Kivisha v Republic (Criminal Appeal 209 of 2018)
[2024] KECA 1118 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1118 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 209 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

NELSON KIVISHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kakamega (Majanja, J.) dated 4th April, 2018 in HCCRA No. 15 of 2014)

JUDGMENT

1. The appellant, Nelson Kivisha, was convicted by the magistrate's court at Vihiga of the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. He was sentenced to 20 years' imprisonment as the child victim was 13 years old. His appeal to the High Court was unsuccessful, as the learned Judge found that there was sufficient evidence to prove the ingredients of the charge, and that the sentence of 20 years' imprisonment was the statutory minimum sentence provided for the offence. The appellant, who was dissatisfied with the judgment of the High Court, preferred this second appeal.

2. The facts leading to the appellant's arrest and conviction as per the concurrent findings of the two lower courts, were that the child, who testified on oath after voire dire examination, was in class 5. On the material day, one EM (EM), who was the appellant's co-accused, took the child to the junction at (Particulars Withheld) where they met with the appellant. EM left the child with the appellant saying she was going to buy bamba (credit for airtime), but she did not come back. The appellant then told the child that EM had gone ahead on a motor-bike. He took the child to his house and locked the door from inside. The child remained in the house from Tuesday to Saturday during which time, the appellant had sex with her on Tuesday, Wednesday and Thursday. When the child resisted on Friday and Saturday, he chased her away, so she slept in the appellant's mother's house on Saturday and Sunday, then went to her aunt's place, from where she was collected by her mother. The matter was

reported to the police and the child was taken to Vihiga District Hospital where she was examined by a clinical officer who filled a P3 Form. The clinical officer, noted on the P3 Form that the child had a lot of painful discomfort on examination of her genitalia, and that although she had no tears, she had a whitish discharge from her vagina which had no foul smell.

3. In his defence, the appellant gave a sworn statement explaining how he was arrested from his house and taken to Chavakali Patrol Base, and asked whether he knew the child and he said he did not. He claimed that he was forced to admit that he knew her, but he refused and he was subsequently charged together with a woman he did not know.

4. In support of his appeal, the appellant filed a memorandum of appeal and written submissions, in which he faulted the Judge of the first appellate court for failing to properly reconsider the evidence that was adduced before the trial court, failing to find that the identification evidence was not sufficient, and that penile penetration was not proved. The appellant further faulted the learned Judge for failing to note that the evidence was full of contradictions and inconsistencies, and that essential witnesses were not summoned. Finally, he complained that his mitigating factors were not considered. Relying on Philip Maingi & 5 Others –vs- DPP & Another; and Edwin Wachira & Another Mombasa High Court Petition *No. 97 of 2021*; the appellant argued that the court had the powers to consider a sentence lower than the minimum 20 years' sentence provided under Section 8(3) of the *Sexual Offences Act*.

5. The respondent opposed the appeal through written submissions that were duly prepared by Chala Kasyoka, a Prosecution counsel in the office of the Director of Public Prosecutions. On the appellant's complaint that the court did not record the language that was used during the proceedings, the respondent submitted that the issue was not open for consideration by this Court, as it was being raised for the first time in this second appeal. In addition, the respondent submitted that from the nature of the appellant's cross-examination of witnesses, his defence and submissions before the High Court, it was apparent that he understood the charges against him and that in any case the record indicated that there was an officer one Mberesia who served the dual role of clerk and interpreter, and the languages used was English and Kiswahili. The respondent relied on Francis Macharia Gichangi & 3 Others –vs- Republic, (2007) eKLR.

6. On the issue of identification, the respondent submitted that the appellant was identified by way of recognition and not identification. In addition, the minor was in the company of the appellant for several days, and she therefore became well acquainted with him such as to be able to recognize him.

7. As regards the failure to call the arresting officer to testify, the respondent submitted that there was no dispute regarding the appellant's arrest, and that in any case the evidence of the child was sufficient and convincing, and there was no need for the prosecution to call more witnesses. The respondent referred to Section 143 of the *Evidence Act*, and *Julius Kalewa Mutunga vs Republic Criminal Appeal No. 31 of 2005* for the proposition that there is no particular number of witnesses required for proof of any fact; that it was within the discretion of the prosecution to decide whether a witness should be called; and that as an appellate Court, this Court could only interfere if it is shown that in excluding the witness, the prosecution was influenced by some ulterior motive.

8. On the issue of penetration, it was submitted that the same was proved to the required standard notwithstanding the inadequacy of the medical evidence. Boaz Nyanoti Samuel vs Republic 2022 eKLR was cited for the proposition that medical evidence is not the only evidence that can prove a sexual offence. It was contended that, in any case, the medical evidence that was produced in court by the clinical officer was corroborative in nature, supporting the oral evidence of the complainant, as the doctor noted that the hymen was broken and the complainant had painful discomfort during the vaginal examination.

9. On the alleged contradictions touching on the apparent age of the complainant, it was submitted that this did not shake the prosecution evidence as the clinic card produced confirmed that the complainant was born on the 22nd January, 1999, and that she was therefore 13 years old.

10. It was submitted that the charge sheet had no error, as the appellant was charged and convicted under Section 8 (1) as read with 8 (3) of the *Sexual Offences Act*, and the error by the learned Judge of the High Court in referring to Section 8 (1) as read with 8(4) of the *Sexual Offences Act* was curable under Section 382 of the Criminal Procedure Code.

11. On the minimum sentence meted out to him of 20 years' imprisonment, the respondent took note of Maingi & 5 Others vs Director of Public Prosecutions & Another (supra), and the Court of Appeal decision in Joshua Gichuki Mwangi vs Republic as well as Julius Kitsao Manyeso vs Republic, but referred to the Judiciary Sentencing Guidelines gazetted on 1st September, 2023 where it was stated that the court is bound by the mandatory and minimum sentences provided under the law and therefore argued that until the Supreme Court decided the issue to the contrary, the court had to adhere to the legislative framework and therefore the courts were still bound by the mandatory minimum sentence. The respondent therefore urged the court to dismiss the appellant's appeal on both conviction and sentence and uphold the sentence of 20 years.

12. This being a second appeal, this court is restricted under Section 361(1) (a) of the Criminal Procedure Code to considering matters of law only. As stated by this Court in Stephen M'Irungi & Another vs Republic 1982 – 88 1KAR 360:

> " 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."

13. With the above caution in mind, we have considered the record, the grounds of appeal and the submissions of both parties. The main issues that we discern for our determination are: whether the appellant's rights to a fair trial were infringed; whether the two lower courts were right in finding the elements of the charge of defilement proved; and whether this Court should interfere with the sentence that was imposed on the appellant.

14. We start our analysis with the appellants' complaint that his rights to a fair trial were breached. He cited Article 25(c) and 50(2) of *the Constitution*, but it is evident from his submissions that his specific grievance was the trial magistrate's alleged failure to indicate the language that was used during the trial. A perusal of the trial court proceedings confirms this omission. Nevertheless, the appellant did not complain that he did not understand the language used by the court. A perusal of the trial court's proceedings indicates that on 4th May, 2012 when the amended charges were read to him, the appellant responded in Kiswahili language. Moreover, the trial proceeded to the end and the record does not show the appellant complaining at any time that he did not understand the language that was being used by the court, or that he was not able to follow the proceedings.

15. During the trial, the appellant cross-examined the witnesses and also gave his defence. Although the language is not indicated, it is evident that the appellant actively participated in the proceedings, which is a clear indication that he was comfortable with, and understood the language that was being used by the court. Moreover, during the hearing of the appeal in the High Court, it was indicated that there was

English/Kiswahili translation and the appellant did not complain nor did he raise any issue regarding the language used or the violation of his rights in that regard either before the trial court or the High Court. We agree with the respondent that it is not open to the appellant at this second appellate stage to raise for the first time, any issue regarding violation of his rights, and this ground therefore fails.

16. As regards an alleged defect in the charge or judgment, according to the charge sheet the appellant was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars given on the charge sheet were clear, that the child was 13 years old. However, as per the judgment of the trial magistrate the appellant was indicated as having been charged with defilement under Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, and he was convicted and sentenced to serve 20 years' imprisonment. Similarly, the learned Judge of the High Court on first appeal noted that the appellant was charged and convicted of defilement contrary to Section 8(1) and 8(4) of the *Sexual Offences Act*. The Judge in dismissing the appeal, noted that the child was 13 years old and that the sentence of 20 years' imprisonment is the statutory minimum under Section 8(4) of the *Sexual Offences Act*.

17. Section 8 of the *Sexual Offences Act*, states as follows:

    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.

    3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

    4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

18. It is evident that the trial magistrate made a mistake in stating that the appellant was charged with defilement under Section 8(1) and 8(4) of the Sexual Offences' Act, as the charge sheet stated the Section under which the appellant was charged as Section 8(1) and 8(3) of the *Sexual Offences Act*. Section 8(4) is the penalty Section where the child is aged between sixteen and eighteen years. The particulars of the charge against the appellant indicated the age of the child as 13 years, which falls under Section 8(3) and not 8(4).

19. It is evident that both the trial magistrate and the learned Judge of the High Court had Section 8(3) in mind as this is the one that provides the minimum sentence of 20 years for defilement of a 13-year-old child. We find that there was no defect in the charge sheet, but there was an error in the judgments arising from Section 8(4) of the *Sexual Offences Act* indicated in the judgments of both the trial magistrate and the High Court Judge, and this error originated from a typographical error on the judgment of the trial magistrate. This error was not prejudicial to the appellant as the particulars of the charge were clear that he was alleged to have defiled a 13-year-old child, and he was evidently given a sentence falling under Section 8(3) which was the right Section under which he was charged. Moreover, the error on the judgment was curable under Section 382 of the Criminal Procedure Code, and, therefore, nothing turns on this ground.

20. Under Section 8(1) of the *Sexual Offences Act*, the prosecution is required to establish three elements in order to prove the offence of defilement, namely; proof that the complainant was a child that is under 18 years old; proof of penetration as defined in the *Sexual Offences Act*, and positive identification of the accused person as the person who caused the penetration.

21. Regarding the issue of age, the appellant contended that the evidence of the prosecution witnesses on the complainant's age was contradictory. He pointed out that the clinical officer stated that the health card indicated that the complainant was born on 22/1/1999, whilst the complainant's mother in her evidence stated that the complainant was born on 22/1/2009. In rebuttal, the respondent submitted that the alleged contradiction does not shake the prosecution's evidence as the clinic card produced confirmed that the complainant was born on the 22nd January, 1999.

22. We note that the complainant testified that she was 13 years old and was in class 5 at the time of the incident. This was corroborated by the evidence of her mother, and that of her father. The Clinical Officer, also produced the child health card, and the P3 Form which indicated that the complainant was 13 years old at the time of the incident. The year of 2009 which the complainant's mother gave was obviously a mistake as it would have placed the complainant's age at three years which was clearly not the position, given that the child was in class 5. We are satisfied that for the purpose of Section 8(1) of the *Sexual Offences Act* the complainant was a child and we agree with the learned Judge of the High Court that:

> " There is no doubt that PW1 was below 18 years old and therefore a child hence the offence of defilement was committed...."

23. On the element of penetration, it is apparent that the medical evidence was not conclusive because although the absence of the hymen was noted. there were no bruises or injuries on the vagina, or the labia, or adjacent areas, nor was there any semen noted. It is clear that the absence of hymen alone is not conclusive proof of penetration. However, the complainant testified that the appellant took her to his house and defiled her on three consecutive nights, before she sought refuge in his mother's house for two nights, then she went to her aunt's house. When she was taken to the hospital about 6 days after the defilement, the Clinical Officer who examined her noted that she had painful discomfort on vaginal examination, even though there were no bruises. He also noted a whitish discharge from her vagina. From his examination, he concluded that there was penile penetration.

24. This Court, in *Muhendu v Republic (Criminal Appeal 60 of 2018)* [2024] KECA 322 (KLR) (22 March 2024) (Judgment), agreed with the observations made by the Supreme Court of Uganda in Bassita vs. Uganda *S. C. Criminal Appeal No. 35 of 1995* with regard to proof of penetration that:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's evidence and corroborated by medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

25. There is no cause to fault the learned Judge's finding that the medical evidence analyzed, together with the evidence of the complainant established beyond any reasonable doubt, that the appellant engaged in sexual intercourse with the complainant, thereby defiling her. Moreover, under the proviso to Section 124 of the *Evidence Act*, in sexual offences, the court can convict on the evidence of the complainant alone, provided it is satisfied that the complainant's evidence is truthful.

26. On the identification of the appellant as the perpetrator of the offence, the complainant testified that the appellant locked her in the house for three days during which period he defiled her daily. On the 4th day when the complainant refused to have sex with him because of pain, the appellant chased her

out of his house at night. She stated that she stayed with the appellants' mother for two days before she was told to go home. When the appellant's mother was confronted about the incident, she did not deny that the complainant had been in her home, but confirmed to the complainant's mother what the complainant had stated, that she had asked the complainant to go back home.

27. The complainant was able to identify the appellant by way of recognition, as the perpetrator of the offence, as she had been with him in his house for three days. The appellant was, therefore, not a stranger to her but a person he had come to know. As stated in Anjononi and Others vs. The Republic [1980] KLR: "Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger." We are, therefore, in agreement with the concurrent finding of both the trial court and the 1st appellate court, that, indeed, the appellant was properly identified as the perpetrator of the offence.

28. On whether there were material contradictions in the prosecution evidence, the question is whether the alleged contradictions were so material as to undermine the core evidence relied upon. The test in this regard is that set by the Court in Sigei v. Republic [2023] KECA 154 (KLR) that:

> "In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case."

29. Similarly, in Richard Munene vs. Republic [2018] eKLR the Court stated that:

> "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."

30. There is nothing on the record to suggest that the evidence led by the prosecution was plagued with grave contradictions. The only contradiction was with regard to the complainant's date of birth, and this as we have endeavored to demonstrate above was not a material contradiction, but a slip of the tongue which was corrected by other credible evidence. Apart from raising this as a ground of appeal, the appellant has failed to demonstrate that there were any contradictions that were fundamental, or that materially affected the prosecution evidence as to justify an acquittal on that ground.

31. Regarding the contention that the sentence meted out on the appellant was harsh and excessive, under Section 361(1)(a) of the Criminal Procedure Code, severity of sentence is a matter of fact which is outside the remit of this Court. The sentence imposed on the appellant was the minimum sentence prescribed under Section 8(3) of the *Sexual Offences Act*, which is the penal Section under which the appellant was charged. The complainant was 13 years old, which explains why the trial magistrate sentenced the appellant to 20 years' imprisonment, which is the minimum sentence provided for under Section 8(3) of the *Sexual Offences Act*, for the age bracket of victims who are 12 years to 15 years old. Contrary to the appellant's contention that his mitigating factors were not considered, the record shows that the trial magistrate considered his mitigation. The learned Judge of the first appellate court also considered the appellant's sentence, but declined to interfere with the sentence that was imposed by the trial court, as it was the minimum sentence provided under the law.

32. 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."

33. Nothing was laid before this Court to show that the trial court failed to properly exercise its discretion in sentencing, or that there was justification for the first appellate court to intervene, but that it failed to do so. Moreover, in his appeal to the High Court, the appellant did not raise any grounds challenging the sentence and has raised the issue for the first time in this appeal. In that regard his appeal is on all fours with the recent Supreme Court decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR); in which the Supreme Court held that since the appellant failed to raise the issue of the constitutionality of the sentence as a ground of appeal in the High Court, he was precluded from raising the issue on appeal before the Court of Appeal. The appeal on the sentence therefore fails.

34. The appellant requested that the period that he was in remand between the time of his arrest and the time of conviction be taken into consideration in computing his sentence. This has not been opposed by the respondent. The appellant was arrested on 21st April, 2012 and has been in custody since then. In accordance with Section 333(2) of the Criminal Procedure Code, the time spent in custody by the appellant ought to be considered in computing his sentence. Accordingly, we order that the appellant's sentence of 20 years' imprisonment be computed to commence on 21st April 2012 which was the date that he was first brought to court, and remanded in custody, where he remained throughout his trial.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST , 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR