Emathe v Republic (Criminal Appeal E036 of 2023)
[2024] KECA 1486 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1486 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E036 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

OCTOBER 25, 2024

BETWEEN

JOSEPH NAKOLE EMATHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Voi (Olga Sewe, J.) delivered on 30th June 2023 in H.C. Criminal appeal No. E025 of 2021)

JUDGMENT

1. The appellant, Joseph Nakole Emathe was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars are that on 26th July, 2021, at about 1900 hours within Taita Taveta County, he unlawfully and intentionally caused his penis to penetrate the vagina of JKK, PW2 a girl child aged 10 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars were that on 26th July, 2021 at about 1900 hours at the same location, he unlawfully and intentionally touched the vagina of JKK, PW2 a girl child aged 10 years with his penis.

3. The appellant pleaded not guilty and the matter proceeded to hearing and the prosecution called 4 witnesses.

4. EMK, PW1, who works with Kenya Red Cross and resides in Bahati testified that, on 26th July, 2021 she left her daughter PW2 with one Mercy as she went to work. At about 6.30 p.m she went and picked her up and went to her sister's home where she found the appellant and one Mutua. Her sister was not at home at the time. She left PW2 at her sister's house as she wanted to assist in washing utensils and went to her home which was a block away. She returned to her sister's house after about thirty minutes

and called out JKK's name. Her daughter came out of a room while struggling to pull up her tights. Her eyes were teary and her dress was above her knees. She looked scared and asked her mother not to beat her. When PW1 went into the room where PW2 was, she found the appellant dressing up. He was in a light inner garment and she could see his manhood. She left the house with her daughter, and on the way, PW2 confided in her that the appellant had been inserting his "dudu" into her private part each time she was at her aunt's home, and that this had happened on several occasions. PW1 then took her to Taveta Sub County Hospital and while in the doctor's room as JKK was being examined, she was informed that her hymen was missing for a long standing period. She produced her daughter's Birth Certificate and stated that she was born on 12th July, 2011, and was a special needs child with a learning disability secondary to autism, but that her memory was satisfactory. She identified the appellant as a person well known to her as they have been neighbours since 2015 and his mother is her biological sister. She had no grudge against her sister and they had been living happily together.

5. PW2 was the complainant. She gave unsworn evidence and stated that the appellant had done bad manners to her and identified him as her brother, and her aunt's son. She informed the court that the appellant put his 'dudu' into her private parts and that he had done it on several occasions whenever she visited her aunt. On that day, her mother caught them as she was putting on her clothes.

6. A report was made to George Ombayo PW3, a clinical officer based at Taveta Sub-County Hospital on 26th July, 2021 on an allegation that the complainant had been defiled, and that it had happened more than once. He stated further that the victim lives with cerebral palsy, but was otherwise in fair general condition. On examination she had no bruises, her hymen was torn, but was not fresh. He observed that she was defiled and began treatment. Laboratory tests were carried out and her urine test showed the presence of yeast cells. A high vaginal swab was done which showed epithelial cells. She had a white discharge, but no spermatozoa were seen. She was put on prophylaxis, emergency pills and antibacterial treatment. He produced her treatment notes and also completed the P3 form. At the time of completing the P3 form, the clinical officer stated that PW2 was not oriented in time and date, but was aware that she was at the hospital. At the time of the incident, she was 10 years old, and he concluded that she had been subjected to habitual sex.

7. PC Ann Kimani, PW4 of force number 236554 based at Taveta police station for three years is attached to the gender-based desk. On 27th July 2021 she was on duty when she noted in the occurrence book that a case of defilement was reported by PW1 who claimed that her child was defiled. She took the minor to hospital where she was examined. From the findings at the hospital, her hymen was broken. She recorded her statement together with that of her mother. She produced the complainant's Birth Certificate that indicated that she was born on 12th July, 2011.

8. When placed on his defence, the appellant, a secondary school student narrated the events of 26th July, 2021 stating that he came from school at 5.00 p.m. when his aunt went to their home together with the complainant and found him washing utensils. The complainant wanted to assist in washing utensils, whereupon she left PW2 with the appellant and informed him that she would return to pick her up. At 7.00 p.m. she had not returned and it was getting dark, and so he decided to get a sweater from his mother's room and take her home, when his aunt arrived. As he came out of the mother's bedroom, he saw his aunt leaving. The following day his mother woke him up at 5.00 a.m. and informed him that his aunt had complained that he had sexually abused her daughter, PW2. He went to school and, at around 1.00 p.m., police went to the school and arrested him. He was taken to the police station and informed that he has defiled his cousin.

9. Upon considering that evidence, the trial Magistrate convicted the appellant of the offence of defilement and sentenced him to serve life imprisonment. Being dissatisfied with both the conviction

and sentence of the trial court, the appellant appealed to the High Court challenging the trial court's decision, which appeal was dismissed in its entirety.

10. Aggrieved, the appellant has now appealed to this Court on grounds that: the learned 1st appellate judge failed to appreciate that the procedure for appointment of an intermediary was not followed; that the appellant was a minor at the time of the commission of the offence and ought to have been given the constitutional protection accorded to minors in conflict with the law; in failing to appreciate that a crucial witness was not called to testify and whose evidence would have been detrimental to the prosecution's case; in failing to appreciate that the appellant's defence was not considered by the trial court and that the sentence imposed was both harsh and excessive since it was applied without consideration of the appellant's mitigation and the facts and circumstances of the case.

11. The appellant and the respondent filed written submissions, and when the appeal came up for hearing on a virtual platform, the appellant, who appeared in person, stated that he would rely on his written submissions. It was submitted that the prosecution did not follow the right procedure in appointing the intermediary; that it was not clear whether the prosecution's application for appointment of an intermediary was allowed; that the court in this case did not declare PW2 as being vulnerable witness; that the evidence of PW2 does not reflect the evidence given by an intermediary; and that the trial court was in error to have treated the evidence of the complainant's mother as that of an intermediary.

12. The appellant further submitted that, at the time of the commission of the offence, he was a child, in terms of the definition of the Children's Act; that even though the prosecution averred that they had a Birth Certificate for the appellant which showed that he was born on 7th December 2000, it did not form part of the record of appeal; that in addition, the age assessment ordered by the High Court is also not part of the record of appeal. He submitted that he was aged 17 years old at the time of being charged with the offence, and therefore, he was a child in need of care and protection; that instead, he was not provided with legal representation or even the benefit of advice from a Children's Officer, that further he was detained with adults for two years.

13. It was the appellant's further submission that the trial court did not consider his defence, and that the prosecution failed to call a crucial witness being one Mutua (Titus) whose evidence which, had it been received by the court, would have provided cogent and candid evidence that PW2 was not defiled by the appellant when his aunt left her in their house. On the sentence, the appellant submits that it was harsh and excessive owing to his age at the time.

14. On their part, the learned prosecution counsel for the State, Ms. Nyawinda, submitted that the prosecution proved its case to the required standard; that the age of the complainant was established by the Birth Certificate, the evidence of her mother and the complainant herself. Counsel submitted that penetration was proved by the complainant and was corroborated by PW3. It was submitted that the appellant was a relative to the complainant and that, therefore, he was identified through recognition.

15. On the vulnerability of the minor, counsel submitted that this was established before the voir dire examination was conducted and that her condition was confirmed by a medical report.

16. On sentence, counsel submitted that a sentence of 30 years' imprisonment would be sufficient in the circumstances.

17. This being a second appeal, this Court's mandate is limited by section 361(1)(a) of the Criminal Procedure Code to matters of law only. In the case of Peter Osanya vs Republic [2016] eKLR, this Court stated:

> " Section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong v. Republic [1984] KLR 611, Ogeto v Republic [2004] KLR 14 And Koingo v Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced: -
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> > "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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did".

18. We have carefully gone through the record and the rival submissions by the parties and find that the issues that arise for determination are; i) whether the trial court followed the correct procedure in appointing an intermediary; ii) whether the prosecution proved its case to the required standards; iii) whether the appellant was a child within the meaning of the Children's Act; iv) whether his defence was taken into account; and v) whether the sentence was harsh and excessive.

19. As to whether the court correctly appointed an intermediary, we begin by observing that section 31 of the *Sexual Offences Act* and Article 50 (7) of *the Constitution* allow for the appointment of an intermediary to assist the vulnerable during trials involving sexual offenses, and also extends to other trials.

20. Article 50 (7) of *the Constitution* stipulates that:

> " In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

21. Section 2 of the *Sexual Offences Act* defines an intermediary as a person who gives evidence on behalf of a vulnerable witness.

22. Section 31 (1) of the Act provides inter alia that:

> " A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary."

23. The role and place of an intermediary was succinctly explained in the case of MM vs Republic NRB Criminal Appeal No. 41 of 2013 [2014] eKLR relied upon by the appellant thus:

> " Is an intermediary the mouthpiece of the vulnerable witness or is he or she the witness? According to section 2 of the *Sexual Offences Act*, an intermediary is defined to mean among other things, a person who gives evidence on behalf of a vulnerable witness.
>
> Section 31(1) provides inter alia that:
>
> > A court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary.

> We have seen that in Article 50(7) of *the constitution*, an intermediary is a medium through which the accused person or complainant communicates with the court. In our understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from unfamiliar environment and hostile cross-examination; to monitor the witness' emotional and psychological state and concentration, and to alert the trial court of any difficulties.
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> The key word in sub section 7 is emphasized as shown below to demonstrate the place of the intermediary's evidence.
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> If a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may:
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> a. Convey the general purport of any question to the relevant witness.
>
> b. Inform the court at any time that the witness is fatigued or stressed and request the court for a recess.
>
> The word "through" is used also in subsection 4(b) in describing the protection of the witness by providing an intermediary through whom his evidence is relayed. It is the witness who gives the evidence which is explained, communicated to the court and the reverse through an intermediary in the manner and style developed between the two.

24. Having discerned the role of an intermediary as by law prescribed, the question that begs is whether an intermediary was appointed for PW2 by the trial court? According to the record at page 18, the prosecutor made an application to have the complainant's mother appointed as an intermediary. The trial Magistrate did not allow the application but rather, proceeded to conduct a voir dire examination of PW2, and concluded that the minor was intelligent enough to testify though not under oath. So that, at no point was an intermediary appointed. PW1 and PW2 testified as substantive witnesses, and were extensively cross-examined by the defence. On this basis, this ground is unfounded and lacks merit.

25. On the age of the appellant, the appellant contends that he was 17 years old as at the time of being charged. He annexed a Birth Certificate Serial Number 3456512 to his appeal showing the he was born on 7th December 2004. It is worthy of note that this Birth Certificate was not produced at any time during the trial or during the first appeal. He claimed that the Birth Certificate presented by his mother to court had errors to wit, at the time of issuance of the Birth Certificate, it had a typographical error and his mother was denied an opportunity to present that fact to the 1st appellate court.

26. The record discloses that the trial court proceedings indicated that before the charges were read to the appellant on 28th June 2021, the trial Magistrate inquired about his age and he stated that he was born on 7th December 2002 meaning he was 19 years old. The trial Magistrate ordered the appellant's mother to present his Birth Certificate. It was presented on 29th June 2021 and, relying on the Birth Certificate presented in court, the prosecution submitted that the appellant was 21 years pursuant to which, the charges were read to him. On 4th August 2021, the court once again inquired about his age. This time the appellant stated that he was 18 years old. Given that from his age he was not a child, the trial proceeded. In the trial Magistrate's ruling on sentence, the court distinctly took into account

that the appellant was 20 years old as at the time of commission of the offence as exhibited in the Birth Certificate Serial No. 3456512 produced in court.

27. The 1st appellate judge when addressing the appellant's age observed that:

> " The appellant submitted that at the time of his conviction and sentence, he was a Form 2 student at [Particulars Withheld]Secondary School in Taveta and he was seventeen (17) years old and he tried to inform the court of his age but the same was ignored by the trial court. It was further contended that that the appellant's mother had sworn an affidavit to the effect that at the time of the issuance of his birth certificate it had a typographical error and that his mother was denied an opportunity to present this fact to the court. I have looked at the proceedings and I have not seen any such affidavit. What is on record is a copy of the appellant's birth certificate; which was rightfully taken into consideration by the trial court. It is evident therefrom that the appellant was born on the 7th December, 2000 and was therefore twenty (20) years old at the time when he committed the crime."

28. Notwithstanding the foregoing considerations by the lower courts, the appellant beseeches us to now rely on the Birth Certificate that he has attached in respect of this appeal. This would amount to new evidence. Addressing the production of new evidence during second appeals, the Supreme Court in Petition No. 7 of 2018 Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others set out the principles that an appellate court must adhere to prior to admitting such evidence. The court stated:

> "...we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate Courts in Kenya as follows;
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> a. the additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;
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> b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
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> c. it is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
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> d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
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> e. the evidence must be credible in the sense that it is capable of belief;
>
> f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
>
> g. whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
>
> h. where the additional evidence discloses a strong prima facie case of wilful deception of the Court;

i. the Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filling gaps in evidence. The Court must find the further evidence needful;

j. a party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;

k. the Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other".

29. We observe that at no time was the Birth Certificate annexed to the appellant's submissions in this Court adduced before the courts below. The appellant has not provided any explanation as to why he did not avail this version of the Birth Certificate to the trial court or even on first appeal. More importantly, there is nothing from the Birth and Deaths Registrar indicating the process that was adopted for correction of the dates on the Birth Certificate. Its production at this stage appears to us to be a belated attempt to adduce additional unauthenticated evidence this late in the day, and without a proper basis upon which this Court can rely. We must therefore disregard it and rely on the Birth Certificate produced by the appellant's mother before the trial court, which indicated that the appellant was born on 7th December, 2000, and which was upheld by the High Court. He was therefore 20 years old at the time of commission of the offence. The ground has no merit and is accordingly dismissed.

30. Turning to the issue as to whether the offence was proved, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* which provides:

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

31. In determining whether the prosecution proved its case to the required standard, it is necessary that three key ingredients for the offence of defilement be proved. These are, i) the complainant's age, ii) the appellant's identity; and iii. whether there was penetration. See Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013 and John Mutua Munyoki vs Republic, [2017] eKLR.

32. The age of the complainant is not disputed. The complainant testified that she was 10 years old, and her age was corroborated by PW1, her mother, who produced her Birth Certificate which indicated that she was born on 12th July 2011 and, therefore, she was 10 years old at the time of the incident. There was also no challenge as to the appellant's identity. He is the complainant's cousin and was therefore identified through recognition.

33. On whether penetration was proved, we begin by considering Section 2 of the *Sexual Offences Act* where "penetration" is defined as:

> " the partial or complete insertion of the genital organs of a person into the genital organs of another person" whereas "genital organs" are described as "the whole or part of a male or female genital organs" and for purposes of this Act includes the anus."

34. Penetration may be proved by direct evidence of the victim or witnesses or by circumstantial evidence, which maybe adduced through medical, witness or other evidence.

35. In addition, Section 124 of the *Evidence Act* provides:

> "…. in a criminal case involving a sexual offence, where 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 if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

36. In the case of Dennis Osoro Obiri vs Republic [2014] eKLR, this Court held that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

37. The minor in this case gave an elaborate narration of how the appellant inserted his 'dudu' in her vagina and that he used to do bad manners to her. This evidence was corroborated by that of the medical doctor who confirmed that she was defiled. When this evidence is considered alongside all the prosecution evidence, it leaves no doubt that penetration was proved to the required standard.

38. That said, the circumstances of this case require that we also bear in mind that PW2 was a child of tender age, and a special needs child with a learning disability. It is obvious that she had the utmost trust in the appellant; her elder cousin with whom she had been left on numerous occasions, but the appellant clearly betrayed her trust, took advantage of her vulnerability and committed the inhumane and atrocious acts against her.

39. In view of our conclusions above, and having regard to the concurrent findings by the two courts below, we are satisfied that the prosecution proved that the appellant defiled the complainant, and that the offence was proved to the required standards.

40. On the prosecution's alleged failure to call crucial witnesses, the appellant has faulted the prosecution for failing to call an essential witness, one Mutua whose evidence would have been adverse to the prosecution's case.

41. Under section 143 of the *Evidence Act*, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. A consideration of the evidence does not disclose that Mutua was present during the incident. Since the prosecution is not expected to call a superfluity of witnesses, we consider that his evidence would have been of little or no value to the prosecution's case. This ground is therefore without basis.

42. On the contested issue of the severity of the sentence, by virtue of Section 361(1) of the Criminal Procedure Code, this Court is explicitly barred from determining matters of fact in cases such as this where appeals lie from subordinate courts. The severity of the sentence is a matter of fact and not of law. The Supreme Court in its recent decision in the case of Republic vs Mwangi;Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR)) held that :

> ....we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court.
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> .....Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

43. The above cited case is clear that the appellant's appeal on the grounds that his sentence was harsh and excessive is therefore outside the purview of this Court's jurisdiction and, for this reason, this ground fails.

44. In sum, we are satisfied that the prosecution proved the offence of defilement to the required standards. The conviction was safe and we have no reason to interfere with the trial court's decision as upheld by the High Court that the appellant defiled the complainant, the appeal is without merit and is accordingly dismissed in its entirety.

45. This judgment is delivered pursuant to Rule 34 (3) of the Court of Appeal Rules 2022 as Odunga, JA declined to sign.

46. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 25TH DAY OF OCTOBER, 2024.

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