Mutuma v Republic (Criminal Appeal 101 of 2018)
[2025] KECA 1010 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 1010 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 101 OF 2018

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

MAY 2, 2025

BETWEEN

JOHN MUTUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Chitembewe, J.) delivered on 18th September 2018 in H.C. CRA No. 20 of 2017)

JUDGMENT

1. This appeal arises from the judgment of the High Court of Kenya at Meru (Chitembwe, J.) and delivered on 18th September 2018 by Mabeya, J. in Criminal Appeal No. 20 of 2017. This is a second appeal.

2. A brief background of the matter is that the appellant was initially charged before the Chief Magistrate's court at Isiolo in Criminal Case No. 590 of 2015 with the offence of defilement contrary to section 8(1) of the *Sexual Offences Act* No. 3 of 2006 and an alternative charge of indecent act.

3. Particulars of the offence were that on the 25th day of December 2015 in Isiolo County within Eastern Region, the appellant intentionally caused his penis to penetrate the anus of ME, a child aged 14 years.

4. At the hearing of the matter, the prosecution called six (6) witnesses. The minor complainant (hereinafter minor) gave sworn evidence after the court subjected him to voire dire examination and noted that he was intelligent enough to testify and he understood the meaning of an oath. The prosecution's case was that at the time of the defilement, the minor was 15 years old, having been born on 24th March 2001, and was in standard 7 at [Particulars Withheld] School, Isiolo. On 25th December around 1.00 a.m., the minor was in a house at Game Area, which had been leased by PW2 AH, his mother, to keep the minor and his two companions, among them PW3 Erube, in isolation after they

passed through the rite of circumcision. The minor and his companions were being cared for by PW4 Stefano Lokorono, one Kayamba, and the appellant whose duty was to take food to them, clean them up, and attend to their needs.

5. On the evening in question, the appellant and PW4 brought food to the minor, PW3 and their co-initiate. After they had eaten, the appellant informed them that they would not sleep that night. The appellant then suggested that they go to a disco, but the complainant refused because he could not wear any shorts or trousers. The complainant felt pressed so he went outside to go to the toilet. While he was outside, the appellant came, pulled him, and told him to accompany him to KWS camp. The complainant refused and the appellant took a rungu and began to hit him, demanding that he agrees to one of the three options; to be raped, to go to his mother's house while naked, or to go to his aunt's house. The complainant declined to make any choice between the given options and demanded to be returned to his mates.

6. The minor narrated how the appellant began to hit him, leading him to the nearby forest at KWS Camp, how he dragged him to a shallow hole, and how the appellant unzipped his long trousers and sodomized him. The minor testified that the appellant used a condom and that he sodomized him for almost 30 minutes. He said that he felt pain in his anus. After the ordeal, the minor explained that the appellant told him to return to the house after he gave him his shirt to wear, as he had torn his shirt during the sexual attack. The appellant remained with a vest. When they returned, the appellant told the minor and his co-initiates to sleep.

7. The next morning, when the minor's younger brother ML, brought him underwear, the minor informed him of the incident and asked him to go and report to their mother that the appellant had defiled him. PW3 and PW4 confirmed that the appellant went out to help himself and that the appellant followed him. They would later hear screams. When the minor returned to the house, he was wearing the appellant's shirt, while the appellant was dressed only in a vest.

8. PW2 told the court that when she received the report of sodomy from her son M, she went immediately to where the minor was staying and started screaming, attracting members of the public to the scene. An elder was also called, who pleaded with the public not to lynch the appellant. The minor informed the mother and the others that the appellant had used a condom as he sodomized him. That condom was recovered at the scene of the incident and identified by the minor. However, it got lost before it could be surrendered to the police. The appellant was taken to the police station using a taxi. The minor and the appellant were taken to Isiolo General Hospital for examination, and according to PW2, the HIV test was done, which proved negative for both.

9. Dr. Mohamed Abdikadir Guyo, PW5, a Medical Officer attached to Isiolo General Hospital produced a P3 form signed on 29th December 2015 by his colleague; Clinical Officer, Daudi Dabaso. PW5 testified that upon physical examination of the minor by the Clinician, he found that the appellant's clothes were intact, they were not torn, and had no blood stains. On examination of his anus, the Clinician found bruises measuring 2 cm in depth and 1 cm wide and that there was bleeding in that area. The minor was unable to walk properly. Further, the injured area had a white discharge oozing. After the examination, the Clinician formed the opinion that the minor had been sodomized.

10. The appellant was placed on his defence. He stated that he would call two (2) witnesses. However, he was unable to trace his witnesses. He gave an unsworn statement. He denied committing the offence. He confirmed that on 25th December 2015, he was assigned by PW2, the minor's mother, to look after the minor and two other boys who had been circumcised. He stated that he went to the minor's mother to claim fKshs.3,000/- which was the agreed payment. However, the mother was rude and told him that she had spent the money. The following day, on 26th December 2015, at around 6.00 a.m. the appellant

went back to take care of the boys and that is when PW2 and three young men came and arrested him and took him to Isiolo police station on the allegation that he had starved and abandoned her child and the other two boys. When they reached the station, he discovered that he had been accused of defiling the minor. He was taken to the hospital but was not examined. The appellant alleged that the minor was pushed by his mother to frame him.

11. In the judgment of the learned trial magistrate delivered on 2nd February 2017, the court Hon. Mungai, found the appellant's guilt had been established beyond reasonable doubt and proceeded to find him guilty and convict him for defiling the minor. During mitigation, the appellant stated that he was 21 years old and had nothing to say. The trial magistrate noting the seriousness of the offence sentenced the appellant to serve 20 years imprisonment.

12. Aggrieved and dissatisfied with the said judgment, the appellant filed an appeal to the High Court of Kenya at Embu to wit Criminal Appeal No. 20 of 2017 and faulted the trial magistrate on grounds that he erred in law and fact by inter alia; failing to observe that the evidence adduced by the prosecution could not sustain a conviction against him; failing to observe that no investigations were carried out, urging that he had suffered prejudice; failing to note that the evidence adduced by the medical officer was inconclusive as he was neither medically examined nor D.N.A profiled; and, by failing to note that the minor claimed to have been examined by the doctor on 29th December 2015 and yet the ordeal was committed on 25th December 2015 which made the evidence to be cooked up.

13. The appeal was canvassed by way of written submissions with oral highlights.

14. In the judgment of Chitembwe, J. dated 16th July 2018 and delivered on 18th September 2018 by Mabeya, J., the learned Judge found that the prosecution had proved its case beyond reasonable doubt. He noted that the appellant was entrusted with the duty of taking care of the initiates and his sexual desires led him to sodomize the minor. He betrayed the trust bestowed upon him by the parents of the three boys. The learned judge found that the appellant penetrated the anus of the complainant and was guilty of defilement and that it was not a frame-up. He agreed with the finding of the trial court and upheld the conviction. On sentence, the learned Judge observed that the sentence was the minimum under section 8 (3) of the *Sexual Offences Act*, and was not harsh. In conclusion therefore, the learned judge found no merit in the appeal and dismissed it.

15. Aggrieved and dissatisfied with the said judgment, the appellant preferred a second appeal to this Court. The appellant faults the learned judge on the following grounds.

    1. That the learned judge erred in law by failing to make findings that there were irregularities, inconsistencies, contradictions and fabrication of the allegations alleged committed by the appellant.

    2. That the learned judge erred in law by failing to observe that the prosecution case was not proved beyond reasonable doubt as the law enjoins.

    3. That the learned judge erred in law by failing to note that there was no exhibit brought before the court to support the allegations.

    4. That the learned judge erred in law by failing to find that the trial magistrate failed to order D.N.A test on both parties to ascertain the truth since the appellant was arrested on the same day as the complainant.

    5. That the learned judge erred in law by rejecting his defence without giving any cogent reasons.

1. The appellant prays that his appeal succeeds entirely, conviction quashed, sentence set aside and he be set at liberty.

2. The appeal was heard on the 6th November 2024. The appellant filed his submissions dated 5th November 2024, while learned Prosecution Counsel, Ms. Adhi filed the respondent's submissions also dated 5th November 2024. They relied on the submissions as filed.

3. We have considered this appeal, the grounds of appeal raised, the submissions by the appellant and the learned prosecution counsel. This is a second appeal, and by dint of section 361 of the *Criminal Procedure Code*, we can only concern ourselves with points of law. However, this can be qualified because, although on a second appeal, this Court is only entitled to deal with matters of law, factual evaluation becomes necessary where it is alleged that the first appellate court failed to undertake its obligation of subjecting the evidence before the trial court to fresh scrutiny. In that regard, this Court held in Jonas Akuno O'kubasu vs. Republic [2000] eKLR 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 judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. 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."

19. Having carefully considered this appeal, we find that what falls for our determination is whether the learned Judge, as a first appellate court, subjected the evidence adduced by the prosecution to fresh scrutiny and arrived at its own conclusion.

20. The appellant has challenged the adequacy of the evidence adduced and the sufficiency of the analyses and evaluation by the first appellate court. The case against the appellant was that he defiled the minor, then aged 15 years old. The minor's age was, proved by the birth certificate produced in evidence by the mother, PW2 as P. Exhibit 1. The appellant's contention was that the minor conspired with his mother, PW2 to frame him of the offence, and that there were inconsistencies in the evidence adduced, which included failure to produce evidence, reliance on inconclusive medical evidence, the lack of investigations into the case and the rejection of the appellant's defence without reasonable explanation.

21. The learned trial magistrate found that the evidence against the appellant was by the minor who testified that the appellant, through assault using a rungu, forced him to the bush where he sodomized him for 30 minutes. He found that the evidence of the minor was corroborated by PW3 and PW4, who heard screams after the minor went out to answer a call of nature. Prior to that, they saw the appellant

go out after the minor. PW3 requested PW4 to check who could be screaming. He said he feared to go far. Afterward, both saw the appellant and the minor return together, with the minor dressed in the appellant's shirt.

22. The first appellate court agreed with the learned trial magistrate that PW3 and PW4 corroborated the minor's evidence. They heard the screams after the minor and the appellant had gone outside. They also saw the minor wearing the appellant's shirt confirming they had been together. Both courts below found that the medical evidence, through the P3 form produced as P.Exh. 2 was proof that the minor was defiled through penetration of his anus given the bruises and bleeding in the anus, and a white discharge, which was all proof of penetration in that area.

23. We have re-considered the evidence and the analyses by the learned Judge. The Judge considered the evidence before the trial court objectively and dispassionately. He arrived at a resolute conclusion that the learned trial magistrate correctly weighed the evidence and arrived at the correct decision. It is trite that a second appellate Court should not interfere with the findings of fact of the trial or first appellate court unless it was based on a perversion of the evidence, or it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. See Adan Muraguri Mungara v R KECA 131 KLR and Jonas Akuno O'kubasu vs. Republic [2000] KECA 141.

24. Having carefully considered the decision of the trial court and the first appellate court, we are satisfied that the two courts below correctly analyzed the evidence and came to the correct conclusions. We find that there was ample overwhelming corroboration of the evidence of the minor in the evidence of PW3 and PW4. The clinician's findings on the medical examination of the minor confirmed that he had been sodomized, another piece of evidence that corroborated the minor's testimony.

25. The appellant complained that his defence was rejected. His evidence was that the minor conspired with his mother PW2 to frame him for the offence. The learned trial magistrate considered the appellant's defence elaborately and concluded that the defence was untenable as it was clear that when PW2 went screaming to the location where the minor was staying during the date in question, she had not had an opportunity to meet with the minor. The learned Judge agreed with that finding of the trial court and was satisfied there was no chance that the offence was a fabrication as the appellant had alleged in his defence. Also considered is the appellant's defence that PW2 had declined to pay his salary for taking care of the minor and his co-initiates and so had a grudge against him. As both the courts below found, he had not completed his work, and therefore the payment was not due. Further PW4, his co-worker taking care of the minor and those others did not make any allegation that they had been denied payment by PW2. We note further that these issues were not raised with PW2 during cross-examination.

26. We are satisfied that the conviction entered against the appellant was safe. There was overwhelming evidence against him. The learned Judge properly analyzed and evaluated the entire evidence and came to the correct conclusion on the case. The appeal on conviction lacks merit.

27. Regarding the appeal on sentence, the trial court imposed the minimum sentence for the offence prescribed under section 8 (3) of the *Sexual Offences Act*. The circumstances of the case shows that the appellant was left caring for the minor and two other youths who were recovering from wounds following circumcision. The sentence awarded was deserved in the circumstances where the appellant took advantage of the minor due to his vulnerable state, which was abuse of his position of trust given to him by the minor's mother.

28. The result is that this appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF MAY, 2025.

S. ole KANTAI

.....

JUDGE OF APPEAL

J. LESIIT

.....

. JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR