Khisa v Republic (Criminal Appeal 262 of 2019)
[2025] KECA 486 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KECA 486 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 262 OF 2019

HM OKWENGU, JM MATIVO & M NGUGI, JJA

MARCH 13, 2025

BETWEEN

ISAAC BUSOLO KHISA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Sitati J.) delivered on 21st September 2017inHigh Court Criminal Appeal No. 148 of 2015)

JUDGMENT

(An appeal from the judgment of the High Court of Kenya at Bungoma (Sitati J.) delivered on 21st September 2017

in

High Court Criminal Appeal No. 148 of 2015).

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JUDGMENT OF THE COURT

1. Isaac Busolo Khisa, (the appellant), was charged, tried and convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* and sentenced to serve life imprisonment in Kimilili Principal Magistrate's Court Criminal case number68 of 2014. The accusation against him was that on 9th February 2016 at Kapkateny market-Cheptais within Bungoma County, he caused his penis to penetrate the vagina of BWN, a child of 7 years.

2. Ali- Aroni, J. (as she then was), dismissed his appeal against the conviction and sentence in Bungoma High Court Criminal Appeal No. 148 of 2015 on 21st September 2017.

3. Undeterred, the appellant filed the instant appeal challenging both the conviction and sentence. He has cited fifteen grounds of appeal summarized as follows:- (a) the charge sheet did not prescribe the sentence. (b) his conviction was based on a non-existing charge in the *Sexual Offences Act*. (c) the three ingredients of the offence were not proved. (d) the prosecution evidence was marred by inconsistencies, discrepancies and contradictions. (e) the life sentence imposed on him is unconstitutional. (e) this Court to apply section 333(2) of the *Criminal Procedure Code* in resentencing him.

4. In his submissions, the appellant argued that he was charged with defilement contrary to section 8 (1) (2) of the *sexual offences Act* instead of section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. He contended that the charge sheet was never amended and, therefore, the trial magistrate used a non-existent provision to convict him.

5. Regarding the complainant's age, the appellant maintained that the birth notification presented by the complainant's mother was not believable because the complainant gave her first name as "Beryline"" while the birth notification indicated her first name as "Berin" and that the order of her other two names are interchanged. The appellant argued that the birth notification was, therefore, for a totally different person. He also contended that the date of birth on the notification of birth was erased from 2002 to 2007 putting into question the actual date of birth.

6. On the ingredient of penetration, the appellant submitted that the complainant did not report to her mother immediately after the alleged offence while her mother testified that she discovered the incident when she was dressing the complainant for school and upon cross-examination PW2 confirmed that her daughter was

indecently assaulted. The appellant questioned why PW2 waited for 4 days to take her daughter to hospital since the incident happened on 17th January 2014 yet the complainant was taken to hospital on 21st January 2014. The appellant also challenged the clinical officer's evidence arguing that it was not convincing. According to him, the rupture of the hymen, bruises to her private parts and wetness in her vagina that smelled could not have been evident after 5 days. He contended that a perforated and or missing hymen is not proof of penetration or defilement and relied on this Court's decision in P.K.W

vs. Republic [2012]eKLR in support of the proposition that the hymen was not always ruptured by sexual intercourse.

7. The appellant further submitted that the complainant's uncle a one Mr. John who took the complainant to hospital was never called as a witness yet he was a very crucial witness. He cited Bukenya & Another vs. Uganda[1972) E.A 549 in which the predecessor of this Court held that it was the duty of the prosecution to make available all witnesses necessary to establish the truth, even if their evidence would be adverse to its case.

8. Regarding the alleged discrepancies, contradictions and inconsistencies, the appellant cited PW1's evidence that she was playing with Sam and Manu at her grandmother's house at 6:00pm on 17th January 2014. The appellant contrasted her evidence with PW2's testimony that on 17th January 2014, at 7:30pm the complainant came home from school and she was playing at her grandmother's place. The appellant contended that it is not clear when the offence was committed and who the perpetrators were between himself, Sam, and Manu.

9. Regarding the sentence, the appellant cited this Court's decision in Julius Kitsao Manyeso vs. Republic, Malindi Criminal Appeal No. 12 of 2021 declaring life

sentences unconstitutional and urged this Court to substitute his life sentence with an appropriate one.

10. The respondent's counsel, Mr. Oyiembo, submitted on the three ingredients of the offence. Regarding the complainant's age, he argued that the minor's age was7 years as confirmed by the notification of birth and argued that the appellant never disputed the age during trial. Regarding penetration, he submitted that the minor narrated to the trial court what the appellant did to her, while PW2 testified that she noticed a foul smell from the complainant's vagina when she was washing her and the medical evidence supported PW1's evidence. On the alleged failure by the prosecution to call crucial witnesses, counsel maintained that the prosecution was only obliged to call witnesses whose testimony was relevant and indeed the evidence of all the witnesses called was credible and the two courts below

believed them. Lastly, counsel argued that this being a second appeal, this court is bound to accept the concurrent findings of fact by the two courts below.

11. The jurisdiction of this Court in a second appeal is limited to consideration of matters of law only as stipulated under Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. (See Chemogong vs. R [1984] KLR 611, Ogeto vs. R [2004] KLR 14 and Koingo - V - R (1982) KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial count could find as it did. (See Reuben Karari S/o Karanja vs. R [1956] 1

E.A.C.A. 146).

12. As to what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, we are guided by the Supreme Court decision in Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 3 others [2014] eKLR in which it characterized the three elements of the phrase "matters of law" as follows:-

"(a) the technical element: involving the interpretation of a constitutional or statutory provision;

b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and

c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

13. Upon reading the proceedings, the judgments rendered by the two courts below, the grounds of appeal and the parties' submissions, we find that the following issues will effectively determine this appeal:- (a) whether the charge sheet was defective; (b) whether the ingredients of the offence were proved; (c) whether the prosecution evidence was contradictory and inconsistent; (d) whether the prosecution failed to call a crucial witness; and (e) whether the life sentence meted upon the appellant is unconstitutional.

14. Our reading of the entire record leaves us with no doubt that the question whether the charge sheet was defective was not raised before the first appellate court. It is also important to mention that the said issue is not strictly founded on matters of law. This is because determining it requires us to verify from the evidence or other material placed before the trial court whether that assertion is correct. More important, an appeal cannot arise out of something upon which the court appealed from had not rendered a decision unless the appellant can demonstrate that he had

raised the said issue, but the court had failed to determine it. In John Kariuki Gikonyo vs. Republic [2019] eKLR, this Court held that:-

> "Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. 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."

15. 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 raised before the lower court, and therefore not determined, then any decision made by the appellate court would not be considered a judgment on an appeal.

16. The other ground mounted by the appellant is that the ingredients of the offence were not proved. On a second appeal, this Court will not interfere with concurrent findings of fact of the two courts below unless it is satisfied that the findings are not supported by evidence or the courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly enunciated in Kalameni vs. Republic [2003] eKLR in which this Court stated:-

> " We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re- assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence." See also Aggrey Mbai Injaga vs. Republic [2014] eKLR and Athanus Lijodi vs. Republic [2021]eKLR.

17. The trial and the first appellate court found that the evidence established that the appellant, who was their neighbour, defiled the complainant. Her mother (PW2) and the medical evidence corroborated her evidence. The complainant's birth certificate established that she was aged 8, and the appellant was identified as the perpetrator. The complainant knew the appellant. This was not disputed nor was it suggested that it could have been a case of a mistaken identity. The trial court and the first appellate court considered the appellant's defence and found that it did not dislodge the prosecution evidence. In the circumstances, we find and hold that there is no basis to interfere with the findings of the courts below on matters of facts.

18. The other argument urged by the appellant is that the prosecution evidence was marred by inconsistencies and contradictions. The appellant maintained that there were discrepancies on the

time the alleged defilement happened and when PW1 reported the matter to her mother, when the complainant's mother discovered that

she had been defiled and when the matter was reported to the police. Indeed, from the analysis as captured by the learned judge, there seems to be discrepancies as regards to when PW2 found out about her defilement and when the same was reported to the village elder and the police.

19. In Phillip Nzaka Watu vs. Republic [2016] eKLR, this Court observed that:-

> "...when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

20. The court's duty is to determine whether there were contradictions and inconsistencies in the evidence to the extent that a reasonable person would be left in doubt as to whether the charge was proved, or whether the contradictions are so material that the trial court ought to have rejected the evidence. However, as was held by the Uganda Court of Appeal held in Twehangane Alfred vs Uganda, [2003] UGCA, 6, it is not every contradiction that warrants rejection of evidence. The question is whether the alleged inconsistencies and contradictions are grave and point to deliberate untruthfulness of the witnesses.

21. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. Having evaluated the evidence tendered by the parties and applying the tests discussed above, we are persuaded

the cited discrepancies/ contradictions viewed in totality of the evidence and the appellant's defence did not affect the credibility of the prosecution witnesses. As was held in Phillip Nzaka Watu vs. Republic (supra), when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail.

22. We now address the appellant's assertion that the prosecution did not call crucial witnesses. The

appellant argued that one Mr. John and his mother should have been called to testify because they were very important and their evidence would have led to his acquittal. The appellant also stated that his mother was called as a witness but she refused.

23. The starting point is that section 143 of the *Evidence Act* provides that "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact." This Court in Julius Kalewa Mutunga v Republic [2006] eKLR stated :-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

24. The appellant relied on Bukenya & Others v Uganda (supra) in which the former East African Court of Appeal laid down the following principles: -

i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

25. However, in the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case. The significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances of the case, it is to be inferred that the reason why the witness was not called was that the party expected to call him feared to do so because the evidence would be adverse to its case.

26. The adverse inference can also be made where a witness is required to explain or contradict some evidence. No inference can be drawn unless evidence is given of facts requiring an answer. It is noteworthy that PW1 testified that the assault took place in the appellant's house and based on the circumstances, neither Mr. John nor his mother would have seen the appellant assaulting the complainant. Therefore, their evidence would not have been of benefit to the prosecution's case. In any event, the appellant was at liberty to call the said persons as his witnesses. He did not do so.

27. Regarding the alleged unconstitutionality of the life sentence, it is noteworthy that the mandatory minimum sentence provided for defilement of a child aged 11 years or below under section 8 (2) of the *Sexual Offences Act* is life imprisonment, which is the sentence that was meted on the appellant.

28. We have carefully considered the record and carefully considered the appellant's Petition of Appeal before the High Court, which appears at page 52 of the record. The appellant did not raise any complaint on the constitutionality of the life sentence before the High Court. Therefore, the constitutionality of the life sentence was not an issue placed before the High Court for its determination. Consequently, the lower court and the first appellate court did not have the benefit of applying their minds on the said ground. Nevertheless, this being a matter of law, this Court can entertain it at this stage.

29. It is common ground that the Supreme Court recently affirmed the constitutionality of the mandatory minimum sentences prescribed by the *Sexual Offences Act* in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) when it held that:-

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of

issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...

(62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

30. In light of the finding by the Supreme Court, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae (supra) affirming the lawfulness of penalties prescribed by the *Sexual Offences Act*, we are unable to interfere with the sentence. Accordingly, we dismiss the appellant's appeal on both conviction and sentence.

DATED AND DELIVERED IN KISUMU THIS 13TH DAY OF MARCH, 2025

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR