Githaiga v Republic (Criminal Appeal 58 of 2019)
[2025] KECA 1138 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1138 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 58 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

ANTHONY MWANGI GITHAIGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Anthony Mwangi Githaiga, is currently serving a 20-year imprisonment term upon being convicted of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on the 9th July 2015 at Nyandarua County the appellant intentionally caused his penis to penetrate the vagina of D.W.W. aged 14 years. The appellant denied committing the offence but after hearing the evidence of five prosecution witnesses and the appellant, the trial court found him guilty and convicted him. The conviction and sentence were subsequently affirmed by the High Court in the judgment that is the subject of this appeal.

2. The appellant challenges both conviction and sentence on the condensed grounds that the ingredients of the offence were not proved and that the mandatory minimum sentence imposed on him is unconstitutional.

3. In brief, the case against the appellant was that on 9th July 2015 at about 5.00 p.m., DW.W. (PW1) who was 14 years old at the time had gone to look for firewood near Tulasha River. It was there that she encountered the appellant, who was their neighbour and known to her as "Baba Njeri". The appellant called her and notified her that he would be her boyfriend henceforth. The appellant then led her into a nearby maize farm where he undressed her and proceeded to have sex with her. She stated that the appellant's male organ did not completely penetrate her, but after the act, she noted a mucus-like substance on her private parts. She then left for home, where she told her mother of the incident.

4. Not far from the scene was D.W.K. (PW2), who had earlier exchanged pleasantries with the appellant while at her farm. A few minutes later, on her way home, she saw the appellant and D.W.W. (PW1) having a chat and then entering a maize farm. She immediately called F.N.M. (PW3), who lived nearby, and as they entered the farm, they met the appellant coming out while buckling his trousers. The appellant informed them that he was from relieving himself. They, however, noted disturbed grass and alerted the village elder.

5. Dr. Maingi Muchiri (PW4) attended to the complainant at Engineer District Hospital. He noticed that the complainant had a freshly broken hymen and the outer vagina was tender and painful. Vaginal swab showed no spermatozoa and the HIV and syphilis tests were negative. There were physical signs of forceful penetration.

6. PC Philip Gatheru (PW5) from Kinangop Police Station investigated the matter and charged the appellant.

7. The appellant testified as DW1 and called his wife G. N. as DW2. They stated that they were in their farm on the material day. When they left in the evening, the appellant went ahead of his wife to tend to their cattle. The appellant would later feel pressed, prompting him to branch into a maize farm to relieve himself. On his way out of the maize, he encountered PW2 and PW3, who accused him of the offence. DW2 additionally testified that at the bridge, she saw her husband who was ahead of her in the company of another man, and they stopped at the hilltop. She also saw a woman. She was then informed of the accusations levelled against her husband, but she opted to proceed with her journey home.

8. When this appeal was placed before us, the self-representing appellant appeared virtually from Naivasha Maximum Prison while on record for the respondent was Senior Assistant Director of Public Prosecutions (SADPP), Mr. Omutelema. Both parties mainly relied on their written submissions.

9. In his undated submissions, the appellant argued that mandatory minimum sentences, particularly that imposed under section 8(3) of the *Sexual Offences Act*, are unconstitutional. He claimed these sentences violate various articles of *the Constitution* by removing judicial discretion in sentencing and undermining the ability of the Judiciary to deliver justice based on individual circumstances. The appellant stressed the importance of separation of powers, asserting that legislative imposition of mandatory minimum sentences encroaches on the Judiciary's authority to determine appropriate punishment. He also asserted that imposing the mandatory sentence, without considering mitigating factors, denied him the right to the least severe punishment. To support his case, the appellant presented evidence of his rehabilitation efforts, including certificates from educational institutions, and requested the Court to consider the time he has spent in custody when reviewing his sentence. He consequently sought a reduction of his sentence in appreciation of his rehabilitation and the time already served.

10. In opposition to the appeal, Mr. Omutelema relied on submissions dated 16th September 2024. Counsel extensively reviewed the evidence on record and submitted that the offence was proved. Regarding the sentence, Mr Omutelema referred to the Supreme Court holding in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) to urge that mandatory minimum sentences for sexual offences are legal and that the sentence imposed upon the appellant was merited in the circumstances of the case. Counsel urged us to dismiss the appeal and maintain the sentence, arguing that despite the mitigation, the sentence was deserved and was the minimum provided by the law.

11. This being a second appeal, our main concern is on matters of law, as issues of fact have been settled by the two courts below. This is the import of section 362(1)(a) of the *Criminal Procedure Code*, which has previously been expounded by the Court in, among other cases, Dzombo Mataza vs. Republic [2014] KECA 831 (KLR) where it was held as follows:

> " 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.
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> 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."

12. In line with our stated mandate, we have reviewed the record, the submissions and the authorities referenced by the parties. The two issues for our determination are whether the offence was proved and, if so, whether the sentence is legal.

13. The ingredients of the offence of defilement under section 8(1) of the *Sexual Offences Act* were summarized in Serem vs. Republic [2023] KECA 30 (KLR) as follows:

> " The key ingredients that must exist to found a conviction in an offence of defilement are firstly, that the complainant/victim is a child, secondly, that there was penetration and thirdly, that the person charged was positively identified as the perpetrator of the offence."

14. In his initial grounds of appeal, the appellant challenged proof of all the three elements of the offence of defilement. However, upon review of the record and the impugned judgment, we are satisfied that all the three essential elements of the offence were established beyond reasonable doubt. The ingredient of age was established through the evidence of PW1 who testified that she was 14 years old. Additionally, her certificate of baptism showed that she was born on 16th March 2000, hence her age at the time was 15 years and 4 months. In Mwalango Chichoro Mwanjembe vs. Republic [2016] KECA 183 (KLR) it was held that:

> " 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 documentary evidence such as a birth certificate, baptism 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, among other credible forms of proof."

15. And in Hadson Ali Mwachongo vs. Republic [2016] KECA 521 (KLR), the Court held that:

> "Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus a person who is, for example, 10 years and 6 months is deemed to be 10 years old and not 11 years old. That approach entails not taking into account the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old, must be treated to be 15 rather than 16 years old."

16. In this case, we are satisfied that the complainant's age fell within the provisions of section 8(3) of the *Sexual Offences Act*, that is to say the complainant was a child between the age of twelve and fifteen years at the time of the commission of the offence.

17. Similarly, the ingredient of penetration was established by the evidence of the complainant and corroborated by that of Dr. Maingi Muchiri (PW4). The complainant narrated how the offence was committed and further stated that she noticed a mucus-like substance on her private parts when the appellant was done. PW4, on the other hand, concluded that there was forceful penetration of the complainant whose hymen was freshly torn. Even though he did not see any spermatozoa, he indicated that the appellant had earlier been attended to in another facility. We therefore find no reason to interfere with the conclusion of the learned Judge that there was penetration.

18. The appellant's identity was never in doubt. He was known to the complainant, who referred to him as "Baba Njeri". Both PW2 and PW3 knew the appellant and placed him and the complainant at the scene of the crime. In his defence the appellant did not dispute being at the scene where the complainant alleged that the offence was committed. In the circumstances, we agree with the learned judge that the appellant's identity was proved beyond reasonable doubt. Consequently, we find that the offence was proved and there is therefore no merit in the appeal against conviction.

19. In his submissions, the appellant concentrated on the constitutionality of his sentence by virtue of its mandatory nature. The jurisdiction donated to this Court by section 361(1) of the *Criminal Procedure Code* was enunciated by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra) as follows:

> "49. Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.
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> 50. As we have stated before, this Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. We have also settled that for an appeal to lie to the Supreme Court from the Court of Appeal under article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination."

20. The decision of the Supreme Court binds us. The appellant's grouse in respect to the legality or constitutionality of the mandatory sentences under the *Sexual Offences Act* is being raised for the first time before this Court. As held by the Supreme Court, the issue having been raised for the first time before this Court, we are barred from determining the issue. Additionally, the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (supra) and Republic vs. Ayako [2025] KESC 20 (KLR) has affirmed the constitutionality of what is commonly referred to as "the minimum mandatory" sentences in the *Sexual Offences Act*. Furthermore, the severity of a sentence is regarded as a matter of fact, which is not within our purview

on a second appeal unless the trial court had no jurisdiction to impose the sentence or the same was enhanced by the High Court. That is not the case in the appeal before us. We also note that the Court considered the appellant's mitigation before sentencing him to 20 years' imprisonment.

21. In the end, we find the appeal lacks merit and we dismiss it in its entirety. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.ARB, FCIARB.

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR