Kangogo v Republic (Criminal Appeal 65 of 2018)
[2023] KECA 28 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 28 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 65 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JANUARY 26, 2023

BETWEEN

TIMOTHY KIMWETICH KANGOGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (M. Mativo, J.) delivered and dated 21st July, 2015) in HC Criminal Appeal No. 28 of 2014)

JUDGMENT

1. This is a second appeal by Timothy Kimwetich Kangogo (the appellant) against his conviction and sentence. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act* by J Owiti, Resident Magistrate, in Eldoret Chief Magistrate's Court Criminal Case No 6317 of 2009. His first appeal was dismissed by Mativo, J (as he then was) who upheld both the conviction and sentence as issued by the trial court.

2. The appellant is now before us faulting the judgment of the first appellate court on the grounds that the learned judge erred in law by relying on the unsworn testimony of PW4; that the learned judge erred in law by failing to note that the case was not proved beyond reasonable doubt; and, that the learned judge erred in law when he ignored the fact that an important witness was not called to testify. In his written submissions the appellant complained of non-compliance with section 200 of the *Criminal Procedure Code* by the trial court and the unconstitutionality of the minimum sentence imposed on him.

3. In summary, the evidence against the appellant was that on October 11, 2009 GJC (the complainant) who testified as PW1 was from a barber shop in Kapchemas shopping center and was heading home alongside her five-year old brother. Along the way, the appellant who was their neighbor came from behind them, grabbed the complainant and took her inside a maize plantation.

He then removed the complainant's clothes, held her by the neck and defiled her. When the complainant tried to raise an alarm, the appellant gagged her with her pants. The appellant ran away after he heard members of the public approaching the scene. The complainant who was bleeding was attended to at Eldoret Moi Teaching and Referral Hospital. Upon examination at Eldoret Moi Teaching and Referral Hospital, it was noted that the complainant had neck injuries, nail marks on the left side of her face which injuries were hours old. The hymen was also torn with a swollen vulva, and trauma to the perineal region. The complainant was also on her menstrual period during the time of her defilement. The appellant was arrested shortly after the incident and taken to the police station.

4. In his defence, the appellant gave sworn testimony and denied having committed the offence. He testified that on the material day, he was in the company of his wife the whole day and never left his house. He later retired to bed only to be rudely woken up by people asking for illicit brew. He was arrested and taken to Kaptagat Police Station.

5. In its judgment, the trial court found the evidence of the complainant compelling and corroborated. The trial court proceeded to convict the appellant for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. In doing so, the court informed itself of the provisions of Section 124 of the *Evidence Act* which permits a court to convict on the evidence of a single witness in sexual offences where the testimony of the victim is believable.

6. On appeal, the first appellate court found that the trial court considered the appellant's defence and that the defence did not rebut the cogent evidence adduced by the prosecution witnesses. The first appellate court ruled that the appellant's defence did not create any doubt on the prosecution's case and that the learned trial magistrate correctly appreciated and analysed the evidence on record and reached a proper conclusion in convicting and sentencing the appellant.

7. During the hearing of this appeal, the appellant appeared in person while the respondent was represented by Ms Carolyne K Chege, prosecution counsel. The appeal was canvassed by way of written submissions. The appellant's submissions are dated November 4, 2021 while those of the respondent are dated February 1, 2022.

8. In his submissions, the appellant contends that during trial Section 200 of the Criminal Procedure Code was not complied with when Mr Owiti, Resident Magistrate, took over the conduct of the matter from Mr Mbogo, Chief Magistrate (as he then was). The appellant also submits that no explanation was offered to him on the import of Section 200 of the *Criminal Procedure Code* as is required under sub-section (3) of the provision. The appellant relied on the case of *Ndegwa v Republic* [1986] eKLR to reinforce his submission on the importance of complying with Section 200 of the Criminal Procedure Code.

9. The appellant also submitted that the first appellate court failed in its duty by not weighing the conflicting evidence and drawing its own conclusions. The appellant relied on the case of *Kiilu & another v Republic* [2005] 1 KLR 174 to elucidate the duty of the first appellant court.

10. The appellant further argued that his identification was in doubt and that the court ought to have found in favour of his alibi defence. On the place of an alibi defence in a criminal trial, the appellant placed reliance on *Kiarie v Republic* [1989] KLR 739. He submitted that the prosecutor was at liberty to challenge his defence by proceeding under Section 212 of the *Criminal Procedure Code*.

11. The appellant finally submitted that the trial court and the first appellate court erred by enforcing the mandatory sentence which he stated had been declared unconstitutional and that the two courts below did not consider calling for a pre-sentencing report. In summary, the appellant urged this Court to allow his appeal, quash the conviction, set the sentence aside and free him.

12. Counsel for the respondent on her part submitted that this Court should not interfere with the concurrent findings of fact by the trial court and the first appellate court. To this end, counsel referred the Court to the case of *Chemangong v R* [1984] KLR 611 and urged us to confine ourselves to points of law.

13. On the alleged non-compliance with section 200(3) of the *Criminal Procedure Code*, it is the respondent's submission that the appellant's trial proceeded under one magistrate from beginning to end and the provision was therefore not applicable in the circumstances.

14. On the issue of identification of the appellant, the respondent relied on the case of *R v Turnbull & others* [1976] 3 ALL ER 549 to submit that both the trial court and the first appellate court considered the relevant factors before reaching the conclusion that the appellant was properly identified by the complainant.

15. As regards penetration, the respondent submitted that the issue had been sufficiently addressed by the first appellate court.

16. On the sentence meted on the appellant, the respondent submitted that the trial court indeed requested for a pre- sentence report and the same was not favourable to the appellant. The respondent further argued that the minimum sentences provided in the *Sexual Offences Act* are constitutional and that the two courts below properly sentenced the appellant in accordance with the relevant provisions of the law. This Court was therefore urged to dismiss the appeal.

17. This being a second appeal, the powers of this Court by virtue of Section 361(1)(a) and (b) of the *Criminal Procedure Code* are limited to considering matters of law. The provision is couched in the following terms:

> "(1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
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> a. on a matter of fact, and severity of sentence is a matter of fact; or
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> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

18. Section 361(1) of the *Criminal Procedure Code* was interpreted by this Court in *David Njoroge Macharia v Republic* [2011] eKLR as follows:

> "That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As 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 *Chemagong v R* [1984] KLR 611."

19. Upon perusing the memorandum of appeal, the record of appeal and the rival submissions of the parties, the issues that arise for determination by this Court are:

i. Whether Section 151 of the *Criminal Procedure Code* was applied with respect to PW4, and if not, the import of the non-compliance;

ii. Whether Section 200 of the *Criminal Procedure Code* was applicable to the proceedings before the trial court;

iii. Whether there was failure to call a key prosecution witness, and if so, the import of such failure;

iv. Whether the trial court applied the right standard of proof in convicting the appellant; and

v. Whether the sentence meted against the appellant was legal.

20. The appellant raised the ground of appeal that Section 151 of the *Criminal Procedure Code* was not complied with in respect to PW4 but he did not submit on it. The respondent also did not submit on it. However, since it is an issue of law raised in the pleadings, we deem it fit to address it. Section 151 of the *Criminal Procedure Code* states as follows:

> " Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."

21. The import of Section 151 is succinctly clear that all witnesses in a criminal trial must be examined on oath. This is of course subject to Section 19 of the *Oaths and Statutory Declarations Act*, cap 15 which allow courts to receive unsworn testimony of children of tender years.

22. We have gone through the record of appeal and it shows that all the witnesses save for PW1 and PW4 were sworn. In the case of PW1, she was not sworn after the court ruled that she was not well appraised with the meaning of an oath. Her evidence was therefore received in accordance with the provisions of Section 19 of the *Oaths and Statutory Declarations Act*, cap 15. We appreciate that the appellant's grouse is in regard to the evidence of PW4. The record is silent on whether he was sworn or not. It is therefore possible for one party to assume that PW4 took the oath while the other party can also not be blamed for adopting the adverse position that PW4 never gave evidence on oath. We are also cognizant of the fact as the time PW4 was called to testify, the appellant was acting in person and thereby he could not have been well versed with the trial procedure as to object to the witness testifying prior to taking the witness oath. This Court in *Samwel Muriithi Mwangi v Republic* [2006] eKLR when faced with a similar situation held as follows:

> " But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of section 151 of the Criminal Procedure Code and the other provisions we have set out herein. That, in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If the trial was a nullity then it does not matter at what stage that issue is raised."

23. Although PW4 was sworn on August 31, 2010 when he was recalled at the behest of the appellant, the record shows that PW4 did not testify on that day after the appellant indicated he had no questions for the witness. In the circumstances, we are inclined and we do find that the evidence of PW4 was

not properly taken by the trial court. The evidence of PW4 is hereby expunged from the record of the proceedings. We will later address the effect of this finding on the appellant's conviction.

24. The next issue for our determination is whether Section 200(3) of the *Criminal Procedure Code* was applicable to the proceedings before the trial court. The appellant has specifically taken issue with the alleged failure by Mr. Owiti, Resident Magistrate, to comply with Section 200(3) when he took over the matter from Mr Mbogo, Chief Magistrate (as he then was). It is the appellant's case that Section 200(3) ought to have been complied with when the matter changed hands between the two magistrates. On the other hand, the respondent submits that the provision was not applicable in the circumstances as the whole trial was conducted by Mr Owiti from the beginning to the end.

25. Section 200(1) and (3) of the *Criminal Procedure Code* provides as follows:

> "(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
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> a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
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> b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
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> (2) ...
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

26. This Court in *Abdi Adan Mohamed v Republic* [2017] eKLR explained the applicability of Section 200 of the *Criminal Procedure Code* as follows:

> "Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also recommence the trial and resummon witnesses. The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern."

27. From the wording of Section 200(1) and (3) of the *Criminal Procedure Code* as well as this Court's opinion in Abdi Adan Mohamed (*supra*), the operative words with regard to this provision is "evidence". It then follows that this section is more concerned with the proceedings in relation to recording or taking of evidence by a trial court. Back to the proceedings before us, we note at page 7 of the record of appeal that on July 9, 2009, Mr Mbogo ordered that the matter was to be heard before Court No 6. Consequently, the matter took off on December 15, 2009 before Mr Owiti. The record is clear that the hearing or taking of evidence up to the delivery of judgment in this matter was

conducted by Mr Owiti. We do not see how Section 200 of the *Criminal Procedure Code* could have been applicable in the circumstances. We agree with the position taken by the respondent that the provision was not applicable in the circumstances. This ground of appeal is therefore without merit and is rejected.

28. The third issue is the effect of the failure to call the brother of the complainant who was with her during the assault. On number of witnesses to be called in a trial, Section 143 of the *Evidence Act* provides as follows:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

29. This Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR addressed this issue in the following terms:

> "The second ground of appeal relates to the failure by the prosecution to call the arresting officer to testify. It is evident, indeed conceded, that the person who arrested the appellant was not called to testify. As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

30. Similarly, in *Joseph Kiptum Keter v Republic* [2007] eKLR this Court stated that:

> "... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

31. It is therefore clear to us that in considering the effect of the failure to call a witness, the court ought to consider the evidence adduced vis-à-vis the evidence of the witness who was not availed. To deliver on this task, it is imperative to consider the elements of the offence charged and then assess whether the evidence on record proved all the prerequisite elements. In a charge of defilement, the key elements are age of the complainant, proof of penetration and identity of the perpetrator.

32. In its judgment, the trial court noted that it was possible to convict on the evidence of a single witness. The appellant's grievance is that the complainant's five-year old brother was not called as a witness. Our analysis of the evidence on record leads us to concur with the two courts below that the witnesses called by the prosecution were adequate to prove the offence charged. Additionally, the appellant has not advanced a convincing case as to what aspect of the case the evidence of the complainant's brother would have reinforced. This Court cannot therefore heed the call by the appellant to enter into the arena of the trial and decide for the parties the witnesses they should call in prosecution of their own cases. In any case, the prosecution may have determined that the five-year old child may not have been capable of adducing any useful evidence. In the circumstances, this ground is without merit and it fails.

33. The appellant has also taken issue with the standard of proof adopted by the two court below. It is the appellant's submissions that the trial court and the first appellate court decided the case on a balance of probabilities as opposed to the requirement that a criminal case should be proved beyond reasonable

doubt. This Court in *Stephen Nguli Mulili v Republic* [2014] eKLR, addressed the issue of standard of proof in the following words:

> " The standard of proof required is "proof beyond reasonable doubt". In reference to this Lord Denning in Miller V Ministry of Pensions, [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.""

34. The appellant is indeed correct when he says that his case ought to have been proved beyond reasonable doubt and that was the standard of proof he was entitled to. We note that although Section 124 of the *Evidence Act* requires corroboration of the evidence of a victim of crime, the proviso thereto permits a court to convict an accused person for a sexual offence on the evidence of the victim where, for reasons to be recorded in the proceedings, the court is satisfied that the victim is telling the truth. We have already expunged the evidence of PW4 which as we have already stated was a nullity. Even with that move, the evidence on record still militates against the innocence of the appellant. The age of the complainant was never challenged and was admitted to have been 13 years. This was proved by the complainant's medical examination report, the evidence of PW5 and the complainant's birth certificate. The appellant suggested in this appeal that the complainant could have been 14 years at the time of the commission of the offence. That makes no difference for Section 8(3) of the *Sexual Offences Act* under which the appellant was charged prohibits sexual engagement with a child between the age of twelve and fifteen years and it has been proved beyond reasonable doubt that the complainant fell in this category.

35. The medical report of PW3 and the evidence of PW2 Mercy Jerop corroborate the evidence of complainant on the issue of the penetration of the complainant's private parts. The evidence of the three witnesses point to the fact that the victim sustained injuries to her genital organ. From their testimony the injuries were fresh. It is immaterial that the victim was in her menses or that no sperm were seen. Lack of spermatozoa can be explained by the fact that PW2 intervened before the appellant could complete the act. Mensuration comes with the territory of a woman and it cannot be used to cover the defilement which was clearly proved.

36. The third element that must be proved in defilement is the identity of the perpetrator. On this, it was the evidence of the complainant and PW2 that the appellant was a neighbor to the complainant and that he had been known by the complainant prior to the incident. This was therefore a matter of recognition as opposed to identification. Further, the incident is said to have taken place at about 6.00pm and there was still light. In our view, the prevailing circumstances were sufficient for the complainant to positively recognize the appellant. Additionally, the appellant's medical examination report which was produced by PW3 corroborates the complainant's evidence that during the ordeal she bit the appellant's left finger. In his defence, the appellant only gave evidence denying his involvement. Nothing in the defence case attempted to absolve the appellant by creating a reasonable doubt on the prosecution's case. We are therefore satisfied that the case against the appellant was proved beyond reasonable doubt as is required by law.

37. The last issue we deal with is with regard to the sentence passed against the appellant. On this issue, the appellant raises two issues. Firstly, that the trial court did not comply with Section 216 of the *Criminal Procedure Code* as required under the Judiciary Sentencing Policy Guidelines. Section 216 mandates the court to call for evidence before passing sentence. The appellant argues that the trial court ought to have called for a pre-sentencing report prior to sentencing him. Secondly, the appellant contends that the trial court erred by imposing the minimum mandatory sentence.

38. Section 361(1) of the *Criminal Procedure Code* bars a second appeal on severity of sentence but an appeal is allowed where the sentence has been enhanced by the High Court or where the subordinate court had no power under Section 7 of the *Criminal Procedure Code* to pass that sentence. In our view, there is no evidence from the record that the first appellate court enhanced the appellant's sentence. Similarly, the sentence passed by the trial court was one which the court was legally empowered to pass. We add, if this will be of any comfort to the appellant, that he was deserving of the sentence imposed, whether it was the statutory minimum sentence or not, considering the violence he visited upon the complainant before accessing the legally forbidden fruit.

39. However, we note from the sentencing proceedings that the trial court failed to take into consideration the period spent by the appellant in lawful custody. This Court faced with a similar scenario in the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR rectified the sentence to run from the date when the appellant was first presented in court. We adopt this position as it is in line with Section 333(2) of the *Criminal Procedure Code* which requires that the period in which the accused was held in custody prior to the sentencing be taken into account. There is no evidence on record that the appellant was released on bail at any time during the trial. In the circumstances, we find that the learned Judge overlooked this fact and we are therefore called upon to correct this mistake.

40. The appellant's appeal against sentence therefore partially succeeds to the extent that the sentence of 20 years in prison shall run from October 14, 2009 when the appellant was first presented in court. The appeal against conviction is however without merit and is hereby dismissed.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JANUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR