Kasanga v Republic (Criminal Appeal 6 of 2020)
[2025] KECA 693 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 693 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 6 OF 2020

KI LAIBUTA, GWN MACHARIA & WK KORIR, JJA

APRIL 11, 2025

BETWEEN

MWANGA KASANGA ALIAS BENJAMIN KASANGA MWANGA . APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 20th March 2019 in HCCRA No. 39 of 2018)

JUDGMENT

1. The appellant, Mwanga Kasanga alias Benjamin Kasanga Mwanga, is before us on a second appeal. The appellant was charged before the trial court with the offence of defilement contrary to section 8 (1) as read with sub-section (3) of the *Sexual Offences Act*. The particulars of the charge stated that, on 18th February 2015 at Kilifi Township within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of PKL, a child aged 6 years. After the trial, the appellant was convicted of the lesser offence of sexual assault found in section 5(1) of the *Sexual Offences Act* and sentenced to twenty-five years in prison. His appeal to the High Court (R. Nyakundi, J.) failed on 20th March 2019, prompting the present appeal.

2. Before the trial court, G.K. (PW1), the complainant's father testified that he had secured the services of the appellant, a motorcycle rider, to be picking up the complainant from school. On the material day, the appellant dropped the complainant a few meters from home and hurriedly left without greeting as was the norm. When he went to where the child was, he found her crying. He thought that something was amiss and asked his female worker to examine the child. It turned out that the complainant had a discharge and sand in her private parts. Upon interrogating the complainant, she told him that the appellant had injured her private parts. He then escorted her to the hospital, where he was informed by the doctor that the complainant had been defiled.

3. The complainant, PKL, testified as PW2, stating that she was in class 2 at [particulars withheld] Primary School. She stated that while her mother would escort her to school in the morning, she would either take a motorbike or walk home in the evening. She narrated that on the material day, the appellant picked her up from school and drove her into a forest where he showed her a thorn tree called "mkurudadi" near a certain house. It was her evidence that the appellant pierced her vagina with the thorn from that tree and told her not to tell anyone. The appellant then gave her money to buy a doughnut and escorted her home. She later informed her father of the ordeal.

4. Police Constable Philip Dzombo (PW3), then based at Kilifi Police Station, testified that on 18th February 2015, he commenced investigations, which led him to arrest and charge the appellant. He produced the complainant's birth certificate, which indicated that she was 6 years old. He also informed the Court that the complainant was treated, and a P3 form was filled.

5. Dr. Bursa Ahmed (PW4) testified on behalf of Dr Kadivani, having worked with her for three years. She stated that the complainant was presented to the hospital with soiled clothes and a history of sexual assault. Multiple bruises were noted on her thigh and vulva, with no discharge. The inner genitalia had injuries, but the hymen was intact. No spermatozoa were seen. The injuries were one day old. The injuries were classified as harm, and the victim was placed on post-exposure prophylaxis. The witness produced the complainant's Post-Rape Care and the P3 forms as exhibits.

6. In his defence, the appellant who testified as DW1 denied committing the offence. He stated that on the material day, he picked up the complainant together with his daughter, N., from school at 4.45 pm. He first dropped his daughter at home and then dropped the complainant by 5.00 pm. His testimony was that Mr. Kadenge (DW2), a teacher to the complainant, had told him that the complainant had difficulties sitting in class and he should pass the information to her parents. Upon dropping the complainant, he relayed the information from Mr Kadenge to PW1's worker and that despite seeing PW1, he did not bother to inform him since he already left the message to the worker.

7. CKC (DW2) testified that he was a teacher at [particulars withheld] Primary School and a teacher to the complainant. He stated that on the material day at around 10.00 am during break time, he noticed that the complainant had trouble sitting and would do her work while standing. Upon interrogation, the complainant informed him that she had a problem with her back. In a quest to dig deeper, he asked the complainant's older sister, N., if she was aware of the complainant's problem, but she was not in the know. He called the father of the complainant and notified him of the issue. When the appellant picked up the child in the evening, he once again asked him to notify the father of the complainant about the complainant's problem.

8. In this appeal, the appellant faults the first appellate court for abdicating its duty to re-evaluate the evidence on record; confirming his conviction on the allegedly contradictory and uncorroborated evidence of PW1 and PW2; confirming his conviction, yet the offence was not proved; and affirming an unjust and excessive sentence.

9. During the hearing of the appeal, the appellant was unrepresented while learned prosecution counsel, Ms. Mwaura appeared for the respondent. They sought to rely on their written submissions and made brief oral highlights.

10. In his undated submissions, the appellant faulted the first appellate court for what he termed as failure to exhaustively re- analyze and re-evaluate the entire evidence. He rehashed the evidence in order to demonstrate that there were inconsistencies and discrepancies in the testimonies of the witnesses, arguing that the elements of the offence were not proved. Referring to Republic vs. Hadson Ali Mwachongo [2016] eKLR to underscore the importance of proving the age of the complainant,

the appellant submitted that the age of PW2 was not proved, as a certified birth certificate was not produced as an exhibit. He maintained that failure to produce the document and the inconsistencies in the evidence of the witnesses amounted to failure by the prosecution to establish the offence charged. Submitting orally in Court, the appellant faulted the trial court for convicting and sentencing him for an offence he was not charged with.

11. For Ms. Mwaura, the submissions were dated 10th March 2022. Addressing the challenge raised in respect to the voir dire examination of PW2, counsel referred to Johnson Muiruri vs. Republic [1983] KLR 445 and agreed with counsel for the appellant that voir dire examination of a child of tender age is indeed a necessity. However, counsel submitted that, in the appeal at hand, the process of voir dire examination of PW2 could not be faulted, and that it met the threshold set by the Court in Japheth Mwambire Mbitha vs. Republic [2019] eKLR as well as the procedure provided in section 19 of the *Oaths and Statutory Declarations Act*, Cap 15.

12. Responding to the appellant's submission that the learned Judge erred in failing to find that his conviction could not stand because he was convicted for an offence not charged, counsel asserted that the trial court rightly convicted the appellant of sexual assault, and that such power was bestowed upon the court under section 179 of the Criminal Procedure Act. Learned prosecution counsel relied on Robert Mutungi Muumbi vs. Republic [2015] eKLR; and John Irungu vs. Republic [2016] eKLR to urge that the offence of sexual assault was cognate to defilement, and that the elements of sexual assault were proved by the prosecution. Ms. Mwaura consequently urged for the dismissal of the appeal in its entirety.

13. This being a second appeal, our focus is on matters of law, as the facts are deemed to have been settled in the two courts below. The Court will only intervene in matters of fact where it is demonstrated that the 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. This is the import of section 361(1)(a) of the *Criminal Procedure Code*, which has been expounded by the Court in several decisions, including Dzombo Mataza vs. Republic [2014] KECA 831 (KLR) where it was held that:

> "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 – see Okeno vs. Republic (1972) E.A. 32. 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."

14. We have reviewed the record of appeal and the submissions by the parties. The issues for determination in this appeal are whether the first appellate court discharged its mandate judiciously, and whether the trial was correct in invoking and relying on section 5(1) of the *Sexual Offences Act* to convict the appellant.

15. The appellant contends that the first appellate court did not discharge its mandate judiciously. The duty of a first appellate court was succinctly summarized by the Court in Sango Mohamed Sango & Sofia Swaleh Hassan vs. Republic [2015] KECA 178 (KLR) as follows:

> "A first appeal to this Court is by way of a retrial, entailing an exhaustive appraisal and re-evaluation of the evidence. The Court is not merely called upon to scrutinize the evidence

to see whether it supports the findings and conclusions of the trial court. On the contrary, the Court must weigh conflicting evidence, make its own findings, and draw its own independent conclusion."

16. This is the touchstone of the mandate of a court exercising its first appellate jurisdiction. However, we must also appreciate that there is no specific methodology for discharging the mandate. In the present case, the learned Judge appreciated his role and referred to the case of Pandya vs. Republic [1957] EA 336 to explain that role. In the introductory part of the judgment, he rehashed the evidence and the submissions of the parties. In the final part of the judgment, the learned Judge conducted an independent analysis and arrived at his own conclusion, affirming the conviction and sentence. We are therefore satisfied that the learned Judge discharged his mandate judiciously and the resulting judgment complied with section 169 of the *Criminal Procedure Code*.

17. The other issue raised by the appellant is that, despite being charged with defilement contrary to section 8 (1) as read with sub-section (3) of the *Sexual Offences Act*, he was convicted and sentenced for sexual assault contrary to section 5(1) of the *Sexual Offences Act*. Addressing this issue, the learned Judge held as follows:

> "What is suggested here is that the prosecution should have applied for amendment of the charge pursuant to Section 214 of the *Criminal Procedure Code*. It follows from this understanding that the appellant took the view of such action by the learned trial Magistrate to be an error or misdirection for proceeding with a trial on a defective charge ...
>
> The question then is whether or not the Learned trial Magistrate indictment and conviction of the appellant with a lesser offence is inconsistent with Section 214 of the *Criminal Procedure Code*. In my view, I do not think so such a motion pursued by the Learned trial Magistrate is appropriately covered under Section 186 of the *Criminal Procedure Code*. Failure to set forth Section 186 as a specific form of indictment mandate by statute to establish the charge did not prejudice nor occasion an injustice to the appellant. As long as the statutory language is otherwise satisfied, any errors or omissions in the present appeal are curable under Section 382 of the *Criminal Procedure Code*. This ground of appeal, therefore fails."

18. We only need to point out that section 186 of the *Sexual Offences Act* was deleted by the Statute Law (Miscellaneous Amendment) *Act, 2023 (No. 19 of 2023)*, which came into force on 11th December 2023. Section 179 of the *Criminal Procedure Code* may therefore continue to be the fallback provision for conviction for a proved minor offence which an accused person was not charged with. After all, as stated in the preamble, the *Criminal Procedure Code* is an "Act of Parliament to make provision for the procedure to be followed in criminal cases."

19. Coming back to the issue at hand, we find the reasoning and holding by the learned Judge to be in tandem with the decisions of this Court. For instance, in DKG vs. Republic [2020] eKLR, the Court faced with a similar scenario held that:

> "Even though the evidence on record did not disclose penetration with a genital organ to warrant the charge of defilement, the evidence clearly points to the fact that the appellant had inappropriate sexual contact with the complainant. The Learned Judge was therefore correct in concluding that the evidence on record disclosed the offence of sexual assault under the *Sexual Offences Act* and not defilement under Section 8(3) of the *Sexual Offences Act*. We consequently do not agree with the appellant's contention that failure of the trial court to invoke Section 214 of the *Criminal Procedure Code* and amend the charges to suit

the circumstances of the case was fatal. Accordingly, we see no reason to interfere with the appellant's substituted conviction for the offence of sexual assault under section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act*."

20. Considering the jurisprudence emanating from this Court, we do not find an arguable point of law worth further analysis, save for affirming and upholding the learned Judge's analysis and conclusion as the correct position of the law.

21. The next issue is whether the offence under section 5(1) of the *Sexual Offences Act* was proved. The appellant's main complaint is that the prosecution failed to discharge its burden of proof. He faults the two courts below for relying on the contradictory evidence of the complainant, and maintains that penetration and the age of the complainant were not proved.

22. Before we delve into the two issues, we wish to inform the appellant that the holding in Maina vs. Republic [1970] EA 370 that "in the cases of sexual offences it is dangerous to convict on the evidence of a woman and a girl..." is no longer good law by virtue of the enactment of the proviso to section 124 of the *Evidence Act*.

23. Turning to the question as to whether the ingredients of the offence were proved, PKL (PW2) testified that the appellant pierced her vagina with a thorn from a tree known as "mkurudadi" on her way from school. She was very detailed on what transpired near that "mkurudadi" tree. The evidence of PW2 was corroborated by Dr Bursa Ahmed (PW4), who testified that the complainant had multiple bruises on her thighs and vulva with no discharge while her inner genitalia had injuries, and that the hymen was intact with no spermatozoa seen. The appellant did not rebut this evidence; therefore, he cannot contend that this evidence was not corroborated. The evidence established that the appellant had inappropriate sexual contact with the complainant.

24. Regarding the complainant's age, the appellant contested that the same was not proved as a certified copy of the birth certificate was not produced. On this, we observe that the provision under which the appellant was subsequently convicted only required the prosecution to prove that the appellant had unlawfully penetrated, with any part of his body or an object, the genital organ of the complainant. Section 5 of the *Sexual Offences Act* does not require that the victim be a child. Age was therefore not an issue in the appellant's conviction. We will let the provision speak for itself as follows:

> " 5. (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.

(2) 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."

25. In order to secure a conviction, another ingredient of the offence that the prosecution was required to prove was that the sexual act was unlawful. At page 138 of the 10th Edition of Black's Law Dictionary, sexual assault is defined as "sexual intercourse with another person who does not consent." The dictionary goes on to state that:

> " The Model *Penal Code* lists eight circumstances under which sexual contact results in an assault, as when an offender knows that the victim is mentally incapable of appreciating the nature of the conduct, either because of a mental disease or defect or because the offender has drugged the victim to prevent resistance."

It therefore means that unlawful sexual assault occurs where a sexual act is committed without the victim's consent or where the victim is incapable of consenting due to age, disability or coercion. The question is whether the prosecution discharged this burden.

26. Although the age of the victim is not an ingredient of the offence of sexual assault, establishing that the victim was a child at the time of the commission of the offence is one way of demonstrating that the sexual act was unlawful. The question therefore is whether the complainant was a child. The prevailing jurisprudence is that the age of a child is not exclusively proved by the production of a birth certificate. For instance, see Richard Wahome Chege vs. Republic [2014] KECA 453 (KLR). Age can be proved through oral evidence, documentary evidence or even the evidence of the parent. In this case, PW1, who was the complainant's father, stated that his daughter was 7 years old, having been born in 2008, and was in class 2. PKL did not state her age but corroborated her father's evidence that she was in class 2. When cross-examining these witnesses, the appellant's counsel never attempted to impeach their evidence on the age of the victim. We are, therefore, satisfied that the complainant was 7 years old at the time of the commission of the offence. Thus, the onus placed upon the prosecution to prove that the sexual assault on the complainant was unlawful was discharged in light of the provisions of section 8(1) of the *Sexual Offences Act*, which prohibits sex with a child, thus making sexual acts with children unlawful. By dint of the stated provision, a child has no capacity to consent to any sexual act and therefore, any sexual act with a child is by statutory enactment unlawful. Ultimately, we find that the prosecution proved the offence of sexual assault.

27. In his grounds of appeal, the appellant also challenged the propriety of the voir dire examination of the complainant. However, he did not pursue this limb in his submissions. Be that as it may, we have reviewed the record and are satisfied that the trial court complied with the legal requirements pertaining to voir dire examination. In respect to the complaint that his conviction should not stand for being based on inconsistent evidence, we find that the discrepancies touching on the age of the victim and the evidence surrounding the reporting of the incident were minor and did not water down the solid evidence proving each element of the charge.

28. The final issue raised by the appellant was that the sentence was unjust, excessive, and violated sections 216 and 329 of the *Criminal Procedure Code*. By dint of section 361 (1) (b) of the *Criminal Procedure Code*, we are barred from entertaining appeals against sentence unless the sentence was passed by the trial court without jurisdiction or enhanced by the High Court. The cited provision also states that the severity of a sentence is a matter of fact which is not within the remit of a second appeal. This Court is further barred from entertaining issues raised for the first time on a second appeal. The Supreme Court explicitly spoke to this principle of law in Republic vs. Mwangi; Initiative for Strategic Litigation in

Africa (ISLA) & amp; 3 Others (Amicus Curiae) [2024] KESC 34 (KLR). In this appeal, we find that the alleged violation of sections 216 and 329 of the *Criminal Procedure Code* is being canvassed for the first time in this appeal and is, therefore, not within our jurisdiction.

29. As to whether the sentence was just, we note that the sentence provided for under section 5(2) of the *Sexual Offences Act* is "not less than 10 years, but which may be enhanced to imprisonment for life." Although it is not clear from the record when the appellant was released on bond, it is deducible that the trial was conducted while he was out on bond. For instance, on 18th August 2016, the appellant was absent and a warrant of arrest was issued. It cannot be said that 25 years' imprisonment is severe and excessive, considering the kind of sexual assault visited upon the 6-year-old girl by a person who had been entrusted with the duty of dropping and picking her from school. That being the case, we find no misdirection on the part of the trial court to warrant our interference with the exercise of the sentencing discretion.

30. In the end, we find no merit in this appeal, which we hereby dismiss in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF APRIL 2025.

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR