Mbogo v Republic (Criminal Appeal 106 of 2017)
[2025] KECA 374 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 374 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 106 OF 2017

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 28, 2025

BETWEEN

STEPHEN MWAURA MBOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyahururu (R.P.V Wendoh, J.) dated 17{{^th}} October 2017 in HCCRA No. 2027 of 2014)

JUDGMENT

1. The appellant, Stephen Mwaura Mbogo, has invoked this Court's second appellate jurisdiction against his conviction and sentence that was upheld by the High Court. The appellant was charged with the offence of defilement of a girl contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* in Nyahururu CMC Criminal Case (SO) No. 2027 of 2014. The particulars of the offence were that on 23rd July 2014 at Kibathi village Nyahururu county, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of RWC, a girl aged 15 years old. In the alternative, the appellant was charged with 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 unlawfully and intentionally touched the vagina of RWC, a girl aged 15 years old.

2. The appellant was arraignment before the trial court to answer to the charges that he faced. He pleaded not guilty. After a full trial, the appellant was convicted on the main charge of defilement and sentenced to serve 20 years imprisonment. His bid before the High Court (Wendoh, J.) on a first appeal, dismissed both conviction and sentence.

3. The appellant is aggrieved by those findings. He has filed his notice of appeal dated 6th December 2017. He also filed his undated memorandum of appeal disputing the findings of the learned judge on grounds which are summarized as follows: that the ingredients to the offence of defilement had

not been established beyond reasonable doubt; that no evidence linked the complainant with the appellant's phone number; that he had been framed maintaining that from the evidence adduced, the offence had been committed by someone else; and that the learned judge failed to consider his defence. He urged this Court to find that the appeal was with merit.

4. When this appeal was heard on 23rd January 2025, the appellant was present in person while learned counsel for the state Mr. Omutelema represented the respondent. The parties wholly relied on their rival written submissions.

5. The appellant in his undated written submissions argued that the evidence when considered in totality is contradictory, unreliable and incapable of sustaining his conviction. On the element of identification, the appellant submitted that he was not positively identified when all the circumstances surrounding the commission of the offence are considered. He pointed out that the complainant in her evidence stated as follows: "it was 23.7.2014 at around 7.00pm. I was going to fetch milk. I met a man who stopped me. He took me to a secluded place and defiled me." It was his argument that if indeed the complainant knew him as the assailant, she would have said so at the earliest opportunity.

6. On the ingredient of penetration, the appellant submitted that it was not proved on account of the fact that PW3 was not the one who examined the complainant and that even the details when the defilement took place in the P3 form and the occurrence book are conflicting. He further argued that the complainant was 8 weeks 4 days pregnant at the time of examination and therefore it was necessary that there be a connection between the pregnancy and the defilement by way of DNA testing. He criticized the learned judge for not formulating her reasoning and findings independent from those of the learned magistrate when determining that the appellant was the perpetrator of the offence. In addition, the appellant was of the view, that the evidence of PW1 could not sustain a conviction as it was unreliable. He opined that DNA samples of the complainant's child and further mobile records regarding the phone number in question ought to have been adduced in evidence.

7. In his penultimate submission, the appellant decried that his defence was not considered. In his view, his unsworn testimony was unchallenged and therefore cogent. Had the same been deliberated upon, the court would have arrived at a different conclusion. Finally, on sentencing, he complained that the court failed to take into account the holding of the High Court in Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) and of this Court in the case of Manyeso vs. Republic [2023] KECA 827 (KLR).

8. The respondent on its part relied on its written submissions, case digest and list of authorities all dated 25th April 2024 to submit that all the ingredients to a charge of defilement had been proved to the required standard being beyond any reasonable doubt. In addition to this, learned counsel submitted that the complainant's evidence complied with section 19 of the Oaths and Statutory Declaration Act as well as section 124 of the *Evidence Act*. Looking at the appellant's defence, the respondent submitted that, it was weak and failed to cast doubt on the prosecution's evidence. Lastly, on sentence, the respondent submitted that the same was proper and just and, in the circumstances, ought not to be interfered with. It prayed that the appeal be dismissed.

9. Our jurisdiction as a second appellate Court is set out in section 361 of the *Criminal Procedure Code*. It is trite that this Court will not interfere with findings of fact by the two courts below unless it is demonstrably clear that the two courts considered matters that they ought not to have considered, failed to consider matters that they ought to have or were plainly wrong. In Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR, this court pronounced itself as follows:

> "This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd

versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, 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 and law, and, it should not interfere with the decisions of the trial or first appellate Court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

10. Against that background, we now set out the summarized facts as captured in the record of appeal before us. 15-year-old PW1 RWC testified that she was a form 1 year student at PACE school. On 23rd July 2014, she left the house at 7:00 p.m. to fetch milk. Along the way, PW1 met the appellant. He stopped her and threatened her with a knife in his hand. She recognized the appellant as a neighbour when lorry lights shone towards them. She also added that she occasionally bought items from his home.

11. PW1 continued that he then took her to a secluded area, lay her on the ground, removed her clothes and sexually assaulted her. When he was done, the appellant left her there, cautioning her to take pills to prevent pregnancy. PW1's evidence was that this continued for the next six days. The appellant would way lay her, take her to a secluded area and have sexual intercourse without using protection. It was her evidence that she never reported these incidents. The record shows that on 27th (month and year not recorded), she informed her parents that she was having headaches. She was taken to Hospital and it was here, that it was discovered that she was pregnant. It was at this juncture that she disclosed to PW2 what had transpired.

12. PW2 CW, the complainant's mother testified that she took PW1 to Hospital following complaints that she was suffering from headaches. When it was revealed that PW1 was 9 weeks pregnant, PW1 informed her what had transpired. The incident was then reported at the children's office and subsequently at Nyahururu police station where they were issued with a P3 form. She recognized the assailant as their neighbour. She maintained that she had no grudge against the appellant and that previously, a dispute had arisen between her and the appellant concerning a phone. PW2 reported the appellant because the complainant was found in possession of his phone.

13. PW3 Dr. Joseph Karimi Kinyua, a medical officer based in Nyahururu Police Station, produced the P3 form dated 13th August 2014 in evidence. The same was filled in by Dr. Beatrice Chesire, a colleague well known to him, who had since been transferred to Uasin Gishu County. The observations recorded were that the complainant's hymen was torn. She had a whitish discharge and tested positive for pregnancy at 8 weeks 4 days. Her conclusions were that there was penetration.

14. PW4 PC Nelson Lechuta attached to Oljoro Orok police station stated that on 11th August 2014, the complainant, accompanied by her mother, arrived at the police station to report the incident. He interrogated the witnesses, recorded their statements and collected the evidence. The appellant was arrested by AP officers from Kibati AP camp and taken to Oljoro Orok police station. He was subsequently arraigned in court to answer to the charges preferred against him. He produced a copy of PW1's revealing that she was born on 11th September 1999.

15. 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 on 15th August 2014 at 5:00 p.m., two men came to the shamba, handcuffed him and escorted him to the police station. He would later be informed of the charges which he denied committing the offence.

16. In order to sustain a conviction in a charge for defilement, the prosecution must establish the following three essential conjunctive ingredients: the age of the complainant, penetration, and the identification of the perpetrator. Regarding the age of the complainant, the trial court and the first appellate court relied on the copy of the birth certificate adduced in evidence, to conclude that having been born on 11th September 1999, the complainant was a minor within the meaning ascribed to the term under section 2 of the Children's Act. That she was approximately 15 years of age at the time of the offence. We see no reason to interfere with that finding. On the aspect of penetration, the two courts relied on the evidence of PW1 and PW3 as to conclude that the same was proved in line with section 2 of the *Sexual Offences Act*. Furthermore, we find that from the pregnancy test results, penetration could not be doubted.

17. The last ingredient is the identity of the assailant. Both courts stated that the paternity of the child was not an issue for determination and did not discount the offence even if the child did not belong to the appellant. It was the conclusion of the trial court and the High Court that the appellant was recognized on the first encounter by the complainant with the help of lorry lights as her neighbour. Subsequently, both courts observed that the appellant repeated this offence on another six occasions demonstrating that there was no iota of doubt that the appellant was the perpetrator.

18. The starting point on this issue lies in section 124 of the *Evidence Act*. The section deals with the question of corroboration where the victim is the single identifying witness. It provides that a court of law shall not convict an accused person unless the evidence is corroborated by other material evidence implicating him or her. However, there is an exception in sexual offences. In such a case, corroboration is not a requirement if the court is satisfied with the evidence of the single identifying witness, the victim, and the reasons are recorded in the proceedings, the evidence of the child can sustain a conviction.

19. We have also reanalyzed the evidence of the complainant. She says that she was first sexually assaulted on 23.2.023. Then she says.... "then he made it a habit to wait for me every day as I went for milk. I would find him in the same spot on several days. He defiled for (sic) six other times without protection. I did not tell anybody" Under section 124 of the *Evidence Act*, the trial magistrate is required to record reasons why he was satisfied that the complainant was credible and reliable. The trial magistrate only said... "I find her evidence believable, having warned myself of convicting on the evidence of a single eye witness."

20. We do not think that statement is enough. This is a complainant that alleges that she was waylaid at the same spot for six days. She never informed anyone. She only indicated that it was the appellant when her pregnancy was discovered. In answer to a question in cross-examination, PW2, the mother stated as follows... "my daughter did not tell you defiled her...I reported to the chief because I found my daughter with your phone...". Considering that the arrest of the appellant was done after the pregnancy was discovered, was the trial court and the first appellate court right in holding that in the circumstances of the case, that the identity of the appellant was proved beyond reasonable doubt?

21. In our view, nothing would have been easier than for the prosecution to establish beyond reasonable doubt who the father of the child was and therefore arraign the perpetrator with proof of DNA. As we say this, we are aware that DNA is not a mandatory requirement to prove the ingredients of the

offence under the *Sexual Offences Act* and we are not in any way saying that it must be done, but this was a case that had so many gaps and it is not a safe conviction.

22. Looking at the above evidence in totality, we come to the inescapable conclusion that the two courts erred in not considering the evidence in accordance with our analysis deciphered above herein. We find that the two courts below did not properly establish that the appellant was the perpetrator of the offence as we are not persuaded that he was. Since all ingredients must be established, the fact that the prosecution failed to discharge its burden of proof on the identity of the assailant leads us to the unwavering decision to interfere with the findings on conviction.

23. Consequently, we find that the conviction was unsafe and the appeal succeeds. We order that the appellant be set at liberty and be forthwith 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

.....

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