Oluoch v Republic (Criminal Appeal 97 of 2017)
[2024] KECA 961 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 961 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 97 OF 2017

M NGUGI, FA OCHIENG & WK KORIR, JJA

JULY 26, 2024

BETWEEN

CHARLES OWAGA OLUOCH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (M.A. Odero, J.) dated 30th October 2017 in HC.CRA. No. 164 of 2013)

JUDGMENT

1. The appellant, Charles Onyango Owaga, being dissatisfied with the judgment of the High Court (M. A. Odero, J.) is before this Court on a second appeal. At the magistrate's court, the appellant faced a charge of attempted defilement contrary to section 9(1) of the *Sexual Offences Act*. The particulars of the offence being that on 15th June 2009 at xxxxx Primary School in Nakuru District within the then Rift Valley Province, the appellant attempted to commit an act which could cause penetration with D.M.N., a child aged 12 years by touching her vagina.

2. At the conclusion of the trial, the magistrate convicted the appellant of the more serious charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* and sentenced him to 15 years' imprisonment. Before the High Court, the appellant's appeal partially succeeded. His conviction for the offence of defilement was set aside and the appellant was instead convicted for the initial charge of attempted defilement. The prison sentence was reduced from 15 years to 12 years.

3. We reproduce verbatim the appellant's grounds of appeal as follows:

> "i. That the learned appellate judge erred in law by noting that I was charged of the offence of attempted defilement and convicted of the offence of defilement

contrary to Article 50(2) of *the Constitution* of Kenya but never applied this anomaly to acquit me;

ii. That the learned appellate judge erred in law by failing to appreciate that wrong section of law was used to convict me;

iii. That the learned appellate judge erred in law by failing to note that P3 forms were defective and could not support any fair and just conviction as required by law;

iv. That the learned appellate judge erred in law by failing to note that the lab report that was used as an exhibit in this case was sourced from a private hospital and not government accredited health facility as provided for by the law;

v. That the learned appellate judge erred in law by failing to note that the case was ordered for a retrial by the second proceeding law court that the third lower Court magistrate proceeded to hear this case ignoring the provisions of section 200(3) of the Criminal Procedure Code;

vi. That the learned appellate judge erred in law by failing to note that the Coram of the Court was not recorded on various occasions when weighty decisions were made contrary to the law;

vii. That the learned appellate judge erred in law by failing to consider that the prosecution evidence was inconsistent and contradictory hence unsafe to rely on to secure a conviction;

viii. That the learned appellate judge erred in law by failing to appreciate that the prosecution failed to prove its case beyond reasonable doubt."

4. The historical posture of this case is well captured and summarized in the judgment of the High Court. This case was heard by three magistrates. It was also a subject of review proceedings before the High Court before being taken over by the third magistrate. The first magistrate recused herself after taking the evidence of the prosecution witnesses. The magistrate who took over from her directed that the trial starts de novo but that was not to be as the prosecution faced challenges in securing the witnesses. The file was transmitted to the High Court for revision where the order for the case to start de novo was set aside and the second magistrate ordered to proceed from where the matter had reached before the first magistrate. By this time, the second magistrate had been transferred and a third magistrate heard the matter to conclusion.

5. In summary, the prosecution's case was that D.M.N. (PW1) was a pupil at the school where the appellant served as the deputy head teacher. On 15th June 2009, the appellant summoned PW1 and two of her classmates (L.W-PW2 and one G.) and asked her to arrange the books in his office. When the girls were done, he released the other two girls and asked PW1 to remain behind. He then told her to hold the desk and bend over. The appellant then removed his penis and held the complainant by the neck. The complainant started crying and left. Again, on 17th June 2009, the appellant called the same three girls into his office. However, when they arrived, he informed them that he wanted to see PW1 and asked the other two to leave. While PW1 was in the appellant's office, another teacher who was in the next office left. After confirming that there was no one else within the vicinity, the appellant blocked the complainant's mouth, forced her down, tore her pants and defiled her. Thereafter, the complainant went to the toilet, cleaned herself and went home. She did not inform anyone of the incident. After

a few days, the complainant was overwhelmed with stomach pains and she informed her desk mate (PW3-M.K.) about what had transpired. They would later share the narrative with their science teacher (PW5-E.G.N.). A report was later made to the headteacher, PW4, J.O.O., who instructed the female teachers to take the complainant to hospital. The appellant was thereafter arrested after the complainant's father (N.N.N-PW9) stormed the school with police officers.

6. In his defence, the appellant, who testified as DW1, denied the charge, stating that the complainant was a stranger to him. He attributed his predicament to a disagreement and bad blood between him and PW4 over lost school books. He also stated that his office was adjacent to the staffroom and whatever was happening in his office would be heard by the teachers in the staffroom. As to the events of 17th June 2009, he stated that he was in school and had issued books to class 7 pupils. His witness (S.K.M-DW2) stated that he was the appellant's colleague. He testified that the appellant had been attacked by a parent while at the assembly. DW2 confirmed that the appellant had reported the theft of school books. He also testified that it would not be possible to have the appellant alone in the office because various teachers had access to the office and teachers were always in the staff room even during games time. DW2 further stated that it was the teacher on duty and not the appellant who would assign pupils various tasks.

7. The appeal came up for virtual hearing before us on 13th March 2024. The appellant, who had completed his sentence, appeared virtually from the Court precincts while the respondent was represented by Mr. Omutelema, a Senior Assistant Director of Public Prosecutions. Both sides relied on their respective submissions and also made oral submissions at the hearing.

8. The appellant commenced his submissions by stating that upon finding that he was convicted and sentenced on an offence not charged, the High Court ought to have set him free. He submitted that by substituting the conviction of the trial court with that of the offence indicated in the charge sheet, the High Court contravened Article 50(2)(p) of *the Constitution*. In support of this submission, the appellant relied on Francis Amazimbi Milimo v. Republic [2006] eKLR. The appellant additionally argued that since a wrong section of the law was relied on to convict him, he ought to have been set free by the first appellate court.

9. Turning to another ground of appeal, the appellant submitted that it was erroneous for the trial court to rely on the P3 form that was produced as an exhibit as it was not filled at a government accredited facility but in a private hospital. He also contended that the lab reports from Kemsa Medical Centre were produced in contravention of Article 50(4) of *the Constitution* of Kenya. He urged us to expunge the P3 form from the record as its authenticity was questionable and the source of the information used to fill it doubtful.

10. Departing from the issue of the P3 form, the appellant proceeded to ask us to allow his appeal owing to the noncompliance with the provisions of section 200(3) of the Criminal Procedure Code. According to the appellant, this failure resulted in the violation of his right to fair trial. Still pursuing his assertion that his rights to a fair trial were violated, the appellant relied on Fredrick Kizito v. Republic, Criminal Appeal No. 170 of 2006 to submit that there was an error in recording the court's Coram when Hon. Kagendo took over the trial and the error should result in the proceedings being quashed.

11. The appellant also submitted that the evidence of PW1 and PW2 was marred with contradictions and inconsistencies that went to the root of the case and their evidence should not have been relied upon to convict him.

12. Finally, the appellant faulted the first appellate court for not considering the additional evidence admitted in the course of the appeal. He consequently urged us to allow the appeal and quash his conviction.

13. For the respondent, Mr. Omutelema rehashed the evidence on record and submitted that the offence of attempted defilement was proved against the appellant. Rejecting the appellant's appeal against sentence, counsel submitted that the circumstances of the case called for a severe sentence pointing out that the complainant was 12 years old and the appellant also abused his position of trust. Counsel asserted that the High Court was right to convict the appellant for the offence with which he was originally charged. In conclusion, counsel urged that the appeal be dismissed.

14. This being a second appeal, section 361(1)(a) of the Criminal Procedure Code limits our jurisdiction to issues of law. In that regard, we are required to respect and uphold the concurrent findings of the trial court and the first appellate court on matters of fact unless the findings are not based on the evidence on record or the decision is bad in law for being based on a subversion of the evidence. This statement of the law has been spoken to by this Court in several decisions, including Adan Muraguri Mungara v. Republic [2010] eKLR, where it was 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."

15. We have carefully reviewed the record and appreciated the submissions and authorities cited by the parties to this appeal. In our view, the issues for determination are: whether the conviction by the High Court was proper; whether the failure to record the Coram vitiated the trial court's proceedings; whether section 200(3) of the CPC was complied with; and finally, whether there were discrepancies and contradictions going into the root of the case.

16. As already indicated at the beginning of this judgment, the appellant was charged with the offence of attempted defilement contrary to section 9(1) of the *Sexual Offences Act*. However, the trial court convicted him for the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. On appeal to the High Court, the conviction of defilement was set aside and substituted with a conviction of attempted defilement contrary to section 9(1) of the *Sexual Offences Act*.

17. It is the appellant's proposition to us that having found that he was convicted under the wrong provision of the law, the first appellate court ought to have set him free. In essence, what we discern from the appellant's contention is that the first appellate court did not properly exercise its appellate powers. We start by pointing out that the decision of Peter Mburu Kangethe v. Republic [1989] eKLR relied upon by the appellant is not applicable to this case. In that case, the appellant's acquittal was occasioned by the fact that the guilty plea was equivocal and the charge sheet was not on record.

18. We return to the merits of the appellant's contention. The powers of the High Court when sitting on appeals from subordinate courts are found in section 354 of the Criminal Procedure Code. The provision relevant to this appeal is contained in section 354 (3)(a)(ii) which states that:

> "(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
>
> a. in an appeal from a conviction—
>
> (i) ....;

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

iii. ...."

[Emphasis ours]

19. A plain reading of the provision leaves no doubt that the High Court has powers to alter the conviction and even alter or maintain the sentence. Such an alteration is dependent on the evidence on record and subject to the offence charged. Such power must also be exercised in affirming what the trial court should have done but failed to do. In vacating the conviction for defilement, the learned Judge stated that:

> "I do agree that the evidence adduced by the witnesses in this case clearly established the offence of Defilement. However for reasons best known to themselves (which reasons I do not wish to speculate about) the charge was reduced to the lesser offence of Attempted Defilement.
>
> Section 186 of the Criminal Procedure Code provides...
>
> This Section in my reading only becomes applicable where an accused is charged with the offence of Defilement and the evidence though failing to prove that charge is sufficient to prove another (less serious) offence, then the accused may be convicted of that less offence although he was not charged with it.
>
> Any other contrary interpretation of Section 186 would in my view be erroneous and would be prejudicial to the accused. To convict the appellant of the more serious offence and an offence for that matter which he had not been charged with would amount to a serious miscarriage of justice."

20. The reasoning of the learned Judge conformed to the law. In Rashid Mwinyi Nguisa & another v. Republic [1997] eKLR, this Court elaborated on the powers of the High Court by stating that:

> "... So that if the High Court tries a man on a charge of murder and at the end of the trial that court thinks that the evidence supports the lesser charge of manslaughter, it would be perfectly legal for the court to convict for manslaughter though the accused person was never charged with that offence. That, in our view, is what section 179 is all about. But when a person is tried for manslaughter and the High Court thinks the evidence supports the more serious charge of murder, it would be illegal to convict for murder because that offence though cognate to manslaughter is not minor to it. Section 179 of the Criminal Procedure Code would not support that kind of thing. Again, when a magistrate tries a man on a capital charge of robbery with violence under section 296 (2) of the Penal Code and at the end of the evidence the magistrate thinks that only a lesser charge of simple robbery under section 296 (1) of the Penal Code is proved, the magistrate would be entitled to convict under the latter section though the accused was tried under section 296 (2). But the fact remains that the accused person was charged and tried under section 296 (2) and if the magistrate wrongly convicts under section 296 (1), it would, in our view, be perfectly lawful for the High Court in its appellate jurisdiction, to substitute the correct conviction. For in that event, the High Court would merely be doing what the magistrate could have lawfully done, namely, to record a conviction on the charge brought under section 296 (2) which was what the accused

person was charged with and tried for before him. That, in our view, is why the High Court under section 354 (3) (a) (iii) of the Criminal Procedure Code may:

"... altering the finding, alter the nature of the sentence.".

[Emphasis ours]

21. Two principles of law can be gleaned from the cited decision. First, that it is erroneous for a trial court to convict an accused person of an offence not minor to the offence charged. In other words, where a more serious offence than the one charged is proved by the prosecution at the conclusion of the trial, the court has no authority to convict on that more serious offence. That is the essence of section 192 of the Criminal Procedure Code which states that:

> "If on a trial for a misdemeanour the facts proved in evidence amount to a felony, the accused shall not be therefore acquitted of the misdemeanour; and no person tried for the misdemeanour shall be liable afterwards to be prosecuted for a felony on the same facts, unless the court thinks fit to direct that person to be prosecuted for felony, whereupon he may be dealt with as if not previously put on trial for misdemeanour."

22. The trial court is given two options; to convict for the misdemeanour even though a felony is disclosed or direct that the person be prosecuted for the disclosed felony. In the appeal before us, the first appellate court was correct in holding that the trial magistrate had no authority to convict for the more serious offence of defilement since the appellant had been charged with the lesser offence of attempted defilement.

23. The second legal principle that can be discerned from Rashid Mwinyi Nguisa & another [supra] is that the High Court in its appellate jurisdiction can set aside a conviction for an offence that was not charged and convict the appellant for the offence that he was charged with at the trial. This principle is relevant to the circumstances of the appeal before us. There was therefore no error on the part of the first appellate court Judge in setting aside the conviction in respect to defilement for which the appellant was not charged and convicting him for the offence of attempted defilement with which he had been charged at the trial. Our conclusion is that the High Court, sitting as a first appellate court properly exercised its powers to enter a conviction based on the provision of the law and the offence which the appellant was charged with. We need not say more on this issue apart from concluding that this ground of appeal has no merit.

24. The next issue is whether the failure to record the Coram vitiated the trial Court's proceedings. We note that the question of Coram was never raised before the first appellate Court. Even so, on our part, we have perused the typed proceedings and noted that at all times, the trial Magistrate signed off the proceedings. Further, we find that such an error, if any, is a minor one curable under section 382 of the Criminal Procedure Code.

25. Regarding the question of compliance with section 200(3) of the CPC, we, as did the High Court, find that the learned magistrate, F. Kombo, PM, was bound by the orders of the High Court on review dated 7th October 2011. The High Court having found that it was difficult to start the trial afresh and having directed that trial should proceed from where it had reached, the trial magistrate had no basis or authority for once more complying with the provisions of section 200 of the Criminal Procedure Code. This ground of appeal similarly lacks merit and fails.

26. The appellant has also challenged the authenticity of the P3 form. On our part, upon review of the record, we do not find any error in the procedure adopted in the production of the P3 form.

Furthermore, no issue was raised about the production or contents of the P3 form by the appellant or his advocate on record. Additionally, the P3 form was filled at the then Nakuru Provincial General Hospital, a public facility, and it bore a stamp to that effect. There was no dispute that the complainant had earlier been attended to at KEMSA Hospital hence the treatment chits issued at that facility were relevant to this case. However, even without the treatment chits, the P3 form was still validly on record and conclusive in corroborating the evidence of penetration. We, however, must point out that, even in the absence of the P3 form, the evidence on record still proved the offence with which the appellant was charged and subsequently convicted by the first appellate court. The charge was that of attempted defilement and not defilement which may have required corroboration through medical evidence

27. Finally, the appellant contends that PW1 and PW2 contradicted each other and their evidence was therefore inconsistent. On this issue, we start by referring to the holding of the Court in John Nyaga Njuki & 4 others v. Republic [2002] eKLR that:

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

28. Similarly, in Philip Nzaka Watu v. Republic [2016] eKLR the Court observed as follows:

> "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 recognised 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."

29. In this case, upon review of the record, we find that the discrepancies pointed out by the appellant did not in any way affect the substratum of the case against him. The alleged inconsistencies were immaterial and would ordinarily be expected, more so, where children like PW1 and PW2 are involved. Courtrooms are not classrooms where children are capable of freely expressing themselves. Being subjected to questions and interrogation in a court is not easy, especially for those who find themselves there not by choice. The evidence of PW1 and PW2 as was given in court was corroborated by the evidence of their teachers who were the first to interrogate them in school, which is a more-friendly environment.

30. We will refresh the appellant's memory as to the evidence that was tendered against him. Apart from the evidence of PW1 and PW2 which placed him at the scene of crime, M.K., another pupil at the school, testified as PW3 and told the trial court that the complainant told her that she had been defiled by the appellant. She urged her to tell their teacher (PW5) about her ordeal but the complainant declined to do so. PW3 later alerted PW5, forcing the complainant to open up to the teacher about the incident.

E.G.N. (PW5) did indeed confirm that she was in the office on 22nd June 2009 when PW3 informed her that PW1 wanted to talk to her. PW1 narrated her encounter with the appellant and also told her that she had not informed her parents about the incident. PW5 would later share the revelation with A.M.,

another teacher. I.K. (PW6) was informed by A.M. that PW1 had confided in PW5 about her ordeal at the hands of the appellant. PW6 then questioned PW1 who told her of her unpleasant encounter with the appellant. PW1 would later repeat the same account in the presence of other teachers who included F.W.W. (PW7). PW7 was among the teachers tasked to escort PW1 to hospital. P.I. (PW8) was also a teacher and was part of the teaching staff that questioned the complainant in the presence of PW6 and PW7. Amos Otare (PW10) was the gynaecologist who attended to the complainant. He testified that the complainant had been seen at KEMSA Medical Centre on 24th June 2009. The witness noted that the complainant had healed bruises on the labia majora and her hymen was broken. The complainant also had an infection. He concluded that the complainant had been defiled. Dorcas Kagwira (PW11) testified she was attached at the Nakuru Police Station Children's Department and that she investigated the matter which was reported on 25th June 2009. PW1 narrated her unpleasant encounter with the appellant to her. She recorded witness statements and later charged the appellant. In view of this overwhelming evidence, there is no way that it can be said that the appellant did not commit the offence. We therefore reject the appellant's attempt to wriggle out of the case by claiming that the evidence of PW1 and PW2 was contradictory and inconsistent.

31. On a different ground of appeal, the appellant claimed that the learned Judge of the High Court failed to consider the additional evidence adduced in the appeal pursuant to his successful application to produce additional evidence. From the appellant's submissions, the additional evidence was in respect of the theft of school books that had been reported to the police. The appellant's submission that the additional evidence was not considered is, to say the least, untruthful. In rejecting this evidence, the learned Judge in her judgment stated that:

> "... This OB report indicates that the appellant did go to Nakuru Police Station to report the theft of some books and stationary from his office. There is however absolutely no evidence to show that this report made by the appellant led to his being framed for a charge of defilement. According to the appellant his dispute was with the head master and his fellow teachers whom the appellant alleged was out to fix him.
>
> The complainant was a mere child of 12 years old. She had no reason or motive to seek to frame the appellant. The complainant would have no interest or bearing in the investigations over the stolen stationary which was purely an administrative matter and she had nothing to gain by falsely implicating the appellant.
>
> Similarly, the other children who were witnesses like PW3 would have had no interest in framing the appellant. I am not persuaded by this defence of the appellant and I dismiss the same."

We have quoted the learned Judge at length in order to demonstrate that it was not only the additional evidence that was considered but the appellant's entire defence was indeed taken into account. Here is a man who says the entire world conspired against him. Apart from the teachers and the pupils who, in our view, were independent witnesses, other independent witnesses were the medical officer and the investigating officer. We cannot fathom how the appellant expects us to believe that a father could impugn the chastity of his daughter in order to stop an investigation into a theft in which he was not a suspect. The conspiracy theory of the appellant cannot fly in view of the cogent evidence that was adduced against him. In this case N.N.N. who is the father of the complainant testified as PW9. He narrated how he confronted the appellant in anger after he heard that he had defiled his daughter only to be calmed by the other teachers who told him that they were aware of the incident. Although PW9 indicated that he was a parent representative in the school, the appellant's counsel never cross-examined him. There was therefore no attempt to link the alleged theft of school property with PW9's action of reporting the defilement of his daughter to the police. We are therefore in agreement with

the two courts below that the appellant's attempt to link his tribulations with theft of school books and stationary was far-fetched. His defence was correctly rejected and we too reject it by dismissing this ground of appeal.

32. We turn to the appellant's last ground of appeal: that the learned appellate Judge erred in law by failing to appreciate that the prosecution failed to prove its case beyond reasonable doubt. The appellant was charged with attempted defilement contrary to section 9(1) of the *Sexual Offences Act* which provides that:

> "A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

In this case, the prosecution was required to prove that there was an attempted penetration by the appellant of a child. A child being defined by the *Children Act*, as commanded under section 2 of the *Sexual Offences Act*, to mean an individual who has not attained the age of eighteen years. That PW1 was under 18 was confirmed by her father who stated that she was 12 years old at the time of the defilement having been born on 24th September 1997. He also identified an immunization card which was subsequently produced by the investigating officer as an exhibit and explained that the birth certificate had been burned during post-election skirmishes. The testimony of PW1 confirmed that the appellant first attempted to defile her before actually defiling her on a second occasion. We need not say more because we have already rehashed this evidence in this judgment. The prosecution therefore fully discharged the onus placed upon it to prove the charge beyond reasonable doubt. This ground of appeal equally fails.

33. Before we conclude, we observe that at the hearing of the appeal the appellant beseeched us to issue certain orders touching on his employment relationship with the Teachers Service Commission (TSC). There are several reasons why we cannot address his request in this judgment. Some of those reasons are firstly, that the appeal before us is in respect to the appellant's conviction in a criminal trial. Secondly, the issues he has raised were not raised before the first appellate court. And, thirdly, TSC is not a party to these proceedings.

34. In the end, we find that the appeal is without merit and is hereby dismissed. For avoidance of doubt, the judgment of the High Court is upheld in its entirety.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024

MUMBI NGUGI

..... **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