Makale v Republic (Criminal Appeal 33 of 2023)
[2023] KEHC 24398 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24398 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 33 OF 2023

JN KAMAU, J

OCTOBER 26, 2023

BETWEEN

HANNINGTON MAKUMBA MAKALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court in SO Case No 15 of 2020 on 12th June 2020)

JUDGMENT

Introduction

1. The Appellant herein was charged with 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 had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon M. Ochieng, Principal Magistrate who sentenced him to twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 29th June 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was of even date. He set out eleven (11) grounds of appeal.

3. His Written Submissions were dated 18th March 2022 and filed on 27th July 2023 while those of the Respondent were dated and filed on 11th August 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. 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.

5. This was aptly stated in the case of *Selle & Another vs 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.

6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Charge Sheet was defective;

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

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

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

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

I. Charge Sheet

8. The issue of defectiveness of the Charge was not a Ground of Appeal in the Petitioner's Petition of Appeal. However, both he and the Respondent submitted on it. This court therefore found it prudent to pronounce itself on the said issue.

9. The Appellant submitted that the Charge was manifestly and incurably defective, irregular and a nullity and that it was not amended under Section 214 of the *Criminal Procedure Code* rendering the entire proceedings null and void. In this regard, he placed reliance on the case of *Yongo vs Republic* CRA No 1 of 1983 (eKLR citation not given) where it was held that a charge sheet was defective if it did not accord with the evidence that was adduced during trial and if there was a mis-description of the alleged offence in the particulars.

10. He argued that the evidence that was adduced did not correspond with the dates that were given in the Charge Sheet as a result of which he could not prepare his defence properly. He pointed out that the Charge Sheet had indicated that the date of the alleged incident was 18th March 2020 and 25th March 2020 but that the Clinical Officer, Wycliffe Jaika Jeda (hereinafter referred to as "PW 3") testified that CC (hereinafter referred to as "PW 1") came to hospital accompanied by her father on 25th March 2020. He added that PW 1's father, JKB (hereinafter referred to as "PW 2") was informed that she was missing on 28th March 2020.

11. He further submitted that the Charge Sheet was altered to indicate her age as fifteen (15) years but that the same was not counter-signed. He pointed out that the evidence on record showed that she was aged sixteen (16) years and he could therefore have benefitted from a sentence of fifteen (15) years if convicted under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.

12. On its part, the Respondent was emphatic that the Charge Sheet was not defective because PW 2 produced in evidence PW 1's Certificate of Birth showing that she was born on 21st June 2004.

13. This court had due regard to the case of *Leonard Kipkemoi vs Republic* [2017] eKLR where it was held that the test of whether or not a charge sheet was defective was if the offence was known to law and if it disclosed the offence so that the accused person could understand the ingredients of the offence he or she had been charged with.

14. In the case of *JMA vs Republic* (2009) KLR 671, it was held that it was not in all cases where a defect in the charge was detected on appeal would render a conviction invalid because Section 382 of the *Criminal Procedure Code* was meant to cure such an irregularity where prejudice to the appellant was not discernible.

15. The applicable test by an appellate court when determining the existence of a defective charge and its effect on an appellants' conviction was whether or not the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.

16. A typographical defect was therefore curable under Section 382 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) which provides that:-

> "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."

17. The above statutory curative position was also envisaged in Section 214 (2) of *Criminal Procedure Code* which stipulates that:-

> "Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

18. Notably, under Article 159(2)(d) of the *Constitution* of Kenya, courts have been mandated to administer justice without undue regard to procedural technicalities. In determining whether or not the Appellant herein was prejudiced by the Charge Sheet as was drawn, this court looked at the facts as had been set out therein.

19. The incident was said to have occurred between 18th March 2020 and 25th March 2020. Having been born on 21st June 2004, PW 1 was therefore about fifteen (15) years nine (9) months at the material time of the incident.

20. A perusal of the Charge Sheet showed that PW 1 was fifteen (15) years. As the Respondent argued, the Appellant was aware of her age once the Certificate of Birth was adduced as evidence in court. The Appellant could not therefore purport that he was not able to prepare for his defence.

21. This court was therefore not persuaded to find that the typographical error in the Charge Sheet that was not counter-signed was incurable and/or that it prejudiced and/or caused him any miscarriage of justice. Indeed, the typographical error was curable under Section 382 of the *Criminal Procedure Code* and by virtue of Article 159(2)(d) of the *Constitution* of Kenya.

II. Fair Trial

22. The issue of the Appellant's representation was also not a Ground of Appeal in his Petition of Appeal. However, as he had submitted on the same, this court also found that it was necessary to pronounce itself on the same.

A. Legal Representation

23. The Appellant cited the case of *Pett vs Greyhound Racing Association* (1968) 2 ALL ER 545 at pg 549 where it was held that not everyone had the ability to represent himself and that it was just if he had someone else to speak on his behalf.

24. On its part, the Respondent placed reliance on the cases of *Macharia vs Republic* [2014] eKLR and *Karisa Chengo & 2 Others vs Republic* (eKLR citation not given) where the common thread was legal representation at the State's expense was to be provided where an accused person had been charged with a capital offence.

25. It submitted that the Appellant was charged with defilement which did not carry a death or life sentence but the sentence under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* was twenty (20) years. It was therefore its averment that the Appellant's right to legal representation was not violated and the ground therefore had to fail.

26. Notably, Article 50(2)(h) of the *Constitution* of Kenya states that:-

> " 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".

27. As can be seen hereinabove, the Appellant herein was charged with the offence of sexual assault and an alternative charge of committing an indecent act with a child. A perusal of the proceedings did not show that he requested the Trial Court to be provided with legal representation and his request was declined and/or demonstrate that he was likely to suffer substantial injustice if the trial proceeded without legal representation. As this issue was not raised during trial when the Trial Court was expected to have pronounced itself on the same, it could now not be raised and considered on appeal.

28. Be that as it may, this court found it necessary to pronounce itself on the duty of a trial court to inform an appellant of his or her right to legal representation. There was no indication that the Trial Court informed of his right his right to be represented by counsel. This was a great omission on part of the Trial Court as the obligation to have informed him was mandated by Article 50(2)(h) of the *Constitution* of Kenya.

29. Having said so, it is not always that such omission must cause an accused person injustice. This is because injustice can be remedied through re-call of witnesses when an accused person subsequently becomes represented by counsel or by way of a re-trial on appeal if is demonstrated that such accused person's right to fair trial had been infringed upon and/or breached and/or if he had suffered prejudice due to such omission by the trial court.

30. Going further, the right to legal representation at the State's expense under Article 50(2)(h) of the *Constitution* of Kenya is limited to certain categories. The said Article 50(2)(h) of the *Constitution* of Kenya stipulates as follows:-

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

31. As the Respondent correctly pointed out, legal representation at the State's expense was currently being given to accused persons who had been charged with capital offences where the sentence was death. It was a progressive right due to scarce resources by the State.

32. For the reasons that have been stated hereinabove and without belabouring this point, this court thus came to the firm conclusion that the Appellant's constitutional and fundamental right to fair trial had not been breached merely because the Trial Court did not inform him of his right of legal representation under Article 50(2)(h) of the *Constitution* of Kenya or that he was not given legal representation at the State's expense as provided in Article 50(2)(g) of the *Constitution* of Kenya.

B. Self-incrimatory Evidence

33. The Appellant faulted the Trial Court for having taking into consideration of the alleged confession and/or admission to a police officer contravening Article 49(2)(d) of the *Constitution* of Kenya.

34. The Respondent was emphatic that the Appellant's assertions in this regard were baseless and asked the court to dismiss the same. It submitted that the Trial Court relied entirely on the evidence that the Prosecution adduced which proved the Prosecution's case beyond reasonable doubt.

35. The said Article 49(2)(d) of the *Constitution* of Kenya stipulates that:-

> " An arrested person has the right not to be compelled to make any confession or admission that could be used in evidence against the person."

36. Further, Article 50(2) (l) of the *Constitution* of Kenya states that:-

> " Every accused person has the right to a fair trial, which includes the right to refuse to give self-incriminating evidence."

37. Save for the Appellant having raised the issue on confessions and admission, he did not expound his submission further making it difficult for the court to follow his reasoning.

38. Be that as it may, this court looked at the evidence of No 71799 Sgt Gilbert Ekirapai (hereinafter referred to as "PW 4") and noted that he testified that the Appellant accepted that he was PW 1's boyfriend. This was not a confession or admission that was envisioned by Article 49(2)(d) of the *Constitution* of Kenya. Indeed, there was other evidence which corroborated PW 1's evidence that he defiled her. In fact, the Hospital Attendance Notes showed that he admitted to the doctor who examined him that he had sex with PW 1 twice.

39. His argument that his rights under Article 49(2)(d) of the *Constitution* of Kenya thus fell by the wayside.

C. Section 211 of the Criminal Procedure Code Cap 75 (Laws of Kenya)

40. Ground of Appeal No (5) in the Petition of Appeal was dealt with under this head.

41. The Appellant contended that the Trial Court did not inform him of a proper explicit explanation under the provisions of Section 211 of the *Criminal Procedure Code* and that no such explanation was recorded in the proceedings. It was his submission that this prejudiced him greatly.

42. On this issue, the Respondent urged this court to dismiss this ground of Appeal. It stated that the Trial Court explained the provisions of Section 211 of the *Criminal Procedure Code* and he elected to adduce sworn evidence and consequently, the Appellant's rights were not infringed upon.

43. Section 211 of the *Criminal Procedure Code* provides as follows:-

> 1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

44. In its proceedings, the Trial Court wrote as follows:-

> " Accused has a case to answer and must comply with S.211 CPC..."

45. The Accused then responded and it was recorded as follows:-

> " Unsworn, no witness"

46. The matter was then fixed for defence hearing on 28th May 2020. On the said date, the Appellant adduced unsworn evidence.

47. This court noted that the style of recording by the Trial Court was too summarised and could easily be challenged on appeal. It was better for a trial court to state that Section 211 of the *Criminal Procedure Code* had been explained to an accused person and that he had opted for a particular way of defending himself or herself. This was more self-explanatory than stating an accused person had to comply with Section 211 of the *Criminal Procedure Code*.

48. This court was persuaded to find and hold that the Trial Court explained the provisions of Section 211 of the *Criminal Procedure Code* to the Appellant herein and that he was aware of and understood his rights under the said Section 211 of the *Criminal Procedure Code* and the three (3) ways of defending himself before he took to the stand for his defence hearing on 28th May 2020. This is because he adduced unsworn evidence and did not call any witnesses as had been captured in the proceedings of 11th May 2020.

49. In the premises foregoing, Ground of Appeal No (5) was not merited and the same be and is hereby dismissed.

D. Proof of Prosecution's Case

50. Grounds of Appeal Nos (1), (2), (3), (4), (6), (7), (8), (9), (10) and (11) were dealt with together under this head as they were all related.

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

52. 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 vs Republic* [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

53. The Appellant relied on the case of Mombasa CRA No No 24 of 2014 *Arthur Mshila Manga vs Republic* (eKLR citation not given) where the Court of Appeal allowed the appeal therein where the assessment report was not produced in evidence. He also placed reliance on the case of CRA No 82 of 2008 *Abdi Sarani Abdi vs Republic* where the court held that failure to adduce the age assessment report in respect of the victim therein amounted to inadequate evidence necessary to sustain a conviction.

54. The Appellant submitted that he took steps to enquire from PW 1 what her age was and she deceived him into believing that she was over eighteen (18) years of age. He averred that she told him that she was not a student and was aged eighteen (18) years of age

55. As the Respondent averred hereinabove, a copy of PW 1's Certificate of Birth was produced which showed that she was fifteen (15) years of age.

56. As the Appellant did not controvert and/or rebut her age, this court found and held that her age had been proven and that for all purposes and intent, she was a child aged fifteen (15) years at the material time of the incident.

B. Identification

57. The Appellant did not submit on this issue. On the other hand, the Respondent stated that PW 1 knew the Appellant as they had been boyfriend-girlfriend for one (1) month and that she lived in his house for one (1) week.

58. In his unsworn evidence, the Appellant testified that it was the first time that he was seeing PW 1 (sic). They met and they went to his house.

59. It was evident that she and the Appellant were known to each other and hence, without belabouring the point, the ingredient of identification was proven.

C. Penetration

60. The Appellant submitted that the Prosecution did not prove penetration as was required by the law and that there were material contradictions as to whether there was sex or not. He asserted that there was no credible or tangible evidence that could irresistibly point to his guilt and emphasised that there was no nexus, connection or linkage to the offence of defilement.

61. On its part, the Respondent relied on Section 2 of the *Sexual Offences Act* that provides that penetration meant partial or complete insertion of the genitalia organs of one person into the genitalia organs of another person.

62. It further placed reliance on the case of *Mohamed Omar Mohammed vs Republic* [2020] eKLR where the court held that testimony of a witness of penetration was usually corroborated by the medical report that was usually presented by a medical officer.

63. It referred this court to the evidence of PW 3 who corroborated PW 1's evidence that penetration occurred. It therefore submitted that since this type of offences occurred in secrecy, the Trial Court was right in finding that the Appellant penetrated PW 1's vagina.

64. According to PW 3, PW 1 was on her menses when he examined her. There were no bruises and since she had taken a bath, nothing was seen. In his cross-examination, he stated that she was not a virgin but he could not say if the Appellant was the first person who had had sex with her.

65. The Trial Court found her to have been truthful and did not contradict herself. It noted that since PW 1's menses started at the time when she was examined, the Appellant could not have been truthful when he said that she was on her menses and was awaiting the same to stop so that he could have sex with her.

66. The incident is said to have occurred between 18th to 25th March 2020. The Medical Treatment Notes indicate that the Appellant informed the doctor that he had sex twice with PW 1. In view of the fact that he admitted to the doctor who examined him that he had sexual relations with PW 1 twice, this court was persuaded that indeed the Trial Court was correct in having found that the Appellant did in fact penetrate PW 1 and that the Prosecution proved its case to the required standard which in criminal cases, is proof beyond reasonable doubt.

67. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (6), (7), (8), (9), (10) and (11) were not merited and the same be and are hereby dismissed.

III. Sentence

68. Both the Appellant and the Respondent did not submit on the issue of sentence. This court nonetheless deemed it necessary to pronounce itself to this issue.

69. As pointed hereinabove, the Appellant herein was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. Section 8(3) of the *Sexual Offences Act* provides that:-

> " 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."

70. The sentence of twenty (20) years that the Trial court had meted on him was therefore legal and in accordance with the law as PW 1 had not attained sixteen (16) years of age where Section 8(4) of the *Sexual Offences Act* where the sentence was fifteen (15) years would have been applicable.

71. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

72. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another vs 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.

73. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake vs 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.

74. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another vs Republic* (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

75. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

76. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

77. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* (*Supra*) 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.

78. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

79. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

80. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of six (6) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

81. This court came to this conclusion in view of the fact that the Appellant and PW 1 were young people and had been boyfriend and girlfriend for about a month. Their age difference was less than five (5) years as the Appellant was aged twenty (20) years when he was arraigned in court and PW 1 was about fifteen (15) years nine (9) months at the material time of the incident. This relationship is what was commonly referred to as Romeo and Juliet cases where young perpetrators who are experimenting have found themselves in the same bracket as paedophiles, a more dangerous category of sexual offenders who deserve stiff sentences for defilement cases.

82. Going further, this court determined that the question of whether the provisions of Section 333 (2) of the *Criminal Procedure Code* was applicable herein was pertinent.

83. Notably, the Appellant herein was convicted and sentenced on 12th June 2020. He had been in custody since 27th March 2020. He was in custody for two (2) months and sixteen (16) days in custody while the trial was going on.

84. Section 333(2) of the *Criminal Procedure Code* which provides that:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

85. It was evident from the proceedings that the Trial Court did not consider the period the Appellant spent while his trial was ongoing. He was therefore entitled to deduction of the said period from his sentence as provided in Section 333(2) of the *Criminal Procedure Code*.

Disposition

86. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated and filed on 6th May 2019 was not merited on conviction the same be and is hereby dismissed. However, the Appellant's and sentence be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to six (6) years imprisonment with effect from 12th June 2020.

87. It is hereby ordered and directed that the period the Appellant spent in custody being the days between 27th March 2020 and 12th June 2020 when he was first arraigned in court and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

88. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE