Biruri v Republic (Criminal Appeal 4 of 2018)
[2025] KECA 375 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 375 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 4 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

MICHAEL MAKAYA BIRURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyahururu (R.P.V Wendoh, J.) dated 28th July 2017 in HCCRA No. 29 of 2017)

JUDGMENT

1. Michael Makaya Biruri, the appellant herein, was charged with the offence of attempted defilement contrary to section 9 (1) as read together with section 9 (2) of the *Sexual Offences Act*. In its oral application made on 29th August 2012, following the testimony of the complainant, the respondent sought to amend those charges under section 214 of the *Criminal Procedure Code* to the offence of defilement. That application was granted. Consequently, on that day, the appellant answered to the charges of defilement contrary to section 8 (1) (sic) of the *Sexual Offences Act*. The particulars of the offence were that on 16th May 2012 at around 4:00 p.m., within Nyandarua county, the appellant caused his penis to penetrate the vagina of PWK, a girl aged 9 years. The appellant faced an alternative charge. However, those the particulars have not been captured in the record before us.

2. The appellant pleaded not guilty to the charge. Upon conclusion of the trial, the learned magistrate convicted him for the offence of defilement under section 8 (3) of the *Sexual Offences Act* (sic) and sentenced him to 30 years' imprisonment. On appeal before the High Court, Wendoh, J. upheld the conviction but set aside the sentence by enhancing it to life imprisonment.

3. The appellant is dissatisfied with those findings. He filed an undated notice of appeal, an undated memorandum of appeal and supplementary grounds of appeal that raised seven grounds disputing the findings of the learned judge.

4. We have taken the liberty to summarize them as follows: the High Court failed to properly analyze the evidence as the ingredients to the charges preferred against him were not proved beyond reasonable doubt; the evidence of the complainant failed to meet the threshold set out in section 124 of the *Evidence Act*; the first appellate court failed to consider his defence; the conviction upheld by the High Court was unsafe as it was marred with inconsistencies and contradictions; and the learned judge incorrectly and improperly enhanced the sentence meted out to the appellant without a notice of enhancement and without a cross appeal being filed by the respondent. In the circumstances, the appellant urged this Court to allow the appeal.

5. The appeal was heard on 17th February 2025. The appellant represented himself while learned counsel for the state Mr. Omutelema represented the respondent. The parties wholly relied on their respective written submissions.

6. The appellant's written submissions and list of authorities, both dated 7th November 2023, argued that the High Court created a misnomer in enhancing the sentence to life imprisonment without a notice of enhancement, cross appeal and/or a warning to the appellant. That sentence was consequently illegal. He further added that the sentence did not consider his mitigation and therefore fell short of the threshold set out in law.

7. On the elements of defilement, the appellant submitted that while the age of the complainant was proved, the aspect of penetration and the identity of the perpetrator were not established to the required standard of proof being beyond reasonable doubt. On penetration, he submitted that PW4's evidence was not corroborated by the other witness accounts. Furthermore, the evidence of PW1 and PW2 bore grave inconsistencies as to cast doubt on this essential element of the offence.

8. Looking at the evidence of PW1, PW2, PW3, PW4 and PW5, the appellant was dissatisfied with the arrival of the two courts' conclusion that he was the perpetrator when no identification parade was conducted. He cited the relevance of the identification parade since PW1 had never seen him before the offence was committed. In any event, the evidence of PW1 and PW2 contradicted on many levels and the two courts ought to have cautioned themselves before making a finding. In view of the foregoing, the appellant urged this Court to allow his appeal.

9. The respondent on its part relied on its written submissions, case digest and list of authorities all dated 12th April 2024. On questioning by the Court, Mr. Omutelema, Senior Assistant Deputy Director of Public Prosecution, representing the state, readily agreed that the enhancement of the sentence to life sentence by the first appellate court was not done in accordance with the law as there was no cross appeal or notice to enhance the sentence and the appellant did not receive a warning on the consequences of proceeding with the appeal.

10. On the conviction the respondent submitted that the prosecution ably discharged its burden of proof to the required standard paving way for a conviction against the appellant. It urged that penetration was established from the evidence of PW1, PW2, PW3, PW4 and PW7. Regarding the offender, the prosecution submitted that PW1 knew the appellant and his home very well. The offence occurred during the day. PW1 led PW5 to the appellant's house and pointed out where the offence took place. Her evidence was unshaken and the description of the offender fit that of the appellant. Therefore, there was no mistaken identity.

11. The respondent submitted that the complainant was nine years old as demonstrated in her testimony and in the immunization card. He added that her evidence was qualified by the proviso to section 124 of the *Evidence Act* and was therefore credible. Finally, that the two court's considered that the appellant's defence was weak and a sham and did not loop holes in the prosecution's evidence.

12. Section 361 of the *Criminal Procedure Code* sets out this Court's authority as a second appellate court. We are further guided by the ruminations of this Court in the case of M'riungu vs. Republic (1983) KLR 455 that held as follows:

> " Where a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

13. The evidence that emerged from the trial court is as follows: PW1 (the complainant) testified that she was nine years of age and was a class two student at Kiandege Primary School. On 16th May 2012, she stood at the junction at around 3:20 p.m. waiting for one Wangeci having left school, that the appellant grabbed her hand and took her to Nduta's house that had two beds. On entering the house, the appellant removed her clothes. He also lowered his trousers and proceeded to sexually assault her. PW1 felt pain.

14. After the ordeal, PW1 stated that she left and went home. She was escorted by her neighbour called Shiko. PW1 found her mother PW2 VN at home but did not disclose what had transpired. PW2 however asked what she was doing at the appellant's house. She then testified that she was taken to Hospital but could not recall if she went to the police station. She added that the appellant never spoke to her again.

15. In her cross examination, PW1 responded as follows:

> " There is no one who saw you take me to my place. Its wooden. I saw two beds in your house. I did not meet anyone on my way home. When I reached home I told my mum. I was alone when coming from school. You did not threaten me in any manner. You did not entice me with any goodies. You did not promise to give me anything."

16. After the charge sheet was amended as earlier stated in this judgment, the appellant elected not to recall PW1, proceeding with the evidence of the other prosecution witnesses. PW2 testified that her daughter PW1, was born on 19th September 2003. On 16th May 2012, PW1 found PW2 at home. PW2 observed that the complainant was bleeding from the back. When quizzed, PW1 disclosed that she had fallen from a tree and injured herself on the back due to the impact on a stone. Suspicious, PW2 called her sister PW3 LK to find out from the complainant what had transpired.

17. PW2 testified that she went home and found her mother Patricia and PW3 who informed her that PW1 refused to speak. Back to the house, PW2 removed PW1's inner wear and observed that it was pink and her vagina was swollen with blood stains. Together with Patricia and PW3, PW2 took PW1 to the clinic.

18. According to PW2, it was here that PW1 revealed to the doctor that when she was coming from school at a junction waiting for her sister Rebecca Wangeci, the appellant took hold of her hand. When they reached the gate, the appellant told PW1 to leave the bag at the gate and took her to the house. He then removed her underwear and had intercourse with her. When he was done, the appellant cautioned her against telling anyone about what had happened. That PW1 knew the perpetrator because he had a lame hand and leg. At that juncture, the trial court observed and recorded that the appellant had a lame hand and leg while walking.

19. PW2 reported the incident to the assistant chief and later Mailo Inya police station. They were advised to take PW1 to Nyahururu District Hospital for treatment. She added that the medial examination revealed that her daughter had been defiled. PW2 testified that later the appellant was arrested. The assistant chief directed the police to his place of abode; approximately 200 metres from PW2's home. However, she met him the first time at the police station. Her evidence was that PW1 recognized him as she would regularly see him when coming from school. That PW1 knew where the appellant lived.

20. PW3's evidence was that on 16th May 2012, her sister PW2 requested her to ask PW1 what had occurred during the day. When she inquired, PW1 refused to speak and instead cried. She noticed that she had blood stains on her school uniform and alerted PW2. They would later escort PW1 to the clinic. That the doctor removed PW1's underwear to wit she observed it had blood stains. PW3 corroborated the evidence of PW2 regarding what transpired in the presence of the doctor. The matter was then reported at the Mailo Inya police station. She added that PW1 disclosed that she could identify the offender on the basis that he had a lame hand and leg. She met the appellant the first time at the police station.

21. PW4 Benson Wambugu, a nurse at Kiandege Medical clinic, testified that two ladies, accompanied with a minor, visited the facility on 16th May 2012 at 6:00 p.m. The minor, who was in shock, informed him, that she was on the road at the junction when she found a man who offered to assist her cross the road because of the presence of donkeys on the road. He escorted her to his two roomed home. They entered the main house that had seats. The other room had hanging clothes and a bed. The gentleman removed her clothes and his clothes, lay her on the bed and defiled her. The offender then took her to the road and left her there. The minor informed PW4 that she could identify the offender as he was limping and was wearing a jacket, a trouser and sandals. He advised them to attend to Nyahururu District Hospital and observed that the minor's clothes were soaked in blood as she was bleeding from the vulva. PW4 recognized the appellant as a person he had seen at the centre and was informed that he was the perpetrator.

22. PW5 Sargent Peter Kinyua working at Shauri AP Post, testified that on 17th May 2012, Amos Mariera the assistant chief, informed him about the offence. He was also notified by the police at Mailo Inya police station. He was informed that the suspect was brown and had a one arm disability. Together with his colleague, they proceeded to Kiandege trading centre. They met the appellant on the way and in his view, fit the description of the offender. Upon interrogating him and establishing his name, PW5 arrested the appellant.

23. PW6 PC Eric Odak the investigating officer based at Mailo Inya police station received the report of the incident on 16th May 2012 at 9: 00 a.m. from PW2 and PW3. He corroborated their evidence in terms of what had transpired. In addition, he was told that during the ordeal, the appellant held the complainant's throat. He produced the complainant's blood stained dress and the complainant's underwear. He recorded the witness statements and collected the evidence. He was informed that the assailant was lame and brown in color. The appellant was arrested on the road by another police officer. That he went with the complainant to the appellant's wooden home but did not find him there. PW6 wanted to establish whether the complainant knew the culprit. He was told that it was the complainant's home.

24. PW7 Dr. Korir, a medical officer working at Nyahururu District Hospital, produced the P3 form and the complainant's treatment notes. He stated that on 18th May 2013, PW1 visited the Hospital. He observed that she had tenderness on her private part. She had tears of varying degree and her hymen was freshly torn. She also had blood on her vagina due to sexual intercourse.

25. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that he was arrested while still recuperating from a broken arm having been discharged from KNH. His evidence was that PW1 was not alone as the school had many children. He lived with his parents, siblings and some two boys who attended the same school as that of PW1. He denied committing the offence maintaining that the complainant, the doctor and PW2 lied in their testimonies. That the arresting officer did not visit his home. That the witnesses did not describe him well since he had injured both arms. He added that he knew the complainant's family for a long time and lived about 2kms away from them. Finally, he used to work in Westlands, Nairobi but only returned home to recuperate after sustaining injuries from an accident.

26. It is trite that in a charge for defilement, the prosecution must establish the following three conjunctive ingredients to sustain a conviction for the offence of defilement: the age of the complainant, penetration, and the identification of the perpetrator. Regarding the complainant's age, the trial court and the first appellate court relied on PW1's immunization card to conclude that she was nine years old at the time of the offence. PW2, the complainant's mother, testified that the complainant was nine years old at the time of the offence. We are satisfied that ingredient of the offence was proved.

27. Did the appellant cause penetration within the meaning set out in section 2 of the *Sexual Offences Act*? Section 124 of the *Evidence Act* provides that the evidence of a single identifying witness shall not, in the absence of corroborating evidence, sustain a conviction. The proviso to that section however gives an exception in sexual offences as long as it is established that the witness is deliberately telling the truth.

28. In this case, PW1 stated that the appellant took her to Nduta's house. However, PW2, PW3, PW4 and PW6 all stated that the appellant took the complainant to his house. Another discrepancy that we observed from the evidence of the prosecution was that PW2 stated that she saw the complainant emerging from the appellant's home. However, she stated that prior to the offence, she did not know the appellant. How then was she able to establish that PW1 was coming from the appellant's house on that fateful day?

29. Thirdly, PW1's evidence was after the ordeal, she was escorted home by a neighbor called Shiko. This was not manifest in the evidence PW2 who we believe would have seen Shiko if at all PW1's evidence was anything to go by. In any event, during her cross examination PW1 stated that she did not meet anyone on her way home. Fourthly, PW1 stated that she did not inform her mother PW2 what had transpired but would later state in cross examination that she did. In addition, PW2 and PW3 stated that PW1 was mute and only opened up in the presence of PW4.

30. PW4 further stated that he was informed by the complainant that she was choked during the sexual act. That was however not the description given by PW1 in her testimony. In addition, he testified that PW1 informed him that the crime scene had one bed when PW1's evidence was there they were two in number.

31. Another discrepancy lay in evidence of PW7 who stated that the incident was reported on 16th May 2012 at 9:00 a.m. when it was reported that the same occurred on the same day at 4:00 p.m. Finally, PW1 did not give a description of the appellant's attributes. We also see this coming alive in the evidence of the other witnesses? We therefore question how this rendition was arrived at.

32. It is clear from the evidence before us that PW1 did not know the appellant prior to the offence. This was a case of identification from the dock rather than recognition. The trial court purported to allude to the fact that the appellant was the only brown young man that was lame and with a broken arm. It is for this reason that he stated: "...the minor did not describe a dark person. She was categorical

that it was a brown young person with a lame hand which description aided the police in arresting the accused. .....though no parade was conducted for identification her description was well enough to identify the accused person."

33. On its part, the first appellate court addressed the issue as follows.... "the best way the police should have proceeded was to hold an identification parade. However, even without the identification parade I am satisfied that the appellant was sufficiently identified by PW1 as the culprit....." We don't understand how the High Court arrived at such an absurd conclusion, in the absence of identification of the appellant. The possibility of mistaken identity is so high and fundamental to a conviction.

34. It is clear that the two lower courts appreciated the need for an identification parade but still went ahead to hold that nonetheless, the identification by the complainant was enough to sustain the conviction. We do think so.

35. After a careful analysis of the evidence, we find that the identification of the perpetrator fell short of the standard of proof beyond reasonable doubt. This was an explicit case calling for an identification parade. Contrary to the findings of the two courts below, PW1's evidence in our view was not sufficient enough to identify that the appellant was the perpetrator of the offence. In Gabriel Kamau Njoroge vs. Republic [1987] KECA 4 (KLR), this Court held as follows regarding the relevance of an identification parade and which sentiments we adopt accordingly:

> "Dock identification is worthless the court should not rely on a dock identification unless this has been preceded by a properly conducted identification parade. A witness should be asked to give description of the accused and the prosecution should then arrange a fair identification parade... On many occasions this court has held that such identification is almost worthless without an earlier identification parade (see Owen Kimotho Kiarie v Republic, Criminal Appeal No 93 of 1983 relying on Rachhodas & Thakore, The Law of Evidence, (The Indian *Evidence Act*) 13th edn p 151.) The operation of this rule may be observed in Gopa s/o Gidamebanya v Republic (1953) 20 EACA 318 at 322 et seq.
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> ... (See Republic v Mohamed bin Allui (1942) 9 EACA 72, Rex v Shabani Bin Donald (1940) 7 EACA 60 and Owen Kimotho Kiarie (supra). If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in Republic v Turnbull [1976] 3 All ER 549 saw the examination. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance? As a result of public disquiet in England that there were mistakes of identification, the Attorney-General agreed that the Director of Public Prosecution would not invite a witness as to identity who has not previously identified the accused at an identification parade, to make a dock identification unless the witness' attendance at a parade was unnecessary or impractical or there were exceptional circumstances. (See Archbold, Criminal Pleading Evidence and Practice (40th edn) para 1348 et seq.) There is no evidence that there is any less disquiet in Kenya than in England, and as the authorities on this topic stretch back some 40 years, it is not asking

too much that a witness is asked to give a description of the accused, and the prosecution to arrange for a fair identification parade."

36. We have carefully examined the record and note that the appellant was arrested by PW5 and taken to the police station, where the complainant identified him. In the circumstances of this case, where a victim did not know the assailant, an identification parade was necessary. This a case where the complainant refused to reveal the identity of the person who assaulted her until she was taken to the hospital and opened up to the doctor. PW5 indicated that he arrested the appellant because his most profound characteristic was that he was limping. PW5 could be right but is there a chance of a mistaken identity? At the risk of repetition, it is our finding that the only way that mistaken identity could have been avoided was to do an identification parade. The casual identification at the police station and the court is unsafe in a case like this where the evidence is inconsistent. Mere suspicion, however strong is not a ground for conviction. We therefore think the case before us is based on mere suspicion. The respondent must be reminded that all offences, including sexual offences, that evoke emotions, must be proved beyond reasonable doubt and where there are doubts, the accused enjoys the benefit of doubt. It always remains the work of the investigating officer to seal obvious gaps like the ones that are glaring in this appeal.

37. This Court has had the benefit of introspecting discrepancies in criminal cases. We find the ruminations of this Court in John Nyaga Njuki & 4 Others vs. Republic, Cr. App. No. 160 of 2000 as useful when it stated as follows:

> " 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."

38. More recently, this Court in Philip Nzaka Watu vs. Republic [2016] KECA 696 (KLR) held as follows regarding discrepancies in criminal trials:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

39. The above contradictions captured in the record were so major that they cannot be glossed over. We find that they cast doubt as to the prosecution's evidence and in particular that of the complainant as to whether she was truthful.

40. We also note that the trial court erroneously shifted the burden of proof to the appellant when it remarked that the appellant did not call the occupants in the home he was in as witnesses. The appellant was not under any duty to prove anything as the burden of proof rested on the prosecution and this holding is wrong.

41. On sentencing, the trial court convicted the appellant under section 8 (3) and sentenced him to 30 years' imprisonment. On this issue, the High court made the following analysis:

> " the court sentenced the appellant to 30 years' imprisonment. Under section 8 (3) (sic) of the *Sexual Offences Act*, the only sentence upon conviction is life imprisonment. The prison sentence of 30 years is illegal. The magistrate had no discretion to reduce the sentence. I therefore set aside the prison sentence of 30 years and replace it with life imprisonment."

42. Before a court of law enhances a sentence, and to which Mr Omutelama rightly conceded, the practice within our jurisdiction which was well enumerated by this Court in JJW vs. Republic [2013] eKLR is 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."

43. In the instant case, we note that the respondent did not file an appeal seeking to enhance the sentence. We have also anxiously looked through the proceedings at the High Court. The appellant was never given a warning that he risked an enhanced sentence. He was also not notified that his appeal risked his sentence being enhanced. The sentence was enhanced in the absence of the respondent's appeal before that court on sentence.

44. To us that was a grave violation the appellant's constitutional rights enshrined in Article 50 (2) of *the Constitution* as to warrant an interference by this Court. We are reminded that Article 25 (c) of *the Constitution* holds it in high regard as a non- derogable right. Our duty is to uphold *the Constitution*.

45. The upshot of our above findings is that the appellant's appeal is merited. His conviction is set aside and substituted with an acquittal. The appellant shall forthwith be set at liberty and is hereby released from custody unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF FEBRUARY 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR