Bukachi v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 9265 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9265 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E016 OF 2023

JN KAMAU, J

JULY 31, 2024

BETWEEN

JOSIAH BUKACHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 70 of 2020 on 19th May 2023)

JUDGMENT

Introduction

1. The Appellant herein was charged with two (2) counts of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was discharged on Count II and both alternative Counts for Count I and Count II under Section 215 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

3. He was convicted by the Learned Trial Magistrate, Hon S.O. Ongeri (SPM), on the charge of defilement and sentenced to twenty (20) years. The said Learned Trial Magistrate clarified that he would serve seventeen (17) years because he had remained in custody for two and a half (2 ½) years.

4. Being dissatisfied with the said Judgment, on 6th July 2023, he lodged the Appeal herein. His Petition of Appeal was dated 4th July 2023. He set out six (6) grounds of appeal. In his Written Submissions dated 10th January 2023 and filed on 11th January 2024, he incorporated his Amended Grounds of Appeal. He detailed five (5) Amended Grounds of Appeal.

5. His Written Submissions were dated 10th January 2023 and filed on 11th January 2024 while those of the Respondent were dated and filed on 1st March 2024. The Judgment herein was therefore based on the said Written Submissions that both parties relied upon in their entirety.

Legal Analysis

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

8. Having looked at the Appellant's Grounds of Appeal and the Amended Grounds of Appeal, it appeared to this court that the issues that had been placed before it for determination were as follows:-

   a. Whether or not the Appellant's right to fair trial was infringed;

   b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

   c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court dealt with the said issues under the following distinct and separate heads.

I. Right to Fair Trial

10. Amended Ground of Appeal No (4) was dealt with under this head. This different issues were dealt with under the different sub-heads.

A. Right to Bond/Bail

11. The Appellant submitted that his right under Article 49(1)(h) of the *Constitution* was violated as applied for review of his bond terms but his efforts were rendered futile as he was not given any substantial reason why he was not granted bond and/or the same reviewed.

12. Article 49(1)(h) of the *Constitution* of Kenya, 2010 provides that:-

> " An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

13. On its part, the Respondent submitted that the Appellant's argument had no factual basis as he was granted bond of Kshs 500,000/=.

14. Notably, on 18th November 2020, the Trial Court gave the Appellant bond of Kshs 500,000/= with a similar surety. On 7th April 2021, the Appellant applied for a review of the said bond terms. A keen look at the proceedings of that day indicated that the Trial Court did not address itself to his application. He never raised the issue again during his trial and the same remained pending.

15. It was the view of this court that it was upon the Appellant to remind the Trial Court of his application for review as he was legally unrepresented. Failure to review the bond terms did not impact on the

evidence that was adduced against him in court and this prejudice him. If he was prejudiced, then he did not demonstrate the same to court. This court could therefore not fault the Trial Court for having failed to review the same.

A. Right to Expeditious Justice

16. The Appellant submitted that his right under Article 50(2)(e) of the *Constitution* of Kenya was violated as the proceedings were full of adjournments most of which, no due reasons were given thus delaying him from getting justice.

17. Article 50(2)(e) of the *Constitution* of Kenya provides as follows:-

> " Every accused person has the right to have the trial begin and conclude without unreasonable delay."

18. A perusal of the Trial Court's proceedings showed that there were several adjournments. However, most of them were occasioned by the Prosecution. Where the Trial Court failed to sit, it was where the Judicial Officer was away on an official duty or where the court could not link with the Prisons virtually due to network challenges.

19. The adjournments if any did not dislodge the essence of the matter being heard to finality and justice being done to both the complainant and the Appellant. This court did not find the delays that were occasioned therein to have been sufficient to render the trial a nullity and necessitate his acquittal or an order for re-trial. In the premises, this claim failed.

B. Right to Legal Representation

20. The Appellant submitted that Article 50(2)(h) of the *Constitution* was also violated as he was not informed of his right to legal representation and was not accorded legal representation by the state.

21. Article 50(2)(h) of the *Constitution* of Kenya provides that:-

> " Every accused person has the right to have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

22. On its part, the Respondent placed reliance on the cases of *Macharia v Republic* [2014] eKLR and *Karisa Chengo & 2 Others v Republic* Cr No 44, 45 & 76 of 2016 (eKLR citation not given) where the common thread was that the right to legal representation was essential for the realisation of a fair trial more so in capital offences. It submitted that the right to legal representation was not absolute and there were situations where it could be limited. It pointed out that it had to be established that the accused person would suffer substantial injustice if he or she was not accorded the legal representation. It asserted that there was no evidence that the Appellant had difficulty in understanding the proceedings and/or that he was prejudiced.

23. The proceedings showed that the Appellant understood English/Kiswahili. There was no indication that he requested the court to give him time to instruct a counsel to represent him during trial. It was therefore difficult for this court to ascertain whether or not he asked that he be given time to get counsel of his own choice as he had submitted and the Trial Court declined to afford him that opportunity thus infringing on his right to fair trial.

24. Be that as it may, this court found and held that the Trial Court was under an obligation to have informed him of his right to be represented by counsel as was mandated by Article 50(2)(g) of the *Constitution* of Kenya, 2010.

25. Notably, Article 50(2)(g) of the *Constitution* of Kenya provides as follows:-

> " Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly."

26. Failure by the Trial Court to have informed the Appellant of this right was a great omission. Having said so, it not always that such omission had to cause an accused person injustice as it could be remedied by way of a retrial if such accused person had completely been prejudiced.

27. In this particular case, the Appellant proceeded with the trial without ever having asked that the Trial Court give him time to instruct counsel to represent him during trial. Provision of legal representation at the State expense was a progressive right which was currently accorded to persons who had been charged with capital offences only.

28. This court thus came to the firm conclusion that his constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform of his right of legal representation under Article 50(2)(g) of the *Constitution* of Kenya.

29. In view of the delays that would be occasioned by recalling witnesses due to failure by trial courts to promptly inform accused persons of their right to choose and be represented by an advocate and to be informed of this right promptly under Article 50(2)(g) and the right to have an advocate assigned to the accused person by the State and at State expense and bearing in mind substantial injustice that would otherwise result as provided in Article 50(2)(h) of the *Constitution* of Kenya, trial courts were called upon to comply with these provisions of the law when an accused person was first presented to court and before taking the plea as this was indeed the best practice besides being mandated by the law.

C. Right to Supply of Relevant Documents

30. The Appellant also submitted that his right under Article 50(2)(j) of the *Constitution* of Kenya was also violated as he was never supplied with witness statements despite several reminders by the Trial Court. In this regard, he placed reliance on the case of *George Ngodhe Juma & Others v AG* [2003] eKLR where it was held that a prosecutor was obligated to place in court all the evidence whether it supported its case or weakened and supported the accused person.

31. He also relied on the case of *Albanus Mwansia Mutua v Republic* Cr No 120 of 2004 (eKLR citation not given) where it was held that it was the duty of the court to uphold constitutional provisions.

32. Article 50(2)(j) of the *Constitution* of Kenya provides that: -

> " Every accused person has to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."

33. A perusal of the proceedings of the lower court showed that indeed on several occasions, the Appellant informed the Trial Court that the Prosecution had not supplied him with witness statements. In fact, the RO, (hereinafter referred to "PW 1") was stood down for the same reason on 21st April 2022. PW 1 was recalled on 25th May 2022 when the case proceeded for hearing.

34. There was nothing in the proceedings of the lower court to suggest that he had not received the said witness statements by the time PW 1 testified. If he had not been furnished with any document, he ought to have informed the Trial Court before the trial commenced. He did not do so.

35. This court was satisfied that he was supplied with the statements and documentary evidence that the Prosecution intended to rely on during trial and that he had been given adequate time to prepare for the trial.

36. In the absence of proof of his assertions that his right to fair trial had been infringed upon and/or violated, this court was therefore not persuaded that it should find that the trial was rendered a nullity necessitating a retrial.

37. In the premises foregoing, the Amended Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

38. Grounds of Appeal Nos (1), (2), (4), (5) and (6) of the Petition of Appeal and Amended Grounds of Appeal Nos (1), (2) and (3) were dealt with under this head as they were all related.

39. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases was proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

40. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga v Republic* [2016] eKLR.

41. This court dealt with the aforesaid Grounds of Appeal under the following distinct and separate heads.

A. Age

42. The Appellant submitted that although the Prosecution insinuated that there was need for an age assessment to be done, no such report was produced in court. He blamed the Prosecution for having failed to call upon a witness to produce the same. In this regard, he cited Section 150 of the *Criminal Procedure Code* and relied on the case of Mungai v Republic 212KLR where it was held that it was the burden of the prosecution to avail all material evidence to the court for it to arrive at a fair impartial decision

43. He contended that the Prosecution relied on a Baptismal card which was an invalid document and which lacked authenticity to convict him thus incurring injustice. In this regard, he placed reliance on the case of *Joseph Kioti Seet v Republic* [2014] eKLR where it was held that the age of a victim could be determined by medical evidence and cogent evidence and the case of Francis Omuroni v Uganda Court of Appeal No 2 of 2000 where it was held that in defilement cases, medical evidence was paramount in determining the age of the victim.

44. On its part, the Respondent pointed out that No 24xxxx PWC DK (hereinafter referred to as "PW 5") testified that PW 1 was thirteen (13) years of age. She produced her Baptismal card as exhibit in the case. It was its contention that proof of age in sexual offences did not necessarily mean a birth certificate.

45. In that regard, it relied on the case of *Fappyton Mutuku Ngui v Republic* Criminal Appeal No 296 of 2010 (eKLR citation not given) where it was held that the conclusive proof of age in cases under *Sexual Offences Act* did not necessarily mean a birth certificate and that such formal documents could

be necessary in borderline cases but other modes of proof of age were available and could be used in other cases.

46. It therefore contended that PW 1's age was proved beyond reasonable doubt and that the production of the baptismal card was not challenged during cross-examination.

47. PW 1 testified that she was fifteen (15) years of age and was born in the year 2007. PO (hereinafter referred to as "PW 2"), her uncle, stated that she was fifteen (15) years old. PW 5 produced PW 1's Baptismal card which indicated that she was born on 26th December 2007.

48. In the case of *Kaingu Elias Kasomo v Republic* Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of *Musyoki Mwakavi v Republic* [2014] eKLR.

49. In this case, PW 1's age was proven by the Baptismal card. The offence was committed on diverse dates between 11th November 2020 and 15th November 2020. Thus, PW 1 was about thirteen (13) years old at the time the offence was committed. The Appellant did not challenge the production of the aforesaid Baptismal card and/or rebut this evidence by adducing evidence to the contrary.

50. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about thirteen (13) years old and was therefore a child at the material time.

B. Identification

51. The Appellant submitted that the Prosecution failed to avail crucial witnesses such as one C who was mentioned to have been defiled together with PW 1. He relied on the cases of *Kingi Ole Yenko v Republic* 112 (1921) and Bukenya v Uganda (1972) EA 549 where the common thread was that failure to call crucial witnesses gives the impression that the evidence would have been prejudicial.

52. He further relied on the case of *Elizabeth Waithengeni Atimu v Republic* 2015 KLR where it was held that where there is a single circumstance that creates doubt in the mind of court, the benefit of doubt must go to the accused person.

53. He contended that there were contradictions surrounding the circumstances that led to the disappearance of PW 1, on how long she disappeared and on who arrested him. He referred tis court to the case of *Ramkrishna Denkeral Pandya v Republic* Appeal No 6 0f 1990 EACA 93 where it was held that it was difficult to distinguish the truth from untruth and the case of *Richard Aspelia v Republic* Appeal No 45 of 1981 CA where it was held that two (2) contradicting statements could not be admitted in court.

54. He pointed out that PW 1's evidence was questionable as her assertion that she trusted a stranger who locked her up for days without her raising an alarm was not plausible. He asserted that as PW 1 mentioned that she had previously had sexual intercourse with one Benjamin Munyoo then there was possibility that she spent in Benjamin Munyoo's home and/or another home and only came to seek shelter at his home which resulted to him being arrested. He blamed the Trial Court for having failed to consider the circumstantial evidence, He relied on the case of *Absalom Ambaka Okila v Republic* [2020] eKLR where it was held that the circumstances under which an offence had been committed could not be ignored.

55. It was his case that PW 1 was dishonest in her evidence and that the Prosecution failed to prove beyond reasonable doubt that he was the perpetrator of the offence herein.

56. On the other hand, the Respondent submitted that PW 1 testified that it was the Appellant who defiled her and was well able to identify him during trial.

57. PW 1 testified that on the material date of 11th November 2020, she had been sent to the market by her grandmother and on her way back, she met the Appellant who was initially a stranger to her and he lured her into his house. He promised to give her Kshs 100/=. She stated that he locked her up and went to his barber shop. He came later in the night. He removed her clothes and his clothes and defiled her. She said that she felt pain.

58. She told the Trial Court said that the following day, he told her to go and look for firewood but she ran away to her cousin, one C. She further testified that she had forgotten her mask at the Appellant's house and therefore asked the said C to accompany her to pick the same as it was late. As it was late, they ended up sleeping on the same bed with the Appellant who also defiled C.

59. Her evidence was corroborated by the evidence of PW 2 who reported her missing to the community policing and her grandmother, DA (hereinafter referred to as "PW 3"), who confirmed that on the material date, she sent her to buy tea leaves at Yala but she never returned home for one (1) week. She stated that she was later informed that she had been seen at Ebukulo and had been found in a man's house and the said man arrested.

60. This court noted that PW 1 was the only identifying witness. Having said so, under Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya), a trial court could convict a person on the basis of uncorroborated evidence of the victim if it was satisfied that the victim was telling the truth.

61. Notably, the proviso of Section 124 of the *Evidence Act* states that:-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence 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 person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis)."

62. Even so, a trial court was required to exercise great caution before relying on the evidence of a single witness to convict an accused person as it would be one person's word against the other. Other corroborating evidence could assist the trial or appellate court to come with a determination as to who between the opposing witnesses was being truthful. Other corroborating evidence could be proof of penetration, which was dealt with later in the Judgment herein.

63. PW 1's and the Appellant's interacted twice. The first day was when PW 1 slept in his house and the second time was when she went to collect her mask from his house accompanied by the said C. PW 1 positively identified him by pointing at him in the dock during trial. There could not therefore have been any possibility of a mistaken identity because they were no longer strangers.

64. This court thus came to the firm conclusion that the Prosecution proved the ingredient of identification which was by recognition.

C. Penetration

65. The Appellant did not submit on this issue. On the other hand, the Respondent contended that PW 1's evidence was well corroborated by that of Michael Ochieng Otieno (hereinafter referred to as "PW 4") who confirmed that penetration had occurred. It noted that under normal circumstances, the victim in sexual offences was the only witness because the offence normally occurred in secrecy.

66. It contended that the variance of the alleged inconsistencies did not dislodge the fact that the offence of defilement had been proved beyond reasonable doubt. In this regard, it placed reliance on the case of *SOO v Republic* [2018] eKLR where it was held that courts have to decide whether inconsistencies and contradictions are minor or go to the root of the matter.

67. It pointed out that the witnesses who were called by the Prosecution were sufficient to establish the case as against the Appellant. To buttress its point, it invoked Section 143 of the *Evidence Act* Cap 80 and cited the case of *Keter v Republic* [2007] EA 135 where it was held that no particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any fact.

68. PW 4 confirmed that PW 1's private parts had no injuries but that her hymen was absent. High vaginal swab showed that she had presence of epithelia cells. He concluded that there was evidence of sexual penetration. He produced the Post Rape Care (PRC) Form and P3 Form as exhibits in support of the Prosecution's case.

69. Notably, PW 1's evidence was well corroborated by the oral evidence of PW 2, PW 3 and PW 5 and by the scientific evidence that was tendered by PW 4 which confirmed sexual penetration.

70. The Appellant's defence that he did not defile PW 1 was simply a denial. This court agreed with the Respondent that the inconsistencies if any, did not outweigh the inference of guilt on the part of the Appellant. The witnesses that were called were indeed sufficient to establish the charge. The Trial Court could not therefore have been faulted for having found that he did in fact penetrate PW 1 and that the Prosecution had proved its case against him beyond reasonable doubt, which is the standard in criminal cases.

71. In the premises foregoing, Grounds of Appeal Nos (1), (2), (4), (5) and (6) of the Petition of Appeal and Amended Grounds of Appeal Nos (1), (2) and (3) were not merited and the same be and are hereby dismissed.

III. Sentencing

72. Ground of Appeal No (3) of the Petition of Appeal and Amended Ground of Appeal No (5) were dealt with under this head.

73. The Appellant invoked Section 216, 215 and 329 of the Criminal Procedure Code and submitted that the court ought to consider the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence.

74. He placed reliance on the cases of *James Kariuki Ng'anga v Republic* [2018]eKLR, *Maingi & Others v DPP & Another*(2022)KEHC 13118 (KLR), *Joshua Gisitoki Mwangi v Republic* (eKLR citation not given) and *Julius Kitsao Manyeso v Republic* Criminal Appeal No 12 of 2021(eKLR citation not given) where the common thread was that courts had powers to impose other sentences other than the mandatory sentences and that the said sentences were unconstitutional.

75. He faulted the Trial Court for failing to consider his mitigation before sentencing him. On its part, the Respondent submitted that his sentence was lawful and urged the court to uphold the same.

76. The Appellant herein was sentenced under Section 8(3) of the *Sexual Offences Act*. The same provides as follows: -

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

77. It was immaterial that PW 1 was thirteen (13) years or fifteen (15) years as the sentence for defilement was the same in both instances. This court could not therefore fault the Trial Court for having sentenced him to twenty (20) years imprisonment as that was lawful.

78. This court took cognisance of the fact that there had been emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts had a discretion to depart from the minimum mandatory sentences.

79. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

80. Notably, in the case of *Joshua Gichuki Mwangi v Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

81. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court had been exercising its discretion to reduce the sentences for those who had been sentenced under the *Sexual Offences Act*.

82. However, in a decision that was delivered on 12th July 2024, the Supreme Court overturned the decision of the Court of Appeal in the case *Joshua Gichuki Mwangi v Republic* (*Supra*) and stated that the Court of Appeal had no jurisdiction to exercise discretion on sentences that had a mandatory minimum sentence. The Supreme Court directed the relevant organs to abide by its decision noting that the appellant therein had since been released from prison.

83. As this court was bound by the decisions of courts superior to it, its hands were tied as regards the exercising of its discretion to reduce the Appellant's sentence. It had no option but to leave the said sentence that was meted against him undisturbed.

Disposition

84. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 4th July 2023 and filed on 6th July 2023 was not merited. His conviction and sentence be and are hereby upheld.

85. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JULY 2024.

J. KAMAU

JUDGE