Mathenge v Republic (Criminal Appeal 38A of 2018)
[2024] KECA 1514 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1514 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 38A OF 2018

P NYAMWEYA, FA OCHIENG & WK KORIR, JJA

OCTOBER 25, 2024

BETWEEN

LAWRENCE GACHUHI MATHENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (R.P.V. Wendoh, J.) dated 5th April 2018 in HCCRC No. 268 of 2013)

JUDGMENT

1. The appellant, Lawrence Gachuhi Mathenge, was before the trial court charged in the main count with defilement contrary to section 8 (1) as read with 8 (3) (a) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between January 2012 and 21st February 2012 in Nyandarua North District of the then Central Province, he unlawfully and intentionally caused his penis to penetrate the vagina of PWM, a child aged 10 years. Arising from the particulars of the main count, the appellant was in the alternative charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was subsequently convicted on the main count and sentenced to life imprisonment.

2. Dissatisfied with the decision of the lower court, the appellant unsuccessfully mounted an appeal in the High Court.

3. The appellant is now before us on a second appeal on the grounds that he was convicted based on evidence marred with contradictions and inconsistencies; that essential witnesses were not availed by the prosecution; that the charge sheet was defective and duplex; that his constitutional rights were violated; and, that the learned Judge of the first appellate court erred in affirming the conviction and sentence.

4. In a nutshell, the case fronted by the prosecution against the appellant was that at the material time, PWM (PW1) lived with her grandmother PMG (PW2). The appellant also lived with them. On 21st February 2012, PWM was accosted and defiled by one Muchemi while on her way from school. Thereafter, PWM proceeded home where the appellant also proceeded to defile her.

   PWM did not disclose these incidents to her parents or PW2. The next day when PWM went to school, her teachers CNM (PW3) and EG (PW4) noticed that she had difficulty in walking and sensed that something was amiss. The two teachers questioned and examined PWM who gave them an account of her ordeal. The two teachers would later escort PWM to the Mairo Inya Police Station where they reported the matter to Police Constable Benson Onkoba(PW5). PW5 escorted the complainant to Nyahururu District Hospital where she was examined by Dr Nganga who confirmed that PWM had been defiled. The evidence of Dr. Nganga was adduced by Dr. Kori who testified as PW6.

5. We heard this appeal through the Court's virtual platform on 29th April 2024. The appellant appeared in person while learned counsel Mr. Omutelema appeared for the respondent. Both the appellant and Mr. Omutelema opted to entirely rely on their filed submissions.

6. The appellant's undated submissions were forwarded to the Court on 12th February 2024. Therein, the appellant submitted that the sentence of life imprisonment was passed in its mandatory nature and his mitigation was not considered. Further, that the sentence offended Article 24 of *the Constitution* as it violated his right to dignity, among other rights. The appellant cited Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR and Evans Wanjala Wanyonyi vs. Republic [2019] eKLR alongside the Judiciary Sentencing Policy Guidelines in urging us to set aside the life sentence in favour of a lesser and determinate prison sentence.

7. Turning to his appeal against conviction, the appellant referred to the evidence of PW1, PW2, PW3 and PW4 and submitted that there were material contradictions concerning the date of the offence and the appellant's presence at the scene of crime. The appellant urged us to find that as a result of the contradictions, the offence was not proved to the required standard.

8. In support of the ground of appeal that crucial witnesses were not called by the prosecution, the appellant submitted that the failure to call the assistant chief, the arresting administration police officer and the doctor who assessed the age of the complainant was detrimental to him. The appellant relied on Bukenya & Another vs. Uganda (1972) E.A. 549 for the assertion that adverse inference should be read into the prosecution case because of the failure to call those witnesses.

9. Turning to another ground of appeal, the appellant contended that the charge sheet was defective and duplex as the evidence adduced did not support the charge. It was the appellant's submission that although he had been charged for violating section 8(1) as read with section 8(3) of the *Sexual Offences Act*, he had instead been convicted for violating section 8(1) as read with section 8(2) of the *Sexual Offences Act* resulting in the imposition of a severe and illegal sentence.

10. Finally, on the alleged violation of his rights under Articles 49 (1) and 50 (2) (e) & (h) of *the Constitution*, the appellant submitted that he was held in police custody beyond 24 hours having been arrested on 20th February 2012 and taken to court on 24th February 2012. He consequently urged us to allow his appeal in its entirety.

11. Through the submissions dated 22nd April 2024, Mr. Omutelema for the respondent rejected the appellant's claim that the prosecution evidence was inconsistent and contradictory. According to counsel, the evidence of PW1 was consistent and was corroborated by that of PW3 and PW4. Counsel relied on Richard Munene vs. Republic [2018] eKLR for the proposition that trivial contradictions

are not fatal to the prosecution case. Counsel also submitted that the identity of the appellant as the perpetrator was never in doubt.

12. Responding to the appellant's assertion that material witnesses were not called by the prosecution, counsel pointed to section 143 of the *Evidence Act* and submitted that no specific number of witnesses is required to prove a fact. According to counsel, the prosecution discharged its duty by proving all the elements of the offence based on the evidence adduced by the witnesses who were summoned to testify.

13. Rejecting the appellant's claim that the charge was defective, counsel submitted that despite the appellant being charged under a non-existent section 8(3)(a) of the *Sexual Offences Act*, the charge sheet complied with section 134 of the Criminal Procedure Code. Further, that the error was curable under section 382 of the Criminal Procedure Code.

14. Regarding the alleged violation of the appellant's rights, counsel submitted that this issue not having been raised before the first appellate court was not open for consideration by this Court.

    Counsel further submitted that the fact that the appellant was accorded a fair trial was proved by his active participation in the proceedings.

15. Concerning the sentence, counsel submitted that life imprisonment is lawful. Counsel, nevertheless, referred to Manyeso vs. Republic [2023] KECA 827 (KLR) to urge that we substitute the life sentence with a term of 30 years in prison.

16. We are seized of this matter on a second appeal and by dint of section 361(1) of the Criminal Procedure Code, our mandate is limited to considering issues of law. The jurisdiction of this Court on a second appeal has been explained in a plethora of decisions, including Adan Muraguri Mungara vs. Republic [2010] eKLR where it was held that:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

17. Upon reviewing the record of appeal as well as the submissions by the parties, the following issues are for determination in this appeal: whether the charge sheet was defective and duplex; whether there were material inconsistencies and contradictions which went to the root of the case; whether the appellant's right under Article 49 (1) (f) of *the Constitution* was infringed; and, whether the sentence of life imprisonment was lawful.

18. Starting with the attack on the charge, the appellant submitted that the evidence adduced during trial was at variance with the charge. Specifically, the appellant pointed out that there was variance between the actual date of his apprehension and the date of arrest as indicated in the charge sheet. It was also his grievance that although he was charged for violating section 8(1) as read with section 8(3) of the *Sexual Offences Act*, the stiffer sentence provided under section 8(2) of the *Sexual Offences Act* was imposed. This, in the appellant's view offended section 214 of the Criminal Procedure Code which requires the amendment of a charge where there is variance between the charge and the evidence.

19. From the record, we note that the appellant was charged under section 8(1) of the *Sexual Offences Act* as read with section 8(3) of the same Act. The particulars of the offence indicated the victim's age to be ten years. In his judgment, the trial magistrate found that the certificate of birth confirmed

that the victim was under eleven years. The certificate of birth conformed to PW1's testimony that she witnessed the birth of the minor on 3rd February 2002. Having established the age of the victim, the trial magistrate concluded that the suitable sentence was the one provided under section 8(2) of the *Sexual Offences Act*. In our view, this discrepancy was immaterial. We say so because the offence of defilement is substantively created under section 8(1) of the *Sexual Offences Act* and subsections (2) to (4) of section 8 are essentially for sentencing purposes. Under section 8(2), what the prosecution was required to prove, and which it did, was that the complainant was under the age of eleven years.

20. Additionally, certain defects in a charge are curable under section 382 of the Criminal Procedure Code which provides as follows:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> > Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. In assessing whether the defect in the charge is curable under section 382, we must consider the charge vis-à-vis the provisions of section 137 of the Criminal Procedure Code as to the rules for the framing of charges and informations. Our understanding of section 137(a) is that a charge or information ought to contain a statement of the offence which describes the offence and refers to the relevant section or provision creating the offence. In the case of John Irungu vs. Republic [2016] eKLR the Court when dealing with a case where the charge sheet did not mention section 8(1) but only referred to 8(2) of the *Sexual Offences Act* held that:

> "As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. As this Court observed in *Samuel Kilonzo Musau v Republic, Cr. App No. 153 of 2013*, that provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice."

22. The Court went further to hold that:

> " In *Amedi Omurunga vs. Republic, Cr. App. No. 178 of 2012*, where, in a charge of defilement reference was made only to the punishment section, this Court held that the defect was curable. We are in agreement with the first appellate court that the failure to refer to section 8(1) of the Act did not occasion a miscarriage of justice in view of the clear statement of the particulars of the offence and therefore cannot form the basis for interfering with the decisions of the two courts below."

23. Back to the case at hand, the charge sheet disclosed clearly the offence which the appellant was charged with. The elements of the said offence were discernible by reference to section 8(1) of the *Sexual Offences Act*. The irregularly cited provision related to the sentence prescribed under the Act. The particulars, and specifically the age of the child being ten years, were also well and clearly articulated in the charge and the appellant was aware of the offence he was accused of. Although it would have been ideal for the trial magistrate to amend the charge, the invocation of the sentencing provision was dependent on proof of age which is an element of the offence already prescribed under section 8(1). No harm or injustice was therefore occasioned to the appellant who knew throughout the trial that it was being alleged that he had defiled a child of ten years and such an offence attracted a sentence of life imprisonment under section 8(2) of the *Sexual Offences Act*.

24. With regard to the appellant's contention that there were contradictions on the date of his arrest, we do not discern any contradiction from the record. From the charge sheet and the Occurrence Book entry, it is apparent that the appellant was arrested and booked on 22nd February 2012. He was charged on 24th February 2012. We therefore do not find any discrepancy or defect in the charge in this regard.

25. The next issue for our determination is whether there were any inconsistencies and contradictions that went to the root of the prosecution case. It was the appellant's contention that the evidence of PW1, PW2, PW3 and PW4 was inconsistent and contradictory in as far as the date of the offence was concerned as well as his involvement in the commission of the offence. We are aware that in every trial, there are bound to be discrepancies as each witness has their individual and peculiar way of recalling incidences. We also appreciate that the position of the law is that unless the alleged discrepancies and contradictions are material to the main issue in question, such discrepancies remain trivial and not fatal to the case. In this regard, we wish to associate ourselves with the holding of the Court in Richard Munene vs. Republic [2018] eKLR 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."

26. Similarly, in Philip Nzaka Watu vs. Republic [2016] eKLR the Court expressed itself as follows:

> "Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

27. In considering the import of the alleged contradictions and inconsistencies, we must review the evidence as a whole. Contradictions touching on material issues must not be overlooked as they have a serious effect on the value of the evidence. The appellant contends that whereas the offence is alleged to have occurred on 22nd February 2012, PW4 talked of the incident happening on 24th February 2012. Upon reviewing the record, we note that PW4 referred to 24th January 2012 as the first time she noticed the complainant walking with difficulties. The witness further referred to February as the time the complainant went to school in bad condition and that is when they decided to report the matter. It is

therefore clear from the record that at no time did PW4 testify that the complainant was defiled on 24th February 2012. Her testimony therefore concurred with the charge which indicated that the offence was committed "between January 2012 and 21st February 2012".

28. Another issue raised by the appellant is that there were contradictions in the evidence surrounding his arrest. He contended that whereas PW1 stated that he identified him during the arrest, the other witnesses testified that PW1 was at the police station at the time of his arrest. In our view, this discrepancy is trivial. It does not go to the root of the case. The discrepancy is not related to the elements of the offence or the commission of the offence but rather the arrest of the appellant post-commission of the offence. Regarding the identity of the appellant, we do not find any discrepancy in the testimony of the witnesses. The evidence of PW1 was corroborated by PW3 and PW4 who were the first people that PW1 reported the matter to. The complainant was clear in her narration that she was defiled by Muchemi along the way and by the appellant at home. There is evidence on record that the appellant lived in the same homestead with the child. Ultimately, we find that the contradictions as to the arrest of the appellant are not material as to upset the decisions of the two courts below.

29. Turning to the issue of uncalled vital witnesses, the appellant contends that the area Assistant Chief and the arresting Administration Police Officer ought to have been called as witnesses in the case. We begin by appreciating that under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove a fact. We also appreciate that the prosecution is only required to call the witnesses who are sufficient to prove a fact and no more; and that the discretion to decide which witnesses to call remains with the prosecution. To this end, we associate ourselves with the views of the Court in Julius Kalewa Mutunga vs. Republic [2006] eKLR that:

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

30. In the case before us, other than identifying the alleged witnesses who were not called, the appellant fell short of pointing out the gaps that would have been filled by the evidence of the uncalled witnesses. The Assistant Chief and the arresting officer were not eyewitnesses. Just like PW3 and PW4, they were witnesses who were informed of the offence by the complainant. Their evidence was not going to be different from that of PW3 and PW4. PW6 was also a police officer just like the arresting officer. We are therefore not inclined to make any adverse inference on the failure by the prosecution to call the two witnesses.

31. The next issue raised by the appellant is that his right under Article 49(1)(f) of *the Constitution* was infringed upon. He contends that despite being arrested on 22nd February 2012, he was presented in court on 24th February 2012 after the lapse of the 24 hours provided by *the Constitution*. Even though the first appellate court did not address this issue, we are satisfied upon reviewing the record that the appellant raised the issue in his submissions. In our view, a violation of the appellant's right to be presented in court within 24 hours of arrest should not ordinarily unsettle a finding of guilt. This is because the violation occurs before the commencement of the criminal trial and is independent of the guilt or otherwise in respect to the criminal charge. Such a violation, unless it is one that affects the right to the fair trial of the appellant, should be deferred to a claim for damages in a constitutional petition lodged by the appellant. Consequently, we can not find merit on this ground as to upset the findings of the trial court. In any event, the appellant never raised the issue before the trial court so that the prosecutor could explain why the appellant was presented in court outside the time provided by

the Constitution. Our views herein find support in the decision of Julius Kamau Mbugua vs. Republic [2010] eKLR where it was held that:

> " In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.
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> However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial EG where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72 (6) expressly compensatable by damages."

32. The Court proceeded to hold that:

> "Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under Section 84 (1) would be an order for compensation for such breach."

33. Finally, the appellant has invited us to enter the arena of sentencing. He contends that the life imprisonment imposed on him was unlawful as the same was passed in its mandatory nature and without considering his mitigation. Sentencing is a matter that falls within the discretion of the trial court. It is also a matter of fact and it can only be considered by this Court sitting on a second appeal in circumscribed circumstances. In that regard, the Supreme Court recently reminded us of our limited jurisdiction on second appeals in respect to sentences, when it held in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) that:

> " Before further delving into the question of the constitutionality or otherwise of the sentence, 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."

34. The Supreme Court reiterated its directive in Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) [2021] KESC 31 that its decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR was limited to the mandatory death sentence provided for the offence of murder and did not extend to the minimum sentences found in the *Sexual Offences Act* or any other law for that matter. The Supreme Court went ahead to find that minimum sentences for sexual offences remain legal unless and until declared unconstitutional.

35. We are bound by the decision of the Supreme Court. We will only interrogate the appellant's claim that his mitigation was not considered by the trial court. Upon reviewing the sentencing proceedings, we note that during mitigation, the appellant informed the Court that he had nothing to say. The trial court noted that statement and proceeded to imprison him for life. That being the case, and the sentence being the only legal sentence provided by the law, we find no reason to interfere with the exercise of discretion by the trial court.

36. Flowing from the foregoing discussion, it follows that we find no merit in the appeal against both conviction and sentence. Consequently, this appeal is dismissed in its entirety.

37. This judgment is delivered in accordance with Rule 34 (3) of the Court of Appeal Rules of 2022, as Nyamweya J.A. declined to sign the judgment.

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

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR