Kamau v Republic (Criminal Appeal 89"A" of 2019)
[2023] KECA 133 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 133 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 89"A" OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

STANLEY KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from Judgment of High Court at Eldoret (D.K. Kemei, J.) delivered on 22nd November, 2018 in HCCRA NO. 83 OF 2017)

JUDGMENT

1. This is a second appeal by Stanley Kamau, the appellant, against his conviction and sentence. The appellant was charged, tried, convicted and sentenced to 20 years imprisonment by H. Barasa, Principal Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* in Eldoret Chief Magistrate's Court Sexual Offence Case No 16 of 2017. The particulars of the offence were that on 23rd January, 2017 at [Particulars Withheld] area, Eldoret West District within Uasin Gishu County the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MN, a girl aged 16 years.

2. Arising from the same set of facts, appellant was faced with an alternative count of indecent act with a child contrary to Section 11 of the *Sexual Offences Act* namely that he caused his penis to come into contact with the vagina of MN.

3. Aggrieved by the judgment and conviction of the trial court, the appellant lodged an appeal before the High Court at Eldoret vide High Court Criminal Appeal No 83 of 2017. The appeal was heard by D.K. Kemei, J. who dismissed it for lack of merit.

4. The appellant is now before us faulting the judgment of the first appellate court on the grounds that the court erred in failing to independently evaluate the evidence on record and come up with its own conclusion; that the learned Judge erred in not finding that the circumstances of identification or

recognition of the appellant were inconclusive thereby not meeting the required legal standards of proof; and, that the High Court erred in failing to consider the appellant's defence.

5. In supplementary grounds of appeal filed together with his submissions on 20th January, 2022, the appellant raised further grounds that the first appellate court failed to observe that the charge sheet was defective; that the appellant was never granted a fair trial; that the standard of proof for criminal cases was never met by the evidence tendered by the prosecution; and, that the prosecution evidence was marred with contradictions.

6. This being a second appeal, the jurisdiction of this Court is restricted under Section 362(1) of the *Criminal Procedure Code* to considering matters of law only. In that regard, this Court has expressed itself on the confines within which it exercises this mandate in *Adan Muraguri Mungara v Republic* [2010] eKLR in the following terms:

> "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."

7. During the trial, the prosecution called to the stand four witnesses to advance their case against the appellant. PW1 GIB testified that on 23rd January, 2017, MN (the complainant who testified as PW2) had been sent home from school for lack of uniform. PW1 then took PW2 to West where they procured the uniforms. On their way back home, PW1 sent PW2 to go home and collect jerrycans which they were to use to take water home from the water point. PW2 took sometime before coming back. When she came back, she informed her that she had been defiled. According to PW1, PW2 was walking with her legs apart. PW2 then described the person who had defiled her and PW1 sent for the appellant. Upon arrival, PW2 confirmed that it was the appellant who defiled her. PW1 then made a report to Baharini Police Post and the complainant was referred to Moi Teaching and Referral Hospital in Eldoret where she was examined and treated.

8. On her part, the complainant testified that on that fateful day, she had been sent by PW1 to get jerrycans. Upon entering the house, the appellant knocked on their door and when she opened the door, the appellant asked whether her PW1 was around. PW2 informed him that PW1 was not around. The appellant then entered the house and grabbed her by the neck while demanding a kiss. Thereafter the appellant removed her clothes and proceeded to defile her. The complainant went and informed PW1 who then sent for the appellant. PW1 testified that she was treated at Moi Teaching and Referral Hospital.

9. PW3 Dr. Eunice Temet presented a P3 form filled by her colleague Dr. RoNo She testified that PW2 was 13 years old and on examination, she had a fresh hymenal tear at position 8.00 o'clock. She also had erythema (redness) on the labia minora. PW3 reached the conclusion that the complainant had been defiled.

10. PW4 Police Constable Priscah Chepkoech on her part narrated to the court the process of the investigations into the matter until the time when the appellant was charged in court.

11. In his defence, the appellant testified that on the material day he was at Tyre Mbili cultivating a piece of land given to him by his mother. On that day his mother had also instructed him to cultivate another piece of land that PW1 used to cultivate. He alleged that PW1 was miffed when he started cultivating the land she had been cultivating and threatened him with unspecified consequences. He testified that when he left the place, he was followed by people on a motorbike who escorted him to the police

station. PW1 later went to the police station and reported that he had defiled PW2. He was later charged in court.

12. In its judgment, the trial court noted that all the elements of the offence of defilement had been proved in the matter. The court also found that PW2 had actually made a succinct description of the appellant to PW1 and when the appellant was brought, PW2 recognized him as the person who had defiled her.

13. The first appellate court in its judgment warned itself of the need to independently assess the evidence on record and reach its own conclusion. The court proceeded to find that the appellant was positively identified based on the description given by the complainant to PW1 as well as the fact that PW2 later identified the appellant. The court ruled that the charge had been proved by the prosecution against the appellant. The first appellate court also noted that the appellant's alibi defence did not shake the probative value of the prosecution's case.

14. At the hearing of his appeal before this Court, the appellant appeared in person while the respondent was represented by Ms Chege. The appeal was majorly canvassed by way of written submissions. The appellant's submissions were filed on 28th January, 2022 while those of the respondent were filed on 16th February, 2022.

15. The appellant in his submissions focused on his supplementary grounds of appeal. In addressing the grounds that the charge sheet was defective and that he did not receive a fair trial, the appellant submitted that the charge was defective as it contained a different occurrence book (OB) number from that which was contained in the P3 form produced by PW3. It was the appellant's submission that such a defect occasioned a miscarriage of justice hence denying him a fair trial contrary to the guarantees in Articles 27, 28 and 50 of *the Constitution*. The appellant further submitted that the trial court shifted the burden of proof to him while also failing to give reasons for not considering his defence. To the appellant, such actions by the trial magistrate amounted to a miscarriage of justice to his detriment. The appellant placed reliance on the decision in *Ouma v Republic* [1988] eKLR in support of his submissions.

16. On his claim that the evidence adduced by the prosecution did not meet the standard of proof in criminal cases, it was the appellant's submission that all the ingredients of the offence of defilement were never proved beyond reasonable doubt. The appellant specifically submitted that the evidence as to the age of the complainant was not concrete because no documentary evidence was adduced to support the allegation that the complainant was 13 years of age. He also submitted that his identification and the aspect of penetration were not proved. On the issue of penetration, he submitted that there may have been other intervening circumstances that would have caused the injuries noted by the PW3 when she examined the complainant. The appellant urged this Court to consider the evidence of PW2 in light of the provisions of Sections 125, 163 and 165 of the *Evidence Act*.

17. Addressing his allegation that the testimony of the prosecution witnesses was contradictory, the appellant contended the evidence of PW1 and PW2 was contradictory to the extent that PW1 in her testimony stated that PW2 returned after a few hours while PW2 on her part testified that the incident took place in a span of about 10 minutes. The appellant further argued that the evidence of PW2 and PW3 was contradictory in terms of the injuries sustained by PW2. According to the appellant, if PW2 was indeed grabbed by the neck, then she should have had noticeable injuries on her neck. The appellant asserted that such contradictions go deep into the root of the prosecution's case and ought to have been taken into consideration by the courts below. In conclusion, the appellant urged this Court to allow his appeal, quash his conviction and set aside the sentence.

18. On her part, counsel for the respondent referred to *Chemangong v R.* [1984] KLR 611 and *Kaingo v R.* [1982] KLR 213 and argued that this Court can only disturb the concurrent decisions of the trial

court and the first appellate court if it finds that those conclusions are based on no evidence, or are based on a misapprehension of the evidence, or if they acted on the wrong principles. The respondent, however, remained adamant that none of the grounds allowing this Court to overturn the judgment of the first appellate court exist in this appeal.

19. In response to grounds 1 and 2 of the supplementary grounds of appeal, counsel for the respondent submitted that the charge sheet as drafted was not defective and that the appellant was accorded a fair trial in the circumstances. In support of this submission, the Court was referred to the cases of *Isaac Omambia v Republic* [1995] eKLR and *Yongo v Republic* [1983] eKLR as stating the factors to be taken into account in determining whether a charge sheet is defective and the recourse available where the charge sheet if found to be defective. The respondent further submitted that this Court should also consider the effect of a defect, if at all there was any. In that regard she urged the Court to adopt the reasoning in *Peter Sabem Leitu v Republic* Cr. Appeal No 482 of 2007 (UR). It was counsel's submission that the error alleged by the appellant was one which was curable pursuant to the provisions of Section 382 of the Criminal Procedure Code. This argument was supported by reference to the decision in *Njuguna v Republic* [2002] LLR No 3735 (CAK) where it was held that minor defects in a charge sheet are curable by Section 382 of the *Criminal Procedure Code*.

20. Turning to the ground of appeal that the prosecution case was not proved to the required standard, counsel for the respondent submitted that the evidence tendered by the prosecution proved beyond reasonable doubt the charge against the appellant. Counsel also submitted that the witnesses called were adequate to prove the case against the appellant and urged this Court to dismiss this ground of appeal.

21. On the claim of the appellant that the prosecution case was riddled with inconsistencies warranting the resolution of the appeal in his favour, the respondent contended that any inconsistencies were of a minor nature and did not go to the root of the prosecution case. The case of *Richard Munene v Republic* [2018] eKLR was cited for the holding that not all inconsistencies and contradictions are fatal to a case. In conclusion, counsel for the respondent urged this Court to dismiss the appeal and uphold the findings of the trial court and the first appellate court.

22. We have considered this appeal, the record of appeal, the submissions made by both parties, and the authorities cited. Bearing in mind the scope of our mandate, it is our view that this appeal turns on three main issues namely whether the charge sheet was defective; whether there were contradictions in the prosecution case which vitiated its evidentiary value; and, whether the learned judge properly evaluated the evidence and came to the correct conclusion in regard to proof of penetration, and the age of the complainant, and identity of the appellant.

23. Upon perusing the record of appeal, we have duly noted that the first appellate court and the trial court made similar findings of fact. In the circumstances, our role is therefore limited to assessing whether there is justification to interfere with the concurrent findings of fact made by the two courts, and whether the decision of the first appellate court should stand.

24. The first issue we address ourselves to is whether the charge sheet was defective. On this, it is the appellant's case that the charge sheet was defective on account of containing OB No 21/23/1/17 which did not match the one contained on the P3 form. The respondent on the other hand addressed this issue by pointing to the Court, which submission we fully agree with, that the OB No 21 if combined with the date indicated on the P3 form being 23/1/17 leads to the full reading of the recording in the occurrence book.

25. Section 134 of the *Criminal Procedure Code* provides what a charge should contain as follows:

> " 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."

26. A charge sheet can only be said to be fatally defective where the defect goes to the substance of the charge rendering a trial based on such a charge a miscarriage of justice. In that regard, this Court held at paragraph 15 of *Benard Ombuna v Republic* [2019] eKLR that:

> " Be that as it may, as this Court appreciated in *JMA v R* [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions....
>
> In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

27. Applying the test established above and upon perusing the charge sheet, it is our finding that there was no defect in the charge sheet contrary to the submission of the appellant. Indeed, the OB reference in the charge sheet being No 21/23/1/17 is one the same thing with Ref OB 21 of 23/01/2017 in the P3 form filled for the complainant and produced as an exhibit at the trial. Furthermore, even if there was a difference between the OB numbers in the charge sheet and the P3 form, this Court would still have been called upon to assess whether such mistake has visited any prejudice to the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial. Even on this, we do not see how a miscarriage of justice could have been visited upon the appellant by a clerical mistake, and more so when the issue was not raised at the trial so as to afford the prosecution a chance to rectify the error or explain it. This ground of appeal is therefore without merit.

28. The next issue for our determination regards the appellant's assertion that the evidence tendered by the prosecution witnesses was marred with contradictions. This Court has on previous occasions addressed itself to the issue of discrepancies in witness evidence. In *John Nyaga Njuki & 4 others v Republic* [2002] eKLR, this Court stated 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."

29. The same message was passed in *Philip Nzaka Watu v Republic* [2016] eKLR where this Court held that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt.
>
> However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. 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."

30. The appellant has taken issue with the evidence of PW1 as being contradictory to that of PW2 with regard to the timeframe within which the offence occurred. He also contends that the evidence of PW2 is not consistent to the injuries noted on the P3 form. Further, the appellant contends that he was arraigned in court on the same day that the complainant was taken for medical examination. In our view, the discrepancy with regard to the timeframe within which the defilement occurred cannot change the fact that defilement occurred. The complainant testified of being defiled for about ten minutes while PW1 stated that the complainant took long before coming back to the water point. There is no way that evidence can be said to be contradictory. Similarly, the absence or presence of bruises on the complainant's neck as a result of the forceful grab is not sufficient to counter the clear evidence that indeed there was penetration of the complainant's vagina. The complainant did not say that she sustained injuries when held by the neck and the medical officer was therefore not expected to testify about what was not observed during the medical examination. As concern the date of the prosecution of the appellant and the date of medical examination of the complainant, the record shows that while the appellant was charged on 24th January, 2017, the complainant was examined a day earlier on 23rd January, 2017. We are therefore of the view, and so we hold, that the alleged discrepancies or contradictions in the prosecution's case are not there and if there exist any inconsistencies then they are not of such a magnitude that they would make the conviction of the appellant unsafe.

31. The final issue we address is whether the ingredients of the charge of defilement were established. That calls upon us to assess whether the complainant was a minor, whether there was penetration of her genital organ, and if so, whether the appellant was established to be the person who penetrated her.

32. Concerning the age of the complainant, the learned Judge found that the same was proved by the age assessment report which was produced as an exhibit. Upon perusal of the record of appeal, we find that the report relied upon by the learned Judge to find that the complainant was aged 13 years is not an age assessment report but a radiology request form. In fact, despite the radiology request/ report form seeking an assessment of the age of the complainant, there is no evidence on the face of the document that her age was actually assessed and determined. It is our view that despite the form produced as Exhibit No 3 indicating that the complainant's date of birth was 2004, the same cannot

be relied upon as a documentary proof of the complainant's age. However, from the record, PW1 produced the complainant's baptismal card as Exhibit No 2 which indicated that the complainant was born on 20th January, 2004. We are therefore convinced that despite the error on the part of the learned Judge, evidence was adduced proving that the complainant was a minor aged 13 years at the time of the incident.

33. The next issue is whether there was penetration of the complainant's vagina. On this issue, we do agree with the findings of the two courts below that the evidence of the victim was corroborated by that of PW3 who conducted the medical examination on the complainant. We do not find misapprehension on fact by the two courts below on the issue of penetration of the complainant.

34. Another element of the offence is whether the appellant was identified as the person who penetrated the complainant. The first appellate court in finding that the appellant was sufficiently identified stated:

> " This corroborated MN's evidence that she had been defiled. MN. stated in her evidence that the appellant who was a casual labourer is the one who defiled her. It emerged from PWI and PW4's evidence that M.N. stated at the time of reporting the incident that it was the appellant who defiled her. MN's said evidence was firm and unshaken by the appellant's. The appellant's evidence did not cast any doubt to MN's. MN. in fact while reporting to PW1 gave a description of the appellant. Considering the time the incident took place, I find that the appellant was positively identified...
>
> As has been stated earlier in this judgment, although the appellant tried to give alibi evidence weighing the same with that of the prosecution, it did not shake the prosecution case's probative value."

35. Going through the record of appeal, we are convinced that the evidence relating to the identification of the appellant was cogent, credible and trustworthy. The appellant herein did not challenge that evidence of PW2 during trial. On dealing with identification of an accused person, this Court has previously held in *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR that:

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v Turnbull [1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

36. In the judgment by the first appellate court, the court addressed itself, and rightly so, to the issue that the complainant gave a description of the appellant to PW1 immediately she arrived at the water point. We do not find any misapprehension of fact or law by the two courts below in as far as identification of the appellant was concerned.

37. We note that the appellant in his submissions alluded to the failure by the prosecution to call the witness who the complainant first talked to at the scene of crime. On this, it is our view, that it is upon the prosecution to call the number of witnesses it deems adequate or sufficient to prove their case. This

position was reiterated by this Court in *Julius Kalewa Mutunga v Republic* [2006] eKLR where the court stated that:

> "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."

38. Applying the above principle to this case, we find that the evidence and witnesses relied upon by the prosecution was sufficient to prove the offence with which the appellant was charged. Additionally, the appellant has not tendered anything substantive as to make this Court impute oblique motive on the part of the prosecution. Similarly, the appellant has failed to raise any substantive ground or issue as to warrant our intervention by departing from the findings of fact by the two courts that have handled this matter prior to this appeal. Consequently, this appeal fails on this ground.

39. On the alleged harshness of the sentence, we note that the appellant was sentenced to imprisonment for 20 years. This sentence was confirmed by the first appellate court. Pursuant to Section 361(1)(a) & (b) of the *Criminal Procedure Code*, this Court, on a second appeal, can only entertain and determine an appeal against sentence on two occasions, namely, where the sentence has been enhanced by the High Court, and where the trial court had no power under Section 7 of the *Criminal Procedure Code* to pass that sentence. For the stated reason, the appellant's sentence shall remain undisturbed.

40. For the reasons stated in this judgment, we find that the conviction of the appellant is supported and is hereby upheld. The sentence imposed cannot be said to be harsh and is within the law. This appeal is therefore without merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 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.

DEPUTY REGISTRAR