Murai v Republic (Criminal Appeal 111 of 2014)
[2023] KECA 25 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 25 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 111 OF 2014

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JANUARY 26, 2023

BETWEEN

JOSEPH MBURU MURAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. A. Mabeya, J.) delivered and dated 29th November, 2013 in HC CR.A. No. 234 of 2014)

JUDGMENT

1. Joseph Mburu Murai, the appellant herein, is before us on a second appeal.

   The appellant was first charged and convicted with two counts of defilement under section 8(1) as read with 8(2) and section 8(1) as read with 8(3) of the *Sexual Offences Act*, respectively. The trial court sentenced the appellant to life imprisonment on the first count and 20 years on the second count. Being dissatisfied with the sentence and conviction, the appellant lodged an appeal to the High Court which appeal was dismissed and the findings of the trial court upheld. The appellant being aggrieved with the judgment of the High Court has come to this court on a second appeal.

2. The appellant raises six grounds of appeal in his memorandum of appeal which we summarize in the following manner; First, that the first appellate court erred in upholding the conviction and sentence against the appellant without observing that the charge sheet was defective. Second, that the two courts below erred in failing to observe that the medical examination was not compliant to section 36 (1) of the *Sexual Offences Act* and that the age of the complainants was not proved.

3. Third, that the two courts below erred when they failed to observe that exhibit, in respect to clothes mentioned, were not produced in court. Fourth, that the trial court failed to address itself to the issue as to why it took so long for the appellant to be arrested. Fifth, that his conviction was based on insufficient evidence and that the burden of proof was erroneously shifted to the appellant contrary to

section 107 and 109 of the *Evidence Act*. It is upon these grounds that the appellant asks this court to find in his favour, quash his conviction and set aside his sentence.

4. In his supplementary grounds of appeal, the appellant raises a further four grounds of appeal, namely, that his right to a fair trial was violated by the failure of the trial court to inform him of the right to recall witnesses after an amendment to the charge sheet. Second, that penetration was not proved. Third, that the prosecution's case was marred with contradictions and inconsistencies. And finally, that the sentence passed against the appellant is mandatory and excessive in nature.

5. As this is a second appeal, our mandate will therefore be limited to considering issues of law. This aspect of the scope of our mandate, as a second appellate court, is provided for under section 361(1)(a) and (b) of the *Criminal Procedure Code* 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."

6. In discharging our mandate as prescribed by section 361(1)(a) and (b) of the Criminal Procedure Code, we are pay homage to the dictum of this court in *Stephen M'riungi & 3 Others v Republic* [1983] eKLR, thus:

> "...that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law. We, here, have resisted the temptation."

7. In summary, the respondent's case against the appellant was made of five witnesses. The evidence was that on the material day, PW3 had sent PW1 and PW2 to their farm to collect some potatoes. While at the farm, PW1 and PW2 were accosted by the appellant and one Kimani who were only donning underpants while carrying arrows. PW1 and PW2 took off but the appellant and Kimani chased after them and caught up with them. The appellant then dragged them to his house where PW1 and PW2 were defiled by both the appellant and his counterpart, in shifts. PW1 and PW2 were later released from the house at around 9 pm when they returned home and informed PW3 of the incident.

8. Upon being informed of the incident, PW3 escorted the two minors to the hospital the next day where they were referred to Rift Valley Provincial Hospital where they were examined by PW4 who filled the P3 forms and Post Rape Care forms which were admitted as Pexhb. 1, 2, 3, and 4. PW4 confirmed that the two minors were defiled. Each of them had visible injuries, as indicated on the forms. PW5 was the investigating officer in the case and gave evidence as to the outcome of investigations leading to the arrest of the appellant.

9. The appellant was placed on his defence and he gave sworn evidence. In his defence, the appellant gave account of the occurrence of the dates between 5th to 13th December, 2009, when he was finally

arrested by an AP officer from Elementaita police post. He stated that on 5th December, 2009, the village chairman picked him from his house and escorted him to the complainant's house at about 5 am. He was later escorted to Tangi Tano AP Camp after being informed of the allegations against him. He was then released and later re-arrested on 13th December, 2009. On cross examination he stated that on the material day, he was in their farm which bordered the farm where the complainants were. He had a panga and he saw the complainants harvesting potatoes in the company of one Kinuthia. He denied taking the two complainants to his house on the material day and stated that PW2 always went to his house with his younger brother.

10. This appeal was canvassed by way of written submissions. In his submissions, it is the appellant's case that his right to fair trial was infringed upon by the trial court when it failed to inform him of his right to recall witnesses after the charge sheet was amended. The appellant also faults the first appellate court for reaching a conclusion that even though there was an error on the part of the trial court, it was not in any way prejudicial to the appellant. To this end, the appellant relies on the case of *Harrison Mirungi Njuguna v Republic*, Cr. Appeal No 90 of 2004 [UR] and submitted that such an error went to the root of the case. He also cited the case of *Elijah Njihia W Akianda v Republic* [2016] eKLR where the court underscored the duty of the trial court to protect the right of an accused person. Still on this ground of appeal, he submits that the record does not show what alterations were made to the amended charge sheet.

11. In his combined submissions on proof of penetration, contradictions and discrepancies, the appellant submits that the evidence of PW1 and PW2 was contradictory and did not conclusively prove that he committed the offence. He cites the case of *Julius Kioko Kivuva v Republic* [2015] eKLR to buttress his view that the evidence of the two complainants ought to have been specific on the act of penetration. The appellant also submits that the evidence of PW1 and PW2 is contradictory as to who was defiled by the appellant, thereby leaving a gap in the prosecution's case. In this regard, he referred the court to the case of *J.O.O v Republic* [2015] eKLR and *Gachango Ng'ang'a v Republic*, Cr. App. No 6 of 1996 and submitted that when such contradictions left gaps in the prosecution's case, the burden of proof could not be shifted to him in the circumstances. Finally, on the issue of sentence, the appellant submits that the sentences meted against him and which are provided for under section 8(2) and 8(3) of the *Sexual Offences Act* are mandatory and thereby denied the trial court an opportunity to exercise its discretion in sentencing. He therefore urges this court to intervene and interfere with the sentences as passed and to accord due consideration of the circumstances of this case as well as his mitigation.

12. Ms Monicah Mburu, prosecution counsel filed written submissions on behalf of the respondent. On the issue of the alleged defective charge sheet, counsel submitted that the charge sheet was not defective, as it met all the legal requirements for drafting a proper charge. She explained that the role of a charge sheet is merely to inform the accused about the particulars of the offence as opposed to detailing the evidence against an accused person. Counsel also submitted that section 36(1) of the *Sexual Offences Act* is not applicable to all cases. She argued that collecting samples in this case was not mandatory since the appellant was arrested one week after the commission of the alleged offences.

13. On the issue of the age of the complainants, counsel submits that the victims testified during voire dire that they were 14 and 10 years respectively. She also submits that the oral of evidence of the victims was corroborated by the P3 forms that were produced as Pexhb. 1 and 3 respectively. To buttress this point, she cites the case of *Julius Muthengi Mwangi v R* [2015] eKLR where the court held that oral testimony of the complainant supported by the P3 form was sufficient proof of age and that the failure to produce a birth certificate was not fatal provided there was other evidence. Counsel for the respondent finally submits that the burden of proof never shifted to the appellant and that the respondent discharged

its mandate in as far as the burden of proof is required. She urged this court to dismiss the appeal in its entirety.

14. We have reviewed the record of appeal and the submissions by both parties, and it is our view that there are three issues for our determination in this appeal. The first issue is whether the age of the victims was proved. The second issue is whether the failure by the trial court to comply with section 214(1)(ii) of the *Criminal Procedure Code* was prejudicial to the appellant. And third, whether the sentences were unlawful.

15. We set off by addressing the issue as to whether the complainants' ages were proved. When an accused person is on trial for an offence under the *Sexual Offences Act*, one of the ingredients which must be proved by the prosecution is the age of the complainant. The reason for that requirement stems from the fact that the sentences under the *Sexual Offences Act* are based on the age of the complainant. In this regard, we make reference to the decision of this Court in *Alfayo Gombe Okello v Republic* [2010] eKLR where the Court stated:

> "In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1)"

16. In addressing the issue of age, the learned Judge of the first appellate court stated as follows:

> "I note that the charge sheet disclosed the ages of the complainants to be 10 and 14 years, respectively. The complainants testified and were cross examined. Their ages were not questioned. PW4, who filled the P3 forms testified and indicated the ages of the complainants as being 10 and 14 years respectively. This was not disputed. In my view, the appellant cannot raise the issue at this stage having failed to challenge the age of the complainants when the medical reports tendered in evidence bore that fact. In my view, it is only if he challenged the same, that the issues of birth certificates or immunization cards or other medical records would have arisen. I find no basis on this ground."

17. In criminal trials, the prosecution is under obligation to prove all the elements of a charge regardless of whether the defendant chooses silence as defence or otherwise. The information and the evidence adduced by the prosecution should be able to dispel any reasonable doubt. It is not an obligation of the defendant to stimulate the prosecutorial aspects of the case against himself. This position was reiterated by this Court in *Evans Wamalwa Simiyu v Republic* [2016] eKLR thus:

> "Clearly the trial magistrate misdirected himself. In his defence the appellant had stated that he knew nothing about the offence. Therefore his defence was a total denial, and the burden remained entirely upon the prosecution to prove its case. The appellant was not under any obligation to challenge the prosecution evidence. He could as well have opted to say nothing in his defence and no adverse inference could be drawn from that silence ..."

18. Having pointed out that, we now move to assess whether the evidence of age was sufficient in this case. It is not in doubt that the only evidence as to the complainants' age is the complainants' own oral evidence and their respective P3 forms. The question then is whether the evidence adduced was sufficient to prove the age of the complainants beyond reasonable doubt.

19. In *Eliud Waweru Wambui v Republic* [2019] eKLR, this Court was faced with an almost identical scenario where the only evidence of age was a P3 form and the evidence of the complainant. The Court stated:

> " There was no age assessment as such that was done on the complainant, while the P3 Form that was produced indicated 17 years as the approximate age of the person examined, namely the complainant. The other evidence of age is that of the complainant herself which, other than being hearsay in character, is no more illuminating.... She stated that she was conceived in May 2009 which would place her age at 17 years and 6 months at the time but, one cannot speak competently on her date of birth as she cannot have witnessed it and the only document that was produced of the same was of no probative value, as earlier stated.
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> ... The totality of the evidence on age is that it did not possess the consistency and certainty that would have proved the exact date of the complainant's birth beyond reasonable doubt."

20. In *Richard Wahome Chege v Republic* [2014] eKLR, the Court of Appeal sitting at Nyeri held the view that:

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself."

21. From the two authorities cited above, it is clear that the age of a complainant can be proved either by oral evidence on through production of documentary evidence. However, the court ought to be on the lookout for consistency whenever the prosecution seeks to solely rely on oral evidence to ascertain the age of the complainant. The prosecution must avoid the laxity of omitting such documents that would ordinarily prove the age of a complainant. Sexual offences such as defilement are serious offences, with strict sentences. In our view, documents for proof of age such as birth certificates, health cards, and baptismal cards are now readily available and easy to acquire.

22. In this case however, the question is whether the evidence on record regarding the age of the complainants was consistent and corroborated. During the voir dire examinations of PW1, she testified that she was 3 years old while PW2 testified that she was 10 years old. The next evidence on the age of the complainants is that of PW4 who produced P3 forms for PW1 and PW2. On the Part A of the P3 forms, which is ordinarily filled in by the police officer who was referring the complainants to a medical practitioner, it is indicated in each form that the complainants were both 10 years.

23. PW4, in his oral evidence, stated that the estimated age of both complainants was 10 years old.

24. However, upon perusal of the P3 forms, we note that the age of PW2 was never indicated by the medical examiner. On the other hand, at page 34 of the record, the age of PW2 was estimated at 14 years old. On cross examination, the appellant also alluded to having known PW2 since 2005 and that she was 10 years old.

25. There seems to be some contradiction on the age of the complainants. To resolve this impasse, perhaps we need to consider various legal provisions.

Rule 4 of the Sexual Offences Rules of Court, 2014 provides that:

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

26. Section 2 of the *Sexual Offences Act* adopts the definition of a child as that which is provided for under the *Children Act*. Section 2 of the *Children Act*, 2022 provides that:

> " "child" means an individual who has not attained the age of eighteen years"

The Act further defined age as follows:

> " "age" means the actual chronological age of the child from conception or the child's apparent age as determined by a Medical Officer in any case where the actual age of the child is unascertainable."

27. Going by the objective of the *Children Act*, 2022, we deem it prudent to adopt the provision of the *Children Act* to compliment the provisions of the *Sexual Offences Act*. In the circumstances, that would imply that the apparent of age of PW2 was proved to be 14 years since this was the apparent age as determined by PW4 when examining the complainant. A similar position was held by this Court in *Evans Wamalwa Simiyu v Republic* [2016] eKLR, where this Court stated that:

> " Indeed section 2 of the *Children Act* defines "age" as meaning apparent age in cases where actual age is not known. Thus we are satisfied that there was ample evidence before the trial court, to show that the complainant was under 18 years of age and we have no hesitation in finding that for the purpose of establishing the offence of defilement the complainant was established to be a child.
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> ... We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the *Children's Act* "age" where actual age is not known means apparent age. This means that in the Doctor's opinion the apparent age of the complainant from his observation was 12 years. Thus although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

28. In that case, the Court of Appeal upheld the appellant's conviction based on the apparent age. Does that imply that proof of the age of the complainant was no longer an essential ingredient in cases of defilement?

29. Far from it: proof of age remains an integral part of the ingredients which ought to be proved by the prosecution. In the said case of *Evans Wamalwa Simiyu v Republic* [2016] eKLR, the court expressed itself thus:

> " This pronouncement was clarified by this Court in *Tumaini Maasai Mwanya v Republic*, Mombasa Criminal Appeal No 364 of 2010 (unreported) and in *Stephen Nguli Mulili v Republic* [2014] eKLR that;
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> 'Proof of age for purpose of establishing the offence of defilement which is committed when the victim is under the age of 18 years should not be confused with proof of age for purpose

of appropriate punishment for the offence in respect of victims of defilement of various statutory categories of age.'"

30. It is thus clear that when the complainant was under the age of 18, the person who causes his or her sexual organ to be inserted into the sexual organ of the complainant is deemed to have committed the offence of defilement.

31. We are satisfied that PW2 was a child, and that her apparent age was 14 years.

32. Meanwhile, as regards PW1 the evidence on record is obscure as to what the real age of the complainant (PW1) was. While the charge sheet and the police formed the opinion that the complainant was 10 years, the complainant herself stated she was 3 years and was in standard 4. It beats logic to imagine that a child of 3 years of age would be in standard 4.

33. The fact that the record of appeal at page 3 of 15 (typed proceedings) shows that PW1 testified that she was 3 years is indeed disturbing. If that was the case, we wonder why the same was never raised before the trial court or before the first appellate court. In our view, if the typed proceedings is an exact reflection of the primary record of the trial court, such a discrepancy is quite glaring. In the absence of any other concrete evidence, it was not possible to establish either the exact age or the apparent age of PW1. Of course, that does not imply that PW1 was not a child.

34. In our considered opinion, once it was clear that PW1 was a child, the offender could be convicted for the offence of defilement.

35. In dealing with the offence of defilement under the *Sexual Offences Act*, the importance of age is for determining the appropriate sentences. Section 8(1) of the *Sexual Offences Act* is definitive on what constitutes defilement, being that act of causing penetration with a child. The elements of the offence of defilement include the penetration of the sexual organ; identity of the perpetrator; and the age of the complainant. Where the age of a complainant is obscure, as is with the case of PW1, the court is left in the dark, when it comes to determining the appropriate sentence to hand down to the offender.

36. Accordingly, we find that there is no legal basis upon which we can uphold the sentence which was meted out in respect to count 1. We therefore, reluctantly allow the appeal in respect to count 1.

37. The second issue is whether the failure by the trial court to comply with section 214(1)(ii) of the Criminal Procedure Code was prejudicial to the appellant. The learned Judge in his judgment found that indeed there was a failure to comply with the laid procedure when the trial court failed to inform the appellant of his right to recall witnesses. However, the learned Judge proceeded to find that such a failure on the part of the trial court did not occasion any prejudice on the part of the appellant.

38. On this issue, we find, as did the first appellate court, that the alterations made in the amended charge sheet was mere realignment of words which did not materially alter the charge. There was no additional information in the charge that would make it prejudicial to the appellant, even though he was not informed of the right to recall witnesses. Our decision on this issue is informed by this Court's pronouncement in *Josphat Karanja Muna v Republic* [2009] eKLR where the Court when addressing a similar scenario stated:

> " On noncompliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant... That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient

into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."

39. Having said the foregoing, it is our finding that the appellant's conviction on the second count of defilement against SW (PW2) is supported by the evidence on record. We therefore find no reason to disturb the concurrent findings of the two courts below on conviction on the second count.

40. Based on the foregoing, the final orders of this Court are as follows:

    i. The appeal with respect to Count one is allowed. The conviction is quashed and the sentence is set aside;

    ii. The appeal with respect to Count two is without merit and is hereby dismissed.

41. It is so ordered.

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

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR