



REPUBLIC OF KENYA



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**Imbai v Republic (Criminal Appeal E028 of 2022)
[2023] KEHC 3330 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3330 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E028 OF 2022
SM MOHOCHI, J
APRIL 19, 2023**

BETWEEN

NELSON OMUNZI IMBAI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Conviction and sentence in CMCC SO No. 239 of 2019 - Eldoret, Republic v Nelson Omunzi Imbai, delivered by HON. N. Wairimu, P.M. delivered on 22.07.2022.)

JUDGMENT

Introduction

1. The Petition appeals against the conviction and sentence to imprisonment of fifteen (15) years imprisonment for the offence of defilement contrary to section 8(1) as read together with section 8(2) of the [Sexual Offences Act](#) of 2006 based on the following seven (7) grounds: -
 - i. That, the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.
 - ii. That, the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistency and uncorroborated.
 - iii. That, the trial court erred in law and facts by failing to hold that this case was not proved beyond doubt.
 - iv. That, the trial court erred in law and facts by convicting on manifestly insufficient prosecution evidence.
 - v. That, the trial court erred in law and facts by failing to consider the appellant defense evidence



- vi. That, I am aggrieved the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.
- vii. That, the learned trial magistrate erred in law and facts by shifting the burden of prove from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

Appellant's Submissions

Ground One (1)-Forged Documents of Exhibit

2. The appellant assertively submitted that his entire prosecution was hinged on forged documents that included a forged Charge sheet that had the Occurrence Book number entered as 22 which the appellant faults as a fatal defect on the charge sheet, he however does not elaborate how this defect confirms forgery.
3. That EXH 1 the child health card was a certified photocopy that bore a rubber stamp from the Chepkonga Health Center dated 9th October 2019 while the complainant was alleged to be born on 16/12/2008 and as such it was issued 10 years 11 months and 23 days after complainant was born and this being 12 days after the alleged offence being committed which to the appellant is demonstration a malicious plot to have him convicted.
4. The Prescription Form EXH.2 (b) has the name Lawin Kiprasa, is overwritten with Calvin Jerotich. Secondly, the place indicating weight is again written Calvin Jerotich instead of figures of age. Thirdly the place written IP/OP No. the figure is xxxx but again the last digit 8 is overwritten to show 3. Fourthly, the place indicating age is written 2008 instead of the age of the complainant. The Appellant contends that the authenticity of the document is in question since it has no stamp. And it is incomplete since the place showing dispensed by is blank and even the signature.
5. The Vaccination Card EXH 2(A) is unreliable and not complete, missing in blood group and the sex of the owner.
6. It was the appellant's assertion that the discrepancies showcased cannot be cured under section 382 of the CPC. They are simply criminal acts which ought to have been prosecuted and condemned.

Ground 2 and 4 argued together

7. That his conviction was based on inconsistent and uncorroborated evidence that included: -
 - a. Inconsistency in PW2 who claimed to have been called by the teacher on September 30, 2016 and also claimed to be called by the teacher on 16/09/19. She claimed that her daughter was defiled in 2016 when she was at the age of 3 years yet at that time the complainant was 8 years. She also claimed to have gone to school on 27/09/19, she claimed that she went to school on the date of the incident where she went to see the teacher at 4.30p.m.
 - b. PW4 (Dr. Taban Lilian Tokosan) did not disclose her job or PF No. and no records were provided proving that she was really a staff of the said MTRH.
 - c. PW5 referred a lady called Hellen Awiti while PW2 is Hellen Akuti
8. That the complainant's evidence supports the appellant's defence that: -
 - a. ".....Scholar called me to come and visit when I asked you for your phone to call my father.....you were with Scholar your wife."



- b. complainant confirmed that indeed she was invited by Scholar, the wife of the appellant they were left together and the appellant went with one, Sherlyn.
9. It is noteworthy that the appellant was silent and presented no arguments in submissions, with regard to his ground(s) of appeal that; identification and recognition evidence was inconclusive and that the trial court shifted the burden of proof on him.

Respondent's Submissions

10. The Appeal is opposed in the respondent's written submissions dated 17/01/23 filed by Counsel Lydia Kipyego who submitted that the charge sheet was not defective it disclosed the charges which the appellant understood very well, that the charges as stated were clear and unambiguous and that the failure to record the full police (O.B) Occurrence Book number on the charge sheet does not make the charge sheet defective.

Reliance was placed in the case of *Peter Ngure Mwangi v Republic* [2014] eKLR which held that a charge sheet can also be defective if it is invariance with the evidence adduced in its support.

11. That the prosecution presented five (5) credible witnesses whose evidence was consistent and corroborated in proof of the charge beyond reasonable doubts and that the court should disallow the appeal and dismiss the same and confirm the conviction and sentence.
12. This being a first appellate court its duties were set out in the case of *Okeno v Republic* [1972] EA 32 as follows;

“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 v Republic* [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Rulwala v Republic* [1957] E.A. 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 findings and conclusions; 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.”

Trial Court Proceedings

13. PW1 the complainant narrated how she met the appellant outside her school on the 27/9/2019 at 4pm and he invited her to his home to see his child but when they got there nobody was home and the appellant closed the door and removed her clothes then did sex to her after which he wiped her and told her to take a bath when she got home and threatened to kill her if she told anyone or screamed. The witness stated that the appellant was in the habit of giving her money and that the 1st time they had sex in the appellant's house when he was a neighbour in Ndovu where he was living with his father. The witness stated that she lied to her mother she had been at a teacher's house when she got home but the following day, she told her teacher what had happened and the teacher called her mother and she was taken to hospital at Chepkanga and the following morning she was taken to Moi Teaching and Referral Hospital. The witness stated that she later went to the police station and identified the appellant as the Nelson who defiled her and stated that she knew him from when they were neighbours.
14. On cross-examination, the witness recalled when she first knew the appellant, he was living with his father and she had met him several times after he moved away while the appellant was on his way to work.



15. On re-examination, the witness stated that the day the appellant called her to go and see Sherlyn, his wife Sharon was not home.
16. PW2 the complainant's mother, stated that; the complainant was born on the December 16, 2008 and produced the complainant's Child Health Card. The witness stated that on September 30, 2016 she was at work when she was called by the deputy head teacher and the child reported that the appellant was in the habit of having sex with her and she was able to identify the person. The witness stated that she went to Chepkoilel Police Station where she was advised to take the child to hospital and she took the child to Chepkanga then to Moi Teaching and Referral Hospital where a P3 was filled. The witness stated that she later recorded her statement at Chepkoilel Police Station and the appellant who was her neighbour was arrested and charged. The witness stated that she had known the appellant since the year 2010 and they had never had any dispute.
17. Upon cross examination she recalled being called to school on 16th and thought it was about school fees and when she questioned the child, she said the appellant had given her Kshs.100/- and that the child reported the appellant started defiling her in the year 2016 but she had never reported until the incident on the 27th. The witness further stated that when the appellant was her neighbor, she used to wash his clothes and he would pay her.
18. PW3 the complainant's teacher stated that on the September 30, 2019 at 11am, she noticed that the complainant was not walking properly and appeared withdrawn. The witness stated that the complainant reported that someone was in the habit of doing bad manners to her when her mother sends her to his house to collect money for the work her mother does to him and asked her not to tell anyone including her mother who is harsh.
19. The witness further stated that she reported the incident to the deputy head teacher who in turn called the complainant's mother and she later recorded her statement. The witness stated that the complainant mentioned the name Nelson but she did not know him until she met him in court when he was pointed out to her by the complainant's mother.
20. Upon cross examination the witness stated she did not know where the appellant was living or lives and that she was the one who told the complainant to tell her mother what had happened. The witness stated that she did not know what state the complainant was in when she left home and that she had told what she observed.
21. PW4 a medical practitioner based at Moi Teaching and Referral Hospital testified that the complainant was attended at the facility as OPD No. xxxx on October 1, 2019 at 10.32am and she narrated what the complainant had reported. The witness stated that the complainant had, pain on her thighs, tears on her hymen, redness on the labia foris which were healing and also had bruises and abrasions on the posterior facet which injuries had occurred on the 27/9/2019 at 7pm. The witness further stated that the complainant had been treated at Chepkanga Sub-county hospital and given STI prophylaxis. The witness further stated that lab tests for HIV, pregnancy and STI were all negative and that she concluded the complainant had been defiled after which she prepared a P3 report which she produced together with prescription sheet and card.
22. Upon cross examination, the witness recalled, that the child did not tell her the name of the perpetrator and that she attended to the child 3 days after the incident. The witness stated that the child reported that it was the 2nd incident although she could not recall when the 1st incident had occurred.
23. PW5 the investigating officer stated that the complainant was taken to Chepkoilel Police Post by her mother PW2 and the child reported that she had been defiled by a person called Nelson who was their



neighbour. The witness stated that she was told what had transpired and shown a clinic card for the child which indicated the child was born on the December 16, 2008.

24. On cross-examination, the witness stated that, she did not visit the scene of the incident and that although there are neighbours in the area, the child reported that there was nobody at the home and therefore nobody witnessed the incident. The witness further stated that the child's teacher noticed the difference in the child and that there were allegations that the child had been defiled before.

Defence Case

25. The appellant was placed on his defence during which, he stated in sworn testimony that on September 27, 2019 he was in his house having breakfast with his family, when a student he knew went to his home and informed him she had been sent home from school and he asked his wife to give her tea and when he was getting ready to leave, the girl asked to use his phone to call her father and he gave the girl's father's number to his wife and asked her to assist the girl after which he left for work. The appellant identified the complainant as the girl he was referring to and further stated that he did not know what time the girl left because he had gone to work.
26. The appellant further stated that he was arrested on the October 10, 2019 while watching a video and taken to Chepkoilel Police Station and later he was transferred to Kapsoya Police Station. The appellant stated that he was surprised at the allegation that he had defiled the complainant yet on the date in question, he had left her with his wife and gone to work.
27. On being cross-examined, the appellant stated that, he had known the complainant since the year 2005 when they were living in the same plot until 2013 and that he did not know how the complainant knew where he was living. The appellant stated that his wife would have testified but she had moved to her home and her phone is off.
28. The court has refined as issues for determination from the appeal canvassed as: -
- i. Whether the charge sheet was fatally defective?
 - ii. Whether the conviction and sentence was safe and sound?

Analysis/Determination.

Whether the charge sheet was fatally defective? The Law,

29. Section 8 (1) of The *Sexual Offences Act* under which the appellant was principally charged provides: -
- “A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
30. Section 8 (2) of The *Sexual Offences Act*, under which the alternative charge was brought provides: -
- “A person who person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
31. The Court of Appeal in *Sigilani v Republic* (2004) 2 KLR, 480 held as follows: -
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and



unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

32. On the same vein, section 134 of the [Criminal Procedure Code](#) provides for what the components/ ingredients of the charge sheet constitute as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.

33. The Court of Appeal in [Peter Ngure Mwangi v Republic](#) [2014] eKLR, held that: -

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [1986] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”

34. Section 382 of the [Criminal Procedure Code](#) provides as follows: -

“subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

35. The appellant fully participated before the trial court and at no time did he raise the issues of defectiveness of the charge and that he did cross examine all prosecution witnesses.
36. It is the courts finding that the charge sheet was not defective and that no prejudice was occasioned upon the appellant by the same.

Whether the conviction and sentence was safe and sound?

37. The trite law with regards contradictions and discrepancies of evidence is that, inconsistencies unless satisfactorily explained, would usually but not necessarily result in the evidence of a witness being rejected. (See *Uganda v Rutaro* {1976} HCB; *Uganda v George W Yiga* {1979} HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the



same case, the High Court of *Kenya in Philip Nzaka Watu v Republic* (2016) CR APP 29 OF 2015, had this to say:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.

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

38. Again the court, in *Joseph Maina Mwangi v Republic* Criminal Appeal No. 73 of 1993, held, inter alia, that: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

39. This court is bound by the Court of Appeal decision in *Erick Onyango Odeng’ v Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v Uganda* Criminal Appeal No 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.”

40. The role this appellate court under the circumstances is to assume the role of the trial court, reconcile these contradictory facts and then determine whether they were prejudicial to the appellant and therefore fatal to the prosecution case or were inconsequential to the appellant’s conviction and sentence. See the case of *Josiah Afuna Angulu v Republic*, Nakuru CR Appeal No 277 of 2006 (UR) and *Charles Kiplang’at Ngeno v Republic* Nakuru CR Appeal No 77 of 2009 (UR).

41. “Contradiction” was defined by the Court of Appeal of Nigeria in the case of *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. Where the court stated as follows: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of



evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

42. In light of the above decisions, and the scrutiny of the record of appeal, the allegations of forgeries is not proven and the discrepancies identified by the appellant were not fundamental to prejudice the appellant. That the contradictions were not grave as to affect the substance of the charge or prejudice the appellant in any way.
43. As earlier alluded the appellant actively participated in the trial proceedings and he never objected to production of exhibits or cross examined on his being set-up theory.
44. This court finds that the trial court prosecution evidence was cogent, coherent, credible, corroborated and truthful informing the conviction and sentence.
45. While the appellant challenged his sentence, very little, if non, was offered in support, this court however note that the trial court judiciously exercised its powers in sentencing and that the imposed sentence is not excessive to warrant any interference by the court.
46. It is the court's finding, that the conviction and sentencing of the appellant by the trial court was safe and sound, thus disallow and dismiss the appeal for lack of merit.
47. The appellant's Conviction dated September 3, 2020 and Sentence dated July 14, 2020 by the trial court is hereby confirmed.

Right of Appeal 14 days

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU

THIS 19TH APRIL 2023

.....

MOHOCHI S.M

JUDGE

19.04.2023

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

