Ali v Republic (Criminal Appeal 49 of 2019)
[2025] KECA 1004 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 1004 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 49 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

MAY 23, 2025

BETWEEN

MOHAMMED ALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Meru (Kiarie, J.) delivered on 19th December, 2016 in HCCRA. No. 37 of 2016)

JUDGMENT

1. Mohammed Ali, the appellant herein, is before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (Kiarie, J.) on 19th December 2016.

2. The appellant had been charged before the Chief Magistrate's Court in Maua, with the offence of defilement, contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* (the Act). The particulars of the offence were that, on 3rd August, 2010 in Igembe North District of the Eastern Province, he caused his penis to penetrate the vagina of N.B. a child aged 4 years.

3. He also faced an alternative charge of indecent act with a child, contrary to Section 11(1) of the Act. The particulars were that on 3rd August 2010, in Igembe North District of the Eastern Province the appellant committed an indecent act with a child by touching her private parts namely vagina.

4. The appellant pleaded not guilty to both counts, and the matter proceeded to trial, where the prosecution called 5 witnesses. The appellant was found to have a case to answer and was placed on defence. Upon considering the evidence, the trial magistrate convicted the appellant of the offence of defilement and sentenced him to life imprisonment. The appellant was dissatisfied with the verdict and appealed to the High Court, which dismissed the appeal; the conviction and sentence were affirmed.

5. The appellant, aggrieved by the High Court's decision, preferred this appeal. Before addressing the grounds, we will summarize the evidence presented in the trial court.

6. PW1 N.B., the complainant, aged four (4) years old, testified that she knew the appellant. While playing outside his house, the appellant called her into his home and told her he would buy her biscuits, then asked her to sleep with him. PW1 further testified that the appellant had sex with her, then dressed, and left her in his house and went to town. PW1 left for home and told her mother what had happened. PW1 was then taken to hospital and later on to the police station to report the matter.

7. PW2 A.B. PW1's mother, testified that the appellant was their neighbuor for seven (7) years. On August 3, 2010, she was at home with her children, including PW1, the oldest at the time, who was four (4) years old, and her two other siblings. Her youngest, who was four (4) months old, started to cry, and she went inside the house to breastfeed him. Shortly thereafter, she heard people shouting outside and calling her by her nickname 'Buke', asking her to come out of the house as her daughter had been defiled by Imma (the appellant). When she got out of the house, she met people holding PW1 as though she was dead. She immediately checked PW1's private parts; saw PW1 was bleeding and was watery, and had no panties on. Members of the public entered the appellant's house and found PW1's panties there. PW2 and the others took PW1 and the panties to the Kachiuru Police Station. On the way, she met her husband, who took charge, and she returned home. She learnt that PW1 was referred to the hospital. Members of the public later arrested the appellant at the market. She did not see the appellant when the child was brought to her. During cross- examination, PW2 testified that PW3, a neighbor, witnessed the appellant committing the act against PW1.

8. Jillo Debaso, PW3, testified that on 3rd August, 2010 at 10.00 am he had gone to untether goats from a plot next to the appellant's house while in the company of his stepmother, when they heard the cry of a child. His stepmother told him that, to the best of her knowledge, there was no child or wife in the appellant's house, and that PW3 should rush there to check. PW3 went to the appellant's home, pulled the door curtain slightly and looked inside, where he saw the appellant defiling PW1 while standing, holding PW1 in his arms, and her panties were on the floor. He screamed and asked the appellant what he was doing, but the appellant did not answer and continued to defile PW1. PW3 screamed loudly, attracting the neighbours, who came to the scene, among them a police officer. The neighbours were angered and threatened to cut the appellant into pieces and burn him. However, the station commander calmed the crowd down, and the appellant and PW1 were taken to the police station.

9. PW4, PC David Kithinji, testified that on 3rd August 2010, at about 1.00 am, while at the police station, members of the public brought in a suspect, Mohammed Umma (the appellant), with an allegation that he had defiled a girl aged four (4) years, namely N.B. PW4 re-arrested the appellant and proceeded to the scene. He testified that they recovered panties from the appellant's house. They later escorted the appellant and PW1 to the hospital. The doctor examined both of them and compiled a P3 form. The appellant was later charged with defilement.

10. PW5, Dr. Salesio Murungi Ithalie, testified that he examined PW1, who was four (4) years old at the time, brought with a complaint of having been defiled by an adult male on the same day. On examination, he noticed that PW1 had blood stained clothing and was in pain. On general examination, PW1 had no other injuries apart from her private parts which were swollen with bruises on the vaginal opening. The hymen was perforated open. There was bleeding from the vagina. A high vaginal swab taken showed the presence of spermatozoa. With these findings, PW5 concluded that the child had been defiled.

11. When placed on his defence, the appellant gave a sworn testimony and denied the offence. He testified that he used to work for PW1's parents, herding 300 goats, but they never paid him his wages or

provided him with food, and he left the job. As a result, PW1's parents begrudged him, beat up his children and chased them away. He testified further that PW1's parents hated him. PW1's parents framed him. They were neighbours, and he had nowhere else to go. They set up a young man against him and asked him to say he had seen him defiling PW1 so that the appellant would be arrested. On the morning of the alleged incident, he had gone to gather firewood and building posts to sell, as this was his primary means of earning a living. When he returned at 10:00 am, he found people in the plot who alleged that he had committed the offence, yet he had not. He was arrested and taken to the police station. He further testified that PW1 was too young for him to have committed the act of defilement.

12. The trial court, having considered the evidence by both the prosecution and the defence, was persuaded that the appellant had committed the offence. Accordingly, it convicted him and sentenced him to life imprisonment. The appellant appealed against both conviction and sentence to the High Court; the appeal was dismissed, the conviction affirmed, and the sentence confirmed.

13. Aggrieved by the conviction and sentence, the appellant appealed to this Court on grounds which can be summarized as follows: that the learned judge failed to consider the charge sheet was incurably defective as the same was not amended as per the records of the trial proceedings; by rejecting the appellant's defence without any cogent reason, hence flouting the provisions of Section 169(1) of the *Criminal Procedure Code* and by failing to consider that the prosecution did not prove its case beyond reasonable doubt.

14. The appellant also filed an undated supplementary grounds of appeal with the following additional grounds: that the judge erred in law by upholding the mandatory life imprisonment sentence and failed to consider that he was a first offender and an elderly man.

15. The appellant who was acting in person filed submissions dated 23rd October 2023, wherein he submitted that failure by the trial court to consider the provisions of Sections 216 and 329 of the *Criminal Procedure Code* was fatal to the prosecution's case; that the sentence meted out was unlawful as recent developments in law have shown that courts can impose sentences other than the mandatory minimum sentences provided in the Act. In support he relied on the case of Philip Mueke Maingi & 5 Others vs. Director of Public Prosecutions & the Attorney General [2022] KEHC 13118 KLR. In persuading the court to reconsider the life imprisonment, he referred to other cases, including Francis Kariokor Muruatetu [2017] eKLR, a Supreme Court decision, and Julius Kitsao Manyeso vs. R, Criminal Appeal No. 12 of 2021, among others.

16. The appellant also submitted that no documentary evidence, such as a birth certificate, notification, or clinic attendance card, was produced to prove the complainant's age. Due to this omission, the offence of defilement remained unproven. In this respect, the appellant relied on the cases of Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000 and Kaingu Elias Kasomo vs. Republic Criminal Appeal No. 504 of 2010.

17. The appellant further submitted that penetration was not proved. Although PW1 stated that the appellant had defiled her, she did not provide any details about what took place. Further, the trial court on relying on the evidence of PW5, it failed to consider that the complainant upon examination did not have bruises in her genitalia, no discharge was noted, the state of urine was not disclosed, the hymen was not freshly broken and the high vaginal swab with spermatozoa was not analyzed. He questioned whether the mere fact that the hymen was perforated could serve as a basis for concluding that defilement had occurred. In support of this contention, he relied on the case of Arthur Mshilla Manga vs. Republic [2016] eKLR.

18. Lastly, the appellant submitted that the prosecution's evidence contained contradictions and inconsistencies, which went to the core of the case. He drew our attention to the inconsistencies

between the evidence of PW1, PW2 and PW3. He gave the example of the contradiction between PW1 & PW2, where PW2 told the court that PW1 was brought to the house, unconscious, yet PW1 said that after she was defiled, the appellant left her in his house, and she took herself home and told her mother what had befallen her. Another example of inconsistency according to the appellant was in the evidence of PW3, who stated that the appellant was arrested by members of the public, including a police officer. However, in his evidence, PW4 informed the court that members of the public took the appellant to the police station. As regards the recovery of PW1's panties, he asserts that there are various accounts. PW2 claimed that a member of the public recovered the same item from the appellant's house; PW3 claimed that it was recovered

from the appellant's home by the police, whereas PW4, the investigating officer, claimed that it was recovered during their visit to the alleged scene of the crime. The appellant argued that the court ought not to have believed the contradictory evidence, and in support of this argument, he relied on the case of Ndungu Kimanyi vs. Republic [2015] eKLR.

19. The respondent filed submissions dated 5th November 2024. The State submitted that the issues to be determined were whether the prosecution proved the offence of defilement against the appellant beyond any reasonable doubt, whether the prosecution's case was contradictory, whether such contradictions went to the root of the prosecution's case, and whether the sentence imposed was harsh and excessive.

20. Learned state counsel submitted that, based on the evidence on record, the minor was four (4) years old at the time of the commission of the offence. To support proof of age, he relied on the cases of Mwolongo Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) (cited in Edwin Nyambaso Onsongo vs. Republic [2016] eKLR), and Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000.

21. Regarding the identification of the perpetrator, the State submitted that it has not been challenged. From the record, it is clear that the appellant was a person well known to the complainant, as they were neighbours. Further, the appellant did not deny knowing the complainant.

22. The State further relying on the case of Philip Nzaka Nzaka Watu vs. Republic [2016] eKLR urged that while considering the effect of inconsistencies and the contradictions in the prosecution's case, the court should note that the contradictions pointed out by the appellant in his submissions are trivial and do not affect the credibility of the prosecution witnesses and would not vitiate a conviction.

23. The State further submitted that sentencing is the discretion of the trial court, which must be exercised judiciously and not capriciously. In support of this proposition, it relied on the case of Wanjema vs. Republic [1991] EA. The State also urged the court, while affirming the said sentence, to be guided by the Supreme Court holding in Republic vs. Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others, Petition No. E018 of 2023.

24. This is a second appeal, and our mandate is defined in Section 361 of the *Criminal Procedure Code* as follows:

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

        a. on a matter of fact, and severity of sentence is a matter of fact; or

        b. against sentence, except where the High Court has enhanced a sentence, unless the subordinate court had no power under section 7 to pass that sentence.

2. On any such appeal, the Court of Appeal may, if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its judgment or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary.

25. This Court in the case of Karingo vs. Republic [1982] KLR 213, expounds on the court's mandate as follows:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja vs. R (1956) 17 EACA 146)."

26. Having considered the record of appeal, submissions by the rival parties, various case law cited and the law, we have formed the view that there are three issues for our consideration, namely, whether the evidence of the prosecution witnesses was fraught with contradictions and inconsistencies; whether the prosecution proved the case against the appellant beyond all reasonable doubt and whether the sentence meted out was lawful.

27. The appellant's main ground is that the ingredients of the offence of defilement were not proved, i.e., the complainant's age, penetration and identification of the perpetrator. He based his grievances on the fact that the evidence placed before the court was contradictory and inconsistent. The two courts below were satisfied that the complainant's age had been proven. Although the trial court noted that no documentary proof of age was presented to the court, it was of the view that, having interacted with the victim, it was obvious that she was four (4) years old. We do not fault the trial court for its observation. The prosecution cited cases that were on point regarding this issue. The cases of Mwolongo Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No.24 of 2015 (UR) (cited in Edwin Nyambaso Onsongo vs. Republic [2016] eKLR) where concerning age, this Court stated:

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism
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> card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, amongst other credible forms of proof," "..we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

Also, Francis Omuroni vs. Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, the court held:

> " In defilement case, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense... "

28. We do not believe that any issue arises from the findings of the two courts below that the victim was a minor and that she was defiled.

29. Regarding whether the perpetrator of the crime was duly identified, the appellant argued that there were contradictions and inconsistencies in the witnesses' evidence, and therefore, the evidence should not have been relied upon by the trial court. The trial court identified inconsistencies in the evidence of two key witnesses. It was categorical that the 'eye' witness PW3 was not to be believed. It also did not believe the evidence of the victim's mother, PW2 to a large extent. In its judgement the trial court said of PW2 & PW3 as follows:

> " The evidence by PW3 in support of the complainant's evidence is that he witnessed the act of defilement. I will say straight away that I am not convinced that PW3 was being honest in his testimony. His evidence is contradictory and inconsistent with the other evidence. He says he saw the accused engaged in defilement of the complainant and seen him talking to him did not elicit a reaction from the accused. I find it inconceivable that PW3 simply stood there screaming as the accused defiled the girl. That he did not raise even his hand to hit the accused person for him to stop his act is implausible. In fact he does not say at what point the accused left the complainant and who exactly caused him to leave her.
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> The evidence of PW3 contradicts that of the complainant that whenever (sic) he claims he found accused in the act, the complainant said when accused had finished his act, he left her in the house and went to the market.
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> The complainant is a very young girl and slender in her build. The accused person is an old man of medium built. If indeed he were to hold the complainant as PW3 described and cause his genitalia organ to penetrate that of the complainant and engage in full intercourse with her, I believe the complainant's genitalia would be torn and not just bruised. She would suffer very serious injuries so I do not believe that PW3 was honest to say that he saw accused in· that position with the complainant. PW3 said the complainant and the accused were taken away by a police officer one Major Langat. There is a contrast to the evidence of the complainant that of her mother and of the investigating officer. The complainant said she went to her mother by herself. The mother said she was carried to her by people. The investigating officer said the accused was taken to the police station by members of the public and no police officer was present.
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> The above reasons make me find that PW3 is not a credible witness and so his evidence not reliable. The complainant's mother also seems to have been untruthful in certain respects. She said the complainant was taken to her being carried by people as though dead. There is no indication as to when the complainant regained her composure. (Emphasis ours)

30. The trial judge in his judgement stated: -

> " The third ingredient is whether the alleged perpetrator was the culprit. The complainant's evidence, that of her mother, and that of Jillo Dabaso (PW3) clearly show that the appellant was defiled. On the same day of the alleged offence, these witnesses testified about her state. This was corroborated by the medical evidence of Dr. Salesio Murungi (PW5), who examined the complainant on the same day of defilement. He found her with fresh bruises to her genitalia and the presence of spermatozoa. This was prove of penetration." (sic)

31. The first appellate court had a duty to analyse, examine and evaluate the evidence afresh to satisfy itself that indeed there was evidence to convict the appellant, which the court failed to do. This duty is described in the case of Okeno vs. Republic [1972] EA 32, as follows:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."

32. Failure by the High Court to consider the evidence afresh, examine and analyse and subject it to fresh scrutiny is a point of law for our consideration as stated by this Court in Jonas

Akuno O'kubasu vs Republic [2000] eKLR, where it was held that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

33. On contradictions, this Court, in the case of Joshua Mutua Musyoki vs R [2017] KECA 376 KLR, stated:

> " How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. 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. The contradictions have to be considered and weighed carefully. In this case there were a number of such contradictions and inconsistencies that have been alluded to by the appellant in his written submissions.
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> ...
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> Clearly the High Court failed to evaluate the veracity of all these contradictions and discrepancies. To our mind these contradictions and inconsistencies are not minor as submitted by the respondent. They were critical and go to the root of the prosecution case and whether the complainant was a credible and truthful witness. If the complainant could lie about what led her to report to school late, what else did she lie about?

34. The trial court chose what to believe from untruthful witnesses, and on the other hand, the High Court failed to discharge its duty as the first appellate court despite the appellant's complaint that the case

had not been proved to the required standard. The contradiction in the evidence of the prosecution witnesses calls into question the credibility of their evidence and the reliability of the same. In the case of Dickson Elia Nsamba Shapwata & Another vs. Republic, Cr. Appeal No. 92 of 2007, the Court of Appeal of Tanzania stated as follows regarding discrepancies in evidence, which we respectfully endorse:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court must decide whether inconsistencies and contradictions are minor or whether they go to the heart of the matter.

35. Having discredited the evidence of PW2 & PW3, the only evidence left for consideration, in our view, is the evidence of PW1, the 4-year-old. There is no doubt that she was sexually molested. What caught our eyes was the language used in court by the 4-year-old. She stated, "I know the accused. He is called Ima. He stays in town house. The accused 'fucked me". In our humble view, the language used by PW1 is not that of a child, let alone a 4-year-old child. The trial court justified the use of the language by blaming it on translation. It is on record that the trial court inquired of the Borana translator on using the word, and he assured the court that the child used the word in question. The court went ahead to exonerate the child from having been coached. The High Court did not consider this piece of evidence, which may be attributed to its casual analysis of the evidence presented before the trial court or lack of it.

36. The proviso to Section 124 of the *Evidence Act* permits the court in sexual offence matters to rely on the victim's evidence. In our view, this proviso cannot be relied on in this case, since the evidence of the victim is incapable of being believed. It is doubtful that a child of such a tender age could fathom what sleeping with a man entails or being defiled in the manner she described the act, which brings into question whether the identification of the perpetrator is without error, especially against the untruthful evidence of PW2 & PW3. Was the child coached on what to say and whom to implicate?

37. Ultimately, we are of the view that the doubt created by the evidence on record should be resolved in favor of the appellant. In the circumstances, we quash the conviction and set aside the sentence. He is set at liberty unless otherwise being lawfully held.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR