Magero v Republic (Criminal Appeal 146 of 2019)
[2025] KECA 323 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 323 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 146 OF 2019

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 21, 2025

BETWEEN

CHARLES OPONDO MAGERO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Siaya (Majanja, J.) Dated 19th February, 2018 in HC. CRA. No. 126 of 2016)

JUDGMENT

1. The appellant, Charles Opondo Magero, was arraigned before the Senior Resident Magistrate's Court at Ukwala, on 24th November, 2015, and charged with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 21st June, 2014, at unknown time, within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of SA [1]., a child aged 3 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that; on the same date and place, the appellant unlawfully and intentionally did an indecent act with a child, causing his penis to touch the vagina of SA, a child aged 3 years.

3. The appellant pleaded not guilty to the charges. The prosecution called five (5) witnesses in a bid to establish its case. A brief summary of the facts according to the prosecution is as follows: The complainant, who testified as PW1 gave an unsworn testimony. It was her evidence that she was two (2) years old, and attended middle class at [Particulars withheld] School. She stated that the appellant used to take her to school and back home on a motorcycle. It was her evidence that on the material day, the

[1] Initials used to protect her identity

appellant picked her up from school, took her to a hole, removed her panty and pierced her vagina with a stick that was between his thighs. He afterwards took her home. The complainant testified that she informed her grandmother what the appellant had done to her. She was afterwards taken to a hospital.

4. The complainant's great grandmother, MA (PW2), told the court that the complainant was born on 3rd December, 2010. It was her evidence that on 20th June, 2014, the appellant dropped the complainant home from school later than usual. She stated that he used to drop her to school and back home on his motorcycle. That evening the complainant did not eat dinner. The following day, the complainant informed her that her private parts were in pain. PW2 examined the complainant and noticed a white discharge. She took her to the Sigomere Health Centre where she was informed that the complainant had been defiled. It was her evidence that the complainant informed her that the appellant placed her in a hole, and hurt her with a stick that was between his legs. She reported the matter to the police. PW2 stated that the appellant was well known to her as his son's wife, who was her neighbour, lived with the appellant.

5. PW3, Joseph Omondi Olunga, Chairman of Community Policing at Sigomere, told the court that on 24th June, 2016, he was summoned by PC Oroko who asked him to go to a police station at Madungu. At the station, he found PW2 with the police, as well as other members of the public. He was informed that the appellant had defiled the complainant and that the police were looking for him. The following day, at 7.30 a.m., he was informed that the appellant had been sighted at a local busaa den. PW3 stated that he went to the place, apprehended and escorted the appellant to the police station.

6. PW4, Joel Atenya Sumba, a clinical officer based at Sigomere Health Centre, testified that he examined the complainant on 21st June, 2014. The complainant had been escorted to the health centre by her grandmother, and it was alleged that she had been sexually assaulted. PW4 testified that upon examination, he found that the complainant's vaginal walls were widened, and there was presence of a white smelly discharge. Her hymen was absent. He concluded that the complainant had been sexually assaulted.

7. PW5, PC Jackline Ondego, was the investigating officer. It was her evidence that PW2 came with the complainant to Sigomere Police Station on 21st June, 2014, and reported that the complainant had been defiled the previous day. PW5 escorted PW2 and the complainant to Sigomere Health Centre where the complainant was examined. She had the appellant arrested and charged before the court of law.

8. The appellant was placed on his defence. He gave a sworn statement, and did not call any witnesses. It was his testimony that he was a boda boda rider who used to pick two children, drop them to school and take them back home in the evening. One of the said children was the complainant. He stated that on Friday, 20th June, 2014, he picked the children as usual, dropped them to school, and in the evening, he dropped them back home. The following week on Monday, PW2 informed him that the complainant would not be going to school. He stated that on Wednesday, he was arrested by a village elder who escorted him to the police station. He denied defiling the complainant as alleged by the prosecution witnesses.

9. At the conclusion of the trial, the learned magistrate determined that the prosecution had established its case against the appellant, with respect to the main charge of defilement, to the required standard of proof beyond any reasonable doubt. The appellant was consequently convicted and sentenced to serve life imprisonment.

10. The appellant, aggrieved by this verdict, filed an appeal before the High Court at Siaya. The appellant challenged the decision of the trial court on grounds that: his conviction was not based on the evidence

on record; the evidence by the prosecution witnesses was contradictory; the medical evidence did not support his conviction; and that his conviction was based on the uncorroborated evidence of a minor.

11. The learned Judge (Majanja J.) after re-evaluating the record of the trial court, and the evidence tendered before it, saw no reason to disturb the conviction and sentence of the appellant by the trial court.

12. The appellant is now before us seeking to overturn the decision of the High Court, and has proffered nine (9) grounds in his memorandum of appeal and supplementary memorandum of appeal. The appellant is aggrieved that: the learned Judge failed to determine that the prosecution failed to sufficiently establish the ingredients forming the offence of defilement; the first appellate court failed to discharge its mandate of re-evaluating and reassessing the evidence afresh so as to arrive at its own independent decision; the evidence on identification was insufficient to sustain a conviction; the trial was invalid as the appellant was not given the opportunity to elect a language he was conversant with upon which the trial could be conducted, and neither did the trial court record the language used during trial; that the trial court erred in shifting the burden of proof to the appellant; the sentence imposed upon the appellant was harsh and excessive in the circumstances; his conviction was based on a defective charge sheet which cited a non-existent section of the law; the medical evidence was altered to suit the narrative by the prosecution; and, that the trial court failed to comply with Section 200 of the *Criminal Procedure Code*, thereby prejudicing the appellant.

13. The appeal was canvassed by way of written submissions. Mr. Onsongo, counsel for the appellant, submitted that the charge as drawn was defective as the section of law cited therein, Section 8(1)(2), did not exist in the *Sexual Offences Act*. Counsel faulted both the trial and first appellate court for failing to address themselves to the propriety of the charge. It was counsel's submission that the trial court failed to comply with the provisions of Section 200 of the *Criminal Procedure Code*. He urged that PW1, PW2, PW3 and PW4 testified before Hon. Wanyama, while Hon. Oada took PW5's evidence, and that the ruling on whether the appellant had a case to answer was delivered by Hon. Wanyama. Counsel averred that the appellant was not informed of his rights under Section 200 of the *Criminal Procedure Code*, when a new magistrate took over the conduct of the case, and that his right to a fair trial was thus compromised.

14. Counsel for the appellant further submitted that the first appellate court failed to undertake its duty of re-evaluating afresh the evidence tendered before the trial court. Counsel urged that during cross-examination, PW1 refused to answer questions posed to her by the appellant, thereby adversely affecting the appellant's right to a fair trial. Counsel faulted the learned Judge for failing to address himself on this issue. With respect to the medical evidence, counsel submitted that the P3 form was altered, and that the clinical officer who prepared the P3 form did not sign against the said alterations. It was counsel's submission that the medical evidence did not sufficiently establish the ingredient of penetration, and that PW4 did not make any mention of the hymen being absent. Counsel faulted the two courts below for relying on the uncorroborated evidence of the complainant, without alluding to the provisions of Section 124 of the *Evidence Act*, as to her reliability as a witness. It was counsel's submission that the appellant's mitigation was not considered during sentencing, and that the sentence imposed upon him was harsh and excessive.

15. In rebuttal, learned Prosecution Counsel, Mr. Okango, on whether the charge sheet was defective, submitted that this question was not raised by the appellant before the first appellate court. Mr. Okango urged that though the section of the law was erroneously drafted as "Section 8(1)(2)", the error was curable as the substance of the charge and particulars thereof were read out to the appellant in a language he understood, and that the appellant was aware that he was being charged with offence of defiling a child aged three (3) years old. On whether the provisions of Section 200 of the *Criminal*

Procedure Code were adhered to by the trial court, counsel averred that similarly, this issue was not raised before the first appellate court. He submitted that Section 200 of the *Criminal Procedure Code* was not in play in this case, as Hon. Oada did not take over conduct of the matter, but merely stood in for Hon. Wanyama and took the evidence of PW5, after which Hon. Wanyama continued to preside over the matter to its conclusion.

16. Mr. Okango was of the view that the first appellate court properly discharged its mandate of reassessing the evidence adduced before the trial court and coming to its own conclusion. He opined that the fact that the complainant failed to answer a question upon cross-examination, did not prejudice the appellant as she was a child of tender years, and her demeanour did not equate to a denial of the right to cross-examine. Counsel urged that the questions raised relating to the medical evidence were issues of fact which were not raised before the two courts below, and that PW4 was never questioned on the alleged alterations. With respect to the sentence, counsel submitted that the sentence meted out by the trial court was sound and legal, as the Supreme Court in Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) affirmed that the minimum mandatory sentences prescribed by the *Sexual Offences Act* remained legal. In the premises, counsel invited us to dismiss the entire appeal for lack of merit.

17. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already 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.... By dint of the provisions of section 361(1) (a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be 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 looking at the evidence they were plainly wrong."

18. After carefully considering the record and the rival submissions set out above, we form the opinion that the issues of law arising for our determination are:

    i. Whether the charge as drafted was fatally defective;

    ii. Whether the prosecution established the elements of the offence of defilement beyond any reasonable doubt;

    iii. Whether the appellant's right to a fair trial was violated; and,

    iv. Whether the appellant's sentence was harsh and excessive, in the circumstances of the case.

19. Starting with the first issue, it was the appellant's submission that the charge as drafted was fatally defective, as the cited section of the law was non-existent. The appellant was charged with the offence of 'defilement contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006'. Section 8(1) creates the offence of defilement, while Section 8(2) provides for the penalty of the offence of defilement in a situation where the victim is a child under the age of eleven years. Ordinarily, the appellant ought to have been charged with the offence of 'defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.

20. We note that the particulars of the offence detailed the date of the offence, the place of the offence, the act constituting the offence as well as the name and age of the victim. The charge and particulars therein sufficiently disclosed the nature of the offence the appellant was facing, and the appellant was well aware of the exact offence he was alleged to have committed. The substance and particulars of the

charge were read out to the appellant to which he pleaded not guilty. He therefore understood the nature of the charges against him. We agree with the submission by the prosecution counsel that the error in drafting the sentencing section did not prejudice the appellant, and is curable under Section 382 of the *Criminal Procedure Code*.

21. Onto the second issue, it was the appellant's submission that the elements of the offence of defilement, were not proved by the prosecution to the required standard of proof beyond any reasonable doubt. In particular, the appellant was of the view that the medical evidence failed to establish the element of penetration, and that the evidence on identification was insufficient to sustain a conviction. The prosecution was required to establish three elements forming the offence of defilement namely; the age of the complainant, proof of penetration and positive identification of the perpetrator.

22. On the age of the complainant, PW2, who was the complainant's great grandmother, testified that the complainant was born on 3rd December, 2010. She was therefore three (3) years of age when the sexual assault on her was alleged to have occurred. The complainant's baptism card produced in evidence confirmed that the complainant was indeed born on the said date. This Court in Thomas Mwambu Wenyi v Republic [2017] eKLR cited with approval the case of Francis Omuroni v. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, where the court held thus:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

23. The appellant did not challenge the evidence adduced with regard to the complainant's age. We find that the prosecution did sufficiently establish that the complainant's age.

24. Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

25. The appellant contended that the medical evidence adduced failed to corroborate the complainant's assertion that there was penetration. The appellant, in his submissions averred that the P3 form only made reference to a widened vagina and both labias not being intact, and that it did not make any reference to the complainant's hymen. The act of penetration, as was held by this Court in Kassim Ali v. Republic [2006] eKLR, can be proved by the oral evidence of a victim of rape or defilement, or by circumstantial evidence or by medical evidence.

26. In this case, the complainant narrated to the court how the appellant picked her up from school, took her to a hidden place, undressed her, and inserted his penis in her vagina. The complainant, who was of the tender age of three years, referred to the appellant's penis as a stick that was between his thighs. The complainant reported to her grandmother, PW2, that she was feeling pain in her private parts. She told PW2 that the appellant had taken her to a hole where he used the stick between his legs and inserted it in her vagina. PW4, who examined the complainant two days after the incident occurred, told the court that the complainant's labia were not intact, her vaginal walls were widened, and there was presence of a smelly white discharge. On re-examination, PW4 stated that upon examining the complainant, he noted that her hymen was missing. It was his assessment that the complainant had been penetrated.

27. It is our considered view that the evidence of the complainant, taken together with that of PW2 and PW4, and the medical evidence, conclusively established that the complainant was penetrated. The contention by the appellant that the P3 form was altered without a corresponding signature was

clarified by PW4 upon cross-examination. PW4, who authored the P3 Form, stated that he made the alteration due to a drafting error that was corrected.

28. The third ingredient is whether the offence was perpetrated by the appellant. The appellant in his grounds of appeal contended that the identification evidence was insufficient to sustain a conviction. He however did not expound on this ground in his written submissions. We note that the appellant was well known to the complainant as he had on several occasions picked her up from her home and dropped her to school, and in the evening, dropped her back home. This fact was confirmed by the appellant in his defence. The appellant admitted to have picked and dropped the complainant to and from school on the material date the incident was said to have occurred.

29. The complainant identified the appellant as "Bibi Mdogo", the man who used to carry her on his bodaboda and drop her to school. PW2 stated that the appellant, who went by the name "Bibi Mdogo" used to ferry the complainant to and from school on his motorcycle, and that he lived with her son's wife who was their neighbour. PW3, a village elder, also confirmed that the appellant went by the said nickname. We find that the appellant's identification by the complainant was by way of recognition, as he was well known to her. We are satisfied that the appellant was properly identified as the perpetrator of the sexual assault.

30. The next issue for determination is whether the appellant's constitutional right to a fair trial was violated. It was the appellant's submission that the complainant failed to answer questions put to her during cross-examination; that the trial court failed to comply with the provisions of Section 200 of the *Criminal Procedure Code*; and that the trial court did not accord him the chance to elect a language he was conversant in for purposes of the trial. We note, and as correctly pointed out by the learned prosecution counsel, that the appellant did not raise any of these issues before the High Court sitting as a first appellate court. How then can issues that were never placed before the first appellate court be the basis for vitiating the said court's decision?

31. It is our considered view that these issues cannot be raised before us for the first time on a second appeal. This was the holding of this Court in John Kariuki Gikonyo v. Republic [2019] eKLR where the Court observed as follows:

> "We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:
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> "...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."
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> In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."

32. This ground of appeal must therefore fail. We are of the considered opinion that this Court sitting as a second appellate Court can only entertain matters that were considered by the court being appealed from, and in any event, matters which can only be deemed as raising points of law.

33. The final issue for determination is whether the sentence imposed upon the appellant was harsh and excessive. The appellant was sentenced to serve life imprisonment, which is the prescribed penalty under Section 8(2) of the *Sexual Offences Act*. The appellant contended that the trial court did not take into account his mitigation, and that the complainant did not suffer any serious injuries. He urged us to set aside the life imprisonment sentence, and substitute it thereof with a custodial sentence of ten (10) years, to include the period served. Learned prosecution counsel was of the view that the sentence imposed upon the appellant was legal and commensurate with the offence committed.

34. The appellant's mitigation captured on record was that he was the sole bread winner of his family comprised of seven children. The trial court, in sentencing the appellant, noted that his mitigation had been considered, as well as the nature of the offence committed. We note that the appellant's actions were heinous to the minor, who was at the tender age of three years. Weighing the mitigating factors against the aggravating factors, we form the opinion that this is a serious offence requiring a deterrent sentence, as it greatly affects the victims psychologically.

35. Further, the Supreme Court in Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR), dealing with the question challenging constitutionality of the minimum sentences prescribed by the *Sexual Offences Act*, found that the mandatory minimum penalties provided for under the said Act are lawful We therefore see no reason to disturb the appellant's sentence.

36. In the circumstances, we are satisfied that the Superior court addressed itself correctly on the law, and that there are no grounds for interfering with the concurrent findings of fact by the two courts below. Accordingly, all the grounds raised and advanced before us by the appellant must fail. We order the appeal dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.