OM v Republic (Criminal Appeal E079 of 2023)
[2025] KECA 1322 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1322 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E079 OF 2023

SG KAIRU, AK MURGOR & KI LAIBUTA, JJA

JULY 18, 2025

BETWEEN

OM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 23rd August 2018 in Criminal Appeal No. 10 of 2018)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 23rd August 2018 in Criminal Appeal No. 10 of 2018 in which the learned Judge upheld the judgment of the Senior Principal Magistrate's Court at Mariakani (L. K. Gatheru, RM) dated 8th April 2016 in Criminal Case No. 632 of 2015.

2. The brief background of the instant appeal is that the appellant was charged and convicted of the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* and sentenced to 20 years imprisonment. The particulars of the offence were that, on 9th December 2015 at [Particulars withheld] Village, Chengo Location in Kinango Sub- County, Kwale County within Coast region, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of GM, a child aged 15 years.

3. In addition, the appellant faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of the alternative charge were that, on the date and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of GM, a child aged 15 years contrary to section 11(1) of the Act.

4. The appellant denied the charges whereupon the trial proceeded with the prosecution calling four (4) witnesses, including the complainant.

5. At the trial, the complainant (PW1) gave a sworn statement after a voire dire examination and testified that, on the material day at about 10pm, she was at home when she and her 7-year-old sister, one L, decided to go and spend the night at her uncle MM (PW2) place; that, while on the way, they met the appellant, who is their uncle and their father's step-brother; that, no sooner had PW1 greeted and passed the appellant, than he grabbed her hand and dragged her into the nearby woods; that her sister L immediately ran off to PW2's home; that, while in the woods, the appellant pulled down her pants, shoved her onto the ground, removed his clothes, lay on her and inserted his penis into her "private parts"; that, after defiling her, he attempted to start all over again, only for L, one M and PW2 to appear at the scene; that PW2 confronted the appellant and frog marched him to the village elder, who advised them to go to the Sub-Chief before reporting the matter at Silaloni Police Patrol Base; that, after recording her statement at Silaloni Police Patrol Base, PW1 was escorted to Samburu Health Centre for medical examination.

6. In cross examination, PW1 stated that there was no-one else at the scene; that no one had paid her dowry; and that the appellant had a grudge with her mother following allegations of attempted rape.

7. PW2 testified that he knew the appellant, who is his younger brother; that, while at home on the material night at around 10pm, one L arrived at his home and informed him that PW1 had been "caught along the way"; that he instantaneously took a torch and dashed towards the path leading to his house in search of PW1; that he arrived at a spot along the path where he heard the sound of someone struggling to breathe; that he ran to the area where the sound was coming from; that, when he reached the area, he found the appellant fully naked with semen dripping from his penis; that PW1 had her skirt pulled above her waist; that he immediately sent L to summon her father to the scene; that PW1's father came to the scene alongside some other villagers; and that they all went back home to deliberate on the matter before the appellant was arrested the following morning.

8. PW3, Rashid Omar, a Clinical Officer at Samburu Health Center, testified that PW1 was presented at the center on 10th December 2015 for medical examination with a history of alleged defilement; that she appeared to be depressed; that, on physical examination, she was found to have laceration on her labia minora; that her hymen was missing, and semen was in her vaginal canal; that a high vagina swab revealed presence of spermatozoa; that a HIV, STD and Pregnancy tests came back negative; that epithelial cells were present in her vaginal canal confirming "friction force during penetration, especially where the complainant is a virgin"; and that he concluded that PW1 had experienced vaginal penetration. PW3 concluded his testimony on production in evidence of PW1's P3 Form dated 10th December 2015.

9. The investigating officer, PC Erastus Mwarome (PW4) attached to Silaloni Police Patrol Base, testified that, at 5.30pm on 10th December 2015, PW1 was presented by her father at the Police Patrol Base to report the incident that had occurred the previous night; that he interrogated PW1, who disclosed what had transpired; that he recorded PW1's and her father's statements; that he referred PW1 to Samburu Health Centre for medical examination; and that he arrested the appellant with the assistance of PW1's father after which he charged the appellant with the offence of defilement. PW4 produced PW1's Child Health Card indicating that she was born on 25th November 2000, and that she was first presented at a medical facility on 9th January 2001.

10. At the close of the prosecution's case, the learned magistrate found that the appellant had a case to answer and put him on his defence. The appellant gave a sworn statement and stated that, on the

material night while on his way back home from work at around 9.30pm, he heard sounds coming from the direction off the path leading to his home, which he identified as PW1's; that he switched on his torch and shone it's light towards the area where the sounds were coming from; that he saw PW1 in the company of a man who ran off immediately thereafter; that he demanded to know the identity of the male individual; that PW1 disclosed that it was one Benjamin Nduni Meko; that he escorted PW1 to her father, who decided to visit Benjamin's house but did not find him; that, the following morning, he visited the village elder in the company of PW1's father to report the incident; that the village elder advised them to report the incident to the police, only for him to be detained and charged in court.

11. In its judgment delivered on 8th April 2016, the trial court (L. K. Gatheru, RM) concluded that there was penetration; that PW1 was 15 years old; that it was contended that PW1 and the appellant are close family members and knew each other all too well; that she identified the accused as the perpetrator of the offence; that PW1 confirmed that there existed a grudge between her mother and the appellant, but that there was no apparent conflict between PW1 and the appellant; that neither of PW1's parents were called as witnesses at the trial; and that the prosecution had established its case beyond any reasonable doubt in "every facet". Accordingly, the trial Magistrate convicted the appellant and sentenced him to 20 years imprisonment.

12. Aggrieved by the trial Magistrate's decision, the appellant moved to the High Court on appeal challenging his conviction and sentence. In his undated "Memorandum Grounds of Appeal", the appellant faulted the trial magistrate for: not considering that his age was not proved; failing to consider that the medical evidence was unreliable; not considering that the prosecution did not prove its case beyond reasonable doubt; and in not considering his defence.

13. In its judgment dated 23rd October 2019, the High Court (R. Nyakundi, J.) found and held: that the prosecution established beyond reasonable doubt that the victim was aged 15 years at the time of the defilement; that penetration was proved by the testimonies of PW1, PW2 and PW3, who prepared the P3 Form; that there was strong and credible evidence on the recognition of the appellant; that the appellant did not raise any issue with the trial court regarding his age throughout the proceedings; that he did not produce any evidence to support his claim that he was born in 1998, and that he was a minor during the trial; that his defence was "just a mere joke"; and that there were no extenuating circumstances for the court to depart from the decision of the trial court on the sentence meted on him. Consequently, the High Court upheld his conviction and sentence.

14. Dissatisfied with the learned Judge's decision, the appellant moved to this Court on a second appeal challenging the learned Judge's decision to uphold his conviction and sentence. In his undated "Grounds of Appeal", the appellant faulted the learned trial magistrate for: convicting him in the absence of any cogent and tangible evidence; relying on the evidence of a single witness; relying on contradictive, inconsistent and unsubstantiated witness accounts; failing to consider time spent in remand while on trial; and for failing to consider his "unshaken" defence.

15. In addition to the grounds aforesaid, the appellant filed undated "Supplementary Grounds of Appeal" containing 2 grounds, namely that the 1st appellate court erred in law for not considering: his mitigating factors pursuant to section 216 and 329 of the *Criminal Procedure Code*; and his sentence of 20 years was harsh and excessive in the circumstances.

16. In support of his 2nd appeal, the appellant filed undated written submissions citing several judicial authorities, namely: Arthur Muya Muriuki v Republic [2015] eKLR; DWM v Republic [2016] eKLR; and Swabir Bukhet Labhed v Republic [2019] eKLR, submitting that where a penal law is couched with the prefix 'is liable to' the prescribed sentence is discretional and the maximum, "leaving the concerned court with the discretion to depart from it and impose a lesser one;" Mwanjahi v Republic

[2023] KECA 1271 (KLR); S v Jansen 1999 (2) SA 368 (C); and Samuel Achieng Alego v Republic [2018] KEHC 9805 (KLR; S v Toms 1990 (2) SA 802, submitting that mandatory sentences take away the discretion of the court in taking into account the mitigating or aggravating factors and imposing a sentence demanded by the circumstances of the case; and S v Scott- Crossley 2008 (1) SACR 223 SCA where the Supreme Court of Appeal of South Africa held that any sentence imposed must have deterrent and retributive force.

17. We hasten to observe right at the outset that a cursory look at the appellant's written submissions reveals that he did not wish to pursue his appeal on conviction but, instead, opted to appeal his sentence. In his words, the appellant submitted that "My main submission in this appeal is the issue of the sentence of 20 years, which was imposed upon me by the trial court, devoid of taking into account my mitigating factors." Accordingly, he addressed us on theseverity of his sentence from which he urged us to depart and substitute therefor a lesser sentence that will allow him to rejoin his loved ones.

18. Opposing the appeal, the Principal Prosecution Counsel, Ms. Susan Lewa, filed written submissions and a List of Authorities dated 16th January 2025 citing 3 judicial authorities, namely: Karani v Republic [2010] 1 KLR, submitting that this Court should consider matters of law only, unless it be shown that the two courts below considered matters of fact that should not have been considered, or that they failed to consider matters that they should have considered, or that they were plainly wrong in considering the evidence; Bernard Kebiba v Republic [2000] eKLR, arguing that the prosecution's evidence was corroborated by both PW2 and PW3; and Erick Onyango Ondeng' v Republic [2014] eKLR, submitting that a court has to decide whether inconsistences and contradictions are minor, or whether they go to the root of the matter.

19. Our mandate on a second appeal, as is the one before us, is confined to matters of law by dint of section 361 of the Criminal Procedure Code. In Karingo vs. 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."

20. While we take to mind the appellant's position regarding his conviction in this appeal, it would be remiss of us not to pronounce ourselves on the other relevant issue raised in this appeal with regard to the severity of the sentence. In doing so, we hasten to point out that it is not lost on us that severity of sentence is not a matter on which this Court can pronounce itself on second appeal except in exceptional circumstances.

21. With regard to the appellant's complaint on the severity of the sentence meted on him, it is indubitable that this Court has no discretionary power to reconsider a sentence on second appeal. Section 361 of the *Criminal Procedure Code* reads:

> 361. Second appeals
>
> (1) 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;

22. This Court in MGK v Republic [2020] eKLR authoritatively stated that:

> " 16. As regards the sentence, under section 361(1) of the *Criminal Procedure Code* severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal."

23. In effect, "the Court is not concerned with the severity of the sentence in a second appeal" unless, for all intents and purposes, the sentence is unlawful (see Oyoko v Republic [1982] eKLR."

24. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, and having declined to pronounce ourselves on the severity of the sentence which is by no means unlawful, we find that this appeal stands or falls on our holding on only two points of law, namely: whether the prosecution proved its case beyond reasonable doubt; and whether the appellant's defence was considered.

25. The remaining grounds of appeal are founded purely on matters of factual evidence and new points of mixed law and fact raised on second appeal, which fall outside the mandate of this Court on second appeal. Consequently, we decline to re-open or re-examine them as they do not raise any points of law worthy of our pronouncement.

26. Our preceding observations are made on the authority of the case of Adan Muraguri Mungara v Republic [2010] eKLR where this Court set out the only circumstances under which it would disturb concurrent findings of fact by the two courts below in the following terms:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the 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." [Emphasis added]

27. Turning to the 1st issue as to whether the prosecution established its case beyond reasonable doubt, we hasten to observe that the offence of defilement is rooted on three main ingredients, namely: (i) the age of the victim, who must be a minor; (ii) penetration; and (ii) the proper identification of the perpetrator, all of which must be established to secure a conviction (see: George Opondo Olunga vs. Republic [2016] eKLR; and GOA v Republic [2018] eKLR).

28. With regard to proof of the 1st ingredient of defilement, to wit, the age of the victim, this Court in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR had this to say:

> " ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." [Emphasis added].

29. Addressing itself to the importance of establishing the victim's age to sustain a conviction and sentence for defilement, this Court in Eliud Waweru Wambui v Republic [2019] eKLR observed:

> "

4. The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence could not be gainsaid. It was not in doubt that the age of the victim was an essential ingredient of the offence of defilement and formed an important part of the charge because the prescribed sentence was dependent on the age of the victim."

30. In her testimony, PW1, whose intelligence was not put to question, stated that she was 15 years old. To confirm her age of minority, PW4 produced PW1's Child Health Card, which indicated that she was born on 25th November 2000. We take to mind the fact that the evidence of PW1's age of minority remained uncontroverted and, accordingly, we agree with the two courts below that the prosecution proved that she was 15 years of age at the time of the incident.

31. On the 2nd ingredient of defilement, section 2 of the *Sexual Offences Act* defines penetration as "the partial or complete insertion of the genital organ of a person into the genital organs of another person".

32. The decision of the High Court of Kenya at Bomet in Sigei v Republic [2022] KEHC 3161 (KLR), citing the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, cannot elude our attention. As the High Court correctly observed:

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence."

33. In addition to PW1's testimony that she was accosted, dragged into the woods and defiled by the appellant, PW3, the Clinical Officer who examined PW1 and prepared a P3 form found, inter alia: her labia minora had lacerations, her hymen was missing, semen was present in her vaginal canal; and that she had experienced sexual penetration. Furthermore, PW2 testified that he discovered the appellant stark naked with semen dripping from his penis while PW1 had her dress pulled up above her waist. Accordingly, we find nothing to suggest that the two courts below were at fault in holding that the prosecution had proved penetration.

34. On the issue of recognition, Madan J.A in Anjononi and Others vs. The Republic [1980] KLR 59 had this to say:

> "... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

35. In the same vein, this Court in Peter Musau Mwanza vs. Republic [2008] eKLR expressed itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

36. PW1's recognition of the appellant as a person well known to her as her uncle remains uncontroverted. PW2 (who is PW1's uncle) is the appellant's older brother. PW1 and PW2 recognised and positively identified the appellant as the person who accosted PW1 and defiled her before he was discovered and

confronted by PW2. Accordingly, we find no fault in the findings of the two courts below that the appellant was properly identified as the perpetrator of the offence charged. Accordingly, we find as did the two courts below that the prosecution evidence of recognition remained unshaken in proof of the 3rd ingredient of defilement.

37. Turning to the 2nd Issue as to whether the appellant's defence was considered, pages 2 and 3 of the trial court's judgment demonstrate the depth to which the trial court went in analysing the appellant's defense. The same holds for the impugned judgment of the 1st appellate court where the learned Judge re-examined and analysed the same evidence on the first paragraph at page 15 which reads as follows:

> "…. As regard his defence, my view is that as someone who was caught at the scene of crime just after committing the offence, denying having committed the offence is just a mere joke. There is overwhelming evidence to show that the chain of events is so tightly locked that am completely satisfied that the appellant offered no explanation both at the trial and on appeal that givers rise for setting aside the conviction."

38. We borrow a leaf from the pronouncement of the High Court of Zimbabwe at Harare sitting on appeal in Effort Mutanda v S [2015] ZAFSHC 13 while addressing itself on the issue as to whether the defence evidence was considered and noted that:

> "I must, however, make it clear that by requiring the trial court to consider and weigh all evidence is not meant that the judgment of the trial court must also include a complete embodiment of all evidence led, as if it comprises a transcript of the proceedings. All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.
>
> .....
>
> In other words, this court must consider whether the magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the convictions and sentences. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence."

39. In our considered view, the appellant's contention that his defence was not considered does not hold. The trial Magistrate was not obligated to provide a complete transcript of the evidence considered in reaching the decision to convict. Moreover, the appellant made no substantive submissions on this ground, which remains a blanketing contention with no substance.. Be that as it may, we hasten to observe that pages 2 and 3 of the trial court's judgment read with the 1st paragraph in page 15 of the impugned judgment speak for themselves. Accordingly, this ground fails.

40. Having examined the record of appeal, the grounds on which it is anchored, the appellant's submissions and those of the Principal Prosecution Counsel, the cited authorities and the law, we find that the appeal has no merit and is hereby dismissed in its entirety. Consequently, the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 23rd August 2018 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR