Kakenyi v Republic (Criminal Appeal E014 of 2024)
[2025] KECA 890 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 890 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E014 OF 2024

AK MURGOR, GWN MACHARIA & KI LAIBUTA, JJA

MARCH 7, 2025

BETWEEN

NGOLOMA MULINGE KAKENYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Garsen (J. N. Njagi, J.) delivered on 29th January 2020 In HCCRA No. 141 of 2018)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Garsen (J. N. Njagi, J.) dated 29th January 2020 in Criminal Appeal No. 141 of 2018 in which the learned Judge upheld the judgment of the Senior Principal Magistrate's Court at Shanzu (D. Mochache, SPM) dated 13th December 2018 in Criminal Case No. 11 of 2016. In its judgment, the trial court had convicted the appellant as charged with the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* and sentenced him to 30 years imprisonment.

2. The particulars of the offence were that, on diverse dates between August and September 2015 at [particulars withheld] village, Bamburi Location in Kisauni sub-county within Mombasa County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MS, a child aged 14 years.

3. In addition, the appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that, on the diverse dates and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of MS, a child aged 14 years contrary to section 11(1) of the Act.

4. The appellant denied the charges whereupon the trial proceeded. The prosecution called six (6) witnesses, including the complainant.

5. The prosecution's case was that the appellant defiled the complainant (PW1) on diverse dates between the months of August and September 2015. PW1 gave sworn evidence after a voire dire examination and testified that she was living with one M (her sister) at [Particulars Withheld] Estate, and that the appellant was their landlord; that M worked at night as a bar maid and would leave PW1 alone in the house; that, on several occasions in the those months, the appellant would sneak into PW1's house at night and defile her when her sister was away at work; that, on other occasions, the appellant would defile her at his house during the day. It was PW1's testimony that the appellant would defile her by penetration into her vagina and into her anus and give her money; and that PW1 later informed M who took her to hospital where it was discovered that she was pregnant. PW1 eventually gave birth on 29th March 2016.

6. PW2, the complainant's mother, SAK, testified that PW1 lived with her other daughter, M; that she later learnt that PW1 was pregnant; that, on inquiring from PW1 about the pregnancy, she revealed that the appellant was responsible; that PW2 knew the appellant who was their neighbour; and that PW2 took PW1 to hospital for medical examination.

7. PW3, MAG, the complainant's uncle, testified that, on 13th January 2016, he received information that PW1 was 5 months pregnant; that he proceeded to escort her to Kiembeni Police Station; and that PW1 recorded her statement whereupon the appellant was summoned to appear at the Police Station.

8. PW4, George Ogunda, a Principal Chemist at Government Chemist's Department in Mombasa, testified that, acting under the instructions of the court given on 29th March 2017, he collected buccal swabs from the appellant, PW1 and from one HM (PW1's child), to determine his paternity; that he generated DNA profiles from those swabs and prepared a Human Identification Report dated 5th April 2017; and that the results disclosed that there was a 99.9% chance that the appellant was the biological father of HM.

9. PW5, Dr. Julius Maneno Sango based at Coast Provincial General Hospital testified that, upon examining PW1 on 6th January 2016, he established that she was 24 weeks pregnant; that her hymen was broken with an old scar; and that her urine analysis was normal. PW5 recorded his findings in a Post Rape Care Form on the same day which he produced as an exhibit at the trial. PW5 also produced a P3 form prepared by one Dr. Ali on 18th January 2016, and who concurred with his findings. PW5 concluded his testimony after producing PW1's age assessment form dated 18th January 2016 prepared by the Dental Officer in charge at Coast Provisional General Hospital as an exhibit by which PW1's age was assessed as 14 years.

10. The arresting and investigation officer, PC Wilson Rono (PW6), attached to Kiembeni Police Station testified that, on 6th January 2024, PW1 accompanied by her father, one J, reported that PW1 had been defiled and was pregnant; that he recorded PW1's statement; that he escorted PW1 for a medical examination at Coast Provincial General Hospital; that PW1 identified the appellant as the perpetrator; and that he thereafter arrested and charged the appellant. It was PW6's testimony that, after the court ordered on 29th March 2017 that the appellant, PW1 and her child appear before the government chemist for extraction of a buccal swab for the purposes of DNA examination, he escorted the appellant, PW1 and her child for forensic analysis at the government chemist; that he was present when the specimens were collected; and that the exhibit memo which he produced during the trial was prepared at the government chemist's.

11. At the close of the prosecution case, the learned magistrate found that the appellant had a case to answer and put him on his defence whereupon he gave a sworn statement and stated that he lived with his family at Mtopanga; that he challenged the DNA results; that PW4 did not produce the appellant's photograph as proof that the appellant visited the facility for collection of his DNA; and that the results were obtained from the OCS Kiembeni Police Station. He contended that even PW1's parents alleged that he was not the father of the PW1's baby.

12. In its judgment delivered on 13th December 2018, the trial court (D. Mochache, SPM) noted that it had carefully looked at the appellant's defence and found the same to be "improbable, meaningless and incapable of dislodging the prosecution evidence"; and that the prosecution had proved its case beyond reasonable doubt. Accordingly, the trial court found the appellant guilty of the offence and convicted him. At the sentencing hearing on 13th December 2018, the court considered the appellant's mitigation. However, the court noted that the appellant was an old man; that he should have been satisfied with his wife or married another wife; that he instead went for PW1 and defiled her thereby ruining her life; that, as a result, PW1 had to live in a rescue centre for fear of the appellant; that the appellant did not deserve any mercy; and that the sentence prescribed was mandatory. Consequently, the court sentenced the appellant to 30 years imprisonment.

13. Aggrieved by the trial court's decision, the appellant lodged an appeal in the High Court faulting the learned trial magistrate for: ignoring pertinent evidence in relation to the DNA test in that the results were dubious and unsafe; finding that the age of the complainant was established through documentary evidence; failing to find that the charges were not proved beyond reasonable doubt; showing open bias and denying the appellant a fair trial; failing to consider the appellant's exculpatory submissions and defence; and for sentencing the appellant to 30 years imprisonment which, according to him, was excessive in the circumstances.

14. In its judgment dated 29th January 2020, the High Court (J. N. Njagi, J.) found and held: that the conflicting evidence in other documents about the age of PW1 was discounted by the age assessment report; that PW1 was aged 14 years; that the appellant's defence that the DNA analysis was not properly carried out had no basis; that the DNA report proved that the appellant was the father of PW1's child; and that the fact that the appellant was the father of PW1's child corroborated the evidence by PW1 that the appellant defiled her on several occasions. The High Court upheld the appellant's conviction, but substituted the sentence of 30 years with 15 years imprisonment.

15. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on a second appeal challenging his conviction and sentence. In his undated "Supplementary Grounds of Appeal", the appellant faulted the trial magistrate and the learned Judge for: failing to appreciate that the entirety of the circumstances of the case were not considered; disregarding vital inconsistences and serious factual contractions thereby arriving at wrong findings; placing undue reliance and weight on weak and unreliable medical accounts as the only corroborative source of evidence; not observing that the evidence surrounding the DNA evidence was questionable; failing to consider his defence; and for failing to consider that the prosecution failed to prove their case beyond reasonable doubt.

16. In support of his 2nd appeal, the appellant filed undated written submissions citing 4 judicial authorities, namely: Francis Muchiri Joseph v Republic [2014] eKLR for the proposition that, where identification is based on recognition by reasons of long acquaintance, there is no better mode of identification than by name; Terekali & Another v Republic [1952] EA 259 where this Court held that the evidence of the first report of the complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statements can be measured; Kimani Ndungu v Republic (1979) 1 KLR 282, submitting that PW1 was not a straight forward

witness, and that her evidence should have been disregarded; and Pius Arap Maina v Republic [2013] eKLR, arguing that the prosecution must prove a criminal charge beyond reasonable doubt and that "evidential gaps in the prosecution's case raising material doubt must be in favour of the accused."

17. Opposing the appeal, the Senior Principal Prosecution Counsel, Ms. Angela Fuchaka, filed written submissions dated 20th September 2024 citing 4 judicial authorities, namely: Anjononi & Another v Republic (1976-1980) KLR 1566 where it was held that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger; David Ojeabuo v Federal Republic of Nigeria (2014) LPELR 22 555(CA) where the Court of Appeal of Nigeria gave the meaning of a "contradiction" as "lack of agreement between two related facts."; John Maina Mwangi v Republic (2013) JELR 100841 (CA) where the court held that "in any trial, there are bound to be discrepancies" and that an appellate court must determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence; and WLN v Republic [2021] eKLR where it was held that DNA testing provides scientific proof of biological parenthood.

18. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> "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."

19. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on two intertwined points of law, namely: whether the medical reports and the DNA examination reports were reliable and corroborative of the evidence on which he was convicted as charged; and whether the prosecution proved its case beyond reasonable doubt.

20. The remaining grounds of appeal are founded purely on matters of factual evidence, which fall outside the mandate of this Court on second appeal. Consequently, we decline to re-open or re- examine them as they do not raise any points of law worthy of our pronouncement. In any event, the appellant does not state with clarity what circumstances of his case were allegedly not considered; what he considered to be "vital inconsistencies" and "serious factual contractions" that allegedly led to what he refers to as "wrong findings". Neither does he identify in his submissions what elements of his defence were not considered by the trial court or re-considered on first appeal. Likewise, it is not lost on us that his contention that the DNA evidence of the paternity of PW1's child was questionable is no more than a blanketing statement that remains unsubstantiated.

21. Our preceding observations are made on the authority of the case of Adan Muraguri Mungara v Republic [2010] eKLR where this Court set out the circumstances under which it will disturb concurrent findings of fact by the two courts below in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

22. Turning to the two issues, we hasten to point out right at the outset that the factual evidence led by the prosecution proved the charge of defilement beyond reasonable doubt. The three (3) ingredients of the

offence of defilement, namely: the age of the victim; penetration; and the recognition/identification of the accused were proved in accordance with section 8(1) and (3) of the Act.

23. It is common ground that the appellant was PW1's landlord in respect of the house in which she lived with her sister; that he was well-known neighbour to the complainant and her family; that her age, which was stated as 14 years, was confirmed by PW5, who produced her age assessment form dated 18th January 2016; and that penetration was proved by production by PW5 of the Post Rape Care Form together with a duly completed P3 form prepared by one Dr. Ali on 18th January 2016. According to PW5, when he examined PW1 on 6th January 2016, he established that she was 24 weeks pregnant; and that her hymen was broken with an old scar, which went a long way in proving penetration. Moreover, the appellant's identity and the evidential documents aforesaid remained uncontested.

24. For the avoidance of doubt, the term "penetration" is defined in section 2 of the Act as "partial or complete insertion of the genital organs of a person into the genital organs of another person." That is precisely what the prosecution witnesses, including PW1 attested to. In addition, the DNA test on PW1's child matched that of the appellant in proof of his biological parenthood, and was corroborative of the evidence of defilement (see WLN v Republic (supra)).

25. The decision of the High Court of Kenya at Bomet in Sigei v Republic [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, cannot escape our attention. As the High Court correctly observed:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence." (Emphasis added)

26. To our mind, the complainant's own evidence as corroborated by the medical and DNA evidence adduced by PW4 and PW5, and the circumstantial evidence of PW2, proved beyond reasonable doubt that the appellant defiled the complainant. In effect, his defense evidence did not dislodge the prosecution evidence. Having carefully considered the record as put to us, we find that his contention that his defense was not considered is without basis as the record speaks for itself.

27. Pages 7 to 9 (both inclusive) of the judgment of the trial court demonstrate the depth to which the trial court went in analysing the appellant's defense. The same holds for the impugned judgment of the 1st appellate court, where the learned Judge re-examined and analysed the same evidence. For instance, paragraphs 7, 23 and 29 thereof were rendered as follows:

> 7. When placed to his 'defence the appellant stated in a sworn statement that he was living with his family at Mtapanga. That the DNA results were not properly done. That the government analyst said that he did not have his (appellant's) photograph to prove that he visited their facility. That the said witness said that he got the results from the OCS. That even the parents of the girl said that he is not the father to the baby.
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> ... .
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> 23. .... The government analyst confirmed that the appellant was taken to the government chemist though he could not remember him. This can be explained by the fact that the government chemist's office is a public office and the witness cannot be expected to remember every person he deals with. The defence by the appellant that the DNA was not properly carried out has no basis.

... .

The DNA report was very credible. There was no reason to doubt its findings. The report proved that the appellant was the father of the complainant's baby."

28. Having examined the record of appeal, the grounds on which it is anchored, the appellant's submissions and those of the Principal Prosecution Counsel, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety.

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

A. K. MURGOR

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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