Wanjala v Republic (Criminal Appeal 155 of 2018) [2023] KECA 342 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KECA 342 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 155 OF 2018

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 24, 2023

BETWEEN

BONIFACE WAFULA WANJALA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court at Kitale (Chemitei J.) dated 12th April, 2018 In Criminal Appeal No. 117 of 2012)

JUDGMENT

1. This is the appellant Boniface Wafula Wanjala's second attempt to overturn the judgment of the then resident magistrate S. K. Ngetich. The matter commenced in the Magistrate's Court where the appellant was charged with defilement of a child contrary to section 8 (1) as read with section 8 (2) of *Sexual Offences Act*. The particulars stated that on diverse dates between July 30, 2009 and August 6, 2009 in Trans-Nzoia West District within the Rift Valley Province, by the use of his genital organ namely penis, the appellant unlawfully and intentionally caused penetration into the genital organ namely vagina of LN a girl aged 11 years.

2. A synopsis of the case as captured from the six witnesses presented by the prosecution to prove its case was that the complainant, LN (PW1), was coming from school on the evening of May 6, 2009 when she met the appellant on the road. Without further ado, the appellant grabbed her and took her to his house where he removed her uniform and under- pant and defiled her on the bed. He then let her go with a warning not to tell anyone about it.

3. PW3, FW the complainant's mother, who was at home on the material day, noticed the soiled state of her daughter's uniform when she came home from school and persuaded PW1 to tell her what was wrong. Subsequently, PW1 finally divulged that the appellant had had sex with her in exchange of money. PW3 examined the complainant and observed that her under garment was torn and there was

blood on her vagina. She reported the matter to PW2, GMW the village elder. The following day she accompanied PW2 to go and arrest the appellant and also took PW1 to Kitale District Hospital.

4. Upon examining the complainant at the hospital, PW4 Linus Likare the Clinical Officer found that her hymen was freshly torn and the vaginal swab showed presence of spermatozoa. He arrived at the conclusion that the girl had been defiled.

5. According to the testimony of PW5 PC William Andayi the investigating officer, the appellant defiled the complainant more than once on diverse dates from August 6, 2009 to August 30, 2009, luring her with money. He referred both the appellant and the complainant for age assessment at Kitale District Hospital. PW6 Doctor Ken Ndege who did the age assessments on both of them on the August 10, 2009, assessed the appellant to be about 19 years old while the complainant was 11 years old.

6. When the appellant was put on his defence, he simply denied the charges in his sworn testimony and also denied knowing the complainant whom he averred he had seen for the first time in court.

7. Upon considering the evidence before it, the court found that there was ample evidence that the appellant defiled the complainant and that the prosecution had proved his guilt beyond reasonable doubt. The appellant was convicted as charged. In mitigation the appellant stated that he is an orphan fending for five children who rely on him and he thus prayed for leniency. The court considered his mitigation, but observed that the offence is serious and it attracts a minimum penalty of 20 years imprisonment, to which the court went ahead and sentenced him.

8. The appellant was dissatisfied with the judgment of the court and filed an appeal in the High Court advancing grounds that he should have been taken to hospital for a medical test, that there were contradictions on the part of the witnesses and that his defence was not considered.

9. The appeal was canvassed by way of written submissions and upon considering the evidence before him, Chemitei J did not find merit in the appeal. He thus dismissed it in a decision dated April 12, 2018.

10. Unbowed, the appellant filed the second appeal now before us on the following grounds: -

    a. That the Judge failed to carry out the duty of the first appellate court.

    b. That the Judge failed to take cognizance of the pre- charge violation of personal liberty of the appellant contrary to his right under article 49 (1) of *the Constitution* to be brought before court as soon as reasonably, practicable and not later than 24 hours after being arrested.

    c. That section 200(3) of the *Criminal Procedure Code* was not complied with.

    d. That the trial Magistrate and the Judge erred in law by not considering the appellant's alibi defence.

11. The appeal was disposed of by way of written submissions. The appellant who was in person filed submissions dated March 29, 2022, while Senior Assistant Director of Public Prosecution, Ms. Kiptoo appeared for the State and filed submissions dated November 23, 2022.

12. The appellant submits that this matter proceeded before five different magistrates and that S.K. Ngetich did not comply with section 200(3) of the *Criminal Procedure Code*. That the court did not inform the appellant of his right to recall the victim who had already testified before the previous magistrate for purposes of being re-heard. That for that reason 'the conviction is vitiated'.

13. The appellant contends that the High Court failed in its duty as a first appellate court. He asserts that the victim was incredible as the material contradictions which exist on record demonstrate and that the

identity of the appellant as the perpetrator is in doubt since the conditions for favourable identification were not available.

14. The appellant further argues that the court did not comply with article 50 (2) (g) of *the Constitution*, having failed to inform him of the right to be represented by an advocate and to be considered for assignment of one at the expense of the State. This is because the matter was complex and the gravity of the prescribed sentence being imprisonment for life.

15. Lastly, on sentence, he urges that a minimum sentence of 20 years was imposed upon him based on the provisions of section 8(2) of the *Sexual Offences Act*. That the Judge did not address the complaint on the sentence vis-à-vis the law in force post 2010 Constitution.

16. In opposition, Ms. Kiptoo submits that the courts below evaluated and re-evaluated the evidence on record and found the prosecution case to be truthful and rejected the appellant's defence. That the courts gave well-founded reasons both on the facts and the law. Counsel asserts that the victim identified the appellant as the one who defiled her and that her evidence was that of recognition as the two met during day time as the complainant was coming from school at around 6.00 p.m.

17. Ms. Kiptoo argued that the violation of the appellant's right to be produced in court within 24 hours did not automatically result in a right to an acquittal from the offence he faced. Instead, it would give rise to a claim for damages, and the appellant was at liberty to claim for the violation of his Constitutional rights. To buttress this fact, she relied on the decision of *Julius Kamau Mbugua vs Republic* (2010) eKLR. Nevertheless, she argues that the delay in arraignment in court was not unreasonable or fatal to the prosecution's case.

18. In regard to section 200(3) of the *Criminal Procedure Code*, the respondent contends that from the record, on the July 24, 2017 the said section was explained to the appellant by Hon. Ngetich and the appellant responded "I do not wish to recall my witnesses".

19. It is also asserted that the appellant's defence was considered by the courts below, and they found that it did not shake the prosecution's case.

20. That being a summary of the case before us, we have considered the record of appeal, the grounds relied on by the appellant, the rival submissions of the parties and the law. Bearing in mind that this is a second appeal, our duty is as was stated by this court in *David Njoroge Macharia vs. Republic* [2011] eKLR as follows;

> " That being so only matters of law for consideration -see section 361 of *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."

21. The appellant states that his rights under article 49 (1) and Article 50 (2) (g) and (h) of *the Constitution* were violated, and that section 200 (3) of the *Criminal Procedure Code* was not complied with. We note that the appellant is raising these issues for the first time in this second appeal. These were not issues that were placed before the High Court for consideration and decision thereon. We are guided by this court's decision in *John Kariuki Gikonyo v Republic* [2019] eKLR where it was held that:

> "(17) ....We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to

the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:

"…. the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal"

22. Be that as it may, since the appellant's complaint is that both *the Constitution* and the *Criminal Procedure Code* were violated we will nonetheless consider them.

23. On the argument that the appellant's right to be produced in court within 24 hours was violated and therefore the trial was vitiated, there is a litany of decisions in which this court has determined that this does not automatically avail an accused person a right to an acquittal from the offence he faced. It would Instead, give rise to a claim for damages, and the appellant - if so minded, is at liberty to bring a claim for the violation of his Constitutional rights.

24. Article 49 (1) (f) of *the Constitution* provides as follows:

(1) An arrested person has the right –

f. to be brought before a court as soon as reasonably possible, but not later than-

i. twenty-four hours after being arrested; or

ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

The Court of Appeal in *Fappyton Mutuku Ngui v Republic* [2014] eKLR pronounced itself thus;

"The correct position in law was set out in Julius Kamau Mbugua v Republic (2010) eKLR where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights."

In *Hussein Khalid and 16 others v Attorney General & 2 others* [2019] eKLR the Supreme Court went on to lay the matter to rest when it held as follows;

"(122) Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant

the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 where it was stated that:

> "The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence."

(123) Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial court. The criminal proceedings pending before the trial court should be allowed to continue expeditiously given the amount of time it has taken."

25. On the question whether the trial court complied with section 200(3) of the *Criminal Procedure Code*, we have considered the record of appeal and it reflects that on the July 24, 2017 the said section was explained to the appellant by Hon. Ngetich. The appellant expressed his wish to continue with the case without recalling the witnesses. In his own words he responded thus: "I do not wish to recall my witnesses". We therefore see no reason to consider it further.

26. Consequently, the only issues falling for our determination are:

    a. Whether the High Court Judge played his role as the first appellate court.

    b. Whether the two courts below considered the defence raised by the appellant; and

    c. Whether the learned Judge addressed the complaint of sentence vis-à-vis the law in force post 2010 Constitution.

27. The appellant argues that the Judge failed in his duty as a first appellate court to re-evaluate the evidence on record. On the other hand, the respondent argued that the Judge re- evaluated the evidence on record and found the prosecution case to be truthful and rejected the appellant's defence.

28. The duty of the first appellate court as was enunciated in *Okeno v Republic* (1972) EA is as follows:

> " An appellate on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v r (1957) EA p.336) and to the appellate court's own decision on the evidence and draw its own conclusion. (Shantilal M. Ruwala v R (1957) E.A p.570). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday (1958) EA p.424"

29. A glance at the impugned judgment shows that the learned Judge pronounced himself thus on the identification of the appellant at paragraph 15:

> " As to whether the complainant identified the appellant clearly, I find that the incident took place at around 6pm when she came from school. The complainant was taken to the house of the appellant, defiled and let go. She went home and found her mother and her friend. All the while it was still daytime. I do not think that there was a case of mistaken identity. In any event the complainant seemed not to have had any difficulty in identifying the appellant and telling her mother who had defiled her."

From the foregoing it is evident that the Judge re-examined and re-evaluated the evidence on record and came to his own conclusion that the evidence of identification was sufficient. Therefore, the appeal on this ground fails.

30. The appellant also argued that his defence was not considered, while the respondent contended that the appellant's defence was considered by the courts below and was found to be a sham.

31. On this the trial court held as follows:

> " I consider the defence evidence given on the other hand where the accused casually stated that he did not commit the offence and that he saw the complainant for the first time in court. I find the defence evidence to be incredible as the consistency of the complainant's evidence and her report to her mother and the village elder and their evidence in court leaves no doubt the complainant knew what she was talking about"

The learned Judge also found, upon re-evaluation of the evidence that:

> " Although the appellant complained that his defence was not considered, I do not find the same to have shaken the prosecution case. He did not attempt to wriggle himself out of the allegations. He failed to explain his whereabouts on the material day. In short the defence was simply a sham"

32. From the above it is clear that indeed the appellant's defence was considered before both courts rejected it. - The ground that the appellant has introduced in the second appeal that his alibi defence was not considered is alien to the proceedings. The appellant did not raise an alibi defence nor did he raise such an issue in the first appeal. In that regard, we find that appeal on this ground fails too.

33. In the end we are satisfied that both courts below assessed the evidence that was presented properly and arrived at the right conclusion in convicting the appellant and upholding his conviction respectively

34. Turning to the sentence, the appellant argues that the Judge did not address the complaint of sentence vis-à-vis the law in force post 2010 Constitution. There was no response to this by the respondent. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The said section provides as follows:

> " 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 2. A person who commits an offence of defilement with a child eleven years or less upon conviction be sentenced to imprisonment for life"

35. When sentencing the appellant, the learned magistrate held as follows:

> " I consider that the accused is a first offender and that he is remorseful. I consider on the other hand that the accused's act may have a long-term psychological effect on the victim. The offence is serious and attracts a minimum penalty of 20 years imprisonment. With all those considerations I now sentence the accused person to twenty (20) years imprisonment"

36. The learned Judge did not look at the sentence and we note that it was not one of the grounds of appeal before him. It is clear that the Learned Magistrate made a mistake when he was sentencing the appellant considering that the child was aged eleven years and the statutory sentence for the defilement of a child below eleven years is life imprisonment. We will however not enhance it.

37. This Court in *J.J.W. v Republic* (2013) eKLR held as follows on enhancement of a sentence:

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

38. Since therefore, the appellant was not warned at the start of the hearing of his appeal that his sentence may be enhanced it shall be left to lie. We will say nothing more on this point but dismiss this ground of appeal as well.

39. Ultimately, our conclusion is that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED IN ELDORET THIS 24TH 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