate that the complainant's evidence was contradictory and, as a consequence, it ought not to have been relied upon.

26. In considering the appellant's claims, it becomes apparent that the question of his identification distinctly renders this case to be one of the appellant's word against the complainant's. The complainant's case being that the appellant was responsible for the pregnancy, which the appellant denied, and instead pointed to another unnamed third person as the perpetrator.

27. As rightly observed by the trial Magistrate, it is in instances such as this that application of section 124 of the *Evidence Act* becomes of necessity in order for the justice of the case to be realised. The import of the proviso to section 124 is that the trial court can convict an accused person facing a charge of defilement solely on the evidence of the victim if, for reasons to be recorded, the court is satisfied that the victim is telling the truth.

28. Contemplating similar circumstances in the case of *Stephen Nguli Mulili v Republic* [2014] eKLR, it was held that:

> " ...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."

29. In this case, the appellant was a person well known to the complainant. It is therefore a case founded on recognition of the assailant which is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon personal knowledge of the assailant. See *Anjononi & Others v Republic* (1976-1980) KLR 1566. The complainant stated that she went to the appellant's house where she had sexual intercourse with him on different occasions. She explained that the appellant threatened her and she became afraid of mentioning his name when initially reporting the offence. But, soon thereafter, she identified him as the perpetrator to her mother, the Children's officer and in her statement. The trial court found her to be an honest and credible witness, and convicted the appellant on the basis of the proviso to section 124 of the *Evidence Act*.

30. Having regard to the circumstances of this case, we are satisfied that in concluding that the appellant was properly identified as the perpetrator. Based on the complainant's evidence, the trial court rightly relied on the proviso to section 124 of the *Evidence Act* to convict him for the offence. Accordingly, we find no basis on which to controvert the finding of the trial court as upheld by the High Court that the appellant was properly identified as the perpetrator.

31. The appellant further complained that the two courts below failed to appreciate that the PW1's evidence on his identification was beleaguered with contradictions and inconsistences that were fatal to the prosecution's case.

32. In addressing the existence of discrepancies and inconsistences in the evidence in the case of *Dickson Elia Nsamba Shapwata & Another v The Republic*, (Criminal. Appeal. No. 92 of 2007), the Court of Appeal of Tanzania observed:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

33. And expressing itself on the issue in the case of *John Nyaga Njuki & Others v R* [2002] eKLR, it was observed that:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

34. We have considered the record and the excerpts of the witness evidence identified by the appellant, and are of the view that, when considered it its totality, the evidence does not disclose any inconsistencies or contradictions in the manner alleged. As already stated, at all times the complainant maintained that the appellant was the perpetrator. The reports she made identified him as the person with whom she had sexual relations. The mention of the unidentified upcountry boy arose only when he threatened her. The trial court found the evidence on his identification to be cogent and believable and, in so finding, convicted the appellant. Essentially, the trial court's determination on his identification which finding was upheld by the High Court rendered the inconsistencies as inconsequential, baseless and unfounded with the result that we dismiss this complaint.

35. The third element of the complainant's age was not disputed. In any event, her age was proved by production of her birth certificate, which showed that she was 13 years old at the time of the commission of the offence. Concerning the contention that she did not behave like a child, we find that the allegation was unsubstantiated and, therefore, nothing turned on it.

36. The next issue is whether the trial court and the 1st appellate court considered the appellant's defence, and whether the High Court properly reevaluated the evidence. A perusal of the record shows that the two lower courts did in fact consider the appellant's defence. The trial court considered both the prosecution and the defence evidence, and in weighing it out, found the prosecution's evidence to be overwhelming as against the defence. The High Court, on the other hand, discussed at length the alleged grudge between PW2 and DW2 and found that this was not established as between them. The court further found that the defence under section 8 (5) of the *Sexual Offences Act*, that he reasonably believed that the complainant was over 18 years old, to be an afterthought and rejected it.

37. Having reanalysed and reassessed the prosecution evidence against the defence's evidence, the High Court reached its own independent conclusion that the offence of defilement was proved to the

required standard, and that the appellant was the perpetrator who defiled the complainant. The grounds enumerated above are unfounded and are accordingly dismissed.

38. As concerns the contention that the charge sheet was fatally defective as the words "intentional" and "unlawful" were not supported by the evidence, our consideration of the record reveals that the question of whether the charge sheet is defective has been brought up for the first time in this second appeal. As indicated above, the mandate of this Court is limited to the examination of legal issues arising from matters canvassed before the High Court. In effect, we have no basis on which to determine this issue now raised for the first time before us and we decline to address it.

39. Turning to the question of severity of the sentence, under section 8 (1) as read with section 8(3) of the *Sexual Offences Act*, a person found guilty of the offence of defilement of a girl aged between 12 and 15 years is liable to imprisonment for a term of 20 years. The appellant was sentenced to 20 years imprisonment as prescribed by law.

40. By virtue of section 361(1) of the *Criminal Procedure Code*, in cases such as the one before us, where appeals lie from the subordinate courts, this Court is expressly estopped from hearing matters of fact. It provides:

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

        a. on a matter of fact, and severity of sentence is a matter of fact…"

41. Furthermore, the Supreme Court in its decision in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR) held that:

> ….we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.
>
> …Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

42. The above excerpt is patently clear that the appellant's appeal against the severity of the sentence is outside the purview of this Court's jurisdiction. For this reason, this ground also fails.

43. In sum, the prosecution having proved its case to the required standards we hereby uphold the conviction and sentence of the trial court as confirmed by the High Court. The appeal is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF JANUARY 2025.

A. K MURGOR

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR