Kombo v Republic (Criminal Appeal E013 of 2020)
[2025] KECA 705 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 705 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E013 OF 2020

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 25, 2025

BETWEEN

YASIN KOMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (E. N. Maina, J.) dated 23rd March, 2017 in Criminal Appeal No. 59 of 2016)

JUDGMENT

1. The appellant, Yasin Kombo, has preferred this second appeal against the decision of the High Court which upheld his conviction and sentence for the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 16th April, 2013, at [Particulars Withheld], in Kisumu County, the appellant intentionally and unlawfully caused penetration with his penis to the vagina of R.A.[1], a child aged 10 years.

   [1] Initials used to protect her identity

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and at the same place, he committed an indecent act with R.A., a child aged 10 years, by touching her vagina.

3. The appellant was tried before the Principal Magistrate's Court, Winam. Setting out briefly the evidence that was before the trial court, it was the complainant's testimony that on the material date of 16th April, 2013, her parents had travelled. She was at home alone when the appellant, who was a neighbour, came to their house at about 9.00 p.m. He inquired about the whereabouts of her parents and she informed him that they had travelled. She stated that the appellant invited her to sleep over at his house, as he was leaving to attend a funeral. When they got to the appellant's house, the appellant

informed his wife that he would escort her to the funeral, and thereafter go to watch a football match. The appellant left with his wife. The complainant testified that she slept on the appellant's bed, while his three young children slept on a mattress on the floor.

4. It was the complainant's evidence that the appellant came back to the house in the middle of the night, and joined her on the bed. He began touching her breasts and private parts using his fingers. The complainant protested. He then lay on top of her and inserted his penis in her vagina. The complainant stated that she felt pain, protested and told him that she wanted to go home. She stood up and walked towards the door, but the appellant caught up with her and pushed her. She hit the wall with her chest. The appellant promised to give her money if she did not tell anyone what had just happened.

5. When she got home, she found her sister, C, but did not immediately tell her what the appellant had done to her. It was not until the pain in her chest got worse that she told C what had happened, and that the appellant had pushed her against the wall as she tried to leave his house. She later informed her mother. They reported the matter to the police.

6. The complainant's mother,JA (PW2), told the court that she travelled home to Seme on 15th April, 2013, and came back three days later, on 18th April, 2013. When she came back, she noted that the complainant had difficulty walking. She asked the complainant what was wrong but the complainant insisted she was fine. However, on 28th April, 2014, the complainant told her that on 16th April, 2014, while she was away, the appellant took her to his house and defiled her. When PW2 and her husband (PW3) confronted the appellant, he admitted to having slept on the same bed as the complainant on the material night, but insisted that they slept on opposite sides of the bed. PW2 reported the matter to the police. The complainant was treated at Kochieng Hospital.

7. PW4, George Mutai, a clinical officer at Kisumu District Hospital, stated that he examined the complainant on 29th April, 2013. She was alleged to have been defiled. PW4 stated that the complainant had lower abdominal pain. She had lacerations on her labia minora and majora, which were also hyperemic. Her hymen was perforated, and there was presence of white vaginal discharge. PW4 came to the conclusion that the complainant had been penetrated.

8. PW5, PC Amran Abdi, stationed at Kisumu Police Station, was the investigating officer. It was his evidence that on 29th April, 2013, the complainant's parents (PW3 and PW4) came to the station to report that their daughter had been defiled by the appellant on 16th April, 2013, while they were away. PW5 interrogated the complainant who confirmed the allegations. He issued them with a P3 form which was filled at the hospital. It established that the complainant had indeed been sexually assaulted. He stated that the appellant was arrested by PC Nyakundi on 29th April, 2013, and charged before the trial court.

9. The appellant, in his sworn statement, denied the evidence as narrated by the complainant. He testified that he was at a funeral when the incident is said to have occurred. He did not go back to the house from the funeral as alleged by the complainant. It was his testimony that the complainant's father framed him. He stated that he had an argument with the complainant's mother when her child was alleged to have beaten his child. He admitted that the complainant was his neighbour.

10. After full trial, the appellant was found guilty as charged in the main count of defilement. He was sentenced to serve life imprisonment.

11. The appellant, aggrieved by this decision, filed an appeal before the High Court. He challenged his conviction and sentence on grounds that the learned magistrate erred: by failing to warn himself of the dangers of relying on uncorroborated evidence of a minor before convicting him; for convicting him in the absence of any evidence from an independent eye witness; for failing to acknowledge

that the prosecution did not adduce any evidence linking him to the offence; for finding that the prosecution proved its case beyond reasonable doubt; for failing to consider glaring inconsistencies in the prosecution's evidence; and for failing to consider the appellant's defence.

12. The first appellate court upheld the conviction and sentence awarded by the trial court, after re-evaluating the record of the trial court, and the evidence tendered before it.

13. The appellant is before us on a second appeal. He has proffered five (5) grounds of appeal. The appellant faulted the learned Judge for failing to find that penetration was not sufficiently established by the prosecution. He was aggrieved that the two courts below failed to find that the prosecution ought to have called upon the appellant to take his plea afresh, after the charge sheet was amended to read that the complainant was aged ten (10) years, when the alleged offence was committed. He took issue with the fact that the trial court failed to comply with the provisions of Section 200 of the *Criminal Procedure Code*, by denying the appellant's application to start the case de novo. He was aggrieved that the language used by the court during trial prejudiced him, and impeded him from adequately preparing for his defence. Lastly, the appellant faulted the two courts below for failing to find that the indeterminate life sentence awarded by the trial court was unconstitutional.

14. The appeal was heard by way of written submissions. The appellant appeared in person. It was his submission that the prosecution did not prove the element of penetration to the required standard of proof beyond reasonable doubt. He explained that the complainant received treatment at the hospital for chest pains, and that her testimony in court was an embellishment, and further, that the medical evidence failed to corroborate her testimony. He faulted the prosecution for failing to call upon him to take a fresh plea, after the charge sheet was amended to change the complainant's age from 12 years to 10 years, which violated his right to a fair trial enshrined under Article 50 of *the Constitution*. He reiterated that the trial court erred in rejecting his application to have the case start afresh, after the succeeding magistrate took over conduct of the trial.

15. It was the appellant's further submission that when he took plea, the trial court recorded that the language understood by the appellant was Dholuo, yet the prosecution witnesses gave evidence in Kiswahili and English languages, and the same was not interpreted to the appellant as required by the law. He stated that this impeded him from giving his defence, based on the evidence adduced by the prosecution. With respect to his sentence, the appellant urged that the life sentence meted by the trial court and affirmed by the High Court was unconstitutional, due to its indeterminate nature, and that it denied him the opportunity to be heard in mitigation. In the end, the appellant urged us to allow his appeal, quash his conviction, and set aside the sentence awarded by the trial court.

16. In response, Mr. Okango for the respondent submitted that penetration was sufficiently proved by the cogent evidence of PW1, and was corroborated by the medical evidence adduced by PW4. Counsel was of the view that the question of whether the appellant was called upon to take a fresh plea after the charge sheet was amended was improperly before this Court, as it was not raised before the first appellate court. He asserted that the said omission was not fatal to the prosecution's case as the appellant, who was represented by counsel, was informed of the amendment and did not object to the same. On whether the provisions of Section 200(3) of the *Criminal Procedure Code* were compromised, Mr. Okango explained that the trial court had the discretion to allow or deny the applicant's application for the trial to start de novo. He urged that the appellant's reason for his desire to have the trial start afresh was deemed insufficient by the trial court. He submitted that this ground was improperly before this Court as it was being raised for the first time at the second appellate stage.

17. On the language used during trial, counsel for the respondent urged that the appellant had legal representation throughout the trial, and that his counsel duly cross-examined all the prosecution

witnesses. He submitted that the appellant addressed the court on several occasions, and that when he was making the application for his case to begin de novo, he intimated to the trial court that he understood the Kiswahili language. Regarding sentence, Mr. Okango maintained that the sentence meted by the trial court was legally sound, as the Supreme Court in Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) affirmed that the minimum mandatory sentences prescribed by the *Sexual Offences Act* remained legal. In the premises, counsel invited us to dismiss the entire appeal for lack of merit.

18. This being a second appeal, the mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

19. We have carefully considered the record of appeal, the submissions by both parties, and the law. We form the opinion that the issues that arise for our determination are:

    i. Whether the element of penetration was proved by the prosecution beyond any reasonable doubt;

    ii. Whether the appellant was required to take a fresh plea after the charge sheet was amended;

    iii. Whether the provisions of Section 200(3) of the *Criminal Procedure Code* were complied with;

    iv. Whether the proceedings were conducted in a language the appellant understood;

    v. Whether the appellant's life sentence was unconstitutional.

20. Starting with the first issue, Section 2(1) of the *Sexual Offences Act* defines penetration as:

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

21. It was the appellant's submission that the complainant, in her first report to her parents, stated that 'the appellant tried to use her but he did not manage'. He stated that the clinical officer testified that perforation of the hymen could be occasioned to other causes, other than penile penetration. He contended that the complainant's initial reason for going to the hospital for treatment was due to chest pains, and that her testimony in court relating to the alleged defilement was an embellishment.

22. The complainant told the court that on the material date, the appellant came to their house, inquired about the whereabouts of the complainant's parents, and after being informed that they were away, he invited the complainant to spend the night at his house. When they got to the appellant's house, the appellant left to escort his wife to a wake at a funeral. The complainant stated that she was left in the house with the appellant's children. The children slept on a mattress that was laid out on the floor, while the complainant slept on the appellant's bed. The complainant narrated how the appellant came back in the middle of the night and asked her to make some space for him on the bed. He then started fondling the complainant's breasts and private parts. The complainant protested, but the appellant

proceeded to lie on top of her and inserted his penis in her vagina. The complainant stated that she felt pain. She informed the appellant that she wanted to go back home.

23. As she walked to the door, the appellant grabbed her and pushed her against a wall, injuring the left side of her chest. He offered to give her money to buy her silence, but the complainant declined. The complainant stated that when she went home, and as her sister C was opening the door, the appellant appeared. The complainant went in and left the appellant outside their home. She did not immediately inform her sister what had transpired. However, she stated that the pain on her chest where she hit the wall persisted. That was when she informed her sister what had happened. Her sister advised her to tell their mother. The complainant's parents (PW2 and PW3) were categorical that the complainant told them that the appellant had defiled her. They stated that when they confronted the appellant, he admitted to have slept on the same bed as the complainant on the material night, but denied defiling her.

24. The appellant's assertion that the complainant's evidence that she was defiled by the appellant was inconsistent is misleading. At no point did the complainant change her story, whether in her first report made to her parents, or in her testimony before the trial court. Even upon cross-examination, the complainant remained steadfast that the appellant sexually assaulted her. The complainant's testimony regarding penetration was corroborated by the medical evidence adduced by PW4. The P3 form indicated that the complainant's vaginal walls contained lacerations, and were hyperemic. Her hymen was perforated. She also suffered abdominal pain which caused her difficulty in walking. PW4 concluded that, from his examination, the complainant had been sexually penetrated.

25. We are satisfied that the complainant's evidence taken together with that of the clinical officer sufficiently established the element of penetration.

26. As pointed out by learned prosecution counsel, issues number (ii), (iii) and (iv) relating to whether the appellant was required to take a fresh plea after the charge sheet was amended, whether the provisions of Section 200 of the *Criminal Procedure Code* were violated, and whether the proceedings were conducted in a language the appellant understood, were raised by the appellant for the first time on second appeal. The two courts below were not given an opportunity to form an opinion on the said issues, and they cannot therefore form a basis of vitiating the decision of the first appellate court. We are guided by the decision of the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) where the Court held thus:

> "Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal."

27. This Court in *Wamalwa v Republic (Criminal Appeal 224 of 2020)* [2024] KECA 742 (KLR) (21 June 2024) (Judgment) made similar observations as follows:

> "As submitted by counsel for the respondent, this issue was never raised before the first appellate Court. Ordinarily, this Court can only consider issues addressed by the first appellate Court since venturing into issues which that Court was not called upon to determine would lead to an improper interference with its decisions when in fact it did

not have a chance to render itself on such issues. We will therefore decline the appellant's invitation to tackle an issue that did not benefit from the insights of the two courts below."

28. That being said, we shall briefly address ourselves as follows.

On whether the appellant was required to take a fresh plea,

Section 214(1) of the *Criminal Procedure Code* provides as follows:

> "Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that:
>
> i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
>
> ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross- examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re- examine the witness on matters arising out of further cross-examination."

29. In this case, the charge sheet was amended to reflect the correct age of the complainant, from twelve (12) years old to ten (10) years old. The amendment was done early in the day before case proceeded to trial. None of the prosecution witnesses had testified. The appellant was recorded by the magistrate to have stated that he had no objection to the amendment of the charge correcting the complainant's age. It is quite clear from the proceedings of the trial court that the appellant knew the offence he was charged with, therefore, failure to take plea on the amended charge did not in any way prejudice or affect his defence on the evidence tendered.

30. This Court in Julius Oremo v. Republic Criminal Appeal No. 176 of 2010 (unreported) as cited in the case of Benjamin Kariuki Wairimu v. Republic [2013] eKLR observed as follows:

> " As correctly observed by M/s. Nyamosi, the trial proceeded as if a plea of not guilty had been entered and the Appellant was given full opportunity to cross examine all the witnesses and to testify on his own behalf. At no stage of the trial was there any indication that the Appellant was ready to plead guilty nor was any complaint raised at all. We think in all the circumstances, therefore, that there was no failure of justice occasioned by the irregularity belatedly complained of, and we find it was curable under Section 382 of the *Criminal Procedure Code*."

31. Further, in the case of Josphat Karanja Muna v Republic [2009] eKLR this Court rendered itself as follows regarding the spirit of Section 214 of the *Criminal Procedure Code*:

> " That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be

invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word."

32. In this case, though the appellant was not called upon to take a fresh plea after the charge was amended to reflect the correct age of the complainant, the amendment was done before the charge proceeded to trial. The matter proceeded as though the appellant had pleaded not guilty. The appellant was informed of the amendment. He did not object to the same. In the circumstances, we find that the lack of opportunity to plead did not occasion the appellant any miscarriage of justice or prejudice, and the irregularity arising thereof, was curable under Section 382 of the *Criminal Procedure Code*.

33. On whether the provision of Section 200(3) of the *Criminal Procedure Code* was complied with, it was the appellant's contention that the trial court erred in rejecting his application to have the trial start de novo, when the succeeding magistrate took over conduct of the proceedings. The trial court, in rejecting the application, noted that no sufficient reason had been advanced by the appellant as to why he wanted the case to start afresh. The appellant merely stated that he wanted the case to start afresh since that is what his advocate wished.

34. A reading of Section 200(3) of the *Criminal Procedure Code* directs that it is mandatory for the succeeding magistrate to inform the accused person of his right to recall any witness, where part of the evidence was recorded by the preceding magistrate. It does not however imply that it is mandatory that a trial will be ordered automatically start de novo in every case that the accused person so demands. The right to recall witnesses is not absolute. It depends on the reasons given, and circumstances arising in a case. The court may or may not accede to the request made by the accused person. This was observed by this Court in the case of Ndegwa v Republic [1985] eKLR as follows:

> " Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial."

35. The appellant in the present appeal, in our view, did not advance cogent reasons to warrant the trial magistrate to exercise his discretion in favour of the appellant's application for the trial to start de novo. The interest of all parties concerned in the trial must be taken into account and balanced, including the question whether it would be inimical to the interest of justice for the trial to begin de novo.

36. Section 200(3) of the *Criminal Procedure Code* does not give an accused person the veto power to determine whether a trial should start de novo or not. The test to be considered is whether the accused will be prejudiced if the succeeding magistrate does not form an opinion regarding the demeanour of the prosecution witnesses who had earlier testified if the record of the court is such that it is not clear as to the credibility of the facts set out to be proved by the prosecution. We find no prejudice was occasioned to the appellant by failure to start the trial de novo, as he was earlier accorded the opportunity to cross examine the prosecution witnesses. The trial court was therefore not misdirected in exercising its judicial discretion in dismissing the appellant's application for the case to begin de novo.

37. Were the proceedings conducted in a language the appellant understood? We have perused the record. When the appellant took plea, the trial court noted that the charge was read out to him in a language he understood which was Dholuo. We note that the prosecution witnesses testified in various languages being Kiswahili, Dholuo and English. As pointed out by respondent's counsel, when the applicant made the application to have the case start afresh, he informed the trial court that he understood Kiswahili. He gave his defence statement in Kiswahili. We further note that the appellant was represented by counsel throughout the trial. He cross-examined all the witnesses through

his counsel. We hold that the appellant has not demonstrated that he suffered any prejudice by the languages used before the trial court as it was evident that he followed the proceedings throughout the trial.

38. The last issue pertains to the life sentence meted by the trial court, and affirmed by the first appellate court. The appellant was sentenced to serve life imprisonment, which is the prescribed penalty under Section 8(2) of the *Sexual Offences Act*. He submitted that the indeterminate nature of the life sentence rendered it unconstitutional. The Supreme Court put to rest the question of constitutionality of the minimum mandatory sentences provided by the *Sexual Offences Act* in the case of R vs. Mwangi (supra). The apex court, in that case, determined that the sentences imposed under the *Sexual Offences Act* remained lawful, as long as the penalty sections remained valid, and that the constitutionality or otherwise of the said sentences would need to be tested through the hierarchy of courts before ultimately reaching the Supreme Court for consideration and determination.

39. As such, the life imprisonment sentence affirmed by the first appellate court was lawful.

40. In the result, this appeal fails on both conviction and sentence. It lacks merit. We order it dismissed.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR