Munene v Republic (Criminal Appeal 58 of 2017)
[2025] KECA 1228 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1228 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 58 OF 2017

S OLE KANTAI, JW LESSIT & AO MUCHELULE, JJA

JULY 4, 2025

BETWEEN

JAMES KARIUKI MUNENE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment of the High Court at Kerugoya (L. W. Gitari, J.) delivered on 17th March, 2017 in H.C. CR. Case No. 26 of 2015)

JUDGMENT

1. Section 361 (1)(a) *Criminal Procedure Code* limits the jurisdiction of this Court on a second appeal to deal with matters of law only; not matters of fact:

> " ... and severity of sentence is a matter of fact."

2. That jurisdictional issue has been the subject of many judicial pronouncements by this Court in such cases as Stephen M'Irungi & Another v Republic [1982-88] 1 KAR 360 where the Court stated:

> " Where a right of appeal is confined to questions of law only, an appellate court has 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, and, it should not interfere with the decisions of the trial or first appellate court unless 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."

3. A brief review of the facts of the case before the trial court as reconsidered on first appeal will enable us to decide whether the two courts below carried out their mandates as required in law.

4. The appellant James Kariuki Munene faced a charge of defilement it being alleged in the charge sheet that he had on 17th November, 2014 caused his penis to penetrate the vagina of A.M.I., a child aged 12 years. He was charged in the alternative that he had indecently assaulted the said girl by touching her private parts.

5. The prosecution case was through the evidence of four witnesses. The girl who testified as PW3 stated after the trial magistrate had conducted voire dire examination that she was 12 years old, a class 6 pupil at a local school. She knew the appellant as a person who resided in her neighbourhood and who worked at a local school. On the material day her younger brother was late in getting home and when she went out to look for him she met the appellant who told her that he knew where her brother was and he offered to take her to where he was. On the way they got to a bushy area and in her own words:

> "... He took me to the bushes, he removed the short and pant I was wearing. He started removing his trouser and lay on top of me. He started putting his penis in my vagina (witness points to her vagina) He was using force. I told him to leave me alone. He told me here no one talks. I told him teacher had told us not to do such a thing. He still did not stop but continued...."

6. When he was finished he warned her that he would kill her if she revealed what had happened to her. He took her home and she immediately told their house help what had befallen her; the house help took her to her mother (PW1) and she (PW3) narrated the whole incident to her mother who took her to hospital and to the police station. On identification of the appellant she said:

> "... I know it was accused since I had seen him on the road. I could identify him...."

7. F.M.I. (PW1) arrived home from work at about 8 p.m. but did not find her daughter (PW3). The daughter arrived shortly thereafter and, according to PW1 she looked terrified and could not talk until 2.10 p.m. when PW3 approached her accompanied by their house help and narrated how, on a mission to look for her brother she had been accosted and defiled by the appellant in the bushes. She checked her daughter and found that her vagina was red and she complained of pain. She took her to Kimbimbi Sub District Hospital where she was treated and later to Wanguru Police Station where a report was made.

8. PW1 produced her daughter's birth certificate that showed that she was 12 years old. She also identified treatment notes in respect of her daughter. She knew the appellant who lived 2 gates away from her home.

9. Dr. Kenneth Munyi, a medical officer at Kimbimbi Sub- District Hospital filled a P3 Form in respect of PW3 which he produced into evidence together with treatment notes. When he examined PW3 he established that she was 12 years old; her genitalia had whitish discharge; on the right side of the entry of vagina he found a minor bruise approximately 0.5 m in length. PW3 was treated, put on pep, antibiotics and medication to prevent pregnancy.

10. The last prosecution witness was Acting Inspector of Police Joseph Ngari, the investigation officer who after establishing through witnesses and investigations charged the appellant accordingly.

11. At the close of prosecution case and upon being put on his defence the appellant stated in an unsworn statement that he was a farmer. On the material day he was at Brethren School as a cleaner but was arrested 4 days later for an offence he knew nothing about. According to him the charges were fabricated.

12. The trial court considered the case made out by the prosecution and the defence offered by the appellant; it convicted the appellant and sentenced him to serve 20 years imprisonment. The appellant appealed to the High Court of Kenya at Kerugoya but his appeal was found to have no merit and was dismissed in a judgment by Gitari, J. delivered on 17th March, 2017.

13. The appellant is still dissatisfied and has filed this appeal through homemade "Intended Grounds of Appeal" where he says that the Judge on first appeal erred in " both law and facts" by not finding that identification was not proved to the required standard; that the Judge should have found that the charge sheet was defective; that the evidence did not support the charge; that the expert witness who testified in the case was not qualified; that crucial witnesses were not called; that the Judge misdirected himself over the whole case and, finally, that:

> " ...the Judge erred in law and facts by relaying (sic) on incredible evidence."

14. When the appeal came up for hearing before us on 5th March, 2025 the appellant was present in person from Naivasha Prison while the Office of Director of Public Prosecutions was represented by learned State Counsel Mr. Naulikha.

The appellant in written submissions drawn by him starts with "Amendment of Memorandum of Grounds of Appeal" where he says that the High Court erred in law by supporting the trial magistrates' decision where PW3 had informed the doctor that she had been defiled by an unknown person but testified in court that she knew the assailant; that the High Court erred:

> " ...in law in upholding conviction yet evident (sic) from house-help to her mother PW1 says she resisted and disappeared after said perpetrator removed her clothes after biting him..."

16. Further that High Court erred by relying on contradictory evidence; that the court erred by not warning itself of the danger of relying on the evidence of a single witness, and, finally that reliance on section 124 of the *Evidence Act* prejudiced him. He then rehashes the prosecution's case which we have summarized in this judgment.

17. The respondent in written submissions supports the judgment of the High Court submitting that identification had been proved to the required standard as PW3 had testified that she knew the appellant who lived in their neighbourhood; that she had informed the house help and her mother the same evening after she had been defiled; that the evidence was that of recognition of a person she knew before.

18. On the charge sheet the respondent submits that the same was not defective but that even if it was such a defect would be curable by section 382 *Criminal Procedure Code*.

19. It is submitted by the respondent that the prosecution called reliable, consistent, direct evidence in support of the charge that the appellant faced; that the doctor gave his credentials to court before testifying.

20. On failure to call the house help as a witness it is submitted by the respondent that her evidence would not have differed from that of PW1. Section 124 of the *Evidence Act* is invoked in support of the proposition that evidence of a single witness is permitted in sexual offences.

21. We started this judgment by identifying our mandate in a second appeal; that was because when the appeal was called for hearing all that the appellant told us was:

> " I ask for reduction of sentence. That is all."

22. As we have seen severity of sentence is a matter of fact and we are not permitted in law to go into matters of fact.

23. Considering that the appellant is unrepresented we will examine whether there are issue of law which he has raised in memorandum of appeal which could call for our consideration.

24. The appellant has raised the issue of identification which we find to be an issue of law. PW3 stated that she met the appellant when it was not yet dark as she embarked on the mission to look for the younger brother. The appellant offered to take her to where her brother was and by the time they reached the bushy area it was now dark and he took advantage of the darkness to take her into the bush and defile her. When she reached home at about 8 p.m. she was, according to her mother, PW1, terrified and unable to talk. She later narrated the whole incident to the house help who took her to her mother (PW1) and told her of the events of the evening.

25. Both PW1 and PW3 knew the appellant very well as a neighbour; they even named the school where he was employed, a school which was also in the neighbourhood. It was held in Anjononi & Others v Republic [1980] eKLR that:

> " ...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."

26. Identification was proved to the required standard.

The appellant raises the issue that crucial witnesses were not called. He does not name who those witnesses were but from the record PW3 informed their house help of the defilement before informing her mother. There is no explanation offered by the prosecution why the house help was not called but the respondent submits that evidence of the house help would have not been different from that of PW1.

27. The position in law is that it is the duty of Office of Director of Public Prosecutions to avail all witnesses in support of its case. This position was captured in the case of Bukenya v Uganda [1972] EA 549, at page 550 where it was held that:

> " It is well established that the Director has a discretion to decide who are the material witnesses and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case."

28. The proviso to section 124 of the *Evidence Act* is to the effect:

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

29. In the case before the trial court PW3 narrated to the house help how she had been defiled by the appellant and the two of them went straightaway and informed PW1 of the whole incident. This was the same evening that the defilement had happened. In those circumstances we agree with the respondent that evidence by the house help would have been exactly what PW1 stated to the trial court; it would not have added any value to the prosecution case.

30. Those are the only issues of law we saw raised by the appellant and the same fail and are rejected.

31. We find the appeal to have no merit and it is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR