Muteti v Republic (Criminal Appeal 16 of 2022)
[2025] KECA 123 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 123 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 16 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 7, 2025

BETWEEN

BEN MWANGI MUTETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court at Malindi (R. Nyakundi, J,) delivered on 5th March 2020 In Criminal Appeal No. 43 of 2018)

JUDGMENT

1. Ben Mwangi Muteti, the appellant was charged with the offence of defilement contrary to section 8(1) as read with subsection (2) of the *Sexual Offences Act*.

2. The particulars of the offence were that on 12th April 2018 at Maweni area, in Malindi Sub-County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SM, PW2 the complainant, a girl aged 4 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars being that on 12th April 2018 at Maweni area, in Malindi Sub-County he intentionally touched the vagina of SM, PW2 the complainant, a girl aged 4 years.

4. The appellant pleaded not guilty and the matter proceeded to hearing.

5. Dr. Ibrahim, PW1 of Malindi Sub-County Hospital testified on behalf of Dr. Rimba, the examining doctor who filled the P3 form that confirmed the injuries suffered by the complainant. PW1 told the court that the complainant vaginal examination showed that her vagina was reddish and tender to touch. Further, there were bruises and tears on the right and left labia majora. PW1 found that the hymen was freshly broken, and that the complainant was defiled. He produced the treatment notes, the P3 form and the laboratory results.

6. Before PW2 testified, the Prosecutor requested the trial court to cross examine her. The court established that the complainant, a child of 4 years did not understand the meaning of an oath. After so holding, the prosecution applied to have the complainant testify through an intermediary which the court allowed. The complainant thereafter proceeded to give unsworn evidence through her uncle as an intermediary.

7. The complainant stated that on the date of the incident the appellant took her into his house, locked the door, removed her clothes, and put his penis in her vagina. He then gave her a shilling and told her to go home. She stated that the appellant was a bad man, and in the midst of her examination in chief she looked at the appellant, broke down and then started crying.

8. At that point the trial Magistrate adjourned the hearing to the afternoon and when the court resumed the Prosecutor submitted that the minor kept crying at the sight of the appellant, whereupon the court held that the minor would not be subjected to cross examination that day as she was extremely agitated by the sight of the appellant.

9. PW2 the complainant's grandmother heard the complainant telling her sister that she was sexually assaulted by the appellant. She questioned the complainant who told her that the appellant called her to his house with the promise of giving her money and then locked the door; that he inserted his penis into her vagina. When she asked the child to take her to his house, the complainant led her to the appellant's house where she pointed to the appellant as her assailant. Thereafter, they reported the matter to the village elder and took the complainant to hospital and the appellant was later arrested.

10. PW3 the complainant's mother stated that on the evening of the alleged incident she found the complaint sleeping. Upon inquiry, the complainant told her that someone had taken her into his house and locked the door and inserted his penis into her vagina. The following day the complainant took her to the appellant's house which was three houses away from the complainant's house. The child pointed at the appellant who was inside his house. PW3 informed the village elder about the incident, whereafter, she took the complainant to the hospital and later reported the incident to the police. The appellant was subsequently arrested and charged.

11. PW4 CPL Mariam Hussein, of Malindi Police Station testified that on 13th April 2018 she received a defilement report involving the complainant. She issued the P3 form and recorded the witness statements which formed part of the evidence tendered against the appellant.

12. When placed on his defence, the appellant denied the offence and claimed that it was a fabrication by the complainant's mother whom he claimed had pestered him to have a relationship with him but he had rejected her advances; that therefore resulted in a grudge against him.

13. The trial Magistrate (Hon. Dr. J. Oseko, CM) upon considering the evidence convicted the appellant of the offence as charged and sentenced him to serve life imprisonment.

14. Aggrieved, the appellant filed an appeal to the High Court, on the grounds that the learned trial Magistrate was in error in law and fact by failing to consider that the prosecution witnesses failed to prove the case beyond reasonable doubt; by relying on the evidence of a single witness which was insufficient to warrant safe conviction; in failing to consider that the sentence imposed on the appellant was manifestly harsh and excessive; in failing to consider that his defence was unchallenged and in failing to consider that the prosecution's case was in violated section 163 (c) of the *Evidence Act*.

15. The first appellate court upon considering his appeal, upheld his conviction, but varied the sentence from life imprisonment to 30 years imprisonment.

16. Dissatisfied, the appellant has filed an appeal to this Court on the grounds that; the prosecution did not prove its case to the required standard of the law; that the trial Magistrate failed to consider that there was massive contradictions and variances in the evidence, and that some of the witnesses mentioned were not called to testify.

17. The appellant also filed supplementary grounds of appeal raising the grounds that; the 1st appellate court was in error in law in failing to appreciate that the trial court did not record the voir dire examination of the complainant; that the trial was conducted in contravention of section 302 of the Criminal Procedure Code; that 1st appellate court was in error in law in failing to appreciate that the complainant did not testify, and her evidence should therefore be treated as hearsay; and in substituting the sentence with a harsh one that did not take into consideration his age.

18. When the appeal was heard on a virtual platform, the appellant who appeared in person relied on his written submissions in their entirety, where it was submitted that no voir dire examination was carried out, as there was no record of it having been conducted which was contrary to section 19 of the *Oaths and Statutory Declarations Act*. The appellant went on to submit that he was not offered the opportunity to cross examine the complainant and that the trial process was not properly conducted; that he was therefore entitled to a retrial, but considering that he has been in prison since 2018, he ought to be acquitted.

19. Finally, it was submitted that the sentence was harsh and excessive and as such ought to be set aside.

20. The prosecution also filed written submissions. Learned prosecution counsel for the State Ms. Nyawinda submitted that in its finding, the High Court concluded that the prosecution's case did not reveal any glaring contradictions or inconsistencies that were fatal to the prosecution's case and that the appellant still has not pointed out any contradictory evidence; that in any event, if at all any contradictions existed, they were immaterial and not fatal to the prosecution's case.

21. On the complaint that not all the witnesses were called to testify, counsel submitted that all the witnesses necessary to prove the offence were called and that all the witnesses it intended to call testified; that as a consequence both the trial court and the 1st appellate court found that the prosecution provided sufficient evidence and rightly convicted the appellant for the offence of defilement; that the prosecution proved the offence to the required standards, since the age of the minor was proved; that penetration was established by the evidence of the minor and the medical reports and that the appellant was properly identified as the perpetrator; that both the trial court and the High Court considered the appellant's defence and concluded that it did not in any way dislodge the prosecution's case.

22. On the issue of whether the record showed that the voir dire questions and answers were recorded counsel observed that they were not.

23. On sentence, counsel submitted that the 1st appellate court exercised its discretion and reviewed the sentence from life imprisonment to 30 years imprisonment which was reasonable in the circumstances, and that this Court should uphold the sentence.

24. This being a second appeal, the jurisdiction of this Court is limited to consideration of issues of law only. Section 361 of the Criminal Procedure Code provides that a second appeal to this Court is only on points of law.

25. In the case of *Boniface Kamande & 2 Others vs Republic, Crim. App. No 166 Of 2004*, this Court expressed:

> "On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it."

26. In the earlier case of M 'riungu vs Republic (1983) KLR 455 the Court had strongly expressed the same view in these terms:

> "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".

27. Having reviewed the record of appeal and the submissions and authorities cited by the parties. The issues for determination that arise are: i) whether a voir dire examination was carried out and whether the lack of it prejudiced the appellant; ii) whether the failure to afford the appellant an opportunity to cross- examine the complainant fundamentally prejudiced the entire case as well as the appellant; iii) whether the offence was proved to the right standard; iv) whether there were variances and contradictions in the evidence; v) whether crucial witnesses were not called to testify; and vi) whether the sentence imposed was harsh and excessive.

28. To begin with, a consideration of the record does not show that the two issues of whether a voir dire examination was carried out and whether the appellant was afforded an opportunity to cross-examine the complainant were at any time raised or addressed by the courts below.

29. Raising of an issue on appeal for the first time, was considered in the case of Kenya Commercial Bank Ltd vs James Osede [1982] eKLR where Hancox, JA (as he then was) had this to say:

> "It is not permissible for matters and issues not raised at the trial court to be raised for the first time on appeal. In this instance, permitting an issue to be raised for the first time in reply to the appellant is improper, as the appellant had no fair notice of this issue. Such an issue should not be decided on appeal."

30. Concerning the effect of new points of law or issues raised for the first time on appeal, Forbes, VP observed in the case of Alwi A Saggaf vs Abed A Algeredi 1961 EA 767 CA 610 that:

> "...these are assumptions which were never tested at the trial. The minds of the parties simply were not directed to this issue, which apparently, was raised by counsel for the respondent for the first time in his reply at the end of the hearing of the first appeal. In the circumstances, it appears to me that the appellant had no fair notice of this issue, and that the court cannot be satisfied that the facts, if fully investigated, would have supported the new plea.
>
> In my view, accordingly, the learned judge ought not to have allowed this issue to be raised, or to have decided the appeal on it."

31. In the case of *Saidinga vs Republic (Criminal Appeal 41 of 2016)* [2024] KECA 383 (KLR) this Court also held that:

> " 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. An appeal can only lie where there has been a decision made by a lower court. If an issue was not brought up before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered in the judgment on an appeal."

32. Based on the afore-cited authorities, we decline to consider or pronounce ourselves on the new issues raised for the first time in the instant appeal. This would be tantamount to the Court condoning piecemeal litigation. The two grounds abovementioned therefore fail.

33. Having so found, the next issue for determination is whether the offence of defilement was proved, it is settled that the ingredients of the offence are; i) proof of complainant's age; ii) proof of penetration; and iii) identification of the perpetrator.

34. As regards the age of the complainant, the appellant has not challenged her age, which was proved by the production of a birth certificate that showed that she was born on 17th May 2014 and therefore, at the time the offence was committed she was 4 years old.

35. On the ingredient of penetration section 2 (1) of the *Sexual Offences Act* defines penetration as:

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

36. The complainant's evidence was that the appellant took her into his house, locked the door, removed her clothes, put his penis in her vagina. He then gave her a shilling and told her to go home. This evidence was corroborated by the P3 form, the treatment notes, and the laboratory results produced by Dr. Ibrahim, that confirmed the injuries sustained by the complainant. The doctor testified that the vaginal examination showed her vagina was reddish and tender to touch. Further, there were bruises and tears on the right and left labia majora, and that the hymen was freshly broken. PW1, found that the complainant was defiled. Additionally, the appellant who was the complainant's neighbour was properly identified as the perpetrator.

37. Based on the evidence the trial court concluded that the offence of defilement was proved which conclusion was upheld by the High Court. As a consequence, we too are satisfied that the offence was demonstrated to the required standard, with the result that we have no justification for interference with the concurrent conclusions of the two courts below.

38. Regarding the allegations that there were variances and contradictions in the evidence, and on the issue that crucial witnesses were not called to testify, a consideration of the record does not disclose that the appellant identified any contradictions, or specified the witnesses who did not testify. As these issues were not substantiated, we have no basis on which to address them, and we accordingly dismiss them.

39. The final issue was whether the sentence was harsh and excessive. In the instant case, as stated above, the appellant was charged with the offence of defilement of a child aged 4 years which attracts a sentence of life imprisonment. On a 1st appeal the High Court reduced the sentence from life imprisonment to 30 years imprisonment.

40. By virtue of section 361(1) of the Criminal Procedure Code, in cases such as this one before us, where appeals lie from the subordinate courts, this Court is expressly estopped from hearing matters of fact. It provides:

    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..."

41. Moreover, the Supreme Court in its decision in the case of R epublic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) held that;

> ....we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.
>
> ...Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and cannot 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 plainly 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 scope of the Court of Appeal's jurisdiction."

42. The foregoing excerpt is plain that the appellant's appeal against the severity of the sentence is outside the purview of this Court's jurisdiction. This ground is therefore without merit and also fails.

43. In sum, the prosecution having proved its case to the required standards, we hereby uphold the conviction and sentence of the trial court as confirmed by the High Court. The appeal is without merit and is accordingly dismissed in its entirety.

    It is so ordered.

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

A.K MURGOR

JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar