Gunga v Republic (Criminal Appeal E133 of 2022)
[2024] KECA 1170 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1170 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E133 OF 2022

KI LAIBUTA, A ALI-ARONI & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

WILSON KAHINDI GUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Malindi (S. Githinji, J.) dated 14th December 2022 in HCCRA No. E027 of 2021)

JUDGMENT

1. The appellant, Wilson Kahindi Gunga, was charged before the Senior Principle Magistrate at the Senior Principal Magistrate's at Kilifi with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 ("the *Act*"). The particulars were that, on diverse dates in December 2019 and January 2020 at Kilifi County, he intentionally and unlawfully caused his penis to penetrate the vagina of NC, a child aged 16 years.

2. In the alternative, the appellant faced the charge of committing an indecent act with a child contrary to Section 11(1) of the *Act*. The particulars of the offence were that, on diverse dates in December 2019 and January 2020 at Kilifi County, he unlawfully and intentionally touched the vagina of NC, a child aged 16 years.

3. The appellant pleaded not guilty to both counts, and the case proceeded to trial. The prosecution called 4 witnesses. The appellant was found to have a case to answer and was placed on his defence. Upon considering the evidence, the trial magistrate convicted the appellant and sentenced him to 20 years' imprisonment. Aggrieved by the said judgment, the appellant preferred an appeal to the High Court at Malindi in Criminal Appeal No. E027 of 2021. On determining the appeal, the learned Judge affirmed both the conviction and sentence.

4. Aggrieved by the decision of the High Court, the appellant preferred the appeal subject of this judgment. To contextualize the appeal, we shall briefly summarise the evidence adduced in the trial court.

5. PW1 – NC, the complainant, testified that, on 8th November 2019, she visited a hair salon and that, after her hair was done, the hairdresser, one Mariam, informed her that someone had paid for her expenses. On returning to the salon later, Mariam gave her a dress and informed her that the person who had earlier paid her salon expenses had bought it for her. Mariam, further told her that the person wanted to meet her. PW1 declined the request stating that she was still a student after which she left. Later, the appellant, whom she had not known before, called her on the phone and asked to meet her at Mnarani petrol station. She agreed and met him and he expressed interest in starting a relationship with her, which she declined and left for home.

6. A week later, the appellant phoned her again, and they arranged to meet at the same petrol station. The appellant promised PW1 a vacation, but she declined, informing him that she was a student. She however was to board a matatu with the appellant which took them to Malindi town. It was her further testimony that the appellant took her to his friend's house, confiscated her phone and that she remained in the said house for the entire month of December; that the appellant would only see her in the evenings; that, on the first night, the appellant forced her to have sex with him; and that, thereafter, he had sex with her daily for the entire month.

7. PW1 further testified that, on 2nd January 2020, the appellant took her back to [Particulars Withheld] but refused to take her to her home; and that, while at the stage, PW1 cunningly asked for money to shop, which he gave her; that she seized the opportunity to escape and return home to her parents; that, together with her mother, they went to Kilifi Police Station to report the incident; and that, subsequently, she was taken to Wananchi Maternity Hospital and Kilifi General Hospital where she was confirmed to be 2 months pregnant.

8. PW2, ERC, PW1's mother, testified that one evening in December 2019 at about 9 pm, while in Kakamega, she received a call from her husband informing her that PW1 had not returned home; that she advised him to report the incident to the police; and that she was later to learn from her husband that he had obtained the appellant's phone number from a young man who had seen PW1 in the company of the appellant; that, on calling the appellant, he blocked his number; and that PW2 requested the appellant's number and rang him, only to be verbally abused. She however pleaded with the appellant to return her child, informing him that PW1 was school-going. The next morning, her husband informed her that PW1 had returned home.

9. She further testified that PW1 vanished for the second time, and that her father searched for her, but was unable to continue the search due to a road traffic accident; that PW1 returned home later in March 2020 and informed PW2 that she had come from Malindi; that PW1 further revealed that the appellant had kept her at his friend's place; that she took PW1 to the police station and Wananchi Clinic where, upon examination, PW1 was confirmed to be pregnant; that she also took PW1 to Kilifi District Hospital for further examination; and that she recorded her statement where she gave the age of PW1 as 16 years old at the time. She later learnt that the appellant had been arrested.

10. PW3, Handerson Karingu, a health reproductive clinician, informed the court that, on 7th July 2020, he filled out a Post Rape Care form for PW1. He further testified that, on examination, he found that PW1 had a broken hymen; that she had had sex severally; that there was no blood flow or discharge; that her urinalysis revealed pregnancy of about 28 weeks/7 months; that she was free of STDs, HIV/AIDS; that she had commenced post-natal sessions; that PW1 was born on 24th April 2004; and that she informed him that she was in a relationship with a man aged 38 years old.

11. PW4, No. 236852 PC Charity Kambe from Kilifi Police Station, Gender Based Violence Desk was the investigating officer in the case. She testified that she took over investigations of the case on July 7th, 2020; that she accompanied PW1 to the Kilifi County Referral Hospital after which she documented PW1's statement and had the P3 and Post Rape Care forms filled. Additionally, she documented PW2's statement. Further, she testified that PW1 gave her the appellant's phone number. She summoned him to the police station where he was subsequently arrested.

12. Further it was her testimony that PW1 informed her that she was 16 years old and pregnant at the time and the encounter between the appellant and PW1 started when PW1 visited a salon and was informed that her expenses had already been paid by a person she did not know. Later, PW1 was to receive a dress as a gift and was told that the appellant had wanted to be linked to her; a week later the appellant contacted her by phone, they met and he asked to have a relationship with her and took her to Malindi. A missing person report for PW1 was filed at the police station. She also learnt that after a while the appellant returned PW1 home to Mnarani. The two had been in a relationship since 8th November 2018. On cross-examination, PW4 stated that the appellant confessed to the offence of defilement.

13. When found to have a case to answer in his defence, the appellant gave an unsworn statement denying the offence. It was his testimony that PW4 phoned him on 7th July 2020, at 4:05 pm, and requested him to report at the police station the following day at 9.00 am. He reported at the police station as requested, and encountered PW4 at the Gender Based Violence Desk when PW4 detained him in the cells. On 8th July 2020, he was presented in court and charged with the offence of defilement. He claimed to have been surprised that Mariam was not called as a witness. Additionally, he challenged PW1's evidence that she was forced into a matatu and wondered why none of the passengers in the said matatu or his friend's wife in whose house PW1 is alleged to have stayed for a month were not called as witnesses.

14. The appellant further contended that there were inconsistencies in the prosecution's case; that PW4 alleged that the case was reported on 7th July 2020, but failed to investigate to determine his culpability; that during cross-examination, PW4 claimed that she referred PW1 to the hospital on 6th July 2020, but the P3 form indicated she was sent to the hospital on 9th July 2020.

15. Having lost his appeal in the High Court, the appellant appealed to this Court. His grounds of appeal are contained in an undated amended grounds of appeal where he averred that the judge erred in law:

    i. by upholding the conviction based on a defective charge sheet in violation of section 137(a)(i), (ii), (iii), (b)(ii), and (c) of the *Criminal Procedure Code*;

    ii. by failing to consider that sections 107, 108, 109, 110, and 111 of the *Evidence Act* were not complied with, and the case was not proven beyond reasonable doubt;

    iii. by failing to appreciate that the trial court failed to consider that the investigations were poor and shoddy; and

    iv. by upholding the conviction based on contradicting, inconsistent, and uncorroborated evidence

16. The appellant filed undated submissions. On the contention that the charge sheet was defective, the appellant submits that the phrase "diverse months" connotes that the offence was committed on diverse months and not dates, and yet PW1 affirmed that she knew the dates the offence was committed; and that the incident took place in Malindi, unlike the particulars on the charge sheet, thus rendering the charge sheet defective; and that, even after the prosecution noted the error and mistake, they did not amend the charges. He asks the court to acquit him since he was convicted on a defective charge sheet.

17. On the issue as to whether the case was proven beyond a reasonable doubt, the appellant admits the age of the complainant and does not challenge proof of penetration as placed before the court. However, he submits that the identification of the perpetrator was not proper. He claims that PW1 did not know him and that he was arrested through a phone call by a number given to the investigating officer by the parents of PW1, who also claimed that they had been given the number by one Martin. He submits further that the prosecution ought to have done more to ascertain whether he was the real perpetrator, for instance by way of a DNA test. He also submits that the trial court having noted that PW1 was truant, ought not to have believed her evidence that she had been defiled by the appellant.

18. The appellant further submits that the investigations in the case were shoddy; and that the investigating officer ought to have interrogated the persons named in this case, such as Miriam, the hairdresser, the alleged friend's wife who housed PW1, and Martin, whose evidence would have assisted in ascertaining the truth. Further, he contended that the person referred to by PW2 and PW4 as Martin could have been the real perpetrator. He questions why Martin had to wait for more than two weeks to report that he had seen a schoolgirl with the appellant; and, further, that since PW1 claimed to have received a call from a man, the investigation should have traced the calls and unearthed the truth.

19. On the contention that the evidence of the prosecution witnesses was contradictory, the appellant submits that PW1 testified that she was away from home from 8th November 2019 to 2nd January 2020, and yet PW2 stated that PW1 went missing in early November for 2 weeks and later came back and vanished again till March 2020; that the variance between January as stated by PW1 and March as stated by PW2 as the date of resurfacing should not go unnoticed; and that, further, there was a contradiction on the date of reporting the case. He submits that PW1 stated that she reported the matter to the police on 2nd January 2020 when she escaped and ran back home. However, on cross-examination, PW2 stated that she reported the matter in December 2019; that the occurrence book was recorded as 57/7/7/2020, which shows that the matter was reported on 7th July 2020. Hence the question remains as to when the case was reported. The other contradiction relates to the date on which the victim was taken to the hospital; that, in cross-examination, PW2 stated that PW1 was taken to hospital in April 2020 while PW3 stated that PW1was taken to hospital on 7th July 2020, the same day the Post Rape Care form was filled, yet PW4 stated that she took the complainant to hospital on 6th July 2020, and that these inconsistencies were overlooked. In support of his submissions he relies on the case of *Republic v. Mohamed Radzi Bin Abu Bakar* [2005] 6ML 399 where the court held that, at the close of the prosecution's case, the court ought to subject the evidence led by the prosecution to maximum evaluation and take into account all reasonable inferences that may be drawn from the evidence and that, if the evidence admits two or more inferences, then draw the inference that is most favorable to the accused.

20. The State has filed submissions dated 3rd November 2023 and distills its submissions under three issues based on the earlier memorandum of appeal that was amended to wit: whether the court violated the appellant's rights under Article 50(2) (g) and (h) of the *Constitution*; whether the prosecution proved its case beyond a reasonable doubt; and whether the sentence imposed was harsh and excessive.

21. On the first issue, the State submits that the record indicates that the right to legal representation was duly explained to the appellant and, therefore, the appellant was duly informed of his right to legal representation by the trial court, but chose not to have one; that Article 50(2) (h) requires an advocate to be assigned to an accused person by the State and at the State's own expense where substantial injustice is likely to result and, therefore, the right is not automatic, but only given on deserving circumstances. Learned State counsel relied on the case of *David Njoroge Macharia v. Republic* [2011] eKLR and *Republic v. Karisa Chengo & 2 Others* [2017] eKLR where this Court held that, for an

appellant to allege that his rights were infringed, he ought to demonstrate the substantial injustice suffered by not being accorded an advocate by the State. Learned counsel contends that, in this case, there is no indication of the injustice suffered by the appellant since the appellant conducted his case while out on bond; that he was able to cross-examine witnesses and defend himself properly; and, further, that the record does not indicate that the case was complex to the appellant that he did not appreciate the issues raised.

22. On the issue as to whether the ingredients of the offence were met, learned counsel submits that the age and penetration were proved. On identification of the perpetrator, the State submits that the appellant was well known to the complainant, and that she was able to identify him as the perpetrator. As to whether failure to conduct a DNA test amounted to improper identification, the State relies on the case of *Nzau v. Republic* (Criminal Appeal No. 11 of 2020) [2022] KECA 502 (KLR), where the court held that the argument that a DNA test was required to prove penetration is not well founded.

23. On sentencing, the State refers to the case of *David Mutai v. Republic* [2021] eKLR where the court observed that an appellate court could not interfere with the lower courts' discretion on sentencing unless it was established that there was a real error on the application of the sentencing guidelines.

24. We have carefully considered the record of appeal, the submissions, and the law. At the hearing, the appellant was clear that he would rely on his amended memorandum of appeal and his submissions. We are therefore of the view that the issues for consideration are:

    i. whether the charge sheet was defective; and

    ii. whether the prosecution proved the offence beyond a reasonable doubt.

25. By dint of Section 361 of the *Criminal Procedure Code*, this Court as the second appellate court must confine itself to issues of law only as enunciated in the case of *Karani v. R* [2010] 1 KLR 73 where this Court expressed itself on the subject as follows:

> "This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

26. Section 134 of the *Criminal Procedure Code* provides for the requirements of a charge sheet or information as follows:

> 134. 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.

27. In addition, Section 137 of the *Criminal Procedure Code* at length states the rules of framing charges and information as follows:

> 137. The following provisions shall apply to all charges and information, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code -

(a)

(i) Mode in which offences are to be charged. — a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

ii. the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

iii. after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary: Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required.

28. In the case of *Sigalani v. R* [2004] 2 KLR, the court had this to say on charge sheets:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."

29. Although we have substantially set out the requirements on how a charge sheet ought to be drawn, the issue as to whether the charge sheet herein was defective was raised for the first time in this appeal, it was not raised at the trial or in the High Court. This Court has pronounced itself on instances where matters are raised for the first time before it on a second appeal time without number. As stated above, our duty on a second appeal is to consider matters of law that arise from issues that were canvassed before the High Court. Since the complaint against the charge sheet is being raised for the first time, we do not have the mandate to apply our minds to it. As if reason prevailed, the appellant did not canvass the ground in his submissions. Accordingly, this ground of appeal fails.

30. From the appellant's submissions, he concedes to the age of PW1 and the report of the doctor who examined the PW1 indicating that she had been defiled. However, the appellant takes issue with the identification of the perpetrator. He argues that PW1's evidence pointing at him as the perpetrator of the offence ought not to be believed. The trial magistrate who saw and heard PW1 believed her evidence that the appellant was the defiler, and so did the judge in the first appellate court. This is a finding of fact. This Court has no basis upon which to interfere with concurrent findings of fact arrived at in the two courts below, unless based on no evidence, or where they considered matters they ought not to have considered or the courts failed to consider matters they should have considered, or from the record they were wrong, in which case such omissions or commissions would be treated as matters of law. See Karani v. R (supra). From our consideration of the record, we are persuaded that PW1 was in a relationship with the appellant, they were together the entire period of December 2020 and there could have been no mistake in PW1's identification. Secondly, the appellant has failed to demonstrate how the two courts below faulted to invoke this Court's interference. In view of the foregoing, we find that the ingredients of the offence of defilement were proved beyond reasonable doubt.

31. On the issue as to the alleged contradictions, we note that they were mainly on the dates when PW1 disappeared from home and the dates she was referred to the hospital for examination. PW2, the

mother to PW1, was upcountry when she disappeared from home on both occasions. She received the information from her husband. She however spoke to the appellant the first time PW1 failed to return home and he abused her. As PW1 returned home after the December escapade PW2 was home and is the one who reported the matter to the police. As for the hospital attendance, PW4 admitted that there was an error made about the dates. Be that as it may, we are of the view that the contradictions are too minor to affect the overwhelming evidence mounted by the prosecution, and that the same do not go to the core of the matter before us. Neither are they prejudicial to the appellant's case. This position was well articulated by this Court in the case of *Richard Munene v. R* [2018] eKLR where the court stated that:

> "It is a settled principle of law, however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily create some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

32. In conclusion, we find the appeal lacks merit and the same is hereby dismissed in its entirety. Consequently, the conviction and sentence meted on the appellant in the judgment of the High Court of Kenya at Malindi (S. M. Githinji, J.) delivered on December 14, 2022 are hereby upheld. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

DR. K. I. LAIBUTA, C.Arb, FCIArb

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR