Mumo v Republic (Criminal Appeal 49 of 2021) [2024] KECA 236 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 236 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 49 OF 2021

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

JOSEPH MUMO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. J. Chitembwe, J.) delivered on 8th February 2017 in H.C.CR.A No. 51 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 8th February 2017 in Criminal Appeal No. 51 of 2014 in which the learned Judge upheld the judgment of the trial court convicting the appellant of defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* and sentencing him to life imprisonment.

2. The particulars of the offence as charged were that, on 12th September 2013 at Watamu Location within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of the complainant, a boy aged 5 years, using his hand. The appellant was also charged with the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the alternative charge were that, on the said day and place, the appellant intentionally and unlawfully touched the anus of the complainant using his hand. Before closing its case on 10th March 2014, the prosecution successfully applied for leave to amend the charge sheet, which was read over to the appellant, whereupon he pleaded not guilty.

3. At the trial, the prosecution called 6 witnesses. PW1, the complainant's mother, testified that the complainant was aged 5 years and 8 months. She stated that, on the material day at about 5:00 pm, she was at her place of work at a tailoring shop near her house when she heard a child crying behind the shop. She then heard an adult man's voice say "take this and buy anything you like". According to

her, she did not at first recognize the man's voice. She then heard a female voice calling out: "L, what is the matter?".

4. When PW1 rushed out, she saw a crowd gathered at a nearby café. They said that the complainant had been defiled. She saw blood on the child's shorts and, when she pulled it down, she noticed that the child was bleeding from his anal orifice. The child led them to where it all happened, stating that the person who defiled him was inside the café whose door was locked from inside. When a neighbour pushed open the door, they found the appellant lying down on a mattress. The child pointed at the appellant and said: "This is the 'uncle' ...". The appellant was arrested, and PW1 took the child to Malindi District Hospital.

5. PW2, a shopkeeper at [Particulars Withheld] village, testified that, on the material day at about 4:00 pm, the appellant came to his shop, gave him KShs. 50 and asked for doughnuts. He saw many children following the appellant. PW2 gave the appellant the doughnuts and closed his door. He later went behind the shop to pick firewood. He then heard a child crying out for its mother from a hotel near his shop, but the door was closed. A male voice was telling the child to keep quiet. PW2 asked the person to open the door. It was the appellant who opened the door and the child came out after being given KShs. 20 by the appellant, who said that the child was crying for fried potatoes. The child was leaning on one side as he walked. The appellant closed the door whereupon PW2 followed the child. One Mama J asked why the child was crying. The child pointed to his buttocks and said: "the man in the hotel". Mama J examined the child and PW2 saw a watery substance and blood oozing from his anus. They took the child to his mother and informed her that the child had been defiled. A crowd gathered, dragged the appellant out and attacked him. Later, the police came and arrested him. PW2 had known the appellant for about 3 months as his customer.

6. After a voir dire examination, the complainant (PW3) testified that, on his way home, the appellant, who he used to see selling food, called him and took him to his (the appellant's) hotel room. When they got in, the appellant laid him on a mattress, removed his penis and thrust it behind him. The complainant felt pain and cried out after which the appellant dressed him up and let him out crying. He met one Mama J, who examined him around the buttocks. He was taken to hospital and to the police station. According to the complainant, the appellant, who he knew well, used to give them food. On the material day, he gave the complainant KShs. 20, telling him to buy anything he liked.

7. PW4, a greengrocer and an aunt to the complainant, stated that she met the complainant crying and asked him what the problem was. The boy pointed to the appellant's stall. She pulled down the child's shorts and saw bloodstains on the shorts. She went to the stall with Mama M and found the door closed. They called the child's mother and informed her that the child had been defiled. Some villagers forced the door open and found the appellant inside. She later accompanied the complainant and his mother to the police station and Gede Health Centre from where they were referred to Malindi District Hospital.

8. PW5, a clinical officer at Malindi District Hospital, stated that he examined the complainant and filled a P3 form. PW5 found a cut of about 2 cm at the anal orifice. There was minimal bleeding. There was a cut in the anus of 3 cm. An anal swab was taken, but no spermatozoa were found. PW5 formed the opinion that there was a high possibility that the complainant had been sodomised.

9. PW6, CPL Margaret Terenoii attached to Watamu Police Station, stated that CPL Maryon Abdi was initially the investigating officer who handed over to CPL Ayuma, who also handed over the file to her. PW6 produced the complainant's birth certificate, a green pair of blood-stained shorts that had been identified by PW1, PW2, PW3 and PW4 and a 20 shillings coin allegedly given to the complainant by the appellant, as evidence of the offence with which the appellant was charged.

10. In his defence, the appellant gave a sworn statement, claiming that his aunt had a kiosk at a plot owned by the complainant's father; that the aunt had closed down the café, but opened it up for him when he went to Watamu; that he was framed by the complainant's father because his aunt owed him (the complainant's father) 3 months' rent arrears; that the complainant's father had threatened him on 1st September 2013 stating that, if the appellant did not pay up the next day, the minor's father would "show him;" that the appellant called his aunt who promised to go and talk to the landlord; that, on 2nd September 2013, the complainant's father went to collect the money, but the appellant had none; that the appellant then went to the market and, on return at about 5:30 pm, he found a group of boda cyclists gathered; that, when he got in, he heard voices saying: "He has come;" and that, after five minutes, the door was knocked and some young men entered and started assaulting him saying that he could not stay in the house free of charge. According to the appellant, he was rescued by police officers, who took him to hospital. He denied committing the offence and alleged that he was framed because of the dispute over unpaid rent.

11. In its judgment, the trial court found that the age of the minor was sufficiently proved; that there was sufficient evidence of penetration into the anus of the minor; that the identification of the appellant as the person who had defiled him was corroborated by testimonies of the above-mentioned witnesses who were at the scene, as well as the medical evidence on record; and that the appellant's defence was not convincing as the matter was reported by neighbours who witnessed the incident firsthand and informed the minor's mother. The court convicted the appellant and sentenced him to the mandatory life imprisonment under section 8(2) of the *Sexual Offences Act*.

12. Aggrieved, the appellant moved to the High Court on appeal on the grounds that the learned trial Magistrate failed to consider that the alleged penetration was not proved beyond reasonable doubt; that the conviction was based only on the evidence of the complainant; that the prosecution did not prove its case beyond reasonable doubt; that the trial court erred by rejecting the appellant's sworn defence which was strong and the truth; that section 36(1) of the *Sexual Offences Act* was not complied with; and that the case proceeded for hearing before he was supplied with witness statements.

13. In its judgment, the High Court (Chitembwe, J.) found that the evidence on record proved that the complainant was defiled; that the defilement of the minor had no relationship with the ownership of the hotel; that the appellant's defence was not strong or truthful; and that there were independent witnesses who had no reason to frame the appellant. Accordingly, the court dismissed the appeal and upheld both conviction and sentence.

14. Still aggrieved, the appellant filed the instant appeal on the grounds that the learned Judge erred in law: by failing to observe that the complainant gave unsworn evidence; in failing to consider the inconsistencies in the prosecution case; in holding that the prosecution had proved their case beyond reasonable doubt; by failing to consider the appellant's alibi; by holding that the appellant had not discharged his burden; and by upholding the conviction, and yet the charges were aimed at settling scores between the appellant and the complainant's family. He argued that the sentence was harsh and excessive.

15. When the appeal came for hearing on 23rd October 2023, the appellant presented in Court an undated supplementary memorandum of appeal pursuant to rule 65(1) of the Court of Appeal Rules, 2010 (now rule 67(1) of the 2022 Rules). He sought leave to lodge the undated supplementary memorandum of appeal, which raised a new ground of appeal not canvased in his original memorandum of appeal, namely that the trial court failed to inform him of his right to legal representation at the state's expense pursuant to Article 50(2) (h) of *the Constitution*.

16. Rule 67 reads:

> 67.(1) An appellant may, at any time with the leave of the Court, lodge a supplementary memorandum of appeal.
>
> (2) ....
>
> (3) A person lodging a supplementary memorandum under this rule shall cause a copy thereof to be served on the respondent.

17. We find nothing on record to suggest that the appellant's supplementary memorandum of appeal was served upon the Respondent as required under the mandatory provisions of rule 67(3) of this Court's Rules. That explains why, in their submissions dated 11th July 2023, the Respondent did not make any submissions on the additional ground raised therein. Notwithstanding the apparent infraction on the part of the appellant, we will nonetheless pronounce ourselves on this important point of law which, in our view, merits consideration.

18. Our mandate on a second appeal, as is the one before us, is confined to consideration of 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."

19. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 8 main issues raised in his memorandum of appeal and the supplementary memorandum of appeal, namely: whether the unsworn statement of the minor complainant was insufficient to sustain a conviction; whether there were contradictions in the prosecution evidence to justify an acquittal; whether the prosecution proved its case beyond reasonable doubt; whether the prosecution discharged its burden of proof; whether the learned Judge can be faulted for allegedly failing to consider the appellant's alibi raised on appeal; whether the appellant was framed, and whether the charges against him were designed to settle scores over rent arrears; whether the sentence imposed on the appellant was excessive; and, finally whether non- attendance of his counsel at the trial was prejudicial to the appellant so as to justify acquittal.

20. The 1st issue turns on the general rule laid down in section 151 of the Criminal Procedure Code, which requires every witness in a criminal trial to be sworn or affirmed, as the case may be. On the other hand, special provision is made under the *Oaths and Statutory Declarations Act*, 1983 to allow admission of unsworn evidence of minor children who may, for good reason, not qualify to testify on oath.

21. In this regard, section 19(a) of the *Oaths and Statutory Declarations Act*, 1983 reads as follows:

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap

75) Laws of Kenya, shall be deemed to be a deposition within the meaning of that section.

22. This Court in Jamaar Omari Hussein vs. Republic [2019] eKLR considered the issue of the unsworn evidence of a child of tender years and held that:

> "This is nonetheless not to say that unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspection and look for corroboration from other evidence adduced in the matter."

23. On the authority of Jamaar Omari Hussein vs. Republic (ibid) and statute law, we find nothing to fault the learned Judge for upholding the trial magistrate's considered view that, even though the complainant was of the tender age of 5 years and 8 months, and unable to understand the nature of an oath, he nonetheless knew what had happened to him and who had defiled him; that he was possessed of sufficient intelligence to justify the reception of the evidence; and that he understood the duty of speaking the truth. In view of the foregoing, this ground of appeal fails.

24. On the 2nd issue, this Court in Richard Munene vs. Republic [2018] eKLR had this to say on apparent contradiction or inconsistency in the evidence of the prosecution witness:

> "Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

25. In Dickson Elia Nsamba Shapwata & Another vs. The Republic [2008] TZCA 17, the Court of Appeal of Tanzania addressed the same issue and stated thus:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

26. Similarly, in Erick Onyango Ondeng' vs. Republic [2014] eKLR, this Court cited Twehangane Alfred vs. Uganda, [2003] UGCA 6, in which the Court of Appeal of Uganda stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

27. We find nothing on record to suggest that the evidence led by the prosecution was plagued with grave contradictions or inconsistencies. Apart from raising this as a ground of appeal, the appellant has failed to persuade us that such contradictions or inconsistencies characterised his trial so as to justify an acquittal as a matter of law. That said, we are cognisant of the fact that there can be no perfect trial in

which all witnesses testify with exactitude and impeccable accuracy on all facts which, in any case, fall outside our remit to re-appraise on second appeal. Likewise, the 2nd ground of appeal fails.

28. On the closely linked 3rd and 4th issues as to whether the prosecution proved its case beyond reasonable doubt, and whether it discharged its burden of proof, our finding is that it did. The prosecution led evidence of numerous witnesses who were in the vicinity of the scene of crime. The appellant was well known to the complainant and all persons who witnessed the incident. The medical report confirmed penetration of the appellant's penis into the complainant minor's anal orifice. Simply put, the evidence that the appellant committed the offence charged was overwhelming, leaving no doubt in his favour. We say so taking to mind the dicta of Lord Denning in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372, who had this to say on the burden of proof in criminal cases:

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

29. Turning to the 5th issue as to whether the learned Judge was at fault in failing to consider the appellant's alibi, we hasten to observe that the alleged alibi was raised too late in the day and on the 1st appeal. Moreover, an alibi is a matter of evidence on which this Court cannot pronounce itself on a second appeal and, therefore, this ground of appeal cannot stand. For the avoidance of doubt, we hasten to observe that the defense of alibi is intended to show evidence that the accused was not at the scene when the offence with which he or she is charged was committed. Though valid as a defence, an alibi cannot be raised for the first time on appeal as is the case here. In the appellant's case, the defence of alibi was neither investigated nor put to test at the trial. Above all, it is not a point of law deserving of consideration in accord with this Court's decision in Wachira vs. Ndanjeru (1987), KLR 252 where Platt, JA. observed:

> ".... the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

30. The same fate befalls the 6th ground on which the appellant alleges that he was framed, and that the charges against him were crafted so as to settle scores between the appellant and the complainant's family on account of rent due and owing from the appellant's aunt. This too is a matter of evidence to which this Court cannot be drawn on second appeal. Accordingly, we need not say more.

31. On the 7th issue as to whether or not the sentence meted on the appellant was harsh and excessive is a matter of statute law as prescribed under section 8(1) and (2) of the *Sexual Offences Act*, which reads:

> 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

32. The sentence imposed under section 8(2) of the Act is mandatory in relation to children aged 11 years and below. The complainant was aged 5 years and 8 months, and that explains why the trial magistrate observed that, with regard to the sentence, his hands were tied. The learned Judge also declined to interfere with the mandatory sentence imposed by the trial court pursuant to statute law, which suggests that neither the trial court nor the learned Judge exercised their discretion in the matter.

33. This Court sitting at Nyeri in Francis Nkunja Tharamba vs. Republic [2012] eKLR held as follows:

> " ...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

34. We find nothing to suggest that the trial court or the learned Judge on 1st appeal took into consideration any factual background or mitigating factors so as to properly exercise their discretion in imposing and upholding the maximum life sentence complained of. In the circumstances, we are inclined to interfere with the sentence imposed on the appellant and substitute therefor a term of imprisonment for thirty-five (35) years.

35. On the 8th and final issue raised in the appellant's supplementary memorandum of appeal as to whether failure on the part of counsel for the appellant to attend court at his trial on 19th May 2014 was prejudicial to his rights, we take note of the fact that the issue was neither raised at the trial nor on the first appeal. Instead, the complaint features for the first time in the appellant's undated supplementary memorandum of appeal laid before us on 23rd October 2023 when his second appeal came up for hearing.

36. With regard to this ground, the appellant submits that on 6th May 2014 (which is in fact 19th May 2014 when his case came up for hearing before the trial court) he told the trial magistrate:

> " I have not seen my advocate. I will conduct the case on my own. I am ready."

37. In his undated submissions before us, the appellant had this to say:

> " ... since the Appellant had already engaged the services of an advocate who failed to come to court on the hearing date, the trial court should have religiously informed the Appellant of the alternative of being provided with an advocate at the state's expense as per the provisions of *the Constitution*. The trial Court should have on the alternative adjourned the proceedings so as to enable the Appellant's counsel attend the court's proceedings. This greatly caused the Appellant prejudice."

38. The appellant cited Article 50(2) of *the Constitution*, the relevant parts of which read:

"50. (2) Every accused person has the right to a fair trial, which includes the right—

g. to choose, and be represented by, an advocate, and to be informed of this right promptly;

h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

39. It is noteworthy that the appellant's advocate did not appear in Court when his case was scheduled for hearing on 7th April 2014. Neither was counsel present when the case was called out again at 11.16 am after the file had been placed aside to give the appellant time to communicate with his counsel. The appellant requested for another date, and his trial was adjourned "... to enable the accused contact his advocate." Fresh hearing was scheduled for 19th May 2014 with orders that it be mentioned on 22nd April 2014, and the appellant was advised to inform his advocate accordingly.

40. The question is whether the appellant was entitled to legal counsel as of right, and whether failure on the part of his counsel to attend at the hearing was prejudicial to his right to fair trial as guaranteed by Article 50 of *the Constitution*. We take to mind the fact that the appellant had already retained legal representation when Mr. Mogaka came on record for him on 27th December 2013. He also appeared when the matter was mentioned on 10th January 2014. A Mr. Obaga also held his brief on 10th March 2014 when PW 1 gave her testimony and cross-examined by Mr. Obaga.

41. Even though the appellant, if proved to be indigent, had the qualified right to legal aid under the *Legal Aid Act*, he nonetheless exercised his right under Article 50(2) (g) when he chose to be represented by Mr Mogaka. He did not qualify to have a state appointed advocate under Article 50(2) (h) while already represented by Mr Mogaka. Moreover, he elected to conduct his own defence on the day in issue. In any event, the right to counsel is not absolute in all criminal trials. The Supreme Court in Charles Maina Gitonga vs. Republic (2018) eKLR had this to say on the matter:

> " ...legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provision of the REPEALED constitution and that under section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

42. In view of the foregoing, and the appellant having elected to conduct his own defence on account of his counsel's absence at some point in his trial, we find nothing to fault the trial court for granting the appellant's wish in that regard. Neither was the learned Judge in error on account of an issue which was not raised for determination in the appeal. Accordingly, this ground, like all others, fails.

43. We have carefully examined the record of appeal, the grounds on which it is anchored, the submissions, the cited authorities and the law, and come to the inescapable conclusion that the appellant's appeal on conviction fails, but that his appeal on sentence partially succeeds. Accordingly, it is hereby ordered and directed that:

a. the judgment of the High Court of Kenya at Malindi (S. J. Chitembwe, J.) delivered on 8th February 2017 in H.C.CR.A. No. 51 of 2014 is hereby upheld in so far as it relates to the conviction;

b. that the life sentence imposed on the appellant is hereby set aside and substituted therefor a term of imprisonment for thirty-five (35) years.

DATED AND DELIVERED AT MOMBASA THIS 8T DAY OF MARCH, 2024

S. OLE KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR