



**Kibii v Republic (Criminal Appeal 42 of 2015)
[2023] KECA 1097 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1097 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 42 OF 2015
FA OCHIENG, LA ACHODE & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

MAXWELL KIPLAGAT KIBII APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.) dated and delivered on 23rd November 2015 in HCCRA No. 59 of 2014)

JUDGMENT

1. The appellant, Maxwell Kiplagat Kibii, was charged at the Chief Magistrate's Court at Nakuru with the main charge of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The particulars of the charge stated that on diverse dates between July 6, 2012 and July 20, 2012 within the now defunct Njoro District of the former Rift Valley, the appellant unlawfully and intentionally penetrated with his penis in the vagina of VJK alias VCK a child aged 4 years. Arising from the same incident he was faced with an alternative charge of indecent act with a minor contrary to Section 11(1) of the *Sexual Offences Act*. The statement of the particulars of the alternative charge is not necessary considering that at the conclusion of the trial the appellant was convicted of the main charge and sentenced to life imprisonment. His appeal to the High Court was dismissed in its entirety by Maureen A. Odero, J. in a judgment delivered on 23rd November, 2015.
2. This is the appellant's second appeal which is premised on the grounds that both the trial court and the first appellate court erred in law in holding that the evidence of identification by a single witness was free from error; that the first appellate court erred in failing to independently subject the alibi defence to exhaustive and conclusive analysis; and, that the life imprisonment imposed on him was manifestly harsh and unwarranted.



3. The case against the appellant was weaved around the evidence of six witnesses. The testimony presented to the trial court was that on July 6, 2012 VJK alias VCK was playing near her home when the appellant who was a neighbour carried her to his house, placed her on his bed, removed her pair of trousers and inner garments and defiled her. The appellant thereafter told the child not to tell anyone of the ordeal lest he beat her up. The child then went home crying and when interrogated by her aunt (PW2), she declined to disclose what had transpired for fear of being beaten by the appellant. About ten days later, the victim overcame her fear and narrated to her mother (PW3) what the appellant had done to her. The child was then taken to Njoro Health Centre where PW4 examined her and ascertained that she had been defiled. She was later taken to the Nakuru Provincial General Hospital where she was admitted for two days. On July 30, 2012, the appellant was rearrested from members of the public by PW5.
4. In this appeal, Mr. Kanyi Ngure appeared for the appellant while Ms Torosi presented the respondent's case. At the time they virtually appeared before us, counsel had filed their written submissions which they sought to rely on and augmented with brief oral highlights.
5. For the appellant, Mr. Kanyi Ngure submitted that both the trial court and the first appellate court erred when they failed to subject the evidence of identification tendered by the victim to greater scrutiny to establish whether it was free from error. According to counsel, the evidence of PW1 on the identity of the appellant did not eliminate the possibility of someone else perpetrating the crime. Counsel pointed out that contrary to the testimonies of PW1, PW2 and PW3 that the perpetrator was called Langa, the appellant testified that he was known as Lang'at and not Langa. Counsel further submitted that there was an alleged eyewitness called "V" who was not called to testify. To counsel, these factors vitiated the evidence of identity of the appellant. Counsel relied on the cases of *Marie & 3 others v Republic* [1986] KLR 224, *Makokha v Republic* [1989] KLR 238 and *Lesarau v Republic* [1988] KLR 783 to buttress his submission that the evidence of a single witness ought to be treated with utmost caution and that the court must warn itself on the danger of basing a conviction on such evidence.
6. Counsel relied on the case of *Kipng'etich v Republic* [1985] eKLR to underscore the duty of the first appellate court to subject the evidence adduced at the trial to fresh analysis and submitted that the first appellate court failed to discharge its duty. In support of this line of submission, counsel pointed out that the first appellate court failed to appreciate the findings of PW4 to the effect that the offence could have occurred over a period of one to two weeks contrary to the evidence of PW1, PW2 and PW3 that the offence occurred on a single day.
7. Counsel contended that the two courts below erred in dismissing the appellant's alibi defence which was not discharged by the prosecution. According to counsel, the alibi defence, when considered against the evidence of PW4 who found that the offence was committed over a period of one to two weeks, would result in the conclusion that the appellant was not within the scene of crime during that period. Counsel relied on the cases of *Kiarie v Republic* [1984] eKLR; *Osiwa v Republic* [1989] eKLR; and *Joseph Peitun Losur v Republic*, CR Appeal No 168 of 2001 to reinforce his submissions in this regard. Counsel maintained that the appellant's alibi defence was credible and ought to have been taken into account as it sufficiently countered the prosecution's case and was not challenged at all.
8. Submitting on the issue of sentence, Mr. Kanyi Ngure relied on the case of *Solomon Limangura v Republic* [2019] eKLR to submit that the sentences under Section 8 of the *Sexual Offences Act* are not mandatory and that courts are free to exercise their discretion. Counsel pointed out that the trial court handed down the sentence of life imprisonment under the assumption that it was the only available sentence in law. Counsel also restated the appellant's mitigation, pointing out that the appellant was



a first offender, was remorseful and was 18 years old at the time of the trial. Counsel urged that the appellant deserves another chance thereby calling for a lesser sentence. In conclusion, counsel urged that we allow this appeal.

9. For the respondent, Ms Torosi relied on the case of *Yusuf Sbiunzi v Republic* [2019] eKLR to point out the duty of the second appellate court. Counsel reiterated the facts and submitted that the evidence on record sufficiently proved the elements of defilement to wit that the complainant who was 4 years old was penetrated by the appellant. Regarding the issue of penetration, counsel relied on the cases of *Mark Oiruri Mose v Republic* [2013] eKLR and *Dennis Osoro Obiri v Republic* [2014] eKLR to submit that it was not mandatory to have medical evidence linking the appellant to the offence but rather that which was required was evidence of the complainant's defilement.
10. With regard to the claim that the appellant was convicted on the evidence of a single witness, counsel submitted that the proviso to section 124 of the *Evidence Act* gave room to courts seized of matters relating to sexual offences to rely on the sole evidence of the victim to secure a conviction. Counsel pointed out that both the trial court and the first appellate court concurred that PW1 was a credible witness.
11. Counsel finally refuted claims that the appellant was denied the right to fair trial pointing out that from the record, the appellant was represented by an advocate and they were present during the trial and actively participated in it. Counsel therefore urged us to dismiss the appeal in its entirety.
12. Section 361(1) of the *Criminal Procedure Code* limits the scope of our mandate on second appeals to matters of law only. Therefore, in exercising our jurisdiction, facts, should as much as possible, remain as concurrently arrived at by the trial and first appellate court. Our departure from the established facts is therefore only plausible where, either the findings of facts are not based on the evidence on record or the conclusions were based on the wrong application of the relevant legal principles and the law. On the same breadth, severity of a sentence is not within our purview but questions surrounding the legality of a sentence are. We can also deal with the issue of sentence where the sentence was enhanced by the High Court. Guided by the stated legal position, we have reviewed the record of appeal as well as the submissions by counsel for both parties in this appeal. In our view, this appeal will be determined by addressing three issues as to whether the first appellate court abdicated its duty; whether the evidence of a single witness was sufficient to sustain the conviction of the appellant; and, whether the sentence imposed on the appellant is harsh and excessive.
13. Counsel for the appellant has faulted the first appellate court for abdicating its duty to appraise the evidence on record anew and come to its own independent conclusion. He pointed out that the appellant's alibi defence was not subjected to fresh, exhaustive and conclusive analysis independent from that of trial court. From the onset, it is worth noting that there is no specifically prescribed yardstick on how the first appellate court should conduct its mandate. In *David Njuguna Wairimu v Republic* [2010] eKLR, this Court explained the varied paths first appellate courts take in the fulfilment of its duty. It stated that:

“In *Okeno v R* [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”



[Emphasis ours]

14. We have keenly gone through the judgment of the first appellate court with a view to ascertaining whether it delivered on its mandate. We note that at pages 13 and 14 of the judgment, the learned Judge independently, without any reference to the findings of the trial court conducted an analysis of the appellant's defence and arrived at a conclusion that the alibi defence was mere fabrication. In our view, the record speaks for itself; the learned Judge was alive to her mandate as a first appellate court and lived up to this billing. In fact, despite reaching the same conclusion as the trial court, the learned Judge opted not to rehash the conclusion but instead belaboured to explain the road to her conclusion. Both the trial court and the first appellate court were agreed that the appellant's alibi defence was for dismissal. The record gives us no reason to depart from that conclusion. Indeed, the record shows that all the witnesses agreed that the appellant had an opportunity to commit the offence before leaving for his father's place of work at Kakamega. The appellant, and his mother who testified as DW2, both testified that the appellant was released from remand custody, where he was being held in regard to a different case, on July 6, 2012. This is the day the complainant stated that she was defiled. Although the appellant testified that he left for Kakamega the next day, his mother testified that he left after two days. The prosecution therefore proved that the appellant was in the locale at the time of the commission of the offence. The appellant's claim that the first appellate court failed to discharge its duty is therefore found to be without merit.
15. The second issue for our determination is whether the evidence of identification by a single witness was sufficient to lead to a conviction in the circumstances of this case. It was the appellant's contention that the learned Judge erred in failing to warn herself of the dangers of relying on the evidence of a single witness and in the process erred in finding that the appellant's identity as the perpetrator was sufficiently proved. Another complaint by the appellant associated to this is that a critical witness was not called to testify. Counsel submitted that there was an eyewitness called V who was never called to testify. The learned Judge of the first appellate court addressed this issue at pages 9 to 13 of her judgment. In the judgment, the Court rightly appreciated the import of the proviso to Section 124 of the *Evidence Act* in as far as it gives room for reliance on the sole evidence of the victim to secure a conviction in sexual offences. Additionally, the first appellate court also appreciated the fact that the trial court found the appellant to be reliable and believable despite the constant threats by the appellant. The first appellate court further acknowledged that it was within the purview of the trial court to make such observations as to the demeanor of witnesses.
16. That being the case, we cannot agree with the appellant's counsel when he submits that the first appellate court did not warn itself of the dangers of relying on the evidence of a single witness. What we hear counsel submitting is that the court ought to have expressly stated that it was indeed warning itself. In our view, that is far from what is expected. Warning oneself of the dangers need not be expressly stated. All that is needed is for the court to appreciate these dangers in the manner in which it approaches and analyses the evidence of a single witness. In this case, the learned Judge cannot be faulted on the grounds that she did not warn herself of these dangers. The learned Judge despite appreciating the leeway provided under Section 124 of the *Evidence Act* still went ahead and assessed the evidence of the complainant in view of the whole case. Ultimately, and rightly so, the first appellate court found that this was more of a case of recognition rather than identification. We find no reason to fault her for that conclusion considering that the victim and her mother testified that the appellant was their next door neighbour. The appellant was therefore well-known to them. The clear identification of the appellant by the victim was confirmed by the investigating officer (PW6 Police Constable Nellius Nyambura Wanjohi) who told the trial court that the child identified the appellant at the police station



- and started crying upon seeing him. In the circumstances, we find this ground of appeal to be without merit.
17. With regard to the issue of the failure to call a crucial witness, we are alive the provisions of Section 143 of the *Evidence Act* that no particular number of witnesses are required to prove a fact. This position of the law was stated by this Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR as follows:
- “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.”
18. Similarly, in *Joseph Kiptum Keter v Republic* [2007] eKLR, this Court concurred with the above position thus:
- “*Bukenya v Uganda* [1972] EA 549 clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”
19. Adding our voice to this, it is not enough for an appellant to allege failure to call a critical witness. An appellant raising this ground ought to go ahead and deduce the evidentiary vacuum left by the omission of the uncalled witness. On the other hand, a court called upon to address such an issue ought to consider the available evidence as adduced by the witnesses *vis-à-vis* the import of the perceived evidence of the witnesses who the appellant complains were not produced. In doing so, the court has to consider the elements of the offence charged and assess whether the evidence on record proved all the requisite elements.
20. In a charge of defilement, the key elements the prosecution needs to prove are that the accused person was under 18 years at the time of the commission of the offence, that there was penetration of the complainant and the identity of the perpetrator. In this appeal, the alleged omitted witness was not relevant in as far as the age of the complainant and the fact of penetration were concerned. Perhaps, he was important in proving the identity of the perpetrator. Even though no evidence was adduced as to the difficulty experienced in availing the said witness, his absence left no evidentiary vacuum. The proviso to section 124 of the *Evidence Act* provided a cure for this defect by allowing the trial court to convict on the evidence of the victim of a sexual offence so long as the court is satisfied with the truthfulness of the witness. Indeed, the trial court observed that the child was “consistent in her testimony despite the threats by the accused person.” This statement was not an idle one as the record clearly shows a bold child who appeared exceptionally confident for her age. She gave a lucid account of her ordeal. The observation of the trial magistrate was reiterated by the High Court Judge who observed that “the complainant gave clear and consistent evidence regarding the events of the day...her story remained unchanged even days later when she narrated her ordeal to her aunt and mother...she was in all likelihood telling the truth.” The two courts below therefore converged in the finding that the victim was a truthful witness. They correctly applied the law to her evidence. This being a finding of fact, and there being no observable misapprehension of the law, we have no wiggle room within which to interfere with the concurrent finding of facts by the two courts. It follows therefore that this ground of appeal must fail and it does actually fail.
21. Finally, the appellant has challenged the life sentence meted upon him by the trial court and upheld by the first appellate court. Counsel for the appellant submitted that the sentence was handed down



in its mandatory nature and was therefore illegal. Although there is still debate as to the place of mandatory sentences in our jurisdiction, we agree with the appellant's submission that the sentences under Section 8 of the Sexual Offences Act are not mandatory but that courts have the discretion to mete out appropriate sentences depending on the circumstances of each case. It follows that in appropriate circumstances, courts are still at liberty to hand down the maximum available sentences. This view is fortified by the decision of this Court, differently constituted, in Joshua Gichuki Mwangi v Republic, Nyeri Criminal Appeal No. 84 of 2015 where the Court held that:

“We emphasise that this Court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished...

On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts...”

22. Having stated the current position of the law, as we understand it, we observe in respect to this appeal that the trial court despite handing down the maximum sentence, did not indicate that it was in its mandatory nature. Even if that was the case, we cannot blame the trial court because that was the law as at February 2014 when the sentence was passed and on November 23, 2015 when the first appellate court confirmed the sentence.
23. In our own assessment, we note that the appellant was a first offender and aged 18 years as at the time of the commission of the offence. On the other hand, the complainant was only 4 years when she was violated. Further, the complainant suffered serious injuries as a result of the appellant's actions resulting in her admission at the then Nakuru Provincial General Hospital for two days. We therefore find that based on the circumstances of this case, the sentence imposed by the trial court was merited and appropriate. It was also a legal sentence. We consequently find no good reason for interfering with the sentence of life imprisonment and we uphold it.
24. In the end, we find that this appeal lacks merit and is for dismissal. Consequently, this appeal is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

