HKN v Republic (Criminal Appeal E097 of 2023)
[2025] KECA 35 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 35 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E097 OF 2023

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

HKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on 13th July 2023 in HCCRA No. E027 of 2022)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) dated 13th July 2023 in Criminal Appeal No. E027 of 2022. In his decision, the learned Judge upheld the judgment of the Senior Principal Magistrate's Court in Kaloleni (L. N. Wasige, PM) dated 7th February 2022 in Sexual Offence Case No. E019 of 2020. In its judgment, the trial court had convicted the appellant as charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* (the Act) and sentenced him to 10 years imprisonment.

2. The particulars of the offence were that, on 16th December 2020 at Mwanamwinga Location, Kaloleni Sub- county in Kilifi County within coast region, the appellant intentionally and unlawfully committed an act which caused his hands to touch the breasts of AKB, a child aged 11 years, contrary to section 11(1) of the Act.

3. The appellant denied the charges whereupon the trial commenced and was heard in part before the Hon. M. W. Njuguna, RM and, subsequently, proceeded to conclusion before the Hon. L. N. Wasige, PM.

4. The prosecution called four (4) witnesses, including the complainant AKB, who testified as PW1. She gave sworn evidence after a voire dire examination and testified that, on 16th December 2020 while

on her way to the shop to buy some chicken feed in the company of two other children, she saw the appellant - her uncle, chasing some children; that the appellant went towards her, grabbed her and rubbed her breasts; that she immediately began crying while asking the appellant not to touch her; that, coincidentally, a car was passing by and the occupants witnessed what had transpired; that the occupants demanded that the appellant desist from touching PW1; that the occupants requested her to board their vehicle and drove PW1 to the local chief's office; that she did not disclose to the Chief what had transpired, but only divulged to the police what had happened to her.

5. On 2nd August 2021, the defence counsel, Mr. Gichana, applied to have PW1 recalled for purposes of cross examination, arguing that the appellant was not represented by counsel when PW1 testified. The prosecution opposed this application, submitting that counsel for the appellant failed to attend court; that the appellant informed the court that he was ready to proceed; and that the appellant subjected PW1 to cross examination. In her Ruling dated 9th August 2021, the trial magistrate, the Hon. L. N. Wasige, PM. allowed the appellant's application to recall PW1.

6. Upon recall, PW1 reiterated her earlier testimony only adding that, on the material day, it was her brother, one M, who had sent her to buy the chicken feed; that the appellant "put his hand behind [her] neck and used his other hand to caress" her breasts; that that was the first time the appellant had touched her breasts; that the appellant did not touch her breasts accidentally, but intentionally; that no one witnessed the appellant "caressing" her; and that she was taken to hospital for examination.

7. FH (PW2) testified that, on the material day, at about 4.30pm while in a vehicle from work with his colleagues, they saw the appellant grabbing and holding PW1 from the shoulders; that they stopped to enquire what was happening since PW1 was crying; that PW1 informed PW2 and his colleagues that the appellant had rubbed her breasts; and that he (the appellant) attempted to pull her towards a bush. PW2 further testified that the appellant appeared drunk; and that they later escorted PW1 and the appellant to the local chief's office to report the incident.

8. The prosecution called one of the arresting officers, PC Justus Kimanzi of Gotani Police Station as PW3. He testified that, on the material day at about 4.45pm, he received instructions from his superior, Sergeant Anderson Mwaro (PW4), to proceed to the area chief's office after the chief had called PW4 to report the incident between the appellant and PW1; that he proceeded to the chief's office in the company of one PC Limo; that, upon arrival, he interrogated the appellant and PW1; that he thereafter arrested the appellant and escorted him alongside PW1 and three witnesses to the police station, but that he only recorded PW2's statement; and that the matter was subsequently handed over to an investigating officer.

9. The last prosecution witness (PW4) attached to Kaloleni Police Station, but formerly the In-Charge at Gotani Police Station, testified that, on the material day, he received a call from the Kinarani area chief, who informed him that members of the public had conducted a citizen's arrest on an individual suspected of committing an indecent act on a child; that the alleged assailant, victim and witnesses were at the chief's office; that he thereafter instructed PW3 to proceed to the chief's office and arrest the assailant; that PW3 proceeded to the chief's office and arrested the appellant; that the appellant, the victim and other witnesses were presented at the police post; that PW1 was later on escorted to Mariakani sub-county Hospital for examination and a P3 form completed; that he thereafter charged the appellant with the present offence; and that, during investigations, PW1's parents produced her child health card, which indicated that she was born on 22nd December 2009. PW3 concluded his testimony by producing the said card as an exhibit.

10. At the close of the prosecution case, the learned magistrate found that the appellant had a case to answer and put him on his defence whereupon he gave sworn evidence, but did not call any witness in

his defence. He stated that, on the material date, he visited his friends and ended up drinking a local traditional brew, mnazi, upto around 3.30pm when he decided to return home; that on his way home, he decided to stop and sit under a tree since he was drunk and sleepy; that, while he sat, "someone hit him with a stone"; that when he opened his eyes, he saw three children laughing and running away; that he stood up and attempted to chase them but was not able to catch them, but caught PW1, who was "running away"; that he asked PW1 why she was laughing but did not get a response; that he took hold of PW1's hand in an attempt to compel her to reveal who had pelted him with a stone; that, immediately thereafter, a car pulled over, whereupon the occupants forced him to board their vehicle and whisked him away to the local chief's office on the accusation that he was harassing PW1; and that, upon arrival at the chief's office, police officers from Gotani Police Station were summoned to arrest him.

11. The appellant further stated that PW1 was his relative; that he had no reason to touch her breasts; and that he only caught PW1 by the hand and not her breasts.

12. In its judgment delivered on 7th February 2022, the trial court (L. N. Wasige, PM) noted that the evidence of PW1 identifying the appellant as the one who committed the offence was satisfactory and beyond doubt; that the appellant's defence was a sham and an afterthought; and that the prosecution had proved their case beyond reasonable doubt. Accordingly, the court convicted the appellant and sentenced him to 10 years imprisonment.

13. Dissatisfied with the trial court's decision, the appellant lodged an appeal to the High Court on the grounds that the prosecution did not prove the offence charged beyond reasonable doubt; and that the sentence meted on him was excessive.

14. In its judgment dated 15th September 2021, the High Court (S. M. Githinji, J.) observed that, the fact that two adults, and those in the vehicle saw the need to intervene, portrays an undesirable scenario; that the appellant's defence was substantially in agreement with the prosecution case, but only denies touching PW1's breasts; that the victim had no cause to make up a case against the appellant; and that the sentence meted on the appellant was the minimum allowed under section 11(1) of the Act and that, therefore, it was neither excessive nor illegal. Consequently, the court dismissed the appeal.

15. Aggrieved by the decision of Githinji, J., the appellant moved to this Court on six grounds set out in his undated "Grounds of Appeal," namely that the "superior judge" erred in law by failing to : appreciate that there was a gross violation of the appellant's right to a fair trial; consider that critical elements of indecency were not considered in light of the conflicting evidence; consider that the charge as preferred was incurably defective since the evidence adduced did not relate to the offence; consider that the matter was riddled with material contradictions and discrepancies; appreciate that the case was not proved to the required standard; and consider that the sentence as meted was harsh and manifestly excessive.

16. In addition to the grounds aforesaid, the appellant filed undated "Supplementary Grounds of Appeal" containing two additional grounds, namely that the learned high court judge erred in law: by failing to consider that no voire dire examination was conducted prior to PW1 testifying at trial; and that the sentence imposed was unconstitutional.

17. In support of his 2nd appeal, the appellant filed undated written submissions citing nine judicial authorities, namely:

    Johnson Muiruri v Republic [1983] eKLR; Samuel Wahini Ngugi v Republic [2013] eKLR; Gamaldene Abdi Abdirahman v Republic [2013] eKLR; and Patrick Kathurima v Republic [2015] eKLR, submitting that failure by the learned magistrate to conduct a voire dire examination on PW1 rendered her testimony inadmissible and incompetent; Godfrey Ngotho Mutiso v Republic [2010]

eKLR where this Court appreciated that a uniform sentence deprived the court the opportunity to consider the mitigating circumstances – the appellant submitting that this "may result to the undesirable effects of over punishing convicts"; Natasha Singh v CBI (State) (2013) 5 SCC 741 where the Supreme Court of India held that a fair trial is a constitutional as well as a human right; Mithu v State of Punjab 1983 AIR 473 where the Supreme Court of India stated that "a law that does not allow mitigating circumstances and denies judicial officers discretion in sentencing is harsh, unfair and unjust."; Evans Wanjala Wanyonyi v Republic [2019] eKLR; and Julius Kitsao Manyeso v Republic [2021] eKLR, submitting on the illegality of mandatory minimum sentences under the *Sexual Offences Act*, 2006 (the Act). The appellant prayed that we allow his appeal in its entirety.

18. Opposing the appeal, the Senior Principal Prosecution Counsel, Mr. Birir Kimaiyo, filed written submissions dated 1st October 2024 and a list of authorities of even date citing seven judicial authorities, namely: Njoroge v Republic [1982] KLR 388 requesting this Court to only consider matters of law in this appeal unless it is 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 they were plainly wrong in looking at the evidence; Adan Muraguri Mungara v Republic [2010] eKLR setting out the circumstances under which this Court could disturb concurrent findings of fact by the trial court; Obedi Kilonzo Kevevo v Republic [2015] eKLR and JMA v Republic (2009) KLR 671 submitting that the charge sheet was not defective, the appellant was charged with an offence "known to law", he was able to follow the proceedings and even crossed examined the witnesses''; and Erick Onyango Ondeng' v Republic [2014] eKLR where this Court noted its Ugandan counterpart's contention that "it is not every contradiction that warrants rejection of evidence." Learned counsel urged us to dismiss this appeal.

19. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code. In Karingo v CA Republic [1982] KLR 213, the Court stated:

> " 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."

20. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on only two issues which the appellant raised on first appeal to the High Court, namely: whether the prosecution discharged its burden to the required standard; and whether the sentence meted on the appellant was manifestly harsh and excessive.

21. We need to point out right at the outset that the appellant advances the following grounds for the first time on 2nd appeal to this Court, namely that the learned Judge erred in law by: failing to appreciate that there was gross violation of the appellant's right to a fair trial; failing to consider that critical elements of indecency were not considered in light of the conflicting evidence; failing to consider that the charge as preferred was incurably defective since the evidence adduced did not relate to the offence; failing to consider that the matter was riddled with material contradictions and discrepancies; failing to consider that no voire dire examination was conducted prior to PW1's testimony at the trial; and by failing to find that the sentence imposed on him was unconstitutional.

22. In so far as some of the grounds advanced on 2nd appeal relate to matters of fact, we call to mind this Court's decision in Adan Muraguri Mungara v Republic [2010] eKLR where the Court set out the

circumstances under which it will disturb concurrent findings of fact by the trial court as well as the first appellate court in the following terms:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

23. In our considered view, we find nothing on record to suggest that the decisions of the trial court and of the 1st appellate court were bad in law, or that the impugned decisions of the two courts below were reached without any evidential basis or on perversion of evidence. In the circumstances, we find nothing to warrant interference with the decisions of the two courts below on matters of fact.

24. With regard to the afore-mentioned seven (7) grounds of law and fact raised for the first time on 2nd appeal to this Court, we hasten to observe that those issues come too late in the day as they were neither raised before the trial court nor on 1st appeal to the High Court. Consequently, they fall beyond our mandate to determine, and for good reason. This Court has had occasion to consider the effect of raising an issue on appeal for the first time in, among other cases, Kenya Commercial Bank Ltd v James Osede [1982] eKLR where Hancox, JA. had this to say:

> " ... that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge."

25. As the Court went on to observe:

> " It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal."

26. Addressing himself to the prejudicial effect of new points of law or issues raised for the first time on appeal, Forbes VP had this to say in Alwi A Saggaf v Abed A Algeredi 1961 EA 767 CA 610:

> " But these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.
>
> In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it."

27. In the same vein, this Court in Alfayo Gombe Okello v. Republic [2010] eKLR underscored the importance of raising all issues in contention at the earliest opportunity at the trial and had this to say on the issue:

> " ... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore

find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

28. Likewise, this Court in Sudi Mnalo Mweke v Republic [2023] KECA 1527 (KLR) identified itself with the holding by the predecessor to this Court in Alwi Abdulrehman Saggaf vs. Abed Ali Algeredi [1961] EA 767 where, in its holding, the Court laid down the guiding principle that the course of taking on appeal a point of law which has not been argued in the court below ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below.
>
> It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court."

29. We need not overemphasise the general principle that trial by instalments militate against the discretionary powers of this Court in the administration of justice. That this principle continues to hold sway was demonstrated in Wachira v Ndanjeru (1987) KLR 252 where this Court spoke to the bar with Platt, JA. observing that:

> " ...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

30. For the foregoing reasons, and on the authority of the afore-cited judicial decisions, we respectfully decline to consider and pronounce ourselves on the new issues raised for the first time on second appeal to this Court.

31. On the 1st issue as to whether the prosecution proved its case against the appellant beyond reasonable doubt, PW1 testified that the appellant, who was chasing some children, came towards her, put one hand around her neck and used the other hand to caress her breasts, all along ignoring her cries and plea to stop. This incident was corroborated by PW2 and his companion with whom they were driving along the road when they witnessed the incident, stopped and rescued PW1 from the appellant, who was trying to pull her towards a bush. They took both complainant and PW1 to the local chief after which the incident was reported to the police. The question is whether the appellant committed an indecent act on PW1 as charged.

32. Section 2 of the *Sexual Offences Act*, 2006 defines an indecent act and reads:

> "indecent act" means an unlawful intentional act which causes —
>
> a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> b. exposure or display of any pornographic material to any person against his or her will;

33. We find nothing on record to suggest that the two courts below were at fault in finding as a fact that the appellant committed the offence charged. The testimonies of PW1 and PW2 left no doubt that the appellant was caressing PW1's breasts as she cried for help. In effect, his hand(s) was or were in repeated contact with her breasts, an indecent act within the meaning of section 2 of the Act. The only question is whether the indecent act was proved to the required degree, namely beyond reasonable doubt. To our mind, and on the evidence on record, it was so proved. The appellant was well-known to PW1, who recognised him and, therefore, his identity was not in contest (see Anjononi & 2 Others v Republic (1980) eKLR).

34. Pronouncing himself on the degree of proof beyond reasonable doubt, Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 had this to say:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

35. This high standard of proof is founded on the fact that criminal convictions involve the highest possible consequence (loss of liberty) and therefore have the highest burden of proof: Beyond a Reasonable Doubt. This strict standard requires that there must be "moral certainty" of the defendant's guilt and there is no other logical explanation or conclusion other than that the defendant committed the crime. In effect, the evidence must be sufficient to convince the court that the accused is guilty. Simply put, the evidence must be truthful, accurate, and irresistibly point to the accused (see Dennis Muthini v Republic [2024] KEHC 2182 (KLR)). Taking to mind this Court's decision in Moses Nato Raphael v Republic [2015] eKLR, we safely conclude that the prosecution proved its case against the appellant beyond reasonable doubt. Accordingly, the 1st ground of appeal fails.

36. Turning to the 2nd issue as to the severity of the sentence meted on the appellant, it is indubitable that this Court has no discretionary power to reconsider a sentence on second appeal. Section 361 of the Criminal Procedure Code reads:

> 361. Second appeals
>
> (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;

37. This Court in MGK v Republic [2020] eKLR authoritatively stated that:

> " 16. As regards the sentence, under section 361(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

38. In effect, "the Court is not concerned with the severity of the sentence in a second appeal" unless, for all intents and purposes, the sentence is unlawful (see Oyoko v Republic [1982] eKLR). Likewise, this ground of appeal fails.

39. Having carefully considered the record of appeal and the grounds on which it is founded, the rival submissions, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on 13th July 2023 is hereby upheld. It is so ordered.

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

A.K MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR