Malalo v Republic (Criminal Appeal E057 of 2023) [2025] KEHC 5269 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEHC 5269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E057 OF 2023

AN ONGERI, J

MARCH 26, 2025

BETWEEN

GABRIEL MAGHANGA MALALO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. D. Wangeci (SPM) in Wundanyi Sexual Offence Case No. E732 of 2021 delivered on 9th November 2023)

JUDGMENT

1. The Appellant was convicted with the offence of unnatural offence contrary to Section 162(a) of the *Penal Code* and he was sentenced to twenty one (21) years imprisonment.
2. The particulars of the charge were that on 19th June 2021 at 1400hours at [Particulars withheld] village, [Particulars withheld] Location, Mwatate Sub County within Taita Taveta County, the Appellant had carnal knowledge of J. M. against the order of nature.
3. The Appellant pleaded not guilty to the charge. The prosecution called four (4)witnesses.
4. The prosecution evidence in summary was that the Appellant was found by PW2 sodomising the complainant who is the son of PW1 and who was born physically and mentally incapacitated.
5. The Appellant asked for forgiveness from PW2 as the complainant pulled back his shorts.
6. The incident was reported to the police and the complainant who is thirty (30) years old was taken to hospital.
7. PW3 Joto Nyawa from Moi Referral Hospital treated the complainant. He confirmed that the complainant had bruised and small cuts deep into the anus which was swollen and reddish with inflammation, PW3 said this was evidence that the complainant had been sodomized.

8. The Appellant said in his defence that he was at school when the alleged incident occurred. He called a witness who also said that the Appellant was at school.

9. The trial court found the Appellant guilty as charged and sentenced him to 21 years imprisonment.

10. The Appellant has appealed to this court on the following grounds:-

    i. That the learned trial Magistrate erred in law and in facts by failing to appreciate that by enactment of the *Sexual Offences Act* No. 3 of 2006 the doctrine of implied repeal of Section 162(a) of the *Penal Code* takes effect and as such the charge was fatally defective.

    ii. That the learned trial Magistrate erred in law and in fact by failing to appreciate that the procedure for appointment of an intermediary pursuant to Section 31 of the *Sexual Offences Act* No. 3 of 2006 was not adhered to and the evidence adduced by PW2 did not adhere to the tenets of evidence by an intermediary.

    iii. That the learned trial Magistrate erred in law and in facts by failing to appreciate that the complainant's age was not positively proved.

    iv. That the learned trial Magistrate erred in law and in fact by failing to find that the medical evidence adduced did not corroborate the charge as stated.

    v. That the trial Magistrate did error in both law and fact when convicting the Appellant without noticing that the Appellant's arrest was conducted after three (3) months as from the date of the incident without any notification that the Appellant was at large after vicinity.

    vi. That the trial court Magistrate erred in law and fact in not considering that there existed a grudge (bad blood) between the alleged victim's mother and the Appellant's father over a love gone sour and therefore the victim was used as just a pawn to affect a revenge when I later learned after my conviction.

    vii. That notwithstanding the provisions of Seciton 143 of the *Evidence Act* very crucial and essential witness of the Appellant was not availed in court to adduce evidence and clear some of the glaring doubts since that witness was the Appellant's school Deputy Principal as well as his class teacher rendering the matter at hand unproved because he would have affirmed the whole of his where-about on that fateful day and time. The Appellant pray for consideration.

    viii. That the trial court erred in law and fact in failing to notice that the Evidence pertaining investigation over this matter was shoddily done to withstand this conviction. May the same be considered.

    ix. That and without prejudice to the instant appeal, the sentence of twenty-one (21) years imprisonment as meted was and remains harsh and manifestly excessive hence a prejudice.

11. The parties filed written submissions as follows:-

12. The Appellant submitted that he was charged with an unnatural offense under Section 162(a) of the *Penal Code*, convicted, and sentenced to 21 years imprisonment. The Appellant argues that the enactment of the *Sexual Offences Act* No. 3 of 2006 impliedly repealed Section 162(a) of the *Penal Code*, rendering the charge defective.

13. The Appellant relies on the doctrine of implied repeal, which prevents the existence of conflicting statutes. The Appellant contends that the *Sexual Offences Act* of 2006 took over all penalties related to sexual offenses, thereby repealing the earlier provisions of the *Penal Code*.

14. The Appellant highlights the inconsistency between Section 162 of the *Penal Code* and Section 3(3) of the *Sexual Offences Act*, particularly regarding the varying minimum and maximum imprisonment terms.

15. Given that the *Sexual Offences Act* commenced after the *Penal Code*, the Appellant asserts that Section 162 of the *Penal Code* was impliedly repealed by Section 3 of the *Sexual Offences Act*. The Appellant argues that the charge was brought under a repealed law, making the charge sheet fatally defective. [cite: 19, 20]

16. The Appellant also challenges the admissibility of evidence from an intermediary, arguing that it did not adhere to established evidentiary procedures. The Appellant claims that the intermediary's evidence was hearsay and not based on direct communication with the complainant.

17. The Appellant argues that the prosecution failed to prove its case beyond a reasonable doubt, as required by Section 111 of the *Evidence Act*. The Appellant contends that the prosecution did not establish penetration, an essential element of the offense.

18. The Appellant further asserts that the evidence presented by the prosecution was unreliable and unbelievable. The Appellant points to inconsistencies and improbabilities in the witnesses' testimonies, as well as a lack of corroborating medical evidence.

19. 8 The Appellant claims that the prosecution relied heavily on suspicion rather than concrete evidence. The Appellant suggests that there was a grudge between the Appellant's father and the victim's father, which influenced the case.

20. The Appellant argues that crucial witnesses, such as the Deputy Principal, were not presented in court, which prejudiced the Appellant's case. The Appellant contends that the absence of these witnesses prevented the court from hearing truthful and factual evidence.

21. The Appellant contends that the sentence imposed by the trial court was illegal, harsh, and excessive. The Appellant argues that the trial court failed to recognize the conflict between the *Penal Code* and the *Sexual Offences Act* and did not adequately consider the Appellant's age and potential for rehabilitation.

22. The respondent opposed the appellant's appeal against both the conviction and the 21-year sentence imposed by the trial court. The key points of the respondent's arguments are summarized as follows:

23. That the appellant was convicted of committing an unnatural offence under Section 162(a) of the *Penal Code*.

24. That the prosecution presented three witnesses, while the appellant called two witnesses in his defense.

25. That the trial magistrate found the appellant guilty and sentenced him to 21 years imprisonment.

26. The respondent cited Okeno vs. Republic and Francis Matonda Ogeto v Republic, emphasizing that the appellate court must independently evaluate the evidence and draw its own conclusions, while considering the trial court's advantage of observing witnesses.

27. On the issue of Penetration, medical evidence (P3 form, lab results, and treatment notes) confirmed the complainant had been sodomized.

28. On identification of the appellant, the witnesses (PW2 and PW1) positively identified the appellant as the perpetrator. PW2 testified that he saw the appellant and the complainant in a bush and witnessed the act. The appellant asked for forgiveness and left the scene.

29. On the issue of consent, the complainant, who has a mental disability, was incapable of giving consent.

30. The age of the complainant's age (30 years) was not a necessary element of the offence.

31. The appellant argued that the charge sheet was defective due to the implied repeal of Section 162(a) by the *Sexual Offences Act*. The respondent refutes this, citing Adhan Nassir v Republic, which confirms that Section 162(a) remains valid.

32. The respondent argued that the trial court followed proper procedures in declaring the complainant a vulnerable witness and appointing an intermediary. Although the complainant could not testify due to his mental condition, other evidence (e.g., PW2's testimony) was sufficient to convict the appellant.

33. The respondent argued that the 21-year sentence is reasonable and not manifestly excessive.

34. The appellant failed to show that the trial court overlooked material factors, acted on wrong principles, or considered irrelevant material.

35. The respondent cited the case of Bernard Kimani Gacheru vs Republic [2002] eKLR, which states that appellate courts should not interfere with sentencing unless it is clearly excessive or based on incorrect principles.

36. The respondent urged the court to uphold both the conviction and the sentence, and to dismiss the appeal.

37. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court. The Court of Appeal in Okeno vs Republic [1972] EA 32 held that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala v R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424."

38. The issues for determination in this case are as follows:-

    i. Whether the prosecution proved the guilty of the Appellant to the required standard.

    ii. Whether the sentence was excessive.

39. The Appellant submitted that Section 162(a) of the *Penal Code* was impliedly repealed by the *Sexual Offences Act*.

40. However, the respondent correctly cited the case of Adhan Nassir V Director Of Public Prosecutions [2016] eKLR which affirms that Section 162(a) remains valid.

41. The *Sexual Offences Act* complements rather than replaces the *Penal Code* provisions, and the charge sheet was not defective. The trial court's decision to proceed under Section 162(a) was legally sound.

42. The complainant's mental incapacity justified the appointment of an intermediary under Section 31 of the *Sexual Offences Act*. While the complainant could not testify directly, PW2's eyewitness account and the medical evidence provided credible and corroborative proof of the offense. The procedural requirements for intermediary evidence were substantially complied with, and the evidence was properly admitted.

43. I find that the prosecution discharged its burden of proof. PW2's testimony, supported by medical evidence (P3 form and treatment notes), confirmed penetration and the Appellant's identity as the perpetrator.

44. The Appellant's alibi was contradicted by PW2's account, and the trial court rightly found it unsubstantiated. The evidence met the standard required under Section 111 of the *Evidence Act*.

45. The Appellant's claim of a grudge between his father and the victim's mother was speculative and unsupported by evidence. The prosecution's case relied on credible witness testimony and medical findings, not personal vendettas. The trial court properly disregarded this argument as irrelevant to the proven facts.

46. The Appellant's contention that the Deputy Principal's absence prejudiced his case is unfounded. The burden of proof rested on the prosecution, which presented sufficient evidence without needing every potential witness.

47. The appellant was found the Appellant was found red-handed by PW2 on the act of sodomising the complainant who is the son of PW1 and who was born physically and mentally incapacitated.

48. The 21-year sentence, though severe, is not manifestly excessive given the gravity of the offense and the vulnerability of the victim. The trial court considered the Appellant's age and the nature of the crime, and the sentence aligns with judicial precedents for similar offenses.

49. I find that there is no justification for appellate interference under the principles outlined in the case of Bernard Kimani Gacheru vs Republic (supra).

50. The said principles upon which an Appellate Court can interfere with the sentence of an Appeal Court are settled. They are:-

    i. If sentence is manifestly excessive in the circumstances of the case, or

    ii. If The Trial Court overlooked some material factor, or

    iii. took into account, some wrong material, or

    iv. Acted on a wrong principle.

51. I find that this appeal lacks merit on all grounds. The conviction was based on credible evidence, the legal procedures were properly followed, and the sentence was justified.

52. I accordingly uphold the trial court's decision and I dismiss the appeal in its entirety. The Appellant's conviction and sentence stand.

53. The appellant has a right of appeal to the Court of Appeal within 14 days of this date (explained).

DATED, SIGNED AND DELIVERED THIS 26TH OF MARCH 2025 IN OPEN COURT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent