Kipruto v Republic (Criminal Appeal E058 of 2019)
[2024] KECA 709 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 709 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E058 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

MATHEW KIPRUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (O. Sewe, J.) delivered and dated 27th June, 2019 in HCCRA No. 111 of 2019)

JUDGMENT

1. Mathew Kipruto, the appellant, was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 29th March 2018 at about 7.30 pm at Elgeyo Marakwet County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VJ, a girl aged 13 years.

2. The appellant also faced an alternative charge of indecent act with a minor contrary to section to section 11(1) of the *Sexual Offences Act* which charge was premised on the facts of the main charge save that if he did not defile VJ then he indecently touched her vagina.

3. The appellant denied the charges and a full-blown trial followed. At the conclusion of the trial, he was convicted on the main charge and sentenced to serve 20 years imprisonment. Dissatisfied with the decision of the trial Court, the appellant preferred an appeal to the High Court which was subsequently dismissed in its entirety hence his present appeal.

4. Before us, the appellant relies on his memorandum of appeal filed together with the record of appeal as well as supplementary grounds of appeal filed alongside his submissions. A perusal of the memorandum of appeal shows that the salient grounds upon which the appeal is premised are that: the charge was defective; the appellant was not accorded a fair trial; the evidence was contradictory; and the appellant's defence was not considered. In his supplementary grounds of appeal, he added two

grounds, to wit, that he was not taken for medical examination and that the sentence was harsh and manifestly excessive.

5. The prosecution called 7 witnesses. VJ testified as PW1 recounting that on 29th March 2018 at about 7.30 pm, she was from the posho mill in the company of her cousin NJ when the appellant who was a passenger on a motorbike alighted and started to follow them. The appellant then grabbed her by the hands and dragged her to the nearby thicket next to an abandoned cattle dip. Her companion, NJ, ran away. The appellant proceeded to defile her before dragging her back to the road. Upon getting to the road, PW3 and PW4 approached on a motorcycle and the appellant took off. VJ was then escorted to the hospital and later to the police station where the incident was reported. The complainant recognized the appellant as a boda boda transporter at the nearby K Centre.

6. NJ testified as PW2 and corroborated the chain of events as narrated by PW1 and further stated that when she ran away, she headed home where she found her aunt, PW5, and informed her that PW1 had been grabbed by someone whom she knew. She disclosed the name of the appellant.

7. TKR testified as PW3 stating that on the material day at about 7.30 pm, while he was at home, PW5 informed him that someone had grabbed PW1 while she was returning home from the posho mill. They both went to Tilatil Centre popularly known as Kipepeo. Upon arriving at the Centre, they looked for the area chief, AKK who testified as PW4, and together they left on a motorbike heading towards the posho mill. On the way, they saw the appellant holding the victim's hand. When the appellant saw them, he took off and they pursued him on the motorbike. The appellant dashed to a nearby farm where he tripped and fell and that is when he was arrested by PW3. Alongside PW4, they escorted the complainant to Iten County Referral Hospital for treatment and later escorted the appellant to the police station.

8. PW4 in his testimony confirmed the occurrence of the events as recounted to the trial Court by PW3.

9. On her part, CJK who testified as PW5 stated that she was the mother of the complainant who was 13 years old at the time of the incident. Her evidence was that on the material day, she had sent PW1 and PW2 to the posho mill. At about 7.30 pm, PW2 came and informed her that PW1 had been accosted and dragged by the appellant to the bush near a cattle dip. She started off towards the dip where she saw the appellant and PW1. Upon reaching where the two stood, the appellant took off. She interrogated PW1 who informed her about the ordeal she had undergone in the hands of the appellant. She thereafter escorted PW1 to Iten County Hospital.

10. Meshack Jemator Kandie, a clinical officer, testified as PW6 stating that he attended to the complainant at Iten County Referral Hospital on 29th March 2018 and observed that there were bruises and lacerations on her vaginal wall. He also noticed that the hymen was freshly torn while the finger used in examining the cervix had blood. He concluded that there was penetrative sexual intercourse.

11. Corporal Lucy Sambu took to the stand as PW7 testifying that on 30th March 2018, the appellant was taken to the police station alongside the complainant. She recounted the evidence of the witnesses and stated that upon concluding her investigations she charged the appellant with the offence of defilement.

12. In his defence, the appellant denied committing the offence and stated that he was framed by PW4 who had a grudge against him. He denied being arrested while in the company of the complainant and further testified that the complainant's home was next to the Centre and that there were no bushes in-between the marketplace and the complainant's home.

13. This appeal was heard on the Court's virtual platform on 4th December 2023. The appellant was present appearing in person while learned counsel Mr. Namasake appeared for the respondent. Both parties had filed their respective written submissions which they sought to wholly rely upon.

14. The appellant identified five issues upon which he based his submissions. Firstly, he submitted that he was not served with witness statements hence his right to fair trial under Article 50(2)(j) of *the Constitution* was trampled upon. Secondly, he submitted that he was not taken to the hospital to ascertain whether he was the one who committed the alleged offence. On the third issue, the appellant contended that the trial Court and the first appellate Court failed to consider his defence that there was bad blood between him and the complainant's family. Fourthly, he asserted that the evidence on record did not establish the elements of the offence of defilement. Finally, the appellant submitted that the sentence passed against him was harsh and excessive. The appellant consequently urged the Court to allow his appeal on conviction or hand him a lighter sentence were the conviction to be upheld.

15. Learned counsel Mr. Namasake relied on the written submissions dated 25th November 2022. Rejecting the appellant's contention that he was not afforded a fair trial, counsel submitted that the charge sheet informed the appellant in clear and unmistakable terms of the allegation against him. According to counsel, the appellant was as such afforded an opportunity to prepare for his defence and he was therefore accorded a fair trial. It was counsel's view that the charge sheet complied with sections 134 and 137 of the Criminal Procedure Code, hence it was not open to rejection based on its form or contents. It was also counsel's submission that there was no infringement of any of the appellant's rights to a fair trial. Counsel submitted that the appellant was not only given ample time and resources to prepare his defence but was also taken through a public trial before a competent court. Counsel refuted the appellant's submission that there were discrepancies and contradictions on the evidence, asserting that the appellant had not highlighted any substantial discrepancies or contradictions as alleged. Counsel maintained that the case against the appellant had been proved beyond reasonable doubt as all the elements of the offence of defilement were sufficiently proved. Counsel further submitted that the trial magistrate considered the appellant's defence before dismissing it and that the judgment complied with section 169 of the Criminal Procedure Code. In the end, counsel urged us to dismiss the appeal.

16. This being a second appeal, we are by dint of section 361(1)(a) of the Criminal Procedure Code required to consider only issues of law. Where the two courts below have made concurrent findings of fact, we must respect those findings unless we are satisfied that the conclusions are not supported by the evidence on record or are based on a perversion of the evidence. This well-established principle has been articulated by this Court in numerous decisions, including Adan Muraguri Mungara v. Republic [2010] eKLR, where the Court held that:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

17. We have reviewed the record of appeal, the memorandum of appeal as well as the submissions and authorities by both sides. In our view, the issues for determination in this appeal are: whether the charge was defective; whether the appellant was accorded a fair trial; whether the standard of proof was attained; whether the appellant ought to have been subjected to medical examination; and, whether the appellant has made out a case for our interference with the sentence.

18. The first issue we address is whether the charge sheet was defective.From the record of appeal, the appellant is raising this issue for the first time. Since this appeal is against the judgment of the first

appellate Court, we are barred from considering this issue for the reason that appeals to this Court can only arise from issues that were raised before the Court appealed from. This position has been reiterated by the Court in numerous decisions, including in AT v.Republic [2023] KECA 1393 (KLR), where it was stated that:

> " The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof."

19. The next issue is whether the appellant was accorded a fair trial. In this appeal, the appellant's main complaint is that his right under Article 50(2)(j) of *the Constitution* to be informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence was contravened. The appellant complains that he was not issued with witness statements in good time so that he could prepare for the trial. As this Court has stated times without number, the prosecution has a duty to provide an accused person with witness statements and any other documentary evidence that they intend to use at the trial. This must be done before the commencement of the trial. We are therefore in agreement with the statement of the Court in Isaak Anjelimo Makana v. Republic,Criminal Appeal No. 57 of 2017 (Court of Appeal at Nakuru judgment dated 2nd February 2024) that:

> " ... we wish to reiterate that the objective of the prosecution furnishing statements of witnesses and documents to the accused person before the commencement of a trial is to enable the accused person know in advance the nature of the case against him and also to help him or her to prepare an appropriate defence. The duty to furnish such evidence lies with the prosecution as opposed to the court which is mandated to guarantee the enjoyment of this right by the accused person."

20. We have reviewed the decision of the first appellate Court on this issue and we find the Court clearly appreciated the law on this issue. As was held in Isaak Anjelimo Makana (supra), the duty to supply witness statements lies solely with the prosecution and the trial court must guarantee and protect that right. In our view, the supply of witness statements and documentary evidence should not be dependent on a court order. It should be a routine function on the part of the prosecution which needs no reminding by the court or the defence. However, whenever an accused person informs the court that he or she has not been supplied with the statements of the potential witnesses, the court must, at that point, halt the trial and ensure that the right is enjoyed by an accused person before proceeding with the trial. This is not to reinvent the wheel, but rather to emphasize that an accused person is also under an obligation to inform the court that he has not been supplied with the trial documents. Protection of trial rights is a matter of concern to all the parties involved in a trial.

21. In this case, the record does not indicate whether the witness statements were supplied or not. However, we note that when the matter came up for hearing on 17th May 2018, the appellant indicated to the trial Court that he was ready to proceed. The trial then commenced and the appellant cross-examined the witnesses thereby testing the veracity of their evidence. These circumstances lead us to one conclusion, that despite the record being silent on the issue of the supply of trial materials, the appellant understood the case against him and was able to properly mount a defence. In the end, we

find that even though there is a possibility that he was not supplied with trial materials, no substantial miscarriage of justice was suffered by the appellant to warrant the quashing of his conviction.

22. The other issue raised by the appellant is that the prosecution case did not meet the standard of proof required in criminal cases. In support of this assertion, the appellant relies on the lack of a date on the P3 form as well as the alleged contradictions in the evidence of the prosecution witnesses. The first appellate Court addressed these two issues in paragraphs 31, 32 and 33 of its judgment and we agree with the learned Judge on her determination of the issues. On our part, we wish to further point out that in his defence, the appellant informed the trial Court that he was arrested on 29th March 2018 and was taken to Iten County Hospital before being taken to the police station. This confirms the evidence of PW1, PW3, PW4 and PW5 as to the chain of evidence from the time the appellant was arrested at the scene of crime up to the time he was presented to the police. Secondly, the appellant did not challenge the authenticity of the P3 form when it was produced and the same was on record and available for the trial Court to consider. The record also reveals, and as pointed out by the first appellate Court, that the P3 form was filled at a later date and not the night when the complainant was treated hence there was no discrepancy in terms of dates. Additionally, even if the P3 form was not dated, Part I of the form indicated the essential details surrounding the date of the offence and the date when the complainant was treated at the hospital. Our conclusion is that we do not find any discrepancies that go to the root of the case against the appellant.

23. Still on the issue as to whether the evidence attained the required standard of proof, we wish to reiterate that proof beyond reasonable doubt doesn't amount to proof beyond a shadow of doubt but the evidence tendered against an accused person must be such that if placed before a judicial officer or judge, the accused person's guilt will not be in doubt. In Stephen Nguli Mulili v. Republic [2014] eKLR the issue of the standard of proof in criminal cases was addressed as follows:

> "The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in Miller vMinistry ofPensions, [1947] 2 ALL ER 372 stated:
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> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.""

24. Just to rehash the evidence on record, the complainant's age was established by the evidence of PW5 and PW1. This evidence was corroborated by the clinic card and the age assessment report. The proof of penetration was established through the evidence of the complainant and corroborated by the evidence of PW6 and the produced medical notes and P3 form. The identity of the appellant was established by PW1 as corroborated by PW2. PW3 and PW4 also testified as to having arrested the appellant as he attempted to escape from the scene. We therefore do not doubt that the evidence against the appellant met the required threshold and his conviction was therefore proper in light of the adduced evidence.

25. The second last issue we delve into is whether the appellant ought to have been subjected to medical examination. What we hear the appellant to be saying is that he was not linked to the offence because he was not subjected to medical examination and his conviction should not be allowed to stand. According to the appellant, section 36(1) of the *Sexual Offences Act* required that he be taken for

medical examination and failure do so should have resulted in his acquittal. The cited provision states as follows:

> "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."

26. Our understanding of the provision is that it does not in any way make it mandatory for an accused person to be subjected to medical examination. The evidence of an accused person's medical examination, if available, would be an added advantage to the court in determining the accused person's guilt. However, the absence of such evidence does not in any way vitiate the finding of guilt of an accused person if the evidence available establishes all the elements of the offence. Of more consequence in respect to an offence such as defilement is the medical examination of the complainant, as such evidence serves to establish or corroborate the element of penetration. Our holding on this issue is fortified by the decision in W.K.K v.Republic [2016] eKLR that:

> " As such, it is evident that subjecting an accused to DNA test is not a mandatory requirement of law, to prove that he committed the offence, and it is not the only evidence upon which a conviction can be based."

27. The determination of the foregoing issue dispenses the appellant's appeal against conviction. Our conclusion is that the appeal against conviction has no merit and is for dismissal.

28. Finally, the appellant raised an issue concerning the sentence of 20 years that was meted upon him by the trial Court and confirmed by the 1st appellate Court. It is important to commence by appreciating that severity of a sentence is a matter of fact that does not fall within our jurisdiction - see section 361(1)(a) of the Criminal Procedure Code. We are also aware that sentence is a matter of discretion within the ambit of the trial court's mandate and this Court can only fiddle with it if it was enhanced by the High Court or if the subordinate court had no power to pass that sentence - see section 361(1)(b) of the Criminal Procedure Code. In the instant appeal, the record is clear that in passing the sentence, the trial magistrate stated that he had considered the probation report and the circumstances of the case and found that the appellant was not suitable for a non- custodial sentence. On her part, Olga Sewe, J while dismissing the appeal against sentence held that:

> " It is noteworthy that, in imposing the 20 years' imprisonment, the learned trial magistrate did not feel constrained by the provisions of Section 8(3) of the *Sexual Offences Act* ... The record further shows that before meting out the sentence of 20 years' imprisonment, she called for a Pre-Sentence Report which revealed not only that the offender had a history of being a bully who took pleasure in harassing girls, but also that he was not remorseful at all for the offence..."
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> We cannot in those circumstances fault the two courts below for imposing the sentence of 20 years imprisonment. The record is very clear that they correctly exercised their discretion. We therefore reject the appeal against sentence for want of merit.

29. The upshot of the foregoing is that this appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 21st DAY OF JUNE, 2024

F. SICHALE

..... JUDGE OF APPEAL

F. OCHIENG

..... JUDGE OF APPEAL

W. KORIR

..... JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR