Rumba v Republic (Criminal Appeal 30 of 2021)
[2025] KECA 52 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 52 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 30 OF 2021

MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA

JANUARY 24, 2025

BETWEEN

CHARO KARISA RUMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(eing an appeal from a judgment of the High Court of Kenya at Malindi Dated by (M. Thande, J.) on 26th February 2020 and delivered by (Njoki Mwangi, J.) on the 28th February 2020 in Criminal Appeal No. 006 of 2019)

JUDGMENT

1. The appellant, Charo Karisa Rumba was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 14th July 2016, at Kilifi County, the appellant intentionally caused his penis to penetrate the vagina of the complainant, LJN, PW1 a child of 10 years.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentionally and unlawfully touched the vagina of the complainant.

3. The complainant's case was that on 14th July 2016 while on her way to school in the morning, she met the appellant who requested her to pass by his house on her way back from school to collect some money that he owed her mother. On her way from school, when she met the appellant at his home, he suddenly pulled her into a bush, forcefully removed her pants, mounted on her and inserted her penis into her vagina. Her screams were heard by one babu, , Stephen Mwanyanje PW3, who came to her rescue. He arrested the appellant, took her home and thereafter to the village elder. A report was later made to Kilifi Police Station where the appellant was re- arrested and charged with the offences.

4. Dr. Laurine PW2, the medical doctor who produced the P3 Form and the post-rape certificate "PRC" Form on behalf of the complainant stated that according to the reports, her hymen was broken, but there was no discharge from her private parts; that in addition, red cells were found in her vagina which was consistent with penetration.

5. PW3, the babu who rescued the complainant told the court that on 14th July, 2016 while at his farm, he heard screams coming from a bush. When he checked, he saw the appellant defiling the complainant. He arrested the appellant and took him to the village elder and then to the Police Station where he was charged.

6 Having received the report from the complainant and recorded statements from those who accompanied her to the station, Corporal Clara Bingo PW4 referred the complainant to Kilifi County Hospital for examination and for completion of the P3 Form and the PRC Form.

7. When placed on his defence, the appellant testified on oath that on the fateful day, he met the complainant and told her that he had not obtained the monies he owed her mother. In the process, PW3 arrived and struck the ground with a panga which frightened the complainant causing her to drop her books. PW3 escorted him to the village elder and then to the police station where he was charged.

8. Upon considering the evidence, the trial Magistrate found that the prosecution had proved its case, and convicted the appellant for the offence of defilement and sentenced him to serve life imprisonment.

9. Aggrieved, the appellant filed an appeal to the High Court on the grounds that the trial Magistrate failed to consider that the appellant was denied his right to information prior to taking plea in breach of Articles 50(2) (a), (b) and (m) of *the Constitution*, which had resulted in a mistrial and a nullity; that the trial Magistrate placed undue reliance and weight on the weak and unreliable medical reports as the only corroborative evidence and also failed to consider that the sentence imposed was manifestly harsh and excessive, and in breach of Article 50(2)(p) of *the Constitution*. The High Court dismissed the appeal and upheld both the conviction and sentence.

10. Dissatisfied, the appellant has filed an appeal to this Court on the grounds that the learned Judge was in error in law in failing to appreciate that there were massive contradictions and variances in the evidence and in failing to appreciate that section 163(1)(c) of the *Evidence Act* was not considered; that the complainant's age was not proved and that his defence was not taken into account.

11. In his amended grounds of appeal annexed to his submissions, the appellant contended that the learned Judge failed to appreciate that Article 49(1) of *the Constitution* was violated; that he was convicted by the trial court in violation of Article 50 (c) and (j) of *the Constitution* and that the learned Judge was in error in upholding the sentence that was manifestly harsh and excessive.

12. Both the appellant and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, the appellant stated that he would rely on his written submissions, where firstly it was submitted that, he was not presented before court within the time stipulated under Article 49(1) of *the Constitution*, as he remained awaiting to be arraigned in court for two weeks and two days. Next, it was submitted that the trial court did not consider his defence as, if it was weighed against the prosecution evidence, the court would have found that the offence was not proved to the required standards. The appellant also submitted that the prosecution's case was not proved because, while he did not dispute the complainant's age, the prosecution did not prove that there was penetration and as a result, the offense was not established.

13. Finally, the appellant submitted that the life sentence imposed on him was discriminatory and unconstitutional and he urged that it be set aside.

14. Learned prosecution counsel for the State, Ms. Kanyuira submitted, that the evidence against the appellant was cogent, credible and consistent; that there were no contradictions in the evidence, and even if there were, they were inconsequential, and therefore did not render the conviction unsafe. Counsel further submitted that the age of the complainant was proved by the oral testimony of the witnesses and the birth certificate that was produced in court; that PW1 testified that she was 10 years old, and her birth certificate showed that she was 10 years old and therefore her age was sufficiently proved; that further, rule 4 of the Sexual Offences Rules 2014 provides that when determining the age of a person, the court may ascertain the age of that person from a birth certificate, school documents, baptismal card or similar documentation.

15. Counsel went on to submit that the appellant in his defence elected to give a sworn statement of defence and denied committing the offence; that his defence was a mere denial and the trial court correctly placed reliance on the prosecution evidence and rejected the appellant's defence; that when confronted with the appellant's defence against the prosecution evidence, the trial court found the prosecution's evidence to be cogent and credible, and as such rightly convicted the appellant on the basis of the evidence.

16. This is a second appeal and the mandate is restricted to addressing only matters of law. This is as provided under section 361(1) of the Criminal Procedure Code. In the case of Karani vs R [2010] 1 KLR 73, this Court succinctly set out the mandate of this Court in a second appeal thus;

> " 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."
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> See also Kaingo vs R [1982] KLR 213 and Reuben Karari C/o Karanja vs R (1956) 17 EACA 146.

17. In the case of Paul Odhiambo Asanya vs Republic [2015] eKLR this Court emphasized that;

> " In other words, what the second appellate court is obligated to do is to decide whether a judgment can be supported on facts as found by the trial and the first appellate courts. It is not the function of the second appellate court to place itself in the shoes of the first appellate court by reconsidering and re-evaluating the evidence adduced in the trial court and drawing its own conclusions. See also section 361(1) of the Criminal Procedure Code."

18. Having considered the grounds of appeal, the submissions by both parties, and the case law cited, the issues for consideration are; i) whether the appellant's rights were violated by his having been detained in custody before being charged for longer than the period prescribed; ii) whether the ingredients of the offense of defilement were proven; iii) whether his defence was taken into account; iv) whether there were inconsistencies in the prosecution witness evidence; and v) whether the sentence imposed was unlawful.

19. Beginning with whether the appellant's rights under Article 49(1) (f) of *the Constitution* were violated as he was detained for more than 24 hours before his arraignment in court, the appellant contends that he was arrested on 14th July 2016 and was arraigned in court on 8th August 2016. However, a consideration of the record does not disclose that this issue was raised in the courts below, and therefore it is being raised for the first time in this Court.

20. This Court when faced with a similar issue in the case of Alfayo Gombe Okello vs Republic [2010] eKLR, Criminal Appeal No. 203 of 2009 held that;

> " ....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."

21. In the case of Dzombo Mataza vs. R, [2014] eKLR this Court stated:

> " ...this is but a second appeal. 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 – see Okeno vs Republic (1972)."

22. It is trite law that this Court sitting on a second appeal ought not to address matters of fact or new issues introduced for the first time on a second appeal. In the circumstances, we decline to address the issue of the alleged violation at this late stage. See also John Kariuki Gikonyo vs Republic [2019] eKLR, and Epeyon & another vs Republic (Criminal Appeal 117 of 2020) [2024] KECA 287 (KLR).

23. Turning to whether the offence of defilement was proved, it is settled that the ingredients of the offence are; i) proof of complainant's age; ii) proof of penetration; and iii) identification of the perpetrator.

24. As regards the age of the complainant, the appellant has not challenged her age, which was proved by the production of a birth certificate that showed that she was born on 30th October 2005 and therefore, at the time the offence was committed, she was 10 years old.

25. On the ingredient of penetration, section 2 (1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person".

26. The Supreme Court in Uganda in the case of No. 0875 Pte. Wepukhulu Nyuguli vs Uganda [2002] UGSC 14 (4 March 2002) held that:

> " The issue as to whether or not sexual intercourse took place in a particular case is a matter of fact to be established by evidence...
>
> It is the law that however slight the penetration may be it will suffice to sustain a conviction for the offence of defilement."

27. In the case of Matumbwe vs Uganda (Cr*iminal Appeal 8 of 2008*) [2011] UGSC 28 held that:

> "...In sexual offences, such as defilement, or rape the slightest penetration into the victim's vagina was sufficient to warrant a conviction for that offence. There was no requirement that the hymen of the victim had to be broken."

28. In proving that there was penetration, the complainant gave a cogent account of how the appellant dragged her into a bush, removed her clothes, threw away her pants and defiled her. Her evidence was corroborated by that of PW3 who upon hearing her screams came to the scene and found the appellant on top of her, whereupon, he promptly arrested the appellant. Indeed, the complainant's evidence as corroborated by the evidence of PW3, an eye witness who caught the appellant in the act, as well as

that of PW2 the medical doctor who reported that red cells were present in the complainant's vagina which is consistent with penetration, all clearly demonstrated that there was penetration.

29. A review of the Judgment of the High Court, shows that, in support of the assertion that his defence was not considered, the appellant strenuously contested the question of whether penetration was proved. The appellant argued that, it was not logical for an adult person of 65 years to defile a child of 10 years without that child having difficulties in walking, yet, the complainant had walked home without

6. difficulties immediately she was sexually abused by the appellant. In addressing this issue, the learned Judge stated:

> "Further, the suggestion by the Appellant that the complainant walked without difficulty after the act which is not proved, is outrageous and cannot lead one to draw the conclusion that there was no penetration."

30. There is no doubt from the above that the court duly considered both the prosecution evidence as well as the appellant's defence, and was satisfied that it did not dislodge the prosecution's case. In our view, the appellant's defence before the trial court was a mere denial as, not only was he caught in the act of sexually assaulting the complainant by PW3, the evidence of PW1 and PW2 proved that there was penetration. In the result, this ground is without merit.

31. As to the identity of the perpetrator, both the lower courts concluded that there was no mistake that the appellant was the perpetrator. His identification was through recognition as, he had been neighbor of the complainant and her family for a long time. He further admitted in his defence that he owed her mother money, but was not able to repay her on the material day. PW3 who caught him also identified him as the complainant's assailant. In view of the concurrent finding of fact by the two courts below on his positive identification, we have no reason to arrive at a different conclusion.

32. Regarding the complaint that there were inconsistencies and variances in the evidence, as this was not substantiated, we have no basis on which to address this ground, and we accordingly dismiss it.

33. On the sentence imposed on the appellant, 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.

34. The Supreme Court in its decision in the case of Republic vs Mwangi; Initiative

7. 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.
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> ...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."

35. The aforegoing excerpt is manifestly plain that the appellant's appeal against the severity of the sentence is outside the purview of this Court's jurisdiction. This ground is therefore without merit and so fails.

36. In sum, the prosecution having proved its case to the required standards, we 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 NAIROBI THIS 24TH DAY OF JANUARY, 2025.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR