Sheikhe & another v Republic (Criminal Appeal E002 of 2024)
[2025] KECA 675 (KLR) (11 April 2025) (Judgment)

Neutral citation: [2025] KECA 675 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E002 OF 2024

KI LAIBUTA, GWN MACHARIA & WK KORIR, JJA

APRIL 11, 2025

BETWEEN

HUSSEIN SHEIKHE ..... 1ST APPELLANT

MOHAMED ALI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa (Kiarie, J.) dated 12th January 2024 in HCCRA No. E035 of 2023)

JUDGMENT

1. The appellant and two others were charged before the Chief Magistrate's Court at Mombasa with the offence of gang defilement contrary to section 10 of the *Sexual Offences Act*. The particulars of the offence were that, on 23rd February 2017, at Bondeni Estate, in Mombasa sub-County within Mombasa County, they intentionally and unlawfully penetrated the vagina of N.A., a child aged 14 years. In the course of the trial, the 3rd accused person passed away and the charge against him was dropped. At the conclusion of the trial, the 1st appellant, Hussein Sheikhe, and the 2nd appellant, Mohamed Ali were convicted and each one sentenced to 15 years imprisonment. Thereafter, they referred an appeal to the High Court (K. W. Kiarie J.), which was dismissed on 12th January 2024, leading to this second appeal.

2. For purposes of record, it is imperative to point out that the 2nd appellant's appeal abated upon his demise during the pendency of this appeal. Consequently, only the appeal by Hussein Sheikhe, hereinafter referred to as the appellant, proceeded for hearing on 18th November 2024.

3. At the trial, the complainant, N.A., a child with mental challenges, whose condition was confirmed by Dr. Charles Mwangome (PW5), testified as PW1 through an intermediary (S.A.). Her evidence was that, on the material day while assisting her mother to fetch water, she was accosted by a man who

held her by the hand and took her to a house upstairs. Inside the house, she found three other men. They undressed her and defiled her in turns. She raised alarm but was threatened with a knife. When people started knocking on the door, her assailants locked her in the toilet from where she was rescued by her sister and taken to hospital. Her evidence was that she bled as a result of the violation and the bedsheets were stained with blood.

4. The complainant's mother (T.A.) testified as PW2 that her daughter was aged 14 years, and that she became mentally challenged at the age of three years. She stated that the complainant went missing as they were fetching water. While ascertaining her whereabouts, her other daughter, Z, emerged with her. She noted that PW1 was bleeding, sweating and crying.

   They proceeded to the police station and later to Coast General Hospital, where PW1 was attended to.

5. Z.W.Y. (PW4) recounted finding the complainant inside the house where the appellant was with three other men. She stated that while searching for the complainant, the appellant and his team had denied her access to their house, but upon forceful entry, they found the complainant locked in a toilet. She stated that one of the four men escaped but they managed to lock up the other three, who included the appellant, in the house from where they were eventually arrested. O.B.A. (PW3) gave an account similar to that of PW4, adding that he was stabbed with a knife by one of the four men as they struggled to rescue the complainant.

6. Dr. Deepkunar (PW7), produced the complainant's Post Care Rape (PCR) and P3 forms which were filled by Dr Tima. The medical evidence established that she had lacerations of the labia minora, a cup wound on the fourchette, a laceration of the anus and a loose sphincter. A high vaginal swab showed epithelial and pus cells. The conclusion was that she had been defiled.

7. Cpl Stephen Okando (PW6) testified that upon receiving a report of defilement, he proceeded to the scene where they found the appellant and two others locked inside a house. He stated that upon being granted access to the house, he recovered shoes, a dress and pants belonging to the complainant. He also recovered a bloodstained bedsheet. He arrested the suspects and escorted them to the police station. He produced the recovered items as exhibits.

8. In defence, the appellant stated that he was at work in Shimazi area on the material day and that upon returning home, he found a crowd gathered in the presence of police officers. He learnt that his co-accused, with another person who had escaped, were alleged to have defiled a girl. He was arrested with the two men who were in the house, escorted to Central Police Station, from where they were taken to court. He confirmed that he lived in the house from which his co-accused were arrested.

9. Through the memorandum of appeal filed by his counsel on 4th April 2024, the appellant faults the first appellate court for upholding the evidence of the intermediary which was recorded contrary to the provisions of sections 31 and 32 of the *Sexual Offences Act*; affirming his conviction on evidence of identification that was not foolproof; failing to find that common intention was not established; acting on evidence marred by inconsistencies and contradictions; failing to find that his alibi defence was not considered; disregarding his submissions; and failing to exercise its discretion thereby upholding a mandatory minimum sentence.

10. When the appeal came up for hearing, learned counsel, Mr. Kago, appeared for the appellant while learned prosecution counsel, Ms. Mutua, was present for the respondent. Mr. Kago had filed submissions dated 14th August 2024, while Ms. Mutua's submissions were dated 8th November 2024. In addition to the written submissions, Mr. Kago made oral arguments.

11. In urging the appeal, Mr. Kago identified three issues for determination. On the first issue regarding the quality of the evidence of the complainant who testified as PW1, counsel submitted that her evidence

was unreliable because there was no compliance with the law on the admission of evidence adduced through an intermediary. Counsel referred to section 31 of the *Sexual Offences Act* and submitted that, an application must be made to the trial court for the declaration that a witness is vulnerable before a protection measure, being the appointment of an intermediary, can be engaged. Counsel also argued that the vulnerability of the complainant could only be determined through a voir dire examination by the trial magistrate. According to counsel, it is only after those steps have been taken that the evidence of the vulnerable witness can be received through an intermediary.

12. Counsel submitted that the trial court erred by failing to ascertain whether the victim was vulnerable, and making such a declaration before allowing her to testify through an intermediary. Citing M. M. vs. Republic [2014] eKLR, counsel asserted that a trial court ought to first satisfy itself that a potential witness would be exposed to undue mental stress before making a declaration of vulnerability and allowing the witness to testify through an intermediary. Wrapping up his submission on this issue, counsel pointed to the fact that the complainant communicated through gestures and contended that this confirmed that the intermediary gave her own testimony instead of acting as a mouthpiece for the complainant. According to counsel, this was a violation of the law.

13. Turning to the second issue that the prosecution failed to discharge its mandate, counsel submitted that the elements of the offence were not proved to the required standard. Counsel referred to the ingredients of the charge and submitted that the appellant was never identified as the person who perpetrated the offence in question. In support of this point, counsel argued that, not only was the evidence of the complainant improperly received, but was also marred by contradictions as to the events, thus rendering it unreliable.

14. Still pressing on with the submission that the prosecution failed to adequately prove the identity and participation of the appellant in the commission of the offence, counsel submitted that there were glaring contradictions in the testimonies of the eyewitnesses as to: whether it was all the four men in the house or only Bonge who defiled the complainant; whether the suspects were indeed locked up in the house awaiting the arrival of police officers; and whether the appellant was among those locked up in the house when the police officers arrived. According to counsel, the appellant was arrested because he lived in the house where the crime was committed, and not that he was among those who committed the offence. Counsel submitted that the contradictions and inconsistencies were significant, and that the appellant ought to have been given the benefit of doubt.

15. On the third and final issue, counsel urged the Court to interfere with the sentence, arguing that its mandatory nature denied the trial court an opportunity to consider the appellant's mitigation and the peculiar circumstances of the case at hand. Counsel relied on Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR to submit that the sentence violated the appellant's rights to human dignity and fair trial. In conclusion, the appellant's counsel urged us to allow the appeal by quashing the conviction and setting aside the sentence.

16. On her part, Ms. Mutua for the respondent, referred to section 361(1) (a) of the *Criminal Procedure Code* and Njoroge vs. Republic [1982] KLR 388 to point out the limited jurisdiction of the Court on a second appeal.

17. Turning to the substance of the appeal, counsel rejected the submission by counsel for the appellant that the evidence of the complainant was improperly received, asserting that the proper procedure for appointing an intermediary was followed and, in particular, that the provisions of section 31 (1) (c) and (2) (b) of the *Sexual Offences Act* were duly complied with. Counsel referred to Article 50(7) of *the Constitution* and section 2 of the *Sexual Offences Act* as the constitutional and legal basis for receiving evidence through an intermediary. In answer to the appellant's argument that the

vulnerability of the complainant could only be determined through voir dire examination, counsel relied on Maripett Lonkomook vs. Republic [2016] eKLR for the proposition that there is no need for such an examination once the trial court is satisfied that the victim is mentally challenged.

18. Responding to the appellant's contention that the appeal should be allowed due to inconsistencies and contradictions in the prosecution's case, Ms. Mutua submitted that the evidence of the complainant, as relayed to the court by the intermediary, was cogent and consistent, and was corroborated by the medical evidence of PW7. Counsel argued that, if there were any infractions, they were minor and did not affect the substratum of the case. The decision of Richard Munene vs. Republic [2018] eKLR was cited for the proposition that it is only when the inconsistencies or contradictions are substantial and fundamental to the main issues in question and, thus, necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it. In conclusion of her submission on this issue, counsel rehashed the evidence on record and submitted that the appellant was properly identified.

19. In response to the other grounds of appeal, counsel asserted that the ingredients of common intention were proved and relied on the statement in Samuel March Philips, A Treatise on the Law of Evidence (1820), 4th ed. P96-100 that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan becomes an act of the whole party and, therefore, proof of such act will be evidence against any of the other who were engaged in the same general conspiracy. On the claim that the appellant's alibi defence was not considered, counsel submitted that it was considered in line with the principles highlighted in Victor Mwendwa Mulinge vs. Republic [2014] eKLR before being rejected. Counsel finally referred to the holding in MGK vs. Republic [2020] eKLR to urge that the severity of a sentence is a matter of fact, and that the Court on a second appeal is barred from considering the issue. We were therefore urged to dismiss the appeal in its entirety.

20. As appreciated by counsel for the parties, in a second appeal as is the one before us, the Court, by dint of section 361 (1) (a) of the *Criminal Procedure Code* concerns itself only with matters of law, the issues of fact having been settled in the two courts below. The only exception is where it is demonstrated that matters which ought to have been taken into account were not considered or those which should not have been considered were taken into account in the determination of the matter, or that, from the facts on record, the decision arrived at was plainly wrong. The principles have been stated again and again 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. We do not discern such misgivings in this appeal."

21. We have reviewed the record of appeal and the submissions by counsel on record for the parties. In our considered view, the core issues for determination in this appeal are whether the appointment of the intermediary complied with the law; and whether the elements of the offence of gang rape were proved. The question as to whether the appellant has made a case for our interference with the sentence will only be considered if the conviction is upheld.

22. At the core of the appellant's case is the question of the regularity of the evidence of the complainant (PW1), which was taken with the help of an intermediary. The appellant faults the process of the appointment and admission of S.A. as an intermediary. His complaint is two-pronged: first, that the trial court failed to ascertain whether PW1 was indeed a vulnerable witness and, secondly, that the intermediary gave her own evidence instead of conveying the evidence of the complainant.

23. In M. M vs. Republic [2014] KECA 441 (KLR), the Court underscored the objective of proceeding through an intermediary thus:

> " The whole object of the proceedings through an intermediary is to achieve fairness in the determination of the rights of all the people involved in a trial and to promote the welfare of a child or vulnerable witness."

24. *The Constitution* in Article 50 (7) recognizes the right of a complainant to communicate with the court through an intermediary. Relevant and specific to this appeal is section 31(1) & (2) of the *Sexual Offences Act*, which states as follows:

"(1) A court, in criminal proceedings involving alleged the commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is

a. the alleged victim in the proceedings pending before the court;

b. a child; or

c. a person with mental disabilities.

2. The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -

a. age;

b. intellectual, psychological or physical impairment;

c. trauma;

d. cultural differences;

e. the possibility of intimidation;

f. race;

g. religion;

h. language;

i. the relationship of the witness to any party to the proceedings;

j. the nature of the subject matter of the evidence; or

k. any other factor the court considers relevant."

From the cited law, vulnerability of a witness will arise for various reasons, including age, race, language or trauma. The list of factors to be considered in determining whether a witness is

vulnerable is not closed, and the court is allowed to declare a witness vulnerable for any other factor it considers relevant.

25. In answer to the appellant's complaint that the law was not complied with in declaring the complainant a vulnerable witness, we start by observing that section 32 of the *Sexual Offences Act* provides the procedure for declaring a witness vulnerable, thereby allowing the witness to testify through an intermediary. Section 32 (1) of the *Sexual Offences Act* requires the prosecution to inform the victim that he or she would be declared a vulnerable witness. Such information, where the witness is a child or incapable of appreciating its import, is given to the parent, guardian or a person in loco parentis. Sub-section (2) obligates the trial court to confirm that the prosecution has informed the witness of the possibility of being declared vulnerable and, if this has not been done, ensure that the witness is so informed.

26. A perusal of the record shows that, on 12th September 2017, Ms. Maina for the State, sought to declare the complainant a vulnerable witness. A medical report was produced to that effect. She proposed S.A. as the intermediary and explained that S.A. lived with the complainant and understood her language. In reply, Mr. Magolo for the appellant informed the trial magistrate that he had no objection to the application made by the State, but reserved the right to raise any issue in the course of the proceedings. The application was allowed, and S.A. was sworn and examined by the court. She informed the court that she will provide a true interpretation of the evidence of the complainant. Counsel indicated that he had no questions for the intermediary. It was at that point that the magistrate proceeded to admit S.A. as an intermediary. We find this procedure elaborate and cannot be faulted. The appellant, who was represented by counsel, had an opportunity and indeed, participated in the proceedings leading to the admission of the intermediary. Additionally, the trial magistrate recorded the assessment and, based on the evidence placed before the court, found it fit to have the evidence of the complainant received through an intermediary. Therefore, the trial court cannot be faulted because, as per the provisions of sections 143 and 125 of the *Evidence Act*, the complainant was a necessary witness who was declared vulnerable due to her mental incapacity.

27. The other contention by the appellant is that the intermediary was allowed to give her own evidence instead of being a mouthpiece of the complainant. The starting point is the observation that the record is clear that the evidence of complainant was taken "and interpreted to Court by S.A." It is also noticeable that the appellant's counsel did not oppose this mode of giving evidence. Additionally, even on the first appeal, the appellant confirmed that the complainant gave evidence by sign language, which was interpreted. There is also no doubt that S.A. informed the trial court that she had lived with the complainant and was conversant with her language or mode of communication. The appellant did not challenge this, and the trial court was satisfied that S.A. was a competent intermediary. It cannot, in the circumstances, be said that the intermediary gave her own story and not what the complainant told her. Prior to receiving the evidence of the complainant through the intermediary, the trial court was satisfied that the complainant could properly communicate through the intermediary. We therefore, find no error in the manner in which the evidence of the victim was received by the trial court. This ground of appeal, therefore, lacks merit and is dismissed.

28. Turning to the issue as to whether the offence was proved, we note that the appellant was convicted of the offence of gang rape. Before us, he contends that the prosecution did not establish the elements of the offence. While considering this ground, we will also address all the other grounds touching on the propriety of the appellant's conviction.

29. Concerning the alleged contradictions and inconsistencies, we appreciate that no two witnesses can recall or perceive an occurrence in a similar manner. As appreciated by the Court in Philip Nzaka Watu vs. Republic [2016] KECA 696 (KLR), some inconsistency in evidence may signify veracity

and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. In order to determine whether the highlighted inconsistencies and contradictions are mundane or go to the root of the trial, there is need to consider the evidence as a whole and not every statement in isolation. In John Mutua Munyoki vs. Republic [2017] KECA 376 (KLR), the Court issued guidance on how inconsistencies and contradictions are to be treated in sexual offences as follows:

> "In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe."

30. We now turn to consider the allegation of contradictions as relates to the elements of the offence. The offence for which the appellant was convicted is legislated through section 10 of the *Sexual Offences Act* as follows:

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

31. The age of the appellant was never contested. Defilement was one of the ingredients of the charge. Section 8(1) of the *Sexual Offences Act* defines defilement as an act which causes penetration with a child. Section 2 of the *Sexual Offences Act* provides that the term "child" has the meaning assigned thereto in the *Children Act*, which Act, at section 2, in turn, defines a "child" as an individual who has not attained the age of eighteen years. The evidence of the complainant's mother (PW2) was that the minor was 14 years old. There was no contradictory evidence to the effect that the complainant was over eighteen years old. Therefore, the fact that the complainant was a child was proved beyond reasonable doubt.

32. As regards penetration, the complainant, through the intermediary, narrated how she was taken by one of the assailants into a house on the second floor of the storey building where she lived with her family. She stated that there were four men inside the house, one of them being the appellant. She recollected the attire she wore on that day. Her evidence regarding penetration was corroborated by the medical evidence of PW7. Additionally, PW2, PW3 and PW6 confirmed that the appellant's clothes were blood-stained and were recovered from the house where the appellant was arrested. Concerning the appellant's arrest, PW1, PW2, PW3, and PW4 all testified that four men were locked inside the house in which the complainant was found, but one of them escaped before the arrival of the police. PW6 testified that when he went to effect the arrest, he found the appellant and two others locked inside the house. He stated that it was from that house that he arrested the appellant. In our view, the evidence was cogent and corroborated.

33. The appellant failed to challenge the foregoing evidence in his defence. His claim that he was at work and only came home to find the police was upset by the consistent evidence of the 5 witnesses who witnessed how and where he was arrested. We cannot, in the circumstances, agree with the appellant that his alibi defence was not considered. The defence case could not withstand the deluge of the prosecution's evidence, and the first appellate court was correct in discarding that defence. From the evidence on record, we do not doubt that the appellant was present at the scene and was among the perpetrators of the crime.

34. On the issue of identity, the appellant contends that the evidence did not point to him as the person who defiled the complainant. In addressing submissions similar to those of the appellant, the Court in James Gichuki Magu vs. Republic [2016] KECA 686 (KLR) defined gang rape as follows:

> " It is gang rape under section 10 of the *Sexual Offences Act* where a person committing the offence of rape or defilement does so in association with another or others, or where a person is in the company of another and share a common intention to commit rape or defilement. The evidence before the court proved beyond any reasonable doubt that the appellant and two others set out, with a common intention, and without shame, to rape the complainant, a lady old enough to be their grandmother. Even though there is evidence that only the appellant did the act, his companion, as accomplices, were just as guilty of the actual offence of rape for their active role in assisting the appellant in the act. An aider or abettor of a crime is just as guilty as the actual perpetrator. See Dracaku S/o Afia and Another vs. R (1963) EA 363." (Emphasis ours).

35. We concur with the above definition and reasoning. Adopting the foregoing approach, we have reviewed the learned Judge's analysis of the question of the identity of the appellant and the aspect of common intention, and we find no fault at all. As we have already pointed out, the appellant was in the company of three others inside the house where the complainant was defiled. In his defence, he did not delink himself from the offence but opted to remove himself from the scene of crime. In our view, he failed to bring himself out of the boundaries of common intention. Consequently, even though the evidence was not clear as to who took the complainant inside the house or the spot at which she was defiled, there was no doubt that the four individuals inside the house harboured the intention of defiling the complainant. Even if not all of them committed the act, they were all accomplices to the offence. Even if the appellant did not defile the complainant, he was, on the strength of the doctrine of common intention, as guilty of the offence as the actual perpetrators. Ultimately, we find that the offence of gang rape was proved against the appellant beyond reasonable doubt, thereby rendering the appeal against conviction meritless.

36. Turning to the issue of sentence, the appellant contends that the sentence of 15 years was imposed in its mandatory nature and the trial court did not therefore consider his mitigation. In addressing this issue, we are guided by the Court's pronouncement in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR), thus:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

37. We note that the appellant is raising the question of the constitutionality of the sentence for the first time before this Court. Numerous decisions of this Court and the Supreme Court have restated the need to limit this Court's consideration to matters addressed by the first appellate court. Thus, in

Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR), the Supreme Court held that:

> "This clear and uncontested position lends credence to the argument by the Appellant that the Court of Appeal heard and determined the present matter without jurisdiction, regarding the unconstitutionality of the sentence meted against the Respondent, because the High Court did not in any way address the issue that the appellate court ultimately focused its judgment on."

38. We will thus not address the issue as to whether the mandatory minimum sentence for gang rape is unconstitutional. Nevertheless, we have reviewed the sentencing proceedings. We note that the appellant was given an opportunity to mitigate, but he did not say anything. In sentencing him, the trial court made an elaborate ruling and considered that he was a first offender with nothing to say in mitigation. The appellant was out on bond during the trial, and we are therefore satisfied that the sentence of 15 years was handed down in accordance with the law. The appeal against the sentence is similarly without merit and is hereby dismissed.

39. From the foregoing, the fate of this appeal is sealed. The appeal on both the conviction and sentence lacks merit. The entire appeal is hereby dismissed. Accordingly, the judgment of the High Court of Kenya at Mombasa (Kiarie, J.) dated 12th January 2024 is hereby upheld. Orders accordingly.

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