Mbaire v Republic (Criminal Appeal 50 of 2018)
[2025] KECA 849 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 849 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 50 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

PETER MIRINGO MBAIRE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (J. Ngugi, J.) delivered on 21st June 2018 AND REPUBLIC RESPONDENT in HCCRA No. 17 of 2017)

JUDGMENT

1. Peter Miringo Mbaire, the appellant herein, was arraigned in court in Nakuru CMC Criminal Case (SO) No. 43 of 2012 to answer to the charges levelled against him 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 offence were that on 6th February 2012 at Njoro District Rift Valley Province, the appellant unlawfully and intentionally committed an act by inserting his penis into the vagina of RN a child aged 7 years which caused penetration. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant unlawfully and intentionally committed an indecent act to RN aged 7 years by touching her vagina.

2. The appellant pleaded not guilty. After a full trial, the trial magistrate convicted him of the offence of defilement and sentenced him to life imprisonment. He appealed that decision in Nakuru HCCRA No. 17 of 2017. Ngugi, J. as he then was, considered the appeal and on 21st June 2018, found that it was unmerited and accordingly dismissed. The appellant's conviction was upheld and sentence affirmed.

3. The appellant is aggrieved by those findings. He has filed his notice of appeal dated 5th July 2018. He also filed his amended grounds of appeal dated 17th January 2024. The appellant prayed that his appeal be considered on the following grounds: the prosecution's evidence was replete with grave

contradictions and inconsistencies that the prosecution failed to discharge its burden of proof to the required standard; and the sentence of life imprisonment as upheld by the learned judge was in breach of the *Constitution*, statute and the sentencing policy guidelines. In view of the premised circumstances, the appellant prayed that his appeal be allowed, the conviction be quashed, the sentence be set aside and that he be set at liberty.

4. During the hearing of the appeal that was heard virtually on 19th February 2025, the appellant represented himself while the state was represented Senior Assistant Director of Public Prosecutions Mr. Omutelema. The appeal was heard on the basis of the parties' written submissions.

5. The appellant relied on his written submissions dated 17th January 2024 to submit that the date of the offence as per the charge sheet was not corroborated with the evidence of the complainant and PW2. He argued that PW2 would not have known when the incident occurred since on one part, she intimated that the complainant did not inform her on the date of the offence but on the other hand, informed the medical officer that PW1 had been defiled on 6th February 2012. He paid close attention to PW1's testimony who stated that the perpetrator on another occasion used his fingers to touch her vagina. In his view, the ingredient of penetration had not been established beyond reasonable doubt. His view was that PW1's evidence was unreliable as she could not ascertain the exact date she was sexually assaulted. Lastly, the appellant submitted that the sentence upheld by the trial court was unlawful, harsh and excessive. That it failed to accord with the provisions of Articles 27 and 28 of the *Constitution*, sections 216 and 329 of the *Criminal Procedure Code*, the sentencing policy guidelines and the decision of Odunga, J. (as he then was) in Philip Mueke Maingi & 2 others vs. Republic [2022] KEHC 2263 (KLR). He prayed that his appeal be allowed.

6. The respondent relied on its written submissions, list of authorities and case digest all dated 13th November 2024 to argue that the ingredients of the offence were established by the prosecution beyond any shadow of a doubt. He submitted that the testimonies presented by the prosecution witnesses were credible accounts of what transpired. Finally, the appellant's defence was considered and the sentence meted out was lawful. He prayed that the appeal be dismissed.

7. This Court in Ahamad Abolfathi Mohammed & another vs. Republic [2018] KECA 743 (KLR) set out our duty as a second appellate court as follows:

> "As it is a second appeal, we are obliged, by dint of section 361 (1) (a) of the *Criminal Procedure Code* to consider only issues of law. Where the two courts below have made concurrent findings of fact, we are further obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as Karingo v. Republic [1982] KLR 213. In M'Riungu v. Republic [1983] KLR 455, this Court was empathic that:
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> > "[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

8. The prosecution marshaled 6 witnesses whose evidence is captured as follows in the record: Eight-year-old PW1 RN testified that she was a class 2 student at [particulars withheld] Academy and was born on 3rd October 2004. She testified that she lived in Nairobi with her mother PW2 MN. Her evidence

was that she had visited her grandmother PW3 JW when the incident occurred. She recognized the appellant as one of her neighbours. PW1 recalled that on one day after school, the appellant sent her to the shop. Thereafter, he took her to his house, removed her clothes and his clothes and had sexual intercourse with her.

9. After the ordeal, PW1 started walking with a funny gait prompting her Aunt N to interrogate her. PW1 confided in her aunt who told PW3 about the incident. It was PW3 who informed her mother PW2 what had transpired. She was later taken to Hospital for treatment and reported the appellant at the police station. She recalled that he had defiled her on several occasions and each time, the appellant cautioned her against disclosing his actions to anyone. She stated that she hated the appellant for defiling her.

10. PW2's evidence was that she received a call on 12th February 2012 from her brother M that her daughter PW1 had been defiled. PW2 was in Nairobi at that time. She confirmed that her daughter was born on 3rd October 2004. Upon receipt of the information, PW2 traveled to where PW1 was and took her to Hospital. She observed that PW1 had difficulties walking. PW1 told her that she was suffering from irritation while urinating. The matter was later reported at Njoro Police Station. PW2 stated that she had known the appellant and were good friends. That he was her neighbour and they grew up together. The appellant was eventually arrested after he had gone hiding.

11. PW3 testified that she received a call from N on 12th February 2012 at 7:00 p.m. who informed her that PW1 had been sexually assaulted. PW3 called PW2 and shared the information about her daughter. The appellant was arrested but released later. That he went into hiding but was eventually re-arrested. She also recalled that the appellant had attempted to negotiate some form of settlement regarding the offence but those negotiations did not materialize. PW3 identified the appellant as her neighbour. Finally, she observed that the complainant had sores on her vagina.

12. Clinician PW4 Jacob Jelimo's evidence was that the minor came to their facility on 13th February 2012. He was told that the incident occurred about a week prior. On physical observation, the complainant had lacerations on her vagina, her hymen was freshly and recently torn and she had a whitish discharge. She also exhibited pus cells and epithelial cells. He also examined the appellant but found no visible injuries on his genitalia. He filed the P3 form that was adduced in evidence together with the treatment cards dated 13th February 2012 for the appellant as well as PW1. He confirmed that from his observation of PW1's hymen, the offence had occurred a week before the date of visit to the Hospital.

13. PW5 NW testified that she was a 14-year-old class 7 student at [particulars withheld] Primary School. Her evidence was that on 12th February 2012, PW5 told PW1 that she would die of diseases if she was defiled before turning the age of 10. This triggered PW1 to tell PW5 that she had been sexually assaulted by the appellant.

    Furthermore, she was informed that the appellant inserted his fingers in her vagina. PW5 then told her mother N what she had been told. PW5 also disclosed that the mother asked PW1 why she was walking with a funny gait. She also knew the appellant as their neighbour.

14. PW6 PC John Chacha of Njoro Police Station was the investigating officer. He received the incident report from PW1 and PW2 on 13th February 2012. He then interrogated the witnesses, recorded their statements, and collected the evidence. The appellant was arrested on 15th February 2012. He also produced the complainant's birth certificate.

15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence and called one other witness aside from

himself. As DW1, the appellant testified that on 6th February 2012, he was at home with his wife, his brother's wife and his grandmother. At around 2:00 p.m., PW1 and PW5 brought him maize that he had purchased. Later that evening, he was told by John Nganga that PW1 had accused him of defiling her. DW1 proceeded to PW1's home where he was arrested and taken to the Police Station. He was released shortly thereafter. He knew the complainant and her family as his neighbours. He denied committing the offence.

16. DW2 Everlyn Anita Miringu, DW1's wife, testified that she returned home on 2nd February 2012 after delivering her baby the previous day. She recalled that on 6th February 2012, she did not see any child entering or leaving their compound where she lived with her grandmother and sister-in-law. She was categorical that nothing sinister took place in the month of February 2012 at their home. She produced the photographs of the homestead in evidence.

17. A conviction on an offence of defilement calls upon the prosecution to establish the following three conjunctive elements: the age of the complainant, penetration and the positive identification of the assailant. On the complainant's age, PW1 and PW2 emphatically testified that the complainant was born on 3rd October 2004. This was corroborated by the production of PW1's birth certificate in evidence. The offence was alleged to have taken place on 6th February 2012 at which time she was 7 years old. We therefore affirm that the victim was a minor within the meaning ascribed to the term and shall not interfere with that finding.

18. On penetration, section 2 of the *Sexual Offences Act* defines it to mean the partial or complete insertion of the genital organs of a person into the genital organs of another person. PW1, testified that the appellant inserted his penis into her vagina at his house. He did this act on several other occasions. PW4 testified that the complainant had lacerations on her vagina, her hymen was freshly and recently torn and she had a whitish discharge. She also exhibited pus cells and epithelial cells. His estimation was that the complainant was defiled about a week prior to visiting the facility. Taking into account the foregoing, we are satisfied that penetration was proved in line with its definition in law and there is no basis for us to not disturb this finding of fact.

19. The last ingredient the prosecution needed to prove was whether the appellant was the offender. We observe that the trial magistrate considered the appellant's defence and pointed out the contradictions between DW1 and DW2 on what transpired. The trial court remarked that the appellant and his witness were lying because while DW2 stated that the complainant never set foot in their home in that month, DW1's evidence was that she was accompanied by PW5 to sell him maize on the material date. The trial court cautioned itself that it was not shifting the burden of proof to the appellant but considered the evidence at trial in totality. These findings were upheld by the learned judge.

20. The learned judge clarified that from the P3 form, the assault took place approximately one week prior to 13th February 2012. Given that the complainant's hymen was freshly torn, there was no contradiction as to when the offence took place irrespective of the fact that PW1 could not recall the exact date the offence took place. Finding that the evidence of the prosecution was not filled with grave contradictions or marred with discrepancies, the learned judge appreciated testimonies or recollections can vary as witnesses might recollect differently from each other. That if they are minor, those contradictions or discrepancies do not challenge the credibility of the witnesses.

21. The trial court further cautioned itself on convicting on the evidence of a single identifying witness but invoked the proviso to section 124 of the *Evidence Act*. The trial court believed the appellant as a truthful witness with no ill intent. PW1 was persuasive that the appellant sent her to the shop. He was their neighbour. He then took her to his house and sexually assaulted her. PW1 stated that she hated the appellant for performing the heinous act on her. The first appellate court upheld these findings

of fact. We have no doubt that PW1 was a credible witness and demonstrated that she was a victim of the offence. That evidence sufficiently established that the appellant was the perpetrator of the offence. Accordingly, we affirm those findings.

22. On the appellant's sentence, the trial court condemned him to life imprisonment in line with section 8 (2) of the *Sexual Offences Act*. The trial court took into account the submissions made by the appellant regarding his mitigating factors but rightly stated that it was bound by the mandatory sentence meted out therein. We find that the sentence meted out was lawful in line with the decision of the Supreme Court in Republic vs. Joshua Gichuki Mwangi, Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) and affirmed in Republic vs. Manyeso [2025] KESC 16 (KLR). Accordingly, the appeal on sentence fails.

23. In the end, we find that the present appeal is unmeritorious and it is dismissed in its entirety. We affirm the conviction and uphold the sentence.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR