MOO v Republic (Criminal Appeal 335 of 2019)
[2025] KECA 1444 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1444 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 335 OF 2019

MSA MAKHANDIA, HA OMONDI & LA ACHODE, JJA

JULY 31, 2025

BETWEEN

MOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nyamira, (Majanja, J) dated 12th October 2018, in HCCRA NO. 53 of 2016)

JUDGMENT

1. This is a second appeal against the judgment of the High Court of Kenya at Nyamira, delivered on 12th October, 2018, by Majanja J. The appellant, MOO, had been charged, tried, convicted and sentenced to life imprisonment by the Senior Resident Magistrate's Court at Keroka in Criminal Case No. 710 of 2015 for the offence of defilement, contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, ("SOA"). Dissatisfied with the conviction and sentence, he appealed to the High Court of Kenya at Nyamira, which in turn upheld the trial court's findings, thereby dismissing his appeal. He is now before this Court on a second and perhaps appeal.

2. The facts of the case before the trial court were that on 22nd June, 2015, at around 7:00 pm, the complainant, (PW1) a seven-year-old girl named FO (real name withheld), accompanied her uncle, the appellant to a shop to purchase airtime. On their way back whilst passing through a tea plantation, the appellant offered her biscuits before forcing her to the ground. He then sexually assaulted her. Shortly after the incident, they were confronted by the complainant's mother (PW2) who demanded to know what had transpired between them. She had learnt that PW1 was with the appellant and went searching for her. Upon confronting him, the appellant began crying and asking for forgiveness before escaping.

3. The complainant and PW2 immediately reported the incident at Ibacho Police Station, after which the complainant was taken to the hospital for medical examination. The examination conducted by

the clinical officer, Danson Nyabuga (PW4) revealed that the complainant had bruises on both her inner and outer vaginal walls, a perforated hymen, and an open vagina. This led to the conclusion that she had been subjected to penetrative sexual intercourse.

4. PW5, the investigating officer confirmed that the matter was reported to Ibacho Police Station and that the appellant was arrested three days later following investigations. He presented the complainant's birth certificate as evidence to verify her age.

5. In his defence, the appellant denied committing the offence and raised an alibi, claiming that he was away on a safari at the time of the incident and only returned three days later, at which point he was arrested and charged.

6. However, the trial court, upon evaluation of the evidence tendered both by the prosecution and the appellant dismissed the appellant's defence, finding that the evidence presented overwhelmingly placed him at the scene. The complainant's testimony, corroborated by medical evidence, proved beyond reasonable doubt that the appellant had committed the offence. Given that the complainant was seven years old, her inability to consent rendered the appellant's actions criminal under the SOA. He was accordingly convicted and sentenced to life imprisonment as already stated.

7. The appellant appealed his conviction and sentence to the High Court at Nyamira arguing that he had not been furnished with witness statements during the trial, which affected his adequate preparation of his defence. He also claimed that the prosecution had failed to prove the offence charged beyond reasonable doubt. The High Court upon reviewing the evidence tendered in the trial court as required upheld the conviction and sentence. In essence it dismissed the appeal in its entirety.

8. The appellant, still dissatisfied, lodged this second and perhaps last appeal. The appellant, in his undated amended memorandum of appeal, raised a whopping 17 grounds of appeal against the judgment of the High Court but which can be condensed into five grounds to wit: that the charge sheet was defective; the case was not proved beyond reasonable doubt; failing to call key witnesses; alibi defence was wrongfully dismissed, and the mandatory life sentence imposed was harsh, excessive and unconstitutional.

9. When the appeal came up for hearing, the appellant appeared in person from Kibos maximum prison on our virtual platform while Ms. Mochama, holding brief for Mr. Sitati, learned Prosecution Counsel appeared for the respondent. Both parties opted to entirely rely on their respective written submissions.

10. The appellant submitted, that he was initially charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of SOA However, following the conclusion of the trial, he was convicted and sentenced to life imprisonment by the trial court whilst invoking Section 8 (2) of the SOA as the penalty section. This action without formally amending the charge sheet seriously prejudiced him. To that extent, the appellant maintained that the charge sheet was defective, relying on the authorities of Chemagong v. Republic [1984] KLR 611 and Nhoro v. Republic [1998] KLR for the proposition.

11. The appellant further submitted that the prosecution failed to establish penetration beyond a reasonable doubt. He emphasized that no vaginal discharge or sperm were observed, and the hymen was intact, arguing that these factors negated any penetration be it partial or complete. He referred to the evidence of PW4, who stated that there were dried stains but could not confirm their nature. Additionally, he relied on the case of P.K.W v. Republic [2012], where the court held that a broken hymen alone is not definitive proof of penetration and that a hymen may be ruptured due to factors unrelated to sexual intercourse, such as physical activities or injury.

12. The appellant contended that inconsistencies in the prosecution's case weakened its credibility. He highlighted contradictions in the testimonies of prosecution witnesses regarding the time of the alleged offence, noting that while PW5 stated it occurred at midday, other witnesses provided conflicting timelines. He submitted that this discrepancy created a reasonable doubt which should have been resolved in his favour. He referred to the case of Arthur Mshila Manga v Republic (2016) eKLR, where inconsistencies in evidence led to the rejection of the prosecution case.

13. Further, the appellant argued that the age of the complainant was not adequately proved. He submitted that the birth certificate produced indicated a date of birth that contradicted the evidence of PW5, rendering the age element of the complainant uncertain. He contended that this was a material contradiction that should again have been resolved in his favour. It was also submitted by the appellant that vital witnesses were not called to testify and therefore adverse inference ought to have been drawn in his favour.

14. On sentence, the appellant submitted that the mandatory life sentence imposed on him was harsh and excessive, considering the circumstances of the case. He relied on the case of Bernard Barasa Wekesa v. Republic [2018] eKLR, where the court reconsidered life sentences to align with principles of fairness and proportionality and imposed a term sentence. He also referred to the judgment of Mativo J in Constitutional Petition No. F009 of 2020 at Mombasa High Court, which questioned the rigidity of mandatory sentences.

15. In conclusion, the appellant prayed that this Court allows the appeal, quash the conviction and set aside the sentence.

16. The appeal was opposed by the respondent. It was submitted that the appellant was properly charged, tried, convicted, and sentenced. He was sentenced under Section 8(2), which prescribes a life sentence for defilement involving a child aged eleven years or less. That though the charge sheet was not amended to reflect this during the trial, no prejudice was suffered by the appellant as a result.

17. Counsel submitted that the appellant's contention that vital witnesses were not called lacked merit. In Bukenya & Others v. Uganda [1972] E.A. 549, the Court held that the prosecution must present all necessary witnesses to establish the truth, even if their evidence is inconsistent. However, as reaffirmed in Julius Kalewa Mutunga v. Republic [2006] eKLR, the prosecution retains the discretion in determining which witnesses to call, and an appellate court should only interfere if improper motives influenced this discretion. The adverse inference suggested by the appellant was unwarranted, as the trial court record does not show any key witness who were not summoned and whose testimony could have affected the overall decision of the trial court either way. Furthermore, Section 143 of the *Evidence Act* provides that no specific number of witnesses is required to prove a fact. Finally, in the case of Keter v. Republic [2007] 1 EA 135 the court held that the prosecution need only present sufficient witnesses to establish a charge beyond a reasonable doubt and not a multiplicity of them.

18. On the complainant's age, counsel submitted that the prosecution produced a birth certificate of the complainant confirming that she was seven years old at the time of the commission of the offence. This was corroborated by the testimony of her mother and the complainant herself. In any event, at no point during trial or on first appeal did the appellant challenge the age of the complainant. To now raise it is legally untenable.

19. Counsel further submitted that the appellant's alibi defence was rightly rejected. The appellant's presence at the scene of crime at the material time was confirmed by the complainant, her mother, and the assistant chief. Counsel therefore contended that the alibi defence was an afterthought and did not displace the otherwise strong prosecution's case.

20. Turning to sentence it was submitted that it was discretionary and lay with the trial court. Relying on the case of Bernard Kimani Gacheru v. Republic [2002] eKLR, counsel submitted that, the sentence must depend on the facts of each case and appellate courts should not interfere unless the sentence is manifestly harsh, excessive or based on improper considerations. In this case, the complainant was only seven years old, and the appellant abused his position of trust. The offence was grave, and the trial court acted in accordance with the law. Section 8(2) of the SOA prescribes life imprisonment for such cases, which is both legal and constitutional.

21. In conclusion, counsel submitted that considering the overwhelming evidence, the appellant's conviction and sentence were sound and should be upheld.

22. The appeal before this Court is a second appeal, and in accordance with the established legal framework, this Court is mandated to consider only matters of law. Section 361(1)(a) of the *Criminal Procedure Code* provides inter alia 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 on a matter of fact."

23. This Court in the case of Njoroge v. Republic [1982] KLR 388, also held that on a second appeal, the court is bound by the concurrent findings of fact made by the lower courts unless such findings were based on no evidence or resulted from a misapprehension of the law.

24. Having considered the record of appeal, the submissions by both parties, and the applicable law, the issues we discern for determination are whether: the charge sheet was defective and if the alleged defect prejudiced the appellant; penetration was sufficiently proved as required by law; the prosecution's failure to call certain witnesses affected the fairness of the trial and whether the sentence imposed was legal and proportionate to the offence.

25. On the issue of the charge sheet, the appellant contends that it was defective. Section 137 of the *Criminal Procedure Code* prescribes the format and substance of charges and stipulates that an error in the charge sheet does not automatically render a conviction invalid unless it results in a miscarriage of justice. This Court in Richard Kaitany Chemagong v. Republic [1984] KLR 611 held that unless the accused was misled or prejudiced by such a defect, it should not vitiate the proceedings. In this case, the charge sheet clearly outlined the offence as per the SOA. Much as it would have been desirable to amend the charge sheet any time before judgment, so as to introduce Section 8(2) as opposed to Section (3) of the SOA under which the appellant had been initially charged considering the ascertained age bracket of the complainant, we do not discern any prejudice that was occasioned to the appellant by the omission as the evidence led showed that the complainant was aged 7 years at the time of commission of the offence. No evidence of any other age and particularly that which would have moved the complainant to the age bracket of Section 8(3) of the SOA was tendered. In our considered view, the omission was more of a typographical error than anything else, and the appellant was not prejudiced at all. In a nutshell therefore the appellant failed to demonstrate how the alleged defect or omission affected his right to a fair trial.

26. At this juncture we now address the question of the age of the complainant. Though the appellant claims that the age of the complainant was not proved to the required standard, we however note that the prosecution produced a birth certificate in respect of the complainant confirming that she was seven years old at the time of the commission of the offence. This fact was corroborated by the testimony of her mother and the complainant herself. In the event that the birth certificate produced indicated a date of birth that contradicted the evidence of PW5, as alleged by the appellant, then obviously the date

on the birth certificate prevails in terms of *Births and Deaths Registration Act*. In any event at no point during trial or on first appeal did the appellant challenge the age of the complainant. That being the case, and as correctly pointed out by counsel for the respondent, it is legally untenable to raise it now.

27. Regarding penetration, Section 2 of the SOA defines penetration as "the partial or complete insertion of the genital organ of a person into the genital organs of another person." The prosecution relied on the complainant's and mother's testimony plus medical evidence to establish penetration of the complainant by the appellant. The Supreme Court in AML v. Republic [2012] eKLR held that penetration does not have to be proved exclusively by forensic or medical evidence but can be established through credible testimony of the complainant. This Court in the case of P.K.W. v. Republic (supra), further reinforced that a broken hymen alone is not conclusive proof of penetration, but medical evidence corroborating the complainant's account should be given due weight. In the instant case, the evidence of the complainant on the issue was not seriously controverted. Coupled with the fact that, it was noted that the complainant's school uniform was dirty and her underwear was watery, as well as the evidence of PW4 and the plea for forgiveness by the appellant when confronted by the complainant's mother immediately after the incident leaves no doubt as to the act of penetration.

28. The appellant challenges the prosecution's failure to call certain witnesses, arguing that their testimony could have been material to the case. However, in Bukenya & Others v. Uganda (supra) the court held that an adverse inference can only be drawn where the prosecution deliberately failed to call essential witnesses whose testimony would likely be adverse to its case. This Court in Keter v. Republic (supra), reaffirmed that the prosecution is not required to call a superfluity of witnesses but only those sufficient to establish the charge beyond reasonable doubt. In this case, the evidence presented was comprehensive, and the appellant has not demonstrated how the absence of additional witnesses prejudiced him. Nor has he suggested the witnesses he had in mind. Again, nothing barred him from calling such witnesses in support of his defence.

29. Finally, the appellant challenges the mandatory life sentence imposed on him under Section 8(2) of the SOA arguing that it was unconstitutional as it denied the trial court judicial discretion. This Court in Bernard Kimani Gacheru v. Republic (supra), held that sentencing is a matter within the discretion of the trial court and should be disturbed only if it is excessive or based on improper considerations. Furthermore, in Munyendo & Another v. Republic [2017] eKLR, the court upheld the legality of mandatory sentences prescribed by statute, affirming their constitutionality unless expressly challenged through a constitutional petition. See also the case of Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions).

30. The appellant, having been convicted of defiling a child below the age of eleven, was subject to the life sentence prescribed by law, which the trial court imposed and upheld by the first appellate court. Both courts found the sentence proportionate to the gravity of the offence. We have no reason(s) to depart from those sentiments.

31. In the ultimate, we are satisfied that the appeal is devoid of merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR