Kariuki v Republic (Criminal Appeal 266 of 2019)
[2025] KECA 990 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 990 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 266 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

MAY 30, 2025

BETWEEN

MICHAEL OTIENO KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated 6th October 2016inHCCRA No. 48 of 2013)

JUDGMENT

1. Michael Otieno Kariuki is currently serving a life sentence after being convicted for the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on 27th July 2012 at [particulars redacted] in Nyanza District, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of T.A.A., a child aged 6 years. His first appeal to the High Court was dismissed.

2. The appellant is dissatisfied with the judgment and has filed a second appeal before this Court on the following grounds: that there was non-compliance with section 19 (1) of the *Oaths and Statutory Declarations Act* and section 169 (1) of the Criminal Procedure Code (CPC); that his alibi defence was not considered;that the sentence was handed down in mandatory terms; that his rights to fair trial under Article 50 (2) (j) & (p) of *the Constitution* were infringed; that his conviction was based on the evidence of a single identifying witness; and that the evidence was contradictory.

3. Briefly, the case, as established by the five prosecution witnesses, is as hereunder. Testifying as PW1, T.A.A. in her unsworn evidence stated that she was 6 years old. She referred to the appellant as "Mzee" and recalled that on 27th July 2012, at about 1:00 pm, the appellant went where she was, and did bad things to her. She stated that the appellant took her into the house, and despite having other clothes, she had no underpants; that the appellant touched her private area; she cried because it hurt, and she

bled from her vagina. After the ordeal, and upon the return of her mother, she informed her of what had transpired, after which she was taken to the hospital and then to the police station.

4. M.A. (PW2) was the mother of PW1. Her testimony was that when she returned home around 2:00 p.m. from the market where she had gone to buy food, she found PW1 crying at the door. Upon inquiry, PW1 informed her that the appellant had done something bad to her. She examined PW1 and noticed that she was bleeding from her vagina. PW2 also noted that PW1's school uniform, a blue and white full dress with a zip, was dirty and had blood stains on the back. She confirmed that PW1 was born on 21st July 2005 and produced an immunization card to support this fact. Her evidence was that as she was leaving for the market, the appellant was grazing livestock nearby.

5. PW3 was the area assistant chief, while PW4 was the investigating officer. The two witnesses essentially provided testimony regarding the arrest of the appellant and the investigation of the case.

6. Dr. Wamanga Lanaro (PW5), conducted a medical assessment of PW1. While producing the P3 and the treatment notes, he testified that there were lacerations on the labia majora and a freshly broken hymen due to penetration. He also noted active bleeding from the complainant's genitalia. PW5 observed that the school uniform the child was wearing was bloodstained.

7. When placed on his defence, the appellant gave an account of how he was arrested and denied committing the offence. He alluded to differences between the assistant chief (PW3) and his family.

8. This appeal was canvassed on 3rd February 2025. The appellant was virtually present from Manyani Maximum Prison. The respondent was represented by Senior Principal Prosecution Counsel, Mr. Patrick Okango. Both parties primarily relied on their filed written submissions, accompanied by brief oral summaries.

9. In his undated submissions, the appellant contended that the learned trial magistrate erred by shifting the burden of proof to him, thereby requiring him to prove his innocence. The appellant also submitted that there was non-compliance with section 19(1) of the *Oaths and Statutory Declarations Act* when the evidence of PW1 was taken. He argued that the evidence of PW1 could not therefore be relied upon to establish the elements of the offence charged. It was his assertion that his alibi defence and mitigation were not considered. He opined that as a result of this failure, the sentence passed against him violated his rights under Article 50 (2)(p) of *the Constitution*. Asserting that his right under Article 50 (2) (j) of *the Constitution* was violated, the appellant submitted that he was not provided with the statements of the prosecution witnesses in advance. According to him, this failure on the part of the respondent and the court hampered his defence, resulting in his not being able to cross-examine the witnesses. Finally, the appellant urged that the evidence of PW1 lacked consistency and was not corroborated; therefore, it could not be relied upon to establish a conviction. In plenary, the appellant urged us to reduce his sentence and take into consideration that he had reformed and gained certification in carpentry while in prison.

10. In the submissions dated 12th September 2024, Senior Principal Prosecution Counsel Mr. Okango urged that the appellant had failed, as was required of him, to clearly articulate the alleged discrepancies in the testimony of the prosecution witnesses. According to counsel, the testimony of PW1 was consistent, and the trial court found her to be credible. Regarding the lack of an independent eyewitness, it was Mr. Okango's submission that section 124 of the *Evidence Act* allows for conviction based on the testimony of the victim of a sexual offence, if the witness is deemed credible. Counsel proceeded to submit that the reliance on the evidence of PW1 as a single identifying witness did not undermine the strong prosecution case, as sexual offences often occur in secrecy.

11. Turning to the issue of alleged non-compliance with Article 50 (2)(j) and (p) of *the Constitution*, counsel referred to the first appellate court's findings on the issue, pointing out that the conclusions had not been challenged in this appeal. Rejecting the appellant's claim that the lack of witness statements hampered his cross-examination of the prosecution witnesses, counsel pointed out that despite PW1, PW2, and PW3 testifying on the same day, the appellant chose to only cross-examine PW3. Counsel was of the view that, in the circumstances, the appellant could not claim to have had difficulties in cross-examining PW1 and PW2.

12. In response to the appellant's assertion that his alibi defence and mitigation were not considered, Mr. Okango submitted that the appellant did not raise an alibi defence.

13. Counsel for the respondent further submitted that the issue of non-compliance with section 19(1) of the *Oaths and Statutory Declarations Act* was not raised before the first appellate court and has thus been improperly raised before this Court. Nonetheless, counsel relied on Maripett Loonkomok v Republic [2016] eKLR to submit that a valid voire dire examination was conducted.

14. Finally, in opposing the appeal against the life sentence, Mr. Okango urged that the sentence should remain undisturbed because it aligns with the relevant statutory provisions.

15. As this is a second appeal, our primary concern is with matters of law, as the issues of fact have been settled in the two courts below. This is the import of section 362 (1) (a) of the *Criminal Procedure Code*, which has been expounded in numerous decisions of this Court, including Dzombo Mataza v 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 v 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."

16. Additionally, this Court is barred from entertaining issues raised for the first time on a second appeal (See Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR); Republic v Ayako [2025] KESC 20 (KLR); Republic v Manyeso [2025] KESC 16 (KLR); and AT v Republic [2023] KECA 1393 (KLR)).

17. We have reviewed the record of appeal and the submissions with the above principles in mind. What arises for our determination is whether there was non-compliance with Article 50 (2) (j) and (p) of *the Constitution*; whether section 19 (1) of the *Oaths and Statutory Declarations Act* was complied with; whether the offence of defilement was proved; and, if we uphold the conviction, whether we can interfere with the appellant's sentence.

18. Since the issue of non-compliance with Section 19 (1) of the *Oaths and Statutory Declarations Act* is being raised for the first time, it is not open for our determination. It is not among the appellant's six grounds of appeal in his petition of appeal received in the High Court on 17th April 2013, and it

therefore amounts to an afterthought. In support of this statement of the law, we cite the Supreme Court in Gitonga v Republic [2020] KESC 61 (KLR) for the holding that:

> "In order to determine whether this appeal is proper before us therefore, we must confirm that the issues of Constitutional interpretation and application being raised before us have risen through the normal appellate mechanism so as to reach us. It is in that regard not disputed that the question as to whether the appellant's right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate's Court nor at the High Court. None of the articles of *the Constitution* in the present appeal was also the subject of interpretation and application at the High Court...
>
> We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to Article 163(4)(a) of *the Constitution*."

19. We also note that although in his grounds of appeal the appellant claimed non-compliance with section 169 (1) of the *Criminal Procedure Code*, he has not explained how the judgment of the learned Judge did not meet the threshold of a judgment as specified in that provision. The cited provision requires that the judgment shall "be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it." The appellant having failed to expound on this ground of appeal, we cannot speculate why the trial Judge is being faulted on the contents of the judgment. Our perusal of the judgment clearly shows that it complied with the law. We say no more on this point.

20. As regards the question as to whether the right of the appellant to access the trial materials as protected under Article 50 (2) (j) of *the Constitution* was violated, we start by observing that the relevance of cross-examination was perfectly captured in Simon Githaka Malombe v Republic [2015] KECA 534 (KLR), thus:

> "So critical is cross-examination in a criminal trial that where an accused person is unrepresented, a trial Magistrate is required under section 208 (3) of the *Criminal Procedure Code* to expressly explain it to the accused person and be careful to record exactly what he said in response to the explanation. It is not expected that the court would maintain a detached neutrality and act as some kind of impartial umpire in the strict tradition of the adversarial system. Rather, he is statutorily enjoined to assume a didactic role as an educator of process. That clearly did not occur herein."

Also, as stated therein, it is the duty of the prosecution, not the court, to disclose the evidence against an accused person, as it is the one that assembles and retains such evidence in preparation for trial. However, as was held in Kipruto v Republic [2024] KECA 709 (KLR), the trial court must guarantee and protect that right.

21. In addressing the appellant's complaint that there was non- compliance with Article 50 (2) (j) of *the Constitution*, the learned Judge of the High Court held as follows:

> "(14) Although the matter was mentioned several times after that direction, the accused did not raise any issue on this subject. When he was invited to cross-examine PW1 and PW2, he did not have any question. I would only fault the learned magistrate for ordering that witness statements be provided to the appellant at his own cost when such an obligation falls on the State under Article 50 (j) of *the Constitution*. In Simon Githaka Malombe v Republic NYR CA CRA No. 314 of 2010 [2015] eKLR, the Court of Appeal held that the State must provide witness statements free of charge. As the appellant did not raise the issue further and proceeded with the hearing, I cannot say that his rights were violated or that he suffered prejudice."

22. Our perusal of the record does indeed confirm that after the trial magistrate directed on 30th July 2012 that the appellant be supplied with witness statements, the appellant never raised the issue again. We observe that the case was mentioned several times before 1st November 2012, when the hearing finally took off. On that day, the appellant informed the trial court that he was ready to proceed. Furthermore, on 7th January 2013, when PW2 was recalled to produce the complainant's immunization card, the appellant cross-examined her. The appellant also cross-examined PW4. Indeed, when called upon to cross-examine PW1, he was categorical that he had no questions for the witness. He never stated that he was incapacitated from cross-examining her due to the lack of a statement of that witness. We agree with the learned Judge that it was erroneous for the trial court to ask the appellant to meet the expenses of getting the copies of the statements of the witnesses. However, as held by the learned Judge, it cannot be said that the appellant was prejudiced in any manner. As pointed out by counsel for the respondent, the appellant was, on the day PW1 and PW2 testified, actually able to cross-examine PW3 without any difficulty. Upon perusal of the record, we find that the trial court did indeed execute the role required of it under section 208(3) of the *Criminal Procedure Code* by informing the appellant, who was unrepresented, of his right to put any questions to the witnesses and recording his answer. The foregoing circumstances lead us to conclude that, although there is a possibility that he was not supplied with trial materials, no substantial miscarriage of justice occurred to warrant the quashing of his conviction. Our finding herein is supported by the decision of the Court in Kipruto v Republic (supra), where it was held that:

> "In this case, the record does not indicate whether the witness statements were supplied or not. However, we note that when the matter came up for hearing on 17th May 2018, the appellant indicated to the trial Court that he was ready to proceed. The trial then commenced and the appellant cross-examined the witnesses thereby testing the veracity of their evidence. These circumstances lead us to one conclusion, that despite the record being silent on the issue of the supply of trial materials, the appellant understood the case against him and was able to properly mount a defence. In the end, we find that even though there is a possibility that he was not supplied with trial materials, no substantial miscarriage of justice was suffered by the appellant to warrant the quashing of his conviction."

23. The next issue is whether the offence of defilement under section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* was proved. The offence of defilement comprises three elements: the age of the complainant, the identity of the offender, and proof of penetration.

24. The first element we address is that of the appellant's identity. The appellant contends that the trial court erred in convicting him based on the evidence of a single identifying witness. In this regard, we are reminded of the proviso to section 124 of the *Evidence Act*, which allows for conviction in cases of sexual offences on the evidence of the complainant, if that evidence is believable, without any need for corroboration. From the evidence of both PW1 and PW2, the appellant's identity was never in doubt. Even though PW1 referred to the appellant as "Mzee", she appeared to have no doubts that she was referring to the appellant. PW2, on her part, gave evidence of how she had left PW1 in the company of her younger brother. She also testified that the appellant was grazing livestock nearby. This evidence placed the appellant at the scene of crime. Further, the evidence of PW2 corroborated that of PW1 that upon her return, the complainant, while in pain, reported to her what the appellant had done to her.

    The appellant did not challenge this evidence or distance himself from the name "Mzee", which was used even in court. The appellant was well known to the complainant prior to the incident, and we therefore have no difficulty affirming that the appellant's identity was proved.

25. Turning to the issue of the complainant's age, PW1 stated that she was 6 years old. Her mother, PW2, stated that she was born on 21st July 2007, a claim supported by the complainant's immunization card. In the offence charged, the prosecution was only required to establish that the complainant was "a child aged eleven years or less", which it did. We therefore find that the element of age was established.

26. Regarding the aspect of penetration, the evidence of PW1 was that the appellant took her inside the house, defiled her, and she felt pain. In explaining the "bad manners", the record shows that PW1 pointed to her private area. PW1 vividly recalled that she felt pain in her vagina and was bleeding. The first person to receive this report was PW2, her mother, who also testified that when she checked the complainant, she was bleeding in her private part. Her school clothes were blood-stained. PW4, the investigating officer, also confirmed that when the clothes were handed over to him, they had blood stains on them. PW5 also confirmed that when she attended to the complainant, she had a freshly broken hymen with an actively bleeding labia majora. The doctor also saw blood on the complainant's school uniform.

27. The appellant in his defence did not mount a challenge to this set of evidence. He did not raise an alibi defence, as he now alleges, except to provide an account of how he was arrested. Given the foregoing, we find that the charge of defilement was proved against the appellant. The conviction was supported by the evidence, and therefore, the appeal against the conviction is without merit and is for dismissal.

28. We now turn to the issue of the sentence. The appellant contends that his mitigation was not considered and that the sentence was passed in its mandatory nature. 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. We are bound to comply with the above principles.

29. We have reviewed the sentencing proceedings and find that the appellant's mitigation was appreciated by the trial court, but just as the law provides, the sentence was life imprisonment. We do not, therefore, possess the jurisdiction to interfere or intervene in such a sentence. (See Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] (supra); Republic v Ayako (supra); and Republic v Manyeso (supra)). Likewise, we do not understand why the appellant alleged violation of his right to the benefit of the least severe of the prescribed punishment for the offence as guaranteed by Article 50 (2) (p) of *the Constitution*. Nowhere has the appellant submitted, nor are we aware, that at the time the appellant committed the offence, there was a lesser punishment, other than

life imprisonment, for the offence he was charged with and convicted of. In the circumstances, we find no merit in the appellant's appeal against sentence.

30. The upshot of the foregoing is that this appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

H. A. OMONDI

JUDGE OF APPEAL

.....

L. KIMARU

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR