MMK v Republic (Criminal Appeal 155 of 2018)
[2025] KECA 966 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 966 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 155 OF 2018

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

MMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Nyeri (Sitati, J) dated 20th December 2018 in HCCRA No. 18 of 2018) (Original Karatina Principal Magistrate's SO Case No. 08 of 2015)

JUDGMENT

1. The appellant was charged before the Karatina Principal Magistrate's Court with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (the Act). The particulars of the offence were that on diverse dates between December, 2011 and 7th February 2015 in Mathira West District in Nyeri County, being a male person, he caused his penis to penetrate the vagina of SW, alias SKM, a female juvenile aged 7, a person who was to his knowledge his daughter.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars being that on diverse dates between December, 2011 and 17th February 2015 in Mathira District within Nyeri County intentionally touched the buttocks of SW alias SKM a child aged 7 years.

3. The appellant pleaded not guilty to both the main and alternative counts, as a result of which the prosecution called three (3) witnesses in support of their case. At the close of the prosecution case, the appellant was found with a case to answer and put on his defence. He gave sworn evidence but called no witnesses. The trial court considered the appellant's defence but found it did not displace the prosecution's case against him.

4. Upon analysing the evidence on record, the learned trial court found that the prosecution had proved its case against the appellant on the main count beyond any reasonable doubt. The appellant was therefore found guilty as charged, convicted and sentenced to imprisonment for life. Dissatisfied with the entire judgment the appellant appealed to the High Court seeking to upset the judgment on grounds: that the trial magistrate erred in both law and fact by convicting the appellant on the basis of the testimony of PW1, the complainant, which evidence was admitted without following the provisions of section 19(1) of the *Oaths and Statutory Declarations Act*; that the trial magistrate erred in law and fact by convicting the appellant without considering that the provisions of section 200 of the *Criminal Procedure Code* were not complied with during trial yet the same was mandatory; that the trial magistrate erred in law and fact by convicting the appellant of charges that were not proved beyond any reasonable doubt by the prosecution, knowing very well that the onus was on them to prove their case; that the trial magistrate erred in law and fact by allowing the clinical officer to produce the P3 form which he had not authored contrary to section 33 of the *Evidence Act*; and that the trial magistrate erred in law and fact by convicting the appellant on the basis of evidence of P3 form that did not ascertain the age of injuries and did not connect the appellant with the alleged offence.

5. The learned Judge, in her judgement identified the issues for determination as whether PW1, the complainant herein was defiled, namely whether penetration was proved and whether the offence of incest was proved.

6. On the issue of non-compliance with section 19(1) of the *Oaths and Statutory Declarations Act*, the learned Judge found that PW1 was taken through a voire dire examination, which though brief, brought out clearly that she understood the difference between truth and lies and she also appreciated the consequences of each hence the allegations of non- compliance with the provisions of section 19(1) of the *Oaths and Statutory Declarations Act* had no basis.

7. On the issue whether PW1 was defiled, the learned Judge found that based on PW1's evidence and with what she explained to the doctor, as recorded in the PRC, she was defiled. She found that the parties were agreed that PW1 was the appellant's daughter while the appellant was PW1's father. Having found that PW1 was defiled, and that she was defiled by the appellant who was her father regularly over a considerably long period of time, defilement was proved. In the learned Judge's view, the appellant's defence, did not challenge the prosecution's case in any material way and, had no merit. In the circumstances the absence of the doctor who examined PW1, the learned Judge found, pursuant to the provisions of section 33 of the *Evidence Act* availing that doctor, who was no longer working at the hospital, would not have been done without undue delay, and more so in a sexual offence case involving a child. The learned Judge found no merit in the appeal and dismissed it.

8. In this second appeal, the appellant contends: that the learned Judge erred in law in upholding the appellant's conviction based on section 124 of the *Evidence Act* when the complainant's failure to reveal the matter to anyone created doubts in her evidence; that the learned Judge failed to find that there were contradictions between the evidence of PW1 and PW4 as to who defiled the complainant; that the learned Judge by relying on the evidence of the doctor who did not examine the complainant failed to consider sections 33, 34B and 77 of the *Evidence Act*; that the learned Judge failed to find that there was no evidence of the age of the alleged broken hymen; that the learned Judge failed to find that the trial court did not warn itself of the danger of relying on a single identifying witness.

9. We virtually heard the appeal on 18th December 2025 when the appellant appeared from Embu Prison while learned counsel, Ms Adhi, appeared for the respondent. Both the appellant and Ms Adhi relied on their written submissions.

10. In his submissions, which were prepared by the appellant himself, he seemed to have convoluted the criminal case with a child custody case, whose particulars were are not conversant with and which, in any case, is irrelevant to this appeal. From what we can distil from his submissions, his grievances were: that the case against him was motivated by grudge and animosity arising from the differences between himself and his estranged wife; that contrary to section 124 of the Oaths and Statutory Declaration Act the evidence of the complainant was not corroborated; that material witnesses who were mentioned were not called to give evidence at the trial; that the medical evidence was not satisfactory; that the prosecution's evidence was riddled with contradictions; that the prosecution did not prove its case beyond reasonable doubt; and that section 7 of the *Criminal Procedure Code* provides that the maximum sentence which can be handed down by a subordinate court is seven years and a fine not exceeding ten thousand shillings and therefore the learned Judge erred in retaining the life sentence.

11. On behalf of the respondent, it was submitted: that the ingredients of the offence of incest were proved; that the trial court warned itself against reliance on the evidence of a single witness; that the evidence was corroborated by the medical evidence; that although the life sentence was not mandatory, the appellant deserved the same; and that the appeal should fail.

12. We have considered the submissions made in this appeal. This being a second appeal, it is important to restate our jurisdiction in such matters. Section 361(1) of the *Criminal Procedure Code* provides that:

> 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 a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

13. This provision was applied in Karani v R [2010] 1 KLR 73 where it was held that:

> " By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

14. In matters where our jurisdiction is confined to matters of law only, this Court in the case of Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360 held that we have:

> " loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law."

15. In this appeal we are therefore bound, as was held in the decision in Adan Muraguri Mungara v R CA Cr App No 347 of 2007:

> " to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of

the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

16. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In Karingo v Republic [1982] KLR 213, the Court stated:

> " 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."

17. In order to determine the issues raised in this appeal, we need to set out, briefly, the evidence as presented before the trial court. The complainant herein (PW1) testified: that the appellant herein was her biological father and that when she was living with him, the appellant would remove "his thing for susu" and put it in "her thing for susu"; that whenever he did so, she would scream but he always blocked her screams with his hand; that each time the appellant completed the act, he would wash PW1 and would tell her not to say anything to anyone about what he was doing to her. PW1 reported the matter to one of her teachers who in turn informed PW2, a sub-county Children's Officer in Mathira. PW2 took PW1 to Jambo Rescue Centre before taking her to Karatina District Hospital for examination and treatment. PW2 was present when PW1 was being examined and she also witnessed the filling of the P3 and the PRC forms.

18. PW3, based at Jambo Rescue Centre received PW1 at the home pursuant to a court order. She also accompanied PW2 and PW1 to Karatina District Hospital for examination and treatment. PW4, the Assistant Chief of Rititi sub-location testified that on 9th February 2015 he received a telephone call from PW1's head teacher informing him that the appellant had complained that PW1 had been defiled by a fellow pupil in school. When he went to the school and investigated the matter, PW4 established that no fellow student had defiled PW1. Instead, PW1 informed PW4 that it was the appellant who had defiled her during the night when she was sleeping on the same bed with the appellant. On 17th February 2015, PW4 accompanied PW2 to the school at about 6.00pm where they found the appellant and PW2. When the appellant was informed that PW1 was to be taken away, he ran off with her, but eventually PW1 was rescued and the appellant arrested and charged.

19. PW5, testified on behalf of the doctor who examined the complainant and who had since left the hospital and produced the P3 and PRC forms in respect of PW1. According to the findings, PW1's hymen was not intact and she had minimal discharge. PW5 also testified that from examination of PW1's genitalia, a creamish discharge was noted from her private parts. The conclusion of the examination was that there had been penetration. From the PRC, the doctor recorded what PW1 told him in Kiswahili concerning what the appellant did to her in the following words:

> " Amekuwa akinifanyia tabia mbaya. Nikilia ananifunga mdomo akimaliza ananiosha na kuniambia nisiambie mtu.'

20. When asked to explain 'tabia mbaya' PW1 said 'anaweka kitu yake kwa kitu yangu".

21. The last witness for the prosecution was number 95520 Police Constable (W) Norah Nyando (PW6) of Kiamachibi Police Station. She is the one who received the report on PW1. Her evidence was that PW1 informed her that the appellant would often defile her. PW6 took PW1 to Karatina District Hospital after issuing PW1 with a P3 form. PW6 confirmed that PW1 was 4 years old at the time of the defilement and that the birth certificate showed PW1 was born on 31st July, 2008.

22. When placed on his defence, the appellant gave sworn evidence. He testified that he had custody dispute with the mother of PW1. He denied defiling PW1 and averred that the charge against him had been engineered by PW1's mother following a custody dispute, and exhibited a copy of the court proceedings.

23. In our view, the issues for determination are whether the prosecution proved its case and whether the sentence is proper.

24. On whether the prosecution proved its case beyond reasonable doubt, the law is that for the prosecution to prove its charge of incest to the required standard, three key ingredients are necessary. These are, the complainant's age, the appellant's identity and the relationship to the complainant and whether there was penetration. See GMM v Republic [2019] eKLR. No issue arises in this appeal as regards the complainant's age, identity, and her relationship with the appellant, since the age of the complainant was proved by the birth certificate, while the appellant admitted that the complainant was his daughter.

25. The only issue for determination is whether there was penetration of the complainant's genital organ with that of the appellant. According to the complainant, the incest took place regularly. Upon examination, the complainant's hymen was found to be missing. Although the appellant tried to implicate a third person, the complainant was steadfast in her evidence that it was the appellant who defiled her. The appellant's contention that the charge was contrived by PW1's mother had no basis since it was not the mother who complained. The complaint was, in fact, made by third parties against whom no allegations of ulterior motive by the appellant were made.

26. As regards corroboration, we find that the complainant's evidence was corroborated by the medical evidence and based on the evidence placed before the trial court, the two courts below rightly found that section 124 of the *Evidence Act* was properly applied by the trial court. The two courts below found that the appellant did have sex with the complainant. We have no basis for interfering with the concurrent findings on that issue. We, similarly have no basis for interfering with the conviction on the ground that some witnesses were not called. The appellant has not pointed out who these witnesses were and, in any case, the prosecution is not duty bound to call all persons involved in the transaction since the failure to call them is not necessarily fatal unless the evidence adduced is barely sufficient to sustain the charge. We are not satisfied that it was the position in this case. In Keter v Republic [2007] 1 EA 135 the court was categorical that:

> " The prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

27. The appellant submitted that there were contradictions in the prosecution's case. Again, he did not point out these contradictions. In our view, where, the first appellate court has reconciled the contradictions and the inconsistencies and arrived at the same conclusion as the trial court, that finding, in our view amounts to concurrent finding of fact and the matter is no longer open to this Court to consider unless it is shown that the finding was based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. This Court explained the respective roles of the trial court, the first appellate court and the second appellate court in the case of Erick Onyango Ondeng' v Republic [2014] eKLR, where it was held that:

> " The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully

analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32). It is in the above context that this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

28. The manner in which the Court deals with allegations of inconsistencies and contradictions in evidence of witnesses was explained by this Court in John Nyaga Njuki & Others v Republic [2002] eKLR where it was held that:

> " In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

29. Considering that this issue was not raised before the first appellate court and that the appellant did not point out specific instances of alleged inconsistencies and contradictions, we cannot interfere with the learned Judge's finding based on an issue not placed before the court for determination.

30. As regards the allegation that the complainant's evidence was admitted without following the provisions of section 19(1) of the *Oaths and Statutory Declarations Act*, the learned Judge properly dealt with the issue, and we agree with that conclusion.

31. On the sentence, we are alive to the fact that in a second appeal, this Court has no jurisdiction to delve into allegation of severity of a sentence. However, there is a limited jurisdiction to interfere with the sentence, even on a second appeal where it is alleged that the sentence imposed is illegal or in circumstances contemplated by this Court in Robert Mutungi Muumbi v Republic [2015] eKLR where it was stated that:

> " Section 361(1)(a) of the *Criminal Procedure Code* restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However, it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts

below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing."

32. Section 20(1) of the *Sexual Offences Act* at the material part it states that:

> "...if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life..."

33. A perusal of the *Sexual Offences Act* reveals that there are clear instances where the legislature prescribed a mandatory sentence in very express terms leaving no window for deviation. Section 8(2) of that Act, for example, provides that:

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

34. That is not the same position as the provision under section 20(1) of the Act where the words "shall be liable to" is used instead of "shall be sentenced to". The predecessor of the court (as per Sir Clement DeLestang V.P) in Opoya v Uganda [1967] EA 752 at page 754 expressed itself thus:

> "It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

35. In sentencing the appellant, the learned magistrate stated that:

> "The law in this matter is clear and has no room for discretion. In the circumstances, I am constrained to sentence the accused person to life imprisonment."

36. This was clearly an erroneous exposition of the law. The first appellate court seems not to have addressed itself to that error. We are unable to state what sentence the trial court and the first appellate court would have imposed had they properly addressed their minds to the law. In Charo Ngumbao Gugudu v Republic [2011] eKLR, the Court of Appeal held that:

> "It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence."

37. Similarly, in Felix Nthiwa Munyao v R Nairobi Court of Appeal Criminal Appeal No. 187 of 2000, this Court expressed itself as follows:

> "As we have said, the maximum sentence provided under Section 205 of the Code is life imprisonment. We will repeat what the Court said in the case of Gedion Kenga Maita vs. Republic Criminal Appeal No. 35 of 1997 (unreported). There, the Court stated:
>
> > "...We are not saying that a court has no power to impose a sentence of life: a court can do so depending on the circumstances of a particular case which circumstances must include the circumstances under which the offence itself was

committed, the circumstances of the accused person such as whether he is a first offender, how long he has been in prison awaiting trial and things of that nature.'

In the present case, the learned Judge wrote very elaborate notes on the sentence he imposed on the appellant. He took into account the fact that the attack on the deceased was brutal and vicious: that was correct and the learned Judge was right in doing so. He also took into account the fact that the vicious and brutal attack was on a wife in the presence of their very young daughter. Once again, that was correct and the Judge was entitled to take it into account. The attack, said the Judge. Was an act of domestic violence and the courts must do their part to discourage it. That was also correct and the Judge was perfectly entitled to consider it. These were matters on one side of the scale aggravating the crime committed by the appellant. But a court is also under a duty to take into account the matters in favour of an accused person. In this case, the appellant was, admittedly, a first offender. The learned Judge does not mention this factor at all in his elaborate notes on sentence. This was, however, a factor which the learned Judge was bound to take into account in favour of the appellant. Again, the appellant was arrested on 27th/28th December, 1998 and by the time the Judge sentenced him on 29th June, 2000, he had been in prison for nearly one and half years. The learned Judge did not mention this factor in his notes on the sentence. We think he was bound by the law to consider the two factors which were in favour of the appellant and weigh them against those which supported a severe penalty. Sentence is essentially a discretionary matter for the trial court but in exercising that discretion, the trial court must take into account all the relevant factors and leave out all irrelevant ones. An appeal court, which ours is, is only entitled to interfere with the exercise of discretion where it is shown that the court whose exercise of discretion is impugned, has either not taken into account a relevant factor, or taken into account an irrelevant factor or that short of these the exercise of the discretion is plainly wrong. Etyang, J appear not to have taken into account the fact that the appellant was a first offender and that he had been in custody for over one year before he was sentenced. The learned Judge's failure to take these factors into account gives us the right to interfere with the sentence he imposed on the appellant. We accordingly set aside the sentence of life imprisonment imposed on a man of some thirty-eight years and substitute it with a sentence of fifteen (15) years imprisonment to run from the date when the appellant was first sentenced by the superior court."

38. In the circumstances, we are constrained to interfere with the sentence. While we uphold the conviction of the appellant, we quash the life sentence imposed upon him and substitute therefor a sentence of 30 years. The record reveals that he was out on bond until 21st January 2016. Pursuant to section 333(2) of the *Criminal Procedure Code* the sentence will run from that date.

39. It is so ordered.

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

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR