SHK v Republic (Criminal Appeal 69 of 2022)
[2025] KECA 176 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 176 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 69 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

FEBRUARY 7, 2025

BETWEEN

SHK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgment of the High Court of Kenya at Garsen (R. Nyakundi, J.) dated 15th September 2021 in Criminal Appeal No. 58 of 2019)

JUDGMENT

1. The appellant was charged with the offence of Sexual Assault contrary to section 5(1) (a) as read with section 5(2) of the *Sexual Offences Act*. It was alleged that, on the 2nd day of November within Tana River County, the appellant unlawfully used his finger to penetrate the vagina of SK, a child aged 4 years.

2. In a brief judgment delivered on 5th December 2019, the trial court (Hon. A. P. Ndege, PM) found the appellant guilty as charged and sentenced him to serve 13 years imprisonment.

3. To advance its case, the prosecution called 8 witnesses whose evidence we shall summarise as required of us. The basis of the prosecution's case was laid down by PW1, HJ, the complainant's mother, who also testified as her intermediary. Her testimony was that she sent the complainant to her sister's house, to get a panga. Her sister was married to the appellant. When she returned 30 minutes later, she was crying and walking with difficulty saying that she was in pain. Upon enquiring what had happened, she (complainant) told her (PW1) what H's father had done to her; and that he had taken her to his bedroom, removed her pant and inserted his finger in her vagina. PW1 while accompanied by the complainant, went to her mother's (the grandmother to the complainant) house where she and her mother examined the complainant's genitalia and found it to be too reddened; that the complainant felt pain when touched on the genitalia; that they went to report to the sub-chief, who in turn called

Kenya Police Reservist (KPR) officers who referred her to the police station; and that she reported the matter at Hola Police Station from where she was referred to Hola County Referral Hospital where the complainant was examined, treated and her age assessed.

4. PW1 went on to state that she thereafter started looking for the appellant whom they found him in her sister's house where he was hiding; which was a place not far from her home. PW1 identified in court the treatment notes, the medical examination report (P3 form) and the age assessment report.

5. PW2 was the complainant. On account of her tender age, she testified through an intermediary, her mother, PW1. PW1 is, in this testimony listed as PW2. Her brief testimony was that the appellant was the father of H; and that the appellant did bad acts to her by inserting a finger into her private parts. In cross-examination, she stated that her mother had sent her to the appellant and not to her aunt when the incident occurred.

6. PW3, AHJ, a farmer, testified that the complainant, while accompanied by her mother, PW1, reported to her that the appellant had inserted his finger into the complainant's genitalia; that, at that time, the complainant was crying; and that she advised them to report the matter to the chief. PW4, Mohamed Bakari, the assistant chief of Ndura Location, testified that he received a call from his colleague of Bondeni sub-location to the effect that a case of sexual assault had been reported at his office; that PW4 went to his colleague's office where he found the complainant, PW1 and KPR officers; that, after taking a brief of the matter, he ordered the KPR officers to arrest the appellant; that he accompanied PW1 and the KPR officers to the house of his second wife, the sister to PW1, where the appellant was arrested while hiding under the bed.

7. PW5, Godhana Yusa Walidea, the assistant chief of Bondeni sub-location, basically reiterated the evidence of PW4, adding that he also accompanied PW4 and KPR officers in search of the appellant; that they did not find the appellant in his first wife house but in that of the second wife, the sister to PW1.

8. PW6, Ismail Hirsi, a Clinical Officer at Hola Hospital filled the complainant's P3 form on 5th November 2018 having been treated on 2nd November 2018. Reading from the treatment notes, he testified that the complainant's vagina was found to be reddened; the labia was affected; the hymen was intact; and VDRL and UTI (urinary tract infection) tests were negative; and that she was treated for pain. He adduced in evidence the P3 form and treatment notes.

9. PW8, Jared Omangi, a Community Oral Health Officer from Hola Hospital, assessed the age of the complainant to be 4 years. He produced in evidence an age assessment report to that effect. The case was investigated by PW7, CPL. Mildred Agiza, who basically summed up the prosecution witnesses' evidence. In addition, she testified that she was the one who recorded the witnesses' statements.

10. After the close of the prosecution's case, the learned trial Magistrate found that the appellant had a case to answer and accordingly put him on his defence. The appellant opted to give a sworn statement in his defence and called no witness in its support. He testified that, indeed, PW1 was his niece and he was her uncle; that there was a land dispute between him and the family of the complainant; and that the complainant's family took his wife from him.

11. In cross-examination, he stated that PW1 testified that she inserted her finger into the complainant's vagina when she was examining her before taking her to hospital; that PW1 confirmed that she was not a doctor, and that, therefore, her evidence was hearsay evidence; that PW3, 4 and 5 also gave hearsay evidence; that PW5 is not the one who treated the complainant and that PW6 only gave the estimated age of the complainant.

12. In its judgment, the trial court (Hon. A. P. Ndege, PM) held that the complainant gave cogent evidence of what transpired, with no trace of coaching; that her evidence was corroborated by the medical documents; and that there was no credible evidence of the existence of animosity between the appellant and the complainant' s family for the complainant's mother to implicate him. It convicted the appellant as charged and sentenced him to serve 13 years imprisonment.

13. Dissatisfied with the judgment of the trial court, the appellant appealed to the High Court of Kenya at Garsen. He raised 3 grounds of appeal in an undated memorandum, namely that: the prosecution case was closed in the absence of essential evidence; the judgment of the trial court was based on assumption and imagination; and that essential witnesses were not called to testify in contravention of sections 150 and 125 of the Criminal Procedure Code and the *Evidence Act* respectively.

14. By a judgment delivered on 15th September 2021, the learned Judge (R. Nyakundi, J.) held that the age of the complainant was proved by the testimony of her mother and the age assessment report; that penetration was proved by the complainant's own narration of what happened, as she gave graphic details of the unlawful acts committed on the material day; that the complainant identified him (the appellant) as the perpetrator; and that, in any event, he was the last person the complainant was seen with prior to her complaining of the sexual assault. The learned Judge therefore dismissed the appeal on both the conviction and sentence.

15. Still dissatisfied, the appellant has preferred the instant and perhaps the last appeal to this Court. In an undated memorandum of appeal, he has raised 4 grounds of appeal, which were reduced to 2 in an Amended Grounds of Appeal which we hereby replicate as follows:

> " a) That the 1st appellate Court judge failed in the rule of law by upholding of the decision reached by the Hon. trial magistrate without noting that the provisions of the law under Article 50(2)(p) of *the Constitution* were not put into consideration.
>
> b) That the 1st appellate Court judge failed in the rule of law by upholding of the decision reached by the Hon. trial magistrate without noting that the sentence was meted while failing to note that the mandatory minimum sentence never allowed the imposition of a sentence which the court deemed to be appropriate based on the scope of the evidence recorded."

16. We heard the appeal virtually on 23rd September 2024. The appellant was unrepresented and appeared in person whilst Ms. Ongeti, learned Principal Prosecution Counsel, represented the respondent. The appellant entirely relied on his written submissions whose filing date we are unable to discern for want of a Court stamp. On her part, Ms. Ongeti briefly highlighted the respondent's submissions dated 16th September 2024.

17. It is paramount to note that the appellant's grounds of appeal as amended purely focus on the sentence, which, when condensed, only fault it for being excessive. Indeed, his submissions too, only challenge the severity of the sentence. According him, the learned trial Magistrate erred in sentencing him to 13 years imprisonment without having regard to the fact that mandatory minimum sentences as provided by the law deny the trial court the discretion to impose an appropriate sentence based on the circumstances of the case and the mitigation that an accused person advances. In this regard, the appellant referred us to the case of Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR; and Evans Wanjala Wanyonyi vs. Republic (2019) eKLR for the proposition that mandatory minimum sentences have been declared unconstitutional for fettering the trial court's discretion in sentencing. He thus submitted that the trial court was in error in sentencing him to 13 years imprisonment without

having the benefit of information that persuaded it to enhance the sentence, or by otherwise failing to impose a sentence that is less than the mandatory minimum spelt out by the law.

18. It was his further submission, and whilst supporting ground 2 of the appeal that, since section 5(2) of the *Sexual Offences Act* provides for a minimum sentence of 10 years, the court having sentenced him to 13 years denied him the benefit of the least severe punishment prescribed as provided by Article 50 (2)(p) of *the Constitution*.

19 The appellant thus urged us to take into account the circumstances of the case, re-analyse and re-evaluate the evidence, set aside the sentence and allow the appeal.

20 The respondent opposed the appeal on both the conviction and sentence. It was submitted that the prosecution proved all three elements of the offence of sexual assault, namely the age of the victim, penetration and positive identification of the perpetrator; that the appellant's defence was nothing but an afterthought; and that, it is trite that, an appellate court cannot interfere with the sentence unless it is established that there was apparent error on application of the sentencing principles.

21. With regard to penetration, it was submitted that the evidence of the complainant was corroborated by the medical evidence as attested by the P3 form which shows that there was reddening of the genitalia, bruises on both sides of the vulva and a freshly broken hymen.

22. On identification, it was submitted that the same was by way of recognition as the complainant knew the appellant who was his maternal uncle; that the complainant knew the appellant so well as baba H; that she ably stated who had defiled her at the first instance and, indeed, led her mother to his home where she had earlier been sent to fetch a panga; and that the appellant was arrested while hiding under the bed in his second wife's house.

23. As regards the sentence, the respondent submitted that, although section 5 (2) of the *Sexual Offences Act* provides for a minimum sentence of 10 years, the same can be enhanced to life imprisonment; and that, in enhancing the instant sentence to 13 years, the trial court took into account the prevalence of the offence. Further, that there was no apparent error committed by the trial court on application of the sentencing principles and, in this regard, we were referred to the case of David Mutai vs. Republic (2021) eKLR and urged to dismissed the appeal in its entirety.

24. This is a second appeal, and our mandate is restricted to addressing only matters of law. Section 361(1) of the Criminal Procedure Code provides as follows:

> 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.

25. The Court will also not normally interfere with concurrent findings of fact by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or that the courts below acted on wrong principles in arriving at the findings. This was aptly held in the case of Karani vs. R [2010] 1 KLR 73, wherein this Court expressed itself as follows:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior Court on facts unless it is demonstrated that the trial Court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they

were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

26. As noted above, the appellant's grounds of appeal challenged the sentence, and the same case applies to his submissions. It seems, and interestingly so, that the respondent's counsel did not notice this fact, consequent to which the learned prosecution counsel submitted on the propriety of both the conviction and sentence. In our view, the appeal belongs to one and only one party, the appellant. In as much as he did not make any oral submission so as to clear the air as to whether he was also appealing against the conviction, it is clear from his grounds of appeal and submissions that he only intended to challenge the sentence.

27. However, for abundance of caution and bearing in mind that the respondent did not help the Court either, we deem it fit to state that, our reevaluation of the entire record of appeal drives us to only one conclusion; that all the elements of the offence of sexual assault, namely penetration; age of the victim; and positive identification of the perpetrator were proved beyond reasonable doubt as defined under section 5(1) of the *Sexual Offences Act*. The provision reads:

1. Any person who unlawfully-

    a. penetrates the genital organs of another person with-

        i. any part of the body of another or that person; or

        ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

    b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

28. We find it critical to mention one thing: that whereas penetration is a key ingredient requiring proof in a case of sexual assault just like in defilement under section 8 of the *Sexual Offences Act*, the point of departure in the offence of sexual assault is the mode of penetration. In sexual assault, which relates to this case, penetration into the genital organ of the victim is by any part of the body of the perpetrator, or another person, or any object manipulated by the accused or another person, for the purpose of causing penetration. In defilement, penetration is by the genital organ into the victim's genital organ. We can only add that, in this case, proof of penetration was sufficiently established.

29. Turning on to the issue of the sentence, section 361(1) (a) of the Criminal Procedure Code states that:

> " 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 of the subordinate court had no power under section 7 to pass the sentence." (emphasis ours)

30. Mindful of the above provision, we are also cognizant of the fact that, sentencing is purely the exercise of discretion of the trial court. In an avalanche of decisions, this Court delivered itself on the limited

power it has of interfering with the discretion of the trial court in sentencing. For instance, in the case of Francis Nkunja Tharamba v Republic (2012) KECA 29 (KLR), it stated:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

31. Section 5(2) of the *Sexual Offences Act* which prescribes the sentence for the offence of sexual assault states:

> A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

32. This implies that, it is within the discretion of the trial court to impose a sentence ranging from 10 years to life imprisonment. In enhancing the sentence from 10 to 13 years, the learned Magistrate stated:

> " Court is alarmed by the prevalence of such heinous barbaric acts on such children of tender years as the complainant. I do hereby sentence the accused to serve 13 years imprisonment."

33. Clearly, the sentence is not only lawful, but the learned Magistrate accorded reasons for enhancing it. As spelt out in section 361(1) of the Criminal Procedure Code, the severity of sentence complained of by the appellant is not a matter of law open for consideration by this Court on second appeal. The appellant has not demonstrated the existence of any of the foregoing exceptions to the rule. A minimum mandatory sentence sets the floor rather than the ceiling. Therefore, that which the section prescribes is the least severe sentence a court can impose, leaving it open to the discretion of the courts to impose a harsher sentence. This case involved a child aged 4 years, and we find that both the trial and the High Court were cognizant of this fact, and the sentence of 13 years was given for good reason. It is trite that a sentence is meted out at the discretion of the court and we have no cogent reason to interfere with the exercise of the trial court's discretion.

34. In the upshot, having considered the record of appeal, the appellant's grounds of appeal, the respective submissions and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. We accordingly uphold the judgment of the High Court at Malindi (Nyakundi, J.) delivered on 15th September 2021.

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

A.K MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR