Mukalatyo v Republic (Criminal Appeal E086 of 2023)
[2025] KECA 221 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 221 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E086 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

FEBRUARY 7, 2025

BETWEEN

NGONDI VERE MUKALATYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kitui (C. Kariuki, J.) dated 17th January, 2020 in HCCRA No. 29 of 2018)

JUDGMENT

1. Ngondi Vere Mukalatyo, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (Kariuki, J.) on 17th January 2020.

2. The appellant was charged before the Senior Principal Magistrate's Court, in Mwingi, with the offence of attempted rape contrary to section 4 of the *Sexual Offences Act* (the Act). The particulars of the offence were that, on 20th June, 2017 at about 1.00 pm at [Particulars Withheld] Village, Kiomo Location in Mwingi Central District of Kitui County, he attempted to unlawfully and intentionally commit an act which would cause penetration of his male genital organ, namely the penis into the female genital organ, namely vagina of MK without her consent.

3. In the alternative charge, he was charged with the offence of an indecent act with an adult contrary to section 11(A) of the Act. The particulars were that on 20th June 2017, at about 1.00 pm, at [Particulars Withheld] Village in the Kiomo Location of Mwingi Central District of Kitui County, they committed an indecent act by touching the vagina of MK without her consent.

4. The appellant pleaded not guilty to both counts and the matter proceeded to trial wherein the prosecution called 5 witnesses. The appellant was placed on his defence, and upon considering the evidence, the trial magistrate convicted him for the offence and sentenced him to 20 years

imprisonment. Aggrieved by the conviction and sentence, he appealed to the High Court, where the appeal was dismissed, and the conviction and the sentence were affirmed.

5. The appellant was aggrieved by the High Court's decision and preferred this appeal. Before we address the grounds of appeal to this Court, we shall summarize the evidence adduced in the trial court.

6. PW1, MK, a 22-year-old housewife, testified that on 20th June 2017, at 1.00 pm, while she was on her way home from her child's school, the appellant followed her and informed her that he wanted to rape her. She informed the appellant that she was married, but he followed her. On reaching her home, she entered through the gate and closed it behind her when the appellant jumped over the fence into the compound, held PW1's hands and pushed her onto the poultry house that was inside the compound. PW1 screamed but no one came to her rescue.

7. The appellant then strangled PW1, tried to lift up PW1's yellow dress and tore PW1's white panty that she was wearing on the material day, caressed her with her yellow dress on, removed his penis and pocked PW1 with it from behind until he ejaculated on the dress. He then escaped. As all this happened, no one rescued PW1 as the homesteads were far away. PW1 then texted her mother-in-law (PW2), who called her and told her what had happened. Her mother-in-law then called PW1's father-in-law, who said they should report the matter to the police station. PW1 did not know the appellant's name but knew him as a casual worker. She knew his face since he worked in the town and had even fenced a nearby secondary school.

8. PW1 and PW2 reported the matter at the police station. A police officer took PW1 to the hospital, they found there was no doctor. They went back the next day, but the doctors were on strike. PW1 was eventually treated and given a prescription for medication as her neck was injured. She was issued with a copy of the treatment notes and a P3 form.

9. On cross-examination, PW1 stated that she knew the appellant because she had seen him working at the secondary school several times. She also noted that the appellant did not manage to insert the penis into her vagina. She further stated that she did not frame the appellant. He was her brother-in-law and denied that the appellant had worked at their home.

10. PW2, FKS, testified that on 20th June 2017, at 1.30 pm, she was from a meeting and on her way home when she received text messages from K (PW1), her daughter-in-law, who informed her that a man had attempted to rape her. They met at the centre. She saw what seemed to be semen on PW1's dress and some discharge on her legs on the front and back, which she learned was from ejaculation.

11. PW2 then called the Assistant Chief and informed him about the matter, and was advised to report to the police. PW2 called JM (PW3) her eldest son and informed him and they were going to the police station to report and asked PW3 to search for the appellant. Later PW3 informed them that he had found the appellant. PW1 and PW2 went home, where they found the two. They took the appellant to the police station. On reaching the police station, the appellant attempted to escape, but he was arrested and brought back by a crowd. She stated further that a police officer then took them to the hospital, but there was no doctor until the following day when PW1 was treated and given a prescription and a copy of the treatment notes. She identified in court a yellow dress and pants, which PW1 had worn on the material day. She denied that the appellant had ever worked for them, though she knew him as a casual worker who served the neighbourhood. She was able to identify him in the dock.

12. On cross-examination PW2 mentioned that she got a message from PW1 requesting her to give PW1 a call. After that, PW1 told PW2 that she was on her way to the centre where they arranged to meet. PW2 also mentioned that she was familiar with the appellant. She noticed that PW1's attire was soiled.

13. PW3, JMS, a brother-in-law of PW1, stated that on 20th June 2017, at about 2.30 pm, he received a call from his mother, who informed him that someone had attempted to rape his sister-in-law (PW1). In the company of another, he went to their home, examined the area, and saw signs of a struggle on the ground. He informed his mother about it. PW1, who recognized the appellant's face, the appellant to him, including the shoe he wore. On the material day, PW3 worked with the appellant at the secondary school; hence, he saw the sports shoes the appellant wore and recognized them as PW1 described them to him. PW3 searched for him but did not find him. At 6.00 pm, he saw the appellant with his cousin near the Catholic Church in [Particulars Withheld]. He and his companion arrested the appellant, who had a paper bag with flour, cooking oil, and onions. He told the appellant that PW2 was looking for him. The appellant persuaded PW3 to discuss the matter, admitted to his actions, and requested that the issue be resolved without going to town.

14. PW2 was informed of the arrest and joined them. The appellant then asked for Kshs. 1500 from the contractor who had employed him the casual job he had done at the school. The appellant also mentioned to them that he had another case and did not want to appear in court. He wanted to pay them with the amount from the contractor and some other money he had so that they could release him, but PW3 refused his offer. They took the appellant to Mwingi Police Station, and on arrival, he escaped. They chased and arrested him at Mwingi Boys School and returned him to the police station. PW3 then gave the appellant's phone, which he had confiscated, to the police.

15. On cross-examination, PW3 mentioned that he recognized the appellant's shoes while working together at the secondary school. PW3 observed that the appellant often wore the same sports shoes. He denied that he was armed with a panga or knife when they arrested the appellant.

16. PW4, Dr Kiema Mwango, a Resident Medical Officer, stated that he knew Dr. Abdallah Muhammad, who had examined PW1. He had worked with him since 2015. He informed the court that the P3 form was filled on 22nd June, 2017 and it contained the medical details of MK, who was 22 years old at the time of the incident. She gave history of an attack by someone who attempted to rape her. The doctor was presented with white underwear with soil stains and tears and a yellowish dress stained with dirt. PW1 reported that at around 1.00 pm on the material day, a man known to her followed her to her compound as she came from school, pushed her onto a poultry house, attempted to rape her, tore her innerwear, and touched her private parts with clothing on until he ejaculated. There was no penetration. She was in good condition. She had scratch marks on her neck when the clinical officer examined her. She had no injuries in her private parts. She received painkillers. The degree of injuries was classified as harm.

17. PW5, No. 66147 Corporal Lucy Murira, stated that on 21st June 2017, at 8.00 am, while at the report office, he perused the Occurrence Book, and there was a reported crime from the previous day where the appellant had attempted to rape a lady. The suspect had been arrested and was in the cell. She went to the crime office and at 11.00 am PW1 and PW2 came. They were from Mwingi Hospital where PW1 had been treated. She interrogated them, recorded statements, and issued a P3 form, which was filled at M.O.H. PW1 availed the P3 form later, and after investigations, she caused the appellant to be charged. The appellant denied committing the offence.

18. PW5 further stated that PW1 presented her with her torn pants and the dress she wore that day. The appellant had ejaculated on the dress, and it had stains.

19. After the close of the prosecution case, the trial magistrate found the appellant had a case to answer and put him on his defence. The appellant gave unsworn evidence. He denied the offence, stating that he was a casual labourer and that in May 2017, he worked at the residence of PW1 and PW2, where he made a fence. He said he worked for a week. At the same time, he worked for PW1's neighbour,

K. On 11th May 2017, he was absent from work because he only had 100m to fence at PW1's home but went to ask for payment, but PW1 refused to pay him, alleging that the appellant had moved the boundary while fencing for K. They disagreed and even quarreled. He went and completed fencing K's land. He ceased working for PW1 on the 15th June, 2017. Later, he approached PW1 and her mother, PW2, to request for his payment, and PW1 issued a threat, but the appellant did not anticipate that she would cause him harm.

20. He further testified that on June 20, 2017, PW3 came to his home, but he was in Mwingi and intended to file a report against PW1 with the chief. He visited his brother to request for money and left Mwingi at 2:00 p.m. At 5:00 p.m. his brother sent him Kshs. 3,500. Later, he encountered PW3 and his cousin close to an M-pesa shop on his way there. After withdrawing his money and making purchases, he began his journey home with PW3, and his cousin trailing him and accosted him. PW3 had a panga while his cousin wielded a knife. The appellant sought to find out whether there was a problem, and PW3 informed the appellant that he had altered their boundary and consequently would not receive payment. Following this, PW3 restrained the appellant with a rope and confiscated the appellant's shopping, phone, and money. He stated that although PW3 admitted to safeguarding the items he had purchased, he denied receiving back his money, PW3 only returned the phone. That he was arrested on 20th June, 2017 and arraigned in court on 22nd June, 2017.

21. In its determination, the trial court found the appellant guilty, convicted him, and sentenced him to 20 years' imprisonment. Aggrieved the appellant appealed to the High Court against both conviction and sentence. The appeal was dismissed, the conviction affirmed, and the sentence confirmed.

22. Aggrieved by the decision of the High Court, the appellant appealed to this Court on grounds which can be summarized as follows:

> The learned judge failed to observe the provisions of Article 50(2) of *the Constitution*, erred by affirming the sentence, failed to observe that the Supreme Court had declared mandatory sentences unconstitutional, and failed to consider the provisions of section 333(2) of the *Criminal Procedure Code* while affirming the sentence.

23. The matter came up for plenary hearing on the 18th of October 2023. The respondent filed submissions dated 17th October, 2023 and which were highlighted briefly. The appellant did not file written submissions. He gave brief oral submissions.

24. In his oral submissions, the appellant indicated to the court that he would confine himself to the issue of sentence only. He urged that the law provide for a punishment of less than five years' imprisonment. That at the time of the incident, he was drunk. He regrets the incident and has reformed.

25. The respondent filed submissions dated 17th October 2023. On the jurisdiction of the court, the State relies on Njoroge vs. Republic [1982] eKLR for the proposition that on the second appeal, the court should focus on points of law accepting and being bound by the concurrent findings of fact by the two courts below, unless those findings were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in making those findings.

26. The State extensively submitted on conviction, but since the appellant dropped the appeal on conviction, we find it unnecessary to summarize the respondent's submission on the same. On the harshness of the sentence, the State argues that the appellant was convicted and sentenced to serve a 20-year term in accordance with the law. The sentence is fair and within the law.

27. We join hands with the State that our mandate as a second appeal is to be confined to issues of law only. On the sentence, the appellant has questioned why he was given an enhanced sentence and the failure of the court to consider section 333(3) of the *Criminal Procedure Code*. The State was of the view that the 20-year jail term is within the law but failed to address the issue of section 333(2) of the *Criminal Procedure Code*.

28. Section 4 of the *Sexual Offences Act* provides that:

> Any person who attempts to unlawfully and intentionally commit an act that causes penetration with his or her genital organs is guilty of the offence of attempted rape and is liable upon conviction for imprisonment for a term that shall not be less than five years but which may be enhanced to imprisonment for life.

In sentencing the appellant this is what the trial Magistrate said:

> " I have considered the social inquiry report, mitigation of the accused, and circumstances of the offense is prescribed. I sentence the accused to 20 years imprisonment."
>
> Section 361 of the Criminal Procedure Act states that:
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> 1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence.

29. Before us, the appellant has questioned the severity of the sentence meted out to him. As seen above, the law prescribes a sentence not below 5 years, which could be enhanced to life imprisonment. The trial court, having considered the circumstances of the case and the material before it exercised its discretion, sentenced the appellant to 20 years.

This Court has held in numerous cases that it cannot, therefore, at this point, interfere with the exercise of discretion that is within the confines of the law. In Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR), this Court stated:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist." (emphasis added)

30. The Supreme Court in its recent decision in the case of R vs. Mwangi: initiative for Strategic Litigation in Africa (ISLA) & 3 Others [2024] KESC 34 (KLR), stated as follows on the subject of sentencing:

> " 3. Section 361(1) of the *Criminal Procedure Code* explicitly bars the Court of Appeal from hearing issues relating to matters of fact, in cases of appeals from subordinate courts. Section 361 (1) also elaborated that the severity of a sentence was a matter of fact and not of law and the Court of Appeal was barred from determining questions relating to sentences meted out, except where such sentence had been enhanced by the High Court.
>
> 4. The Court of Appeal's jurisdiction on second appeals was 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 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".

31. The issue of section 333(3) was not raised in the High Court and therefore the judge cannot be blamed for failure to consider the same.

Section 333(3) of the Criminal Procedure Act states:

> Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.
>
> The court in sentencing a person who has been in custody and taking account of times spent is a matter of law that appears to have been overlooked by both the courts below.

32. In the end, the appeal partially succeeds to the extent that we direct that the appellant's time spent in custody be considered in computing the sentence. To avoid doubt, the sentence of 20 years' imprisonment remains.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

P.O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

Deputy Registrar