MO v Republic (Criminal Appeal 57 of 2020) [2025] KECA 716 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 716 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 57 OF 2020

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 25, 2025

BETWEEN

MO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Siaya R.E. Aburili, J, dated 9th October 2019 in HCCRA No. 42 of 2018)

JUDGMENT

1. MO, the appellant herein, was charged in the Senior Resident Magistrate's court at Ukwala, with the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*. The particulars of the offence were that on 11th and 12th July 2017 at Siranga sub-location in Ugenya, the appellant intentionally caused his penis to penetrate the vagina of VAO[1] a child of 14 years.

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 appellant was tried and convicted on the main charge and sentenced to serve 20 years imprisonment. Aggrieved with both conviction and sentence, he appealed to the High Court, which affirmed and upheld the decision of the subordinate court.

3. Being dissatisfied and aggrieved with the judgment of the High Court, the appellant has now filed this appeal.

4. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, we are mindful that a second appeal must only be confined to points of law, and this Court will not interfere with concurrent findings of the two courts below, unless based

[1] Initials used to protect the identity of the minor

on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

5. The evidence before the trial court, and which was subsequently considered by the High Court was as follows: VAO testifying as PW1 after voir dire examination, recalled that on 11th July 2017 the appellant called her to his house, where he ordered her to remove her clothes; defiled her; gave her Kshs.100/-; the appellant implored her not to tell anyone. PW1 described in graphic detail what the appellant did to her; saying it was the second time it had happened; and that the appellant requested her to go back on the 3rd month of the year.

6. PW1 also alluded to a previous occasion where the appellant defiled her; and as she was leaving his house some children saw her leave and alerted her teachers. When she was questioned by the teachers, she admitted that the appellant had been defiling her. PW1's mother was informed and she was taken to hospital. PW1 stated that when she urinated it stung; and that the appellant had been defiling her since she was in class 3.

7. On cross-examination, PW1 stated that after the defilement she had a discharge and that she was reported by other children. PW1 denied knowledge of her mother and the appellant being in a sexual relationship; or that she was coached by her mother to testify against the appellant. PW1 reiterated that she was defiled on several occasions by the appellant.

8. According to CAO[2], the complainant's mother, who testified as PW2, VAO was born on 31st January 2003; she identified the birth certificate which was produced by the investigating officer. She recalled that on the day in question she went to school and found a teacher by the name Mr. Odero, who asked her whether she was aware of any relationship between her daughter VAO, and the appellant.

9. PW2 stated that the appellant was a caretaker in the home of one Masawa, and sometimes he would subcontract her duties. She stated that both she and the appellant knew they were HIV positive but denied being sexually involved with the appellant. PW2 noted that the complainant was treating other children with goodies. On cross-examination, PW2 denied having a dispute with the appellant or that she coached her daughter to give false information against the appellant; maintained that she never had a sexual relationship with the appellant.

10. PW3, George Otieno Ombwak, a clinical officer examined both the appellant and complainant, he found that the complainant's hymen had been broken and the breakage was not fresh. There was fresh tenderness and a thick offensive smell significant of a sexual infection but the HIV test was negative. The injury was 9 days from the alleged defilement. PW3 filled the P3 form and advised counselling for VAO. PW3 also examined the appellant who had normal genitalia with mild tenderness on the foreskin which was painful. The appellant was found to be on HIV care.

11. On cross examination PW3 stated that he found only one disease on the complainant; explaining that if the appellant was taking his antiretroviral drugs well, then chances of infecting the complainant with HIV were reduced. The medical officer also cautioned that despite the complainant testing negative she was still within the window period for infection as she came to hospital 9 days later after the sexual assault.

12. Jimmy Oluoch Yamo, PW4, a teacher at [particulars withheld] school received information from other students that VAO was having a sexual affair with an adult man, who would give her money. They described the man as a caretaker of a certain home. He relayed the same information to teacher Patricia Opondo, who in turn informed the school's deputy Principal; eventually VAO's mother was requested to come to school over the matter.

[2] Initials used to ensure privacy of the minor is protected and not revealed through recognised link

13. PC John Towett, PW7 the investigating officer received the report from VAO and her mother, that VAO had been defiled by someone known to them. After compiling the witnesses' statements, he charged the appellant with the offence.

14. The appellant in his sworn statement of his defense denied the offence, arguing that on those two dates he was at Ugenya Technical Training Institute. He had been there from 6th July to 14th July 2017 working for Sylvestre Otieno and was working with Francis Okoth and Chrispine Odhiambo from 7.00am to 7.00pm. His major occupation was fencing compounds; and that earned him the nickname, Jasingeng'e.

15. Francis Okoth Omondi who testified as DW2 worked with the appellant as a mason, and that he was with the appellant from 5th July to 14 July 2017 working. On cross examination, DW2 stated that on 11th July, he was with the appellant. They left work at 7.00pm; walked together until Yenga, where they separated, so he could not tell what happened at night.

16. Chrispine Odhiambo More, DW3, testified that he knew the appellant as a fencer, and that from 6th to 14th July 2017 between 7.00am and 7.00pm, he was working with him; further that on the evenings of 11th and 15th July 2017, he was with the appellant. On cross examination, DW3 conceded that he could not account for what the appellant did after the work day ended.

17. The trial court, having considered both the prosecution's case and appellant's defence was satisfied that the ingredients of the offence of defilement had been proved by the prosecution. Among the issues the appellant raised before the High Court was the assertion that voir dire examination was not conducted on PW1 and PW6 who were minors; that the provisions of section 144 of the *Criminal Procedure Code* was violated as a vital witness, Anna, the student who claimed to have seen VAO leaving the appellant's residence was not called to testify; the medical analysis and findings was not conclusive; and his alibi defence was unnecessarily overlooked.

18. The learned judge found that failure to conduct voir dire examination on the particular witnesses did not occasion any prejudice to the appellant as the trial court believed that PW1 was telling the truth. And there was nothing to suggest that she had been coached, PW6's evidence was irrelevant and was not considered by the trial court as it was hearsay; the cumulative medical evidence established penetration, a vital ingredient in defilement; and that with regard to the alibi, the defence witnesses could only account for the hours between 6.00am to 7.00pm. Consequently, the learned judge upheld the conviction and sentence; and dismissed the appeal.

19. The appeal before us raises four grounds of appeal. First, the appellant submits that voir dire was not carried out for PW1 and

6. The respondent on this ground argues that the same question was dealt with adequately by the High Court, which found that voir dire though not properly conducted was not fatal to the prosecution's case with regard to PW1 and that with regard to PW6, the testimony was of no probative value as it was just hearsay.

20. The law is that absence of voir dire examination is not automatically fatal to the evidence of a witness. This was the observation made by this Court in Maripett Loonkomok vs. Republic (2016) eKLR where it was held that:

> "We now turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has

recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case."

21. We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case. See James Mwangi Muriithi vs. R, Criminal Appeal No.10 of 2014. This position was echoed by the Court of Appeal in Athumani Ali Mwinyi vs. Republic, Criminal Appeal No.11 of 2015 where the court stated that:

> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

22. The response to this limb is that a voir dire examination was done for PW1; that the trial magistrate noted so in her Judgement; and that in any event, there is no strict format on how a voir dire is to be conducted.

    This Court has also through a long line of cases held that voir dire examination of children of tender years must be conducted, but that failure to do so does not per se vitiate the entire prosecution case. However, the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person unless there is sufficient independent evidence to support the charge. (See Maripett Loonkomok vs. Republic (2016) eKLR).

23. Whereas we are in agreement with the finding of the High Court that although voir dire was not thoroughly and elaborately conducted on PW1, it nonetheless constituted an examination of the minor's capacity to understand the duty of telling the truth in court, in this regard we draw from the decision in Kairimi vs. Republic Criminal Appeal No. 16 of 2014 [2016] KECA 812 (KLR) 3rd February, 2016 judgment, which addressed the issue on who is a child visa vis a child of tender years, in the following manner:

> "Which definition should guide the courts in determining who is a child of tender years, is it the *Children Act*, or the precedents set by the Court of Appeal? The requirement by the aforementioned provisions of the *Evidence Act* and the *Oaths and Statutory Declarations Act* of voire dire examination of a witness of tender years in a criminal trial is meant to guarantee an accused person a fair trial. A fair trial is guaranteed by the *Constitution*. We have done the aforementioned review of the law and decided cases in an attempt to ascertain in this case whether failure by the trial magistrate to conduct voire dire examination on the complainant a child aged 12 years affected the credibility of her evidence. We are persuaded the definition of a child of tender years under the *Children Act* cannot globally be imported for offences under the criminal law Samuel Warui Karimi. This is because children develop and mature differently depending on their social economic and other factors such that, some children of 11, 12 or 13 years can be very sharp and intelligent witnesses whereas others in the same age bracket may not at all comprehend what is a court of law Samuel Warui Karimi. This explains why the courts have held on the age at 14 years and sometimes even a higher age as the age below which a child is of tender years for purposes of criminal trials and insisted the competency be tested through questions that must be put to the child and answers given by the child be recorded verbatim. The definition of a child of tender years provided under the Children's Act has remained a guide in regard to criminal responsibility."

In the circumstances, we are satisfied that the testimony of PW1 as well as the medical report did establish that the complainant was indeed defiled by the appellant.

24. On the second ground the appellant argues that no penetration was proved. The respondent also argues that the complainant was examined nine days after the incident and that the said medical report could not corroborate defilement in the period lapsed. The clinician's report on this is instructive where it is noted that penetration occurred and VAO had a broken hymen, there was mild tenderness on labia minora, pus cells, offensive foul smell and discharge indicative of a sexually transmitted infection. It is on record that the complainant stated that the appellant defiled her on four different occasions last being 11th/12th July 2017. The medical report supports the complainant's claim of penetration, which is a vital ingredient in an offence of this nature. Accordingly, this ground of appeal also fails.

25. With regard to sentence, the appellant alleges that his mitigation and the social inquiry report were disregarded during sentence. On this limb, the respondent points out that the social inquiry report is meant to guide the court; that in any event such a report is not binding to the court, as it only serves as a guide and helps the court get a clear picture in exercising its sentencing discretion. As pointed out by learned counsel for the State, the learned judge considered all contents in the social inquiry report, observing that the appellant was portrayed as a person loved by his family, but on the other hand the victim's family were against leniency. The court also considered the aggravating factor that the appellant knew of his HIV status and proceeded to put the child at risk by defiling her, and further that he was not remorseful; thus, the finding that the 20 years imprisonment was sufficient.

26. It is submitted that in meting out the sentence, the court exercised its discretion; there is no evidence that the same was whimsically exercised. We are urged not to interfere with the sentence and dismiss the ground of appeal. We take note that the High Court made an order for a social inquiry report to be filed by the Siaya County Probation Officer, on the ground that the record did not show that the appellant was ever given a chance to present his plea in mitigation prior to sentence. The report was availed; and on a resentencing ruling, dated 11th November 2019, the court considered the report as well as the appellant's mitigation and was satisfied that the sentence was proper considering the circumstances and upheld the trial court sentence. This limb has no leg on which to stand.

27. On the fourth ground the appellant submits that his defense of alibi was not considered. From the record, the appellant called 3 witnesses, all who testified that they were with the appellant from 6th to 14th July 2017 between the hours of 6.00am to 7.00pm;

none of them could however vouch for the whereabouts of the appellant after 7.00pm; the learned judge took this explanation into account. Indeed, the appellant's witnesses did not help to strengthen the alibi defence raised and we find that it is therefore erroneous for the appellant to claim that his alibi defence was ignored. This ground of appeal also fails.

28. The appellant has protested the mandatory minimum sentence meted, yet this issue was not raised before the High Court. Procedurally this court would have no jurisdiction to determine the same. Yet even if one were to argue that in dealing with resentencing, the issue of sentencing was addressed by the first appellate court, we take note that the recent decision by the Supreme Court 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) is to the effect that minimum sentences under the *Sexual Offences Act* are valid and constitutional for as long as section 8 of The *Sexual Offences Act* remains in the statute. This Court therefore has no jurisdiction to interfere with any such sentence.

29. This Court is well guided by the Mwangi case (supra) and finds that it has no jurisdiction to interfere with the sentence as affirmed by the High Court. The upshot of the foregoing is that the appellant's appeal on both conviction and sentence lacks merit and is dismissed.

It is so ordered.

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