Okumu v Republic (Criminal Appeal 178 of 2018)
[2023] KECA 353 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 353 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 178 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

ERICK OCHIENG OKUMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kitale (Hon. H.K. Chemitei, J.) delivered and dated 10th May, 2018 in HC CRA No. 17 of 2017)

JUDGMENT

1. Erick Ochieng Okumu (the appellant) was on July 4, 2016 arrested on a charge of defilement. He was later presented before the Chief Magistrate's Court at Kitale where he was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The charge was premised on particulars that on diverse dates between June 28, 2016 and July 4, 2016, at (name withheld) village within Trans Nzoia County, he had carnal knowledge of NWW, a child aged 16 years. He also faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*.

2. The prosecution's case against the appellant was constructed from the evidence of 3 witnesses. In summary, it was the prosecution's case that on June 28, 2016, NWW, who was aged 16 years was sent by her mother JN (PW2) to get charcoal. On her way, she met the appellant who asked her for sex. She declined but the appellant persisted and she let him succeed in having sex with her. NWW then went home but did not tell anyone of the ordeal. Fast forward to July 4, 2016, NWW was on her way from school when she met the appellant. The appellant then pushed her into a nearby bush and had sex with her. He thereafter gave her 50 shillings. On reaching home, NWW found her mother who questioned her as to why she was late. At that point, NWW told her that she had been defiled by the appellant on her way home. The matter was reported at Kitale Police Station where NWW was issued with a P3

form which was filled at Kitale District Hospital. PC Esther Nolari (PW3) who was the investigating officer in the matter produced a P3 form, NWW's age assessment report and Kshs 50 as exhibits.

3. The appellant's defence was made of his own unsworn evidence.

He stated that he was 21 years old. He denied knowing the complainant. His evidence was that on July 4, 2016, he was at work as a welder until the close of business after which he headed home. At about 8.00pm, his boss called him asking of his whereabouts to which he informed him that he was home. He then went back to work as instructed where he met his employer. He was interrogated regarding his alleged defilement of the complainant after which his employer escorted him, the complainant and PW2 to Kitale District Hospital where he was arrested.

4. The trial court in its judgment noted that the age of the complainant was proved as per the age assessment report. On proof of penetration, the court held that the conclusions reached after the medical examination corroborated the evidence of NWW that she had been defiled. The court also observed that NWW was honest. With regard to the appellant's identity, the court found that the appellant was known to the complainant to an extent of referring to what he did for a living. The court also pointed out that the appellant in turn knew PW2 including where she worked. The court found that the elements of charge of defilement had been proved and proceeded to convict the appellant and sentenced him to 15 years.

5. Dissatisfied with the judgment of the trial court, the appellant lodged an appeal in the High Court challenging both the conviction and sentence. In the judgment delivered on May 10, 2018, HK Chemitei, J concurred with the trial court that the offence had been proved and dismissed the appeal. The learned Judge noted that even though the P3 form and the age assessment report should ordinarily be produced by a medical practitioner, the appellant did not object to their production by the investigating officer. The learned Judge further noted that there was no prejudice suffered by the appellant as a result of the production of those documents by PW3.

6. The appellant appeared and prosecuted his appeal in person in this court. He sought to challenge the judgment of the High Court on various grounds which we condense as follows. To the appellant, the trial court erred by failing to adhere to the provisions of sections 77(1) and 107(1) of the *Evidence Act*. He also asserts that his evidence was not taken into consideration; that section 169 of the *Criminal Procedure Code* was not complied with; that the offence was not proved to the required standard; and, that the sentence passed by the trial court was arbitrary and unconstitutional.

7. This matter came before us in plenary on December 6, 2022.

Both the appellant and the respondent sought to rely on their written submissions which we proceed to summarize hereinafter. The appellant's submissions addressed five thematic areas. Firstly, the appellant submits that the first appellate court did not deliver on its mandate of scrutinizing the evidence and coming to an independent conclusion. To buttress this view, he argues that the court failed to acknowledge that the complainant was coerced into naming him as the perpetrator of the offence.

In his view, such coercion depreciated the probative value of the complainant's evidence. It is also the appellant's view that the evidence of PW1 and PW2 was contradictory as to whether the defilement occurred while the complainant was from school or going to the market. To this end, he submits that the evidence on record was contradictory and insufficient to support the charge.

8. Secondly, the appellant submits that the production of the medical documents by the investigation officer offended the provisions of sections 77(1) & (2) and 33 of the *Evidence Act*. In his view, the documents were to be produced by the author. He also contends that the P3 form was inconclusive as

to whether defilement actually occurred. Still on this issue, he submits that once the P3 form and the age assessment report are excluded, the evidence so remaining on record cannot sustain the conviction.

9. The third limb of the appellant's submission is on identification where he argues that the evidence on his identity was unsubstantiated. He submits that the circumstances of his identification were not clear urging us to find the evidence of his identification as the perpetrator is not beyond reasonable doubt.

10. The fourth limb of the appellant's submissions is that section 169 of the *Criminal Procedure Code* was not complied with.

    The appellant contends that the trial court and the first appellate court failed to warn themselves of the dangers of relying on the evidence of a single witness. The appellant also contends that the burden of proving his innocence was shifted to him without the prosecution discharging its burden of proof thereby breaching the provisions of section 107(1) of the *Evidence Act*. He further contends that the evidence tendered by the prosecution did not establish his culpability beyond reasonable doubt as is required in law.

11. The fifth and final limb of the appellant's submissions is that the sentence passed was excessive in nature. The appellant argues that sentencing is a matter of discretion by the trial court by referring the court to the decision in *S v Scott* [2008] (1) SACR 223 (SCA). He states that the sentence of 15 years was passed in disregard of his mitigation and was therefore not justiciable in the circumstances. In support of his prayer for a lighter sentence, the appellant mitigates that he suffers from asthma, and chronic chest complications and that his health has deteriorated during his time in custody. He also reiterates that he was a first offender, a widower and that his children were being taken care of by a good samaritan.

12. In rebuttal, the respondent maintains that there was no enhancement of the appellant's sentence by the first appellate court and therefore the sentence imposed on the appellant is not within the remit of this court. As to whether the sentence was merited, counsel submits it was the statutory sentence since the age of the complainant was proved to be 16 years through the oral evidence of PW1 and the age assessment report. Counsel contends that the appellant was not opposed to the production of and admission of that report as exhibit and therefore seeking to oppose it now on appeal is an afterthought. Counsel insists that the sentence passed is legal as it falls within the sentence provided under section 8(4) of the *Sexual Offences Act* for defiling a 16 years old minor.

13. The respondent stresses that the prosecution's case was proved beyond reasonable doubt and that the evidence on record was sufficient to sustain the conviction. Counsel draws the attention of this court to the fact that the first appellate court found that all the ingredients of the charge of defilement were established and that the appellant was not prejudiced by the fact that the medical report was produced by the investigating officer. Counsel relies on the case of *Charles Waukau Karani vs Republic*, Criminal Appeal No 72 of 2013 to reiterate that the ingredients of defilement are the age of the complainant, penetration and the identity of the perpetrator. According to counsel, the age of the complainant was proved by both oral evidence and the age assessment report; penetration was proved both by oral evidence of the complainant and the P3 form; and, the identity of the appellant was not in doubt as he was known by the complainant.

14. On the claim by the appellant that the production of the age assessment report and the P3 form was prejudicial to him, counsel submits that PW3 produced the P3 form and the age assessment report pursuant to the appellant's consent and that the appellant did not raise any objection. The respondent reiterates that the evidence of PW3 was not adversely inappropriate and any objection on appeal constitutes an afterthought. In the end, we are urged to dismiss this appeal in its entirety.

15. This is a second appeal and our scope of work is limited to addressing matters of law. At this level of the appellate ladder, matters of fact are deemed to have already been ascertained by the two courts below. Our intervention can only be invoked if in arriving at those factual conclusions, the two courts below misapprehended themselves in the application of the relevant legal principles or that the conclusions reached are not backed by the evidence on record.

16. We have carefully reviewed the record of appeal, the memorandum of appeal as well as the rival submissions of the parties. In our view, three issues are for determination, namely, whether the P3 form and age assessment report were properly admitted as exhibits; whether the offence was proved; and, whether the appellant has met the limited conditions that allow us to interfere with the sentence.

17. The appellant challenges his conviction on grounds that the P3 form and the age assessment report were produced by PW3 who was not qualified to produce them. In his view, this process violated the provisions of sections 33 and 77(1) and (2) and (3) of the *Evidence Act*. The respondent on the other hand holds the view that the production of the documents by PW3 was not prejudicial to the appellant because he did not object to PW3 producing the said documents. Section 77 of the *Evidence Act* provides as follows:

> "(1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof."

18. In our view, section 77 cannot be read in isolation because it is more concerned with the authenticity of a document as opposed to the procedure of its production in court. The section in itself gives the court leeway to presume that documents are genuine and admit the same without requiring the appearance of the maker. But what is the probative value of such evidence in court? In our view, a document produced in the absence of its maker is of a lower probative value as compared to one which is produced by the author. The reason is simple, where the maker of the document attends the trial, the document and its contents and conclusions will be subjected to cross-examination hence testing the veracity thereof.

19. What then should be the right approach? It is our view that the production of expert evidence is regulated by section 48 of the *Evidence Act*. However, we acknowledge that the provisions of section 33 of the *Evidence Act* permit the production of documents, including expert evidence, if the makers cannot be found or their attendance procured without unreasonable delay or expense. In such an instance, the party desirous of relying on that evidence, the prosecution or the defence as the case may be, is required to procure another expert witness from the same field and who is familiar with the handwriting of the author of the document to tender the evidence. In our view, therefore, precedent to the operation of section 77 of the *Evidence Act* is a condition set under section 33 of the *Evidence Act*. This ensures that basis is laid for the production of the document under section 33 of the *Evidence Act*; thereafter, the court will still be at liberty to assess the genuineness of the document under section 77(2) of the *Evidence Act*. This procedure also accords the accused person an opportunity to test the

veracity of the document and its contents as the alternate witness producing it, is an expert in the particular field.

20. Our view is not an outlier as a similar view was expressed in *Chaol Rotil Angela vs Republic* [2001] eKLR where this court sounded a warning on an open-ended use of Sections 33 and 77 of the *Evidence Act* as follows:

> " We must however, sound a word of caution against the use of expert reports and opinions either under section 33 or under section 77 of the *Evidence Act* without procuring the attendance of the experts concerned to give evidence and to be cross-examined on their reports and opinions. It is desirable that an expert should attend court and explain to the court his expert opinion and the grounds upon which that opinion is based. This is more particularly so in a case, such as here, of a trial with aid of assessors who might have difficulty in understanding the expert opinion or report without full explanation by the expert. In short therefore, the two sections of the *Evidence Act* must be used only in the most exceptional circumstances and where the best possible interests of justice permit their use."

21. We appreciate that there are open and shut cases where the eye-witness testimony is so overwhelming that the non- production of medical evidence will not provide room for an acquittal. That is why this court in *Evans Wamalwa Simiyu vs Republic* [2016] eKLR stated that:

> " [19] Another issue for consideration is the contention by the appellant that the trial Court failed to order a DNA test on him contrary to section 36 of the *Sexual Offences Act* which evidence could have exonerated him. In *AML v Republic* 2012 eKLR (Mombasa), this Court upheld the view that:
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> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."
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> [20] This was further affirmed in *Kassim Ali v Republic* Cr Appeal No 84 of 2005 (Mombasa)(unreported) where this Court stated that:
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> "The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

22. Back to the present case, the P3 form and the age assessment report were produced by PW3 who was the investigating officer. From the proceedings of October 25, 2016 in the trial court, an adjournment was occasioned by the prosecution for the reason that the doctor was on leave. On November 29, 2016 and January 3, 2017, the prosecution again occasioned adjournments because of the unavailability of the police file. On January 3, 2017, the trial court ordered summons to issue to the remaining witnesses including the clinical officer to attend court at the next hearing. On January 20, 2017 when the matter next came up for hearing, the investigating officer took the stand testifying as PW3 and in the process produced the P3 form and the age assessment report.

23. From the chain of events as highlighted above, we do not find any evidence of compliance with section 33 of the *Evidence Act*. The rules of procedure including those guiding the taking of evidence are there to aid in the delivery of justice. The argument by the respondent that the exhibits were produced with the consent of the appellant cannot hold for two reasons. First, no basis was laid for the production of the documents by PW3 as is required under section 33 of the *Evidence Act*; second, the appellant was acting in person and did not have the benefit

of understanding the legal nuggets of the rules of evidence. The trial court, in the least, ought to have taken judicial notice of this fact and ensured the right procedure was adopted. In our view, PW3 who was trained as a police officer was not in a position to answer any questions that may have been put to her by the appellant. Looked at from the constitutional perspective, the appellant's right to a fair trial was violated as he was denied right guaranteed to every accused person by article 50(2)(k) of the *Constitution* to adduce and challenge evidence.

24. Faced with a similar scenario, this court in *Sibo Makovo v Republic* [1997] eKLR stated as follows:

> "The P3 form which was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act* (cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is not taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."

25. In the circumstances, we reach the conclusion that the P3 form and age assessment report were irregularly produced. Further, that the procedure adopted for the production of the exhibits was prejudicial to the appellant. Therefore, the exhibits had no probative value in the case.

26. What remains for us to determine is whether in the absence of the age assessment report and the P3 form, the evidence remaining on record proves the offence beyond reasonable doubt.

    Having discarded the documentary exhibits, the only evidence that remains in support of the commission of the offence is that of the complainant. Even though for sexual offences, the law permits a conviction based on the evidence of the complainant alone, the veracity of the testimony of the complainant is often affirmed by corroborative evidence. In this case, the P3 form and the age assessment report would have corroborated the evidence of PW1. Further, the evidence regarding the age of the complainant ought to be corroborated as it is not part of the evidence intending to prove a fact that may have been done in secrecy as is the case with the fact of penetration. The standalone evidence of the complainant when viewed against the defence of the appellant leaves doubt as to whether the appellant did indeed have sexual contact with the complainant. The appellant's submission that the complainant's evidence has no probative value because the report of the alleged defilement was made at the pain of corporal punishment by her mother cannot be ignored. In light of the foregoing, we reach one inevitable conclusion, that the evidence on record cannot sustain the conviction of the appellant.

27. Since the appeal against conviction succeeds, it follows that the sentence cannot stand. The appropriate conclusion therefore is to allow the appeal by quashing the conviction and setting aside the sentence. The appellant is hereby set at liberty forthwith unless otherwise held on a lawful warrant. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR