BNT v Republic (Criminal Appeal 179 of 2019)
[2025] KECA 643 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 643 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 179 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 4, 2025

BETWEEN

BNT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Njagi, J.) dated 14th February, 2019 in HCCRA No. 11 of 2018)

JUDGMENT

1. The appellant, BNT, was the accused person in the trial before the Chief Magistrate's Court at Kakamega in Sexual Offence Case No. 94 of 2015. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 26th day of December, 2015, within Kakamega Central District in Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of SA, a child aged 8 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial during which the prosecution called five (5) witnesses, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment, the mandatory sentence provided under section 8(2) of the *Sexual Offences Act*.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (J. Njagi, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 14th February, 2019.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised fourteen (14) grounds in his Memorandum of Appeal, which in summary are that: the charge sheet was defective; the prosecution did not prove its case beyond reasonable doubt; the prosecution evidence was inconsistent and uncorroborated; the prosecution failed to call vital witnesses to testify; no DNA test was done with respect to the blood stained clothing and neither were they taken for analysis, which gap denied the appellant a right to a fair trial under Article 50(2) of *the Constitution*; and the appellant's defence was not considered.

7. A summary of the evidence that emerged at the trial through five (5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

8. The complainant, SA, was a class one (1) pupil at (Particulars withheld) School at the time of the incident. She testified as PW2 and gave unsworn testimony after the learned magistrate concluded that she was sufficiently intelligent to testify but did not understand the nature of an oath. She recalled that on 26th December, 2015, her grandmother was away and she was playing with her siblings, B and M when the appellant, who was well known to her, went to where they were and carried her to an unoccupied house. While inside the house, the appellant covered her mouth and warned her not to scream or else he would strangle her. He then removed her panties, pushed her to the ground, touched her vagina with his right hand and proceeded to "rape her" (the actual word the complainant used at trial as specifically noted by the trial court). After the ordeal, the appellant ran away and left her there bleeding from her vagina.

9. PW2 then picked herself up, put her panties back on and slowly went home. Upon arrival, she found her grandmother who had just returned home and she told her what happened.

10. JAI, the complainant's grandmother, testified as PW1. She told the court that on 26th December, 2015, she left the complainant at home with her siblings, B and M and returned at 6.00pm. At the time, the complainant was not home but she came back later with blood flowing down her legs, thighs and hands; and walked with difficulty. She also looked shaken and initially refused to talk to PW1. Shortly thereafter, the complainant fell and appeared to be in a traumatic daze. She was also bleeding profusely from her vagina. PW1 took her to hospital with the help of a good Samaritan and reported the matter to the police that same night. The complainant remained in hospital for five days.

11. The following day when the complainant regained her consciousness, she narrated to PW1 how the appellant carried her to an unoccupied house and defiled her.

12. APC Sylvester Wambua, the arresting officer, testified as PW3. He told the court that on 27th December, 2015, the appellant and another suspect by the name of Keya, were taken to Shimanyiro AP Post by the village elder and community policing members, on the allegation that they had defiled an 8-year-old child. He re-arrested them and took them to Kakamega Police Station. However, from his investigation, he gathered that it was the appellant who committed the offence.

13. Patrick Mambiri, a chief clinical officer at Kakamega County Hospital, testified on behalf of Dr. James Akhonya who examined the complainant. He testified as PW5. He told the court that the complainant was examined on 27th December, 2015, with a history of being defiled by a person known to her on 26th December, 2015, at around 4.00pm. She had a bandage which was soiled with blood and there was blood on her thighs and legs. She had also been tied with a leso which was white and blue in colour and it had dried blood stains. The medical examination showed that external genitalia was swollen; there

was a 1cm tear on the posterior vaginal wall; and her hymen was torn with parts of it still visible. The lab test showed the presence of blood in her urine. After examination, she was admitted and taken to theater for repair in her vagina and thereafter put on medication. He produced the complainant's P3 form, PRC form and discharge summary as exhibits.

14. PW5 also told the court that he examined the appellant three days after the incident occurred. The medical examination showed that he was in general fair condition and had no physical injury on his genitalia. He also said that the appellant was 26 years old at the time of the incident.

15. PC (W) Christine Kemunto, was the investigating officer in the case. She testified as PW4. She testified that the matter was reported at Kakamega Police Station on 26th December, 2015, and that the following morning, she visited the complainant at the hospital and recorded her statement. She also recovered the clothes that the complainant wore to the hospital and visited the crime scene, which was 100 meters from PW1's home. She reiterated the testimonies of the complainant, PW1 and PW3, and said that during her investigation, she found that out of the two suspects who were arrested, the appellant was culpable as the complainant mentioned him but said nothing about the other suspect by the name Ronald Keya.

16. She further told the court that an age assessment was conducted on the complainant since she had no birth certificate and she was found to be between 6 to 7 years old. She produced the age assessment report as an exhibit at trial. She also produced the soiled clothing she recovered as exhibits.

17. When he was placed on his defence, the appellant gave unsworn testimony and called one witness. He denied the charge against him and testified that on 26th December, 2015, he woke up at 8. 00am and went to do construction work at Dickson's (DW2's) place where he stayed until 5.30pm. He then returned home and reached at around 6.00pm whereupon he found that an incident had occurred and a girl had been found bleeding. The following morning, he was arrested.

18. He told the court that the complainant was his niece and he had stayed with her since she was born. However, he had a land dispute with her parents. He conceded that there was, indeed, a house near their home that was under construction, but denied taking PW2 there.

19. Dickson Manguba testified as DW2. He told the court that the appellant was his neighbour and that on 26th December, 2015, he called him to assist in fetching water for construction work at his home. He maintained that the appellant spent the entire day at his home and left at 5.30pm. He also said that he knew the complainant as she was his neighbour and stayed with her grandparents.

20. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Chacha appeared for the respondent. Both parties relied on their submissions.

21. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

22. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. We will now address them.

23. The appellant's first complaint is that the charge sheet was defective because it charged him with "....defilement contrary to section 8(1)(2) of the *Sexual Offences Act*...", and did not specify the sentence.

24. The respondent submitted that the charge sheet was clear on the offence of defilement and the age of the minor which in this case was 8 years old. In any event, the respondent argued that if the charge sheet was defective, the same as per jurisprudence does not automatically entitle an acquittal as section 134 of the *Criminal Procedure Code* describes the information or particulars which should be specified in a charge sheet as "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". In view of this section, the respondent submitted that the charge sheet met the stated threshold and relied on Benard Ombuna vs. Republic (2019) eKLR,

25. There is no doubt that the charge sheet in this case was defective – but only minimally so. There is certainly no "section 8(1)(2)" in the *Sexual Offences Act* yet that is what appeared in the charge sheet. We note, however, that the appellant has raised this complaint for the first time on this second appeal – a clear indication that it was not prejudicial to him. Further, the fact that the issue was not raised at the first appellate level bereaves us of jurisdiction to consider it.

26. In any event, were we to consider the issue substantively, we would still dismiss it as a harmless error. As this Court held in Nyamai Musyoki vs. Republic [2014] eKLR, an appellant would only be entitled to an acquittal or retrial where a defective charge sheet prejudiced them. The test for whether a defective charge sheet caused prejudice to an accused person is substantive not technical: the question to ask is whether the accused person was charged with an offence known to law and whether the charge sheet, as framed, gave him, in clear and unmistakable terms, sufficient notice and information about the allegations he was facing in order to mount a defence.

27. The Court in Nyamai Musyoki Case clarified that:

> " if a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person or the defect goes into the root of the charge and distorts it in a way that the accused cannot understand the charge, then the court ought to be reluctant to apply section 382 of the *Criminal Procedure Code* to cure the defect."

28. In the present case, there is no doubt in our mind that the defect in the charge sheet was a harmless error as it did not cause any failure of justice. Consequently, the charge sheet is curable under section 382 of the *Criminal Procedure Code*.

29. We will now turn to the substantive complaints raised by the appellant. He complains that the prosecution did not prove their case beyond reasonable doubt, and that their evidence was inconsistent and uncorroborated. In this regard, he argued that a broken hymen was not proof of penetration, and that the P3 form, PRC form and treatment notes did not support the evidence of PW5.

    It was his submission that there is scientific and medical proof that some girls are born without a hymen while others break their hymen by getting involved in activities such as masturbation, medical examination, horseback riding, bicycle cycling and gymnastics.

30. Additionally, he claimed that his identification was doubtful as the complainant had mentioned another suspect by the name Ronald. Further, the appellant submitted that the complainant's testimony was full of inconsistencies and contradictions since she testified that she was 7 years old but the charge sheet indicated that she was 8 years old. He also argued that the evidence of PW1, PW2, PW3, PW4 and PW5 were uncorroborated and not tight enough to secure his conviction as PW5 testified that the appellant's genitalia did not have any physical injury; whereas PW4 testified that she interviewed S who was a bit older but she did not remember seeing the appellant. He relied on Ndungu Kimani vs. Republic (1979) KLR 283 for the proposition that the evidence of a witness in a criminal case should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness, or do or say something that makes it unsafe to accept his evidence.

31. The appellant also complained that no DNA evidence was presented to link him with the crime charged.

32. On our part, we have perused the trial record and we endorse the concurrent findings of the two courts below that the prosecution proved their case beyond reasonable doubt on the three ingredients of the offence of defilement, that is, the age of the complainant; penetration; and the identity of the appellant as the person who caused the penetration.

33. We find that the age of the complainant was conclusively established through the age assessment report which was produced showing that the complainant was between 6-7 years old. The oral testimonies of PW1 and PW2 similarly showed that the complainant was below twelve years old – the triggering age under section 8(2) of the *Sexual Offences Act*: the complainant said she was seven years old while PW1 said she was born in December, 2009 (which would make her age at the time of the incident around five years old).

34. Further, we endorse the concurrent findings of the two courts below that penetration was proved by the oral evidence of the complainant and the medical evidence by PW5. The complainant was consistent in her testimony that it was the appellant, and not Ronald Keya, who defiled her. She gave detailed testimony on how the appellant carried her to an unoccupied house and defiled her amidst threats of strangling her if she screamed and then when he was done, he ran away and left her bleeding on the ground.

    Thereafter, PW2 returned home and found her grandmother who testified that blood was flowing down her legs, thighs and hands, and she looked traumatized. Moments later, she lost consciousness and was taken to hospital whereby it was found that she had been defiled and even had to undergo corrective surgery since the injuries on her vagina were extensive.

35. We find the few discrepancies in the accounts of the prosecution witnesses to be minor as not to go to the root of the offence. The three specific discrepancies pointed by the appellant are: that the complainant testified that she was seven years old yet the charge sheet showed she was eight and the grandmother (PW1) said otherwise; that the name Ronald Keya had come up during investigations; and that PW4 mentioned that he interviewed a girl by the name S (who appeared to be a little older than the complainant). None of these discrepancies is major enough to go to the root of the prosecution case. They do not weaken the prosecution case and neither do they affect its substance. See Erick Onyango Ondeng' vs. Republic, Criminal Appeal No. 5 of 2013 [2014] eKLR. Further, as already stated above, there is no reason to depart from the concurrent findings of the two courts below that the evidence of the complainant was cogent and reliable and was not shaken during cross examination.

36. The appellant also argues that his identification as the perpetrator was not proved beyond reasonable doubt and that it was an error for the first appellate court to so hold in view of the fact that the complainant mentioned a second suspect.

37. The lower court addressed this aspect of the case thus:

> " The victim mentioned B. Similarly, the victim had earlier told PW1 and PW4 that the person responsible was B, the accused herein. PW1, on the other hand, referred to the accused as his grandson meaning the accused was a person well known within the family. I have no doubt therefore the victim could not be mistaken as to the accused person's identity. I am aware that another person was arrested alongside the accused. PW4, the investigating officer was clear that in her investigations that the other person was mentioned by people but was not implicated by the victim."

38. The High Court affirmed this position, holding that the identification evidence in this case was one of recognition and was, therefore, more reassuring:

> " The prosecution relied on the evidence of the complainant that it is the appellant who had defiled her. This was not circumstantial evidence but direct evidence. The appellant was a person well known to the complainant. Hers was evidence of recognition rather than identification. In the case of Anjonini & Others v Republic (1989) KLR, the evidence of recognition was held by the Court of Appeal to be "more satisfactory, more assuring and more reliable than identification of a total stranger because it depends on a person's knowledge of the assailant in some form or other."
>
> The complainant in this case is the one who mentioned the appellant to her grandmother PW1 and to the investigating officer PW4. Her evidence in court was not shaken by cross-examination. She knew the appellant before. Her evidence on identification was satisfactory."

39. We have absolutely no basis to interfere with the concurrent factual findings of the two courts below regarding the identification of the appellant as the perpetrator.

40. The appellant alleged that his defence was not considered by the two courts below. We note that this issue was first raised in the High Court and the learned judge dealt with it comprehensively. The learned Judge found that the trial learned magistrate rightly dismissed the appellant's defence on the ground that he did not raise his defence of alibi during cross examination of the prosecution witnesses which led to the conclusion that it was an afterthought. The trial court held thus:

> " 15. The accused raised an alibi defence in that on the material day he was at DW2's home working and that he worked at the said home the entire day. When an alibi is preferred, the prosecution is obliged to investigate it. However, the accused did not give notice that he would raise the defence of alibi and the same was being set up after the close of the prosecution's case. I am therefore left to weigh it against the prosecution evidence already tendered (see Wangombe v Republic [1976-80] KLR 1683.) As the alibi was not put to any of the prosecution witnesses, I find that in light of the clear and convincing testimonies of PW1, PW2 and PW4, the accused person's alibi defence was an afterthought.

16. The accused also stated that there is a land dispute between him and the victim's parents. The accused did not delve much into this and the same was not put to any of the prosecution witnesses. I also find the same to be an afterthought."

41. It is true that an accused person does not assume the burden of proving his alibi; the prosecution bears the burden of proving all aspects of the charge beyond reasonable doubt – and this includes dislodging the accused persons' alibi defence. In Kiarie v R [1984] KLR this Court laid down the following principle:

> "An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

42. However, it is also an established principle that where an accused person fails to disclose an alibi at a sufficiently early time to permit it to be investigated by the police, this is a factor which may be considered in determining the weight given to the alibi defence. An alibi defence will only prevail where it successfully raises reasonable doubt about the probability whether it is the accused person who committed the offence. The trial court is expected to evaluate the evidence in its totality; to weigh up all the elements; and consider the inherent probabilities. In doing so, as aforesaid, the trial court is entitled to take an adverse view of the fact that an accused person failed to raise the alibi defence at the earliest opportunity.

43. In the present case, the trial court considered the alibi defence and found that it had been displaced by the evidence adduced by the prosecution. This was confirmed by the first appellate court. We agree with the two courts below. The recognition evidence in the present case was so strong that it completely negated the alibi defence by the appellant especially taking into consideration the manner in which the appellant raised his alibi defence which was on the witness stand having not given any prior notice of the defence. In the present case, looking at the evidence in its totality, the prosecution eliminated any reasonable possibility that the alibi evidence was true.

44. The appellant raised three other aspects of the case that need brief responses. First, he complained that no DNA evidence was done or present to link him with the defilement. He finds this to be unfair and unconstitutional. However, in making that argument, he misunderstands our law. There is no requirement under our law for the prosecution to present DNA tests linking an accused person to the crime in sexual offences, in order to secure a conviction. This is because sexual offences are proved by any admissible cogent and credible evidence. See AML vs. Republic (2012) eKLR and section 36 of the *Sexual Offences Act*. Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples for tests, including DNA testing to establish the linkage between the accused person and the offence. However, that provision is not couched in mandatory terms.

45. The appellant also, mystifyingly, complains that his constitutional rights were violated because the State did not assign him a lawyer. We say mystifying because the record shows that the appellant was represented by counsel throughout the trial and even during his first appeal. Nothing turns on this complaint.

46. Finally, the appellant submits that the conviction was not safe because the prosecution failed to call a vital witness. That vital witness, the appellant submits, is Ronald Keya – the other suspect who was briefly held before being released upon the investigations confirming that it was the appellant who had, in fact, defiled the complainant. The appellant relies on Bukenya & Others vs. Uganda (1972) EA 549

to argue that an adverse finding should be drawn against the prosecution for their failure to call Ronald as a witness.

47. As we observed above, the investigating officer explained that the complainant never implicated Ronald; that she only mentioned one perpetrator – the appellant. This was the reason the investigating officer made a decision to release Ronald, who had been implicated by other people other than the complainant. In the circumstances, it cannot be said that Ronald was a vital witness at all in the case; and, in fact, there is no indication that he had any useful evidence to share with the court.

48. In the circumstances, we are satisfied that the conviction against the appellant was safe, and we affirm it.

49. The appellant did not appeal against sentence. That is just as well since he was sentenced to life imprisonment which is the mandatory minimum sentence prescribed in the Sexual Offences Act for the offence for which he was charged and convicted.

50. The upshot is that the appeal fails in its entirety and is hereby dismissed.

51. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR