Njagi v Republic (Criminal Appeal 135 of 2018)
[2025] KECA 362 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 362 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 135 OF 2018

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

FEBRUARY 28, 2025

BETWEEN

JAMES MURAGE NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Embu (S. Chitembwe, J.) delivered on 9th July 2018 in H.C. CR. Appeal No. 3 of 2017)

JUDGMENT

1. This is a second appeal from the original conviction and sentence of the appellant, James Murage Njagi, who was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* it being alleged in the charge sheet that on the date and place stated in the charge sheet he intentionally caused his genital organ (penis) to penetrate the genital organ of HKM (PWI), a child aged 10 years. There was an alternative charge of committing an indecent act with a child contrary to section 11(1) of the said Act. He was convicted by the Chief Magistrates Court, Embu and sentenced to serve 50 years imprisonment and his first appeal to the High Court of Kenya at Embu was dismissed by Chitembwe, J. in a judgment delivered on 9th July, 2018.

2. Being a second appeal our mandate is circumscribed by section 361 (1)(a) *Criminal Procedure Code* to deal with matters of law only if we find that there are any raised in the appeal. We must resist the temptation to deal with facts of the case which were tried by the trial court and retried on first appeal. That mandate was recognized as follows in Stephen M'Irungi & Another vs. Republic [1982-88] 1 KAR 360 where the following passage appears:

> " 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 as holdings of law or mixed finding 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."

3. We shall visit the facts of the case briefly to ascertain whether the two courts below carried out their mandates as required in law and to ascertain whether there are any matters of law in the appeal within the background of the case that was before those courts.

4. It was established by the prosecution through oral evidence of PW1 and his mother (PW2) and through production of a Certificate of Birth that he was 10 years old when the offence was committed on 26th July, 2015. On that day he was playing soccer with his friend when the appellant, who he knew very well as a neighbour and an employee in the home of a local pastor, called him and took him to a timber structure in the pastor's compound. PW1 testified of the timber house and events that followed:

> "...It was a one room house made of timber. There was a bed, beddings and vehicle tyres were beside the bed. They were three tyres. I also saw a seat in that house. It was a long seat made of timber. He made me lie on the bed. He removed my trouser and underwear. He did "tabia mbaya" at the back.
>
> ..."

5. He described how the appellant removed his own trouser, "... took out his thing used for urinating and put it in my anus"; that he felt pain; that the appellant gave him earphones, after which he (PW1) ran away. The appellant threatened him with death if he reported the incident to any person. The appellant later collected the earphones and left the neighbourhood. PW1 later informed his mother (PW2) of what had happened and he was taken to Embu Level 5 Hospital where he was treated by Dr. Phyllis Muhonja (PW3) of that hospital and the incident reported to police.

6. That narration was corroborated by PW2 who produced the Certificate of Birth for PW1 into evidence. On receiving information that the appellant had sodomized a neighbor's son PW2 questioned her son (PW1) who revealed to her what had happened when the appellant called him (PW1) to his house. She had seen PW1 using earphones. She reported the matter at Itabua Police Station where she was referred to Embu Level 5 Hospital where PW1 was treated by Dr. Muhonja who found no external injuries on the anal area but she observed that there was anal penetration with degree of injury as grievous harm. She examined PW1 6 days after the incident. She produced P3 Form and PRC into evidence.

7. PC John Gitahi (PW4) of the said police station investigated the case and later arrested the appellant who had fled the area to Nairobi after the incident.

8. The case for the prosecution was then closed and the trial magistrate put the appellant on his defence after finding that a prima facie case had been made calling for him to answer. In an unsworn statement in defence the appellant, who stated that he was a water vendor, narrated how PW2, who he said was his sister in law, had separated from her husband (his brother) and that she had a grudge with him because he was opposed to her plans to sell family land. For that reason he decided to leave their village and relocate to Nairobi but PW2 followed him there, where she was insulting him and his wife. PW2 separated from her husband and when he (the appellant) refused to intervene and bring them together she threatened to deal with him. He was then arrested for something he knew nothing about and "... The rest I left to God." The trial magistrate evaluated the case and as we have seen the appellant was convicted and sentenced and his first appeal failed and was dismissed.

9. There are 5 grounds of appeal in the homemade "Grounds of Appeal" where the appellant states that he pleaded not guilty at the plea stage. He says, that the first appellate court erred in "law and facts" when the Judge failed to consider that the prosecution's evidence was insufficient to uphold conviction; that the Judge erred when he failed to note that crucial and vital witnesses were not called, that the Judge erred when he failed to note that the appellant had a grudge with PW2 and, finally, that the Judge erred when he rejected the appellant's defence "... under weak reasons." He prays that the appeal be allowed, conviction be quashed, the sentence set aside and he be set at liberty.

10. When the appeal came up for hearing before us on 13th November 2024, the appellant appeared in person from Kamiti Maximum Prison while learned counsel Mr. Naulikha appeared for Office of Director of Public Prosecutions. Both sides had filed written submissions which they entirely relied on without finding any need for an oral highlight.

11. We have perused the said written submissions. The appellant's submissions are a rendition of alleged breaches of constitutional rights and do not address the grounds of appeal at all. He submits, for instance, that the trial and first appeal were unconstitutional and violated his rights. He questions why there was delay in his been apprehended stating that that led to a breach of certain Articles of *the Constitution* and the *National Police Service Act*. The record shows that after the incident complained of the appellant hurriedly collected earphones he had given to PW1 and left Embu for Nairobi where he remained until he was lured with a job offer leading to his arrest.

12. The other complaints relate to an allegation that the appellant was denied witness statements during trial and that he was denied representation by counsel which led to a breach of his constitutional rights.

13. On whether the appellant's constitutional rights were violated when he was allegedly not supplied with witness statements or other prosecution documents the question was answered by this Court in the recent case of Ogunda vs. Republic (Criminal Appeal 229 of 2018) [2024] KECA 131 (KLR) (9 February 2024) (Judgment) stated:

> " There is no doubt at all that our Constitution requires the state to supply, at a minimum, the charge sheet, witnesses' statements and copies of any documents which the state intends to rely on in the prosecution of an accused person - see, in particular, Article 50(2)(c) and (j) of *the Constitution*. For judicial application of these provisions, see Simon Githaka Malombe v R [2015] eKLR (Court of Appeal Crim. App No 314 of 2010 at Nyeri).
>
> 18. We must point out, however, that what *the Constitution* provides for is a substantive right; not a technical booby trap for the state: the obligation is for the state to provide the documents so that an accused person has adequate information to prepare his defence; the obligation is not to formulaically demonstrate technical compliance with the constitutional obligation. Hence, whereas it is a salutary practice for the court to record that an accused person confirms that he has received witness statements and other documents, it is not fatal for a conviction if there is no specific record indicating that the documents were supplied if the context is clear that they were, in fact, supplied. Furthermore, an accused person has a minimal obligation to bring it to the attention of the court that he has not been supplied with the witness statements (or any other prosecution documents) as ordered by the court. It is this minimum duty on the part of an accused person which triggers the court's duty to ensure that the documents are supplied before the trial commences. An accused person cannot fold his hands, string the court along only for him

to strategically raise as a point on appeal that he was not supplied with witness statements."

14. We have perused the record of appeal. Nowhere in that record does the appellant complain to the trial court or to the first appellate court that he was denied or was not supplied with witness statements or any other prosecution document(s). It is too late in the day for that issue to be raised in this appeal.

15. Whether the appellant's constitutional rights were violated when he was allegedly not accorded legal representation, again this had been the subject of judicial pronouncement by this Court in the case of Mohamed Abdullahi vs. Republic [2019] eKLR where the Court held that legal representation was not an automatic right. It was observed:

> " 18. Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. Article 50(1) of *the Constitution* does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation. Was the appellant entitled to legal representation at State expense as of right? Was his right to legal representation at the State's expense violated?
>
> 19. In Isaiah Maroo -vs- Republic [2015] eKLR this Court discussed the issue of right to legal representation at length as set out herein below:-
>
> Does the right to legal representation which we have treated (sic) above apply to appeals" We think not. Beginning with the constitutional text itself, it is quite plain that the right to State funded legal representation is available to every accused person. Indeed, it is one of nearly a score safeguards to a fair trial during which all care must be taken to ensure that the process of adjudicating on whether an accused person is guilty of that which he is charged with is fair, open, transparent, timely, efficient and devoid of prejudice. The entire process presupposes the accused person's innocence until the court should find otherwise on the basis of evidence tendered by the prosecution to the appropriate standard in discharge of a duty peculiarly its own.
>
> We do not apprehend that the entire corpus of the elements of a fair trial applies wholesale to an appeal. Once a person has been convicted, on a trial fairly and properly conducted, he no longer enjoys that all-important presumption of innocence. The presumption that sets in is one of legitimacy of his conviction and sentence so long as it was imposed by a court of competent jurisdiction. The fair trial rights enumerated in Article 50 (2) (a) to (p) do not and cannot apply to his situation without leading to an absurdity. In fact, the only

application of Article 50 (2) to an appeal is in (q) which provides that an accused person has the right;

> "if convicted, to appeal to, or apply for review by a higher court as prescribed by law."

It is for precisely this change of status that, for instance, release on bond or bail, which is a right that an arrested person has pending charge or trial and which he enjoys automatically unless compelling reasons dictate otherwise under Article 49 (1) (h), becomes available to a convicted person only under unusual or exceptional circumstances. See, Jivraj Shah vs Republic [1986] KLR 605; Somo - vs- Republic [1972] EA 476 and Munjia Muchubu -vs- Republic [2014] eKLR... The considerations that obtain and the position an accused person is placed at in the eyes of the law are totally different after the trial. In the latter case the law is highly solicitous of the position of an accused person, anxious to ensure he receives a fair trial, hence the extra safe guards including State-funded legal representation. In contrast, appeals and other consequential proceedings have a voluntary or elective character at the instance of the appellant. In a jurisdiction where even provision of State-funded legal representation at trial is yet to materialize, it seems to us overly ambitious for the appellant to seek to upset the judgment of the High Court on account of his not having been provided an advocate to represent him in his first appeal. Emphasis added.

We concur with the above sentiments and find that the appellant was not entitled to legal representation at the first appellate stage. We also find that he never raised the issue before the trial court for the consideration by the trial court to give the court an opportunity to consider whether substantial prejudice would have been occasioned if he proceeded in absence of counsel. Consequently, we find that this ground should also fail."

16. In an appeal from a conviction in a defilement case this Court observed on the same issue in Thomas Alugho Ndegwa vs. Republic [2016] eKLR that legal representation is a right but is has to be applied for in writing but still remains discretionary as to whether or not it will be awarded. It was stated:

> 20. In Kenya, Section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.
>
> 21. In the instant application, it is clear the framework for full implementation of Article 50 (h) is now in place as required by *the Constitution*. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to section 41 of the *Legal Aid Act* is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its

discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate."

17. We have addressed those issues raised by the appellant in written submissions although they are not part of grounds of appeal raised before us. We found it important to address them as they claim breach of his constitutional rights. The appellant was bound by Rule 74 of the Court of Appeal Rules, 2022 to argue only grounds as set out in Memorandum of Appeal unless he applied and was granted leave to argue grounds in a supplementary Memorandum of Appeal.

18. Coming back to the homegrown grounds of appeal the appellant says that the evidence before the Judge was insufficient to found a conviction.

19. The evidence of PW1, a boy aged 10 years showed how he was lured by the appellant with the promise that he would be given earphones at the appellant's house. He narrated in detail events that followed including a description of the furniture in the house and how the appellant undressed him and defiled him through the anus. The incident was reported to PW2 and when Dr. Muhonja examined PW1 (6 days after the incident) she confirmed that there had been penetration and thus defilement.

20. The appellant, in defence, talked about a grudge with PW2. The record does not show existence of any grudge. Nowhere in the proceedings was the issue of a grudge raised, not even when the appellant cross-examined PW1 or PW2. The trial Court found the issue of a grudge having been an afterthought, a conclusion upheld on first appeal. Upon our own consideration we think in the circumstances that the evidence before the trial court was overwhelming and proved the charge of defilement to the standard required in law.

21. On the complaint that crucial and vital witnesses were not called the appellant does not identify who those witnesses who should have been called were.

22. Section 124 *Evidence Act* allows a trial court to convict an accused person in sexual offences without corroboration as long as the court believes the evidence of the victim. The trial magistrate stated on that aspect in his judgment:

> "I find the testimony of Pwl unwavering and believable. Pwl described in great detail how the accused lured him with the offer of a pair of earphone are details which cannot be forged by a child aged ten years old. This evidence was consistent and without equivocation and was not contradicted by the accused person."

23. On the need for the prosecution to avail witnesses in a case it was held in the oft-cited case of Bukenya vs. Uganda [1972] EA 549, at page 550 that:

> "It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

24. We find in the case that was before the trial court that the prosecution called all witnesses necessary to found a conviction.

25. The last complaint by the appellant is that the Judge erred by failing to consider his defence. We have gone through the record. The Judge set out the whole case made by both sides, considered it and made findings on it. On the appellant's defence the Judge found that it was an afterthought and did not answer the strong case made out by the prosecution.

26. We have reached the conclusion upon perusal of the record that the appellant's defence was considered and dismissed. All the grounds of appeal fail and are rejected. The appeal has no merit and we dismiss it in its entirety.

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

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL ALI – ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR