



REPUBLIC OF KENYA



KENYA LAW
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**Ngetich v Republic (Criminal Appeal 43 'A' of 2018)
[2023] KECA 451 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KECA 451 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 43 'A' OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
APRIL 14, 2023**

BETWEEN

KENNEDY NGETICH ALIAS TIONDO BENARD KIPRONO APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.)
dated 14th May 2018 and delivered on 24th May 2018 in HC CR Appeal No. 2 of 2017)*

JUDGMENT

1. Kennedy Ngetich alias Tiondo Bernard Kiprono (the appellant) is now in the second tier of our appellate hierarchy. His initial appearance in the court system in regard to this matter was before the Chief Magistrate's Court at Nakuru where he was charged and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and subsequently sentenced to life imprisonment in Criminal Case No. 180 of 2012 by J. N. Nthuku, the then Senior Resident Magistrate. The particulars of the offence were to the effect that on 3rd August 2012 at [Particulars Withheld] Farm, Njoro District within the Rift Valley Province the appellant intentionally and unlawfully inserted his penis into the anus of EK a child aged six years.
2. The evidence tendered against the appellant was that on 23rd August 2012 he escorted EK (PW1) and T to sleep at the house of MC (PW2). T was PW2's son and EK was the son of SC (PW3). The appellant then left the two minors in the house and proceeded to watch a football match at the nearby shopping centre. After sometime, the minors heard a knock on the door. T put on a lamp and the assailant, who was already inside the house, put it off. The assailant then told the minors not scream or he would strangle them. The assailant then proceeded to sodomize EK. Shortly after the assailant had left, the appellant arrived and went to sleep on the bed where he ordinarily slept with PW2. Upon returning late from her night duty, PW2 found the appellant asleep where upon a disagreement ensued and she went to sleep at a neighbour's house. The next day, EK informed PW3 of his ordeal. He was examined by



- PW2 who confirmed his allegation that he had been defiled. PW3 then escorted EK to the police station and later to the hospital. Jacob Chelimo (PW5) attended to EK at Njoro Health Centre and confirmed that he was indeed sodomized. The appellant was later arrested and charged as already particularized.
3. The appellant being dissatisfied with the findings of the trial court lodged an appeal to the High Court. The first appellate court in a judgment dated 14th May 2018 concurred with the trial court thereby confirming the conviction and sentence of the appellant. Aggrieved with the judgment of the first appellate court, he is now before us on a second appeal raising various grounds as can be gleaned from his memorandum of appeal and the supplementary memorandum of appeal. The appellant contends that his identity as the assailant was not proved; that there was no direct or circumstantial evidence linking him to the crime other than mere suspicion; that both the trial court and the first appellate court engaged in an improper and partial analysis of the evidence hence arriving at a wrong conclusion; that he was prejudiced by non-compliance with sections 210 and 211 of the *Criminal Procedure Code* which prejudice is not curable under section 382 of the Criminal Penal Code; that the investigations were impartial and skewed against him; that the prosecution did not prove his culpability beyond reasonable doubt as the evidence was contradictory; and, that the two courts below failed to consider his defence and improperly dismissed it.
 4. This matter was listed for mention in Court on 14th December 2022 for directions on a notice of withdrawal of the appeal filed by the appellant. However, the parties informed the Court that the notice was abandoned when the file was placed before the Deputy Registrar for case management. Mr Maragia for the appellant and Ms Mburu for the respondent agreed to have the matter heard on that day since all parties had filed their respective written submissions and we acceded to their request.
 5. The submissions for the appellant were structured around five thematic areas. On whether his identity as the perpetrator was proved, it was submitted that the two courts below failed to appreciate that the circumstances surrounding the commission of the offence did not offer a favourable environment for the identification of the assailant of the complainant. It was also submitted that PW1's testimony was that he was unable to identify the assailant and that the voice was different from that of the appellant. Further, that PW1 attested that "T" (with whom he was with in the house at the time) told him that the voice was not that of the appellant. It is argued that the appellant was known to the complainant and therefore the complainant could have identified his voice but he did not. Additionally, the appellant contended that the circumstances of identification did not favour a positive identification of the appellant as the assailant. To this end, the appellant maintained that the evidence on his identification did not achieve the beyond reasonable double standard. He also stated that the evidence left a possibility of any other person accessing the house and committing the offence.
 6. The second limb of argument is that the trial court and the first appellate court improperly applied themselves to the evidence on record thereby arriving at a wrong conclusion. The appellant contended that the trial court and the first appellate court wrongly analysed the chain of events of the night of the incident. He stated that as a result, the courts reached a wrong conclusion not supported by the evidence on record. His view was that it is as a result of the wrong analysis that the courts below arrived at a wrong conclusion on the identification and participation of the appellant in the commission of the offence. He also submitted that the courts failed to appreciate other intervening circumstances established in the evidence such as the possibility of other people being aware of where the children slept, and that both he and PW2 would always be away for some hours in the night thereby leaving an opportunity for someone else to commit the offence. Specifically, the appellant took issue with the courts' concurrent finding on his drunken state and that he did the act as a result of the rejection of his sexual advances by PW2 as well as the findings on his identity as the offender.



7. The third issue submitted on was that the investigation was skewed to the disadvantage of the appellant. It was the appellant's contention that despite making a report of his assault by one Joseph alias Suez Canal and securing a P3 form to that effect, the police did not pursue that case despite his informing APC Simon Nyiike (PW4) who was the arresting officer. The appellant argued that Joseph had threatened him with undisclosed consequences and the relationship between Joseph and PW3 was so close that the police ought to have investigated whether that conflict was related to his prosecution.
8. The fourth limb of the submissions was that sections 210 and 211 of the Criminal Procedure Code were not complied with thereby prejudicing the appellant; and which prejudice is not curable under Section 382 of the Criminal Procedure Code. The appellant submitted that the trial court in complying with Section 211(1) extensively analysed the prosecution case and thus went beyond what was required in law thereby prejudicing his defence. He relied on the case of *Charles Kipkirui Chepkwoy v Republic* [2016] eKLR to urge that such an error leads to the quashing of the conviction. The appellant further submitted that the trial magistrate did not comply with the detailed requirements of Section 211(1).
9. The fifth argument of the appellant was that the evidence on record did not establish the offence. He submitted that certain elements of the offence were not established and therefore the offence cannot be said to have been proved beyond reasonable doubt. The appellant added that the court also failed to consider his defence in the process. He relied on Section 309 of the Criminal Procedure Code to argue that it was incumbent upon the respondent to disapprove his alibi defence. To buttress this argument, he relied on the cases of *Kimotho Kiarie v Republic* [1984] eKLR and *Victor Mwenda Mulinge v Republic* [2014] eKLR and argued that the Court ought to have interrogated his alibi defence and considered it based on the evidence on record.
10. The appellant consequently urged us to allow the appeal, quash the conviction and set aside the sentence. He, however, submitted that in the event that we uphold the conviction, we should consider the fact that he was a first offender and reduce the sentence to the period already served.
11. On her part, Ms Mburu for the respondent submitted that the identity of the appellant was sufficiently proved. She stated that the evidence of PW1 and PW2 placed the appellant at the scene of crime and that there was evidence that on that night, he left for the house before the official end of the game he was watching. Ms Mburu also submitted that from the record, the trial court and the first appellate court considered the appellant's defence and found it not truthful prior to dismissing it. Counsel submitted that a perusal of the judgments of the two courts below affirm that the appellant's defence was considered. Ms Mburu urged that the prosecution discharged its burden of proof and that at no time was the burden of prove shifted to the appellant. To buttress this argument, counsel stated that the evidence of the prosecution witnesses proved the charge against the appellant beyond reasonable doubt.
12. Ms Mburu rebutted the appellant's submission that sections 210 and 211 were not complied with arguing that the trial court delivered the ruling on a no case to answer and thereafter proceeded to comply with Section 211 of the Criminal Procedure Code. In conclusion, Counsel urged the Court to dismiss the appeal in its entirety.
13. This matter is before us on second appeal. Our mandate is defined under Section 361(1)(a) of the Criminal Procedure Code. In discharging that mandate, only matters of law will be open for our re-evaluation and consideration. With reference to issues of facts, we are required to pay homage to the findings by the two courts below unless those findings are not based on any evidence or are based on wrong application of the law. See *Adan Muraguri Mungara v Republic* [2010] eKLR.



14. Upon giving due consideration to the record of appeal, the submissions of the parties, the law and the authorities cited, we arrive at the conclusion that the overarching issue in this appeal is whether the respondent discharged its burden of proof. In particular, we ask ourselves whether it was proved that the perpetrator of the crime was the appellant; whether Section 211 of the *Criminal Procedure Code* was properly complied with; and, whether the appellant's defence was duly considered.
15. The evidence as to the elements of penetration and age of the complainant has not been contested. The third element of the offence of defilement being the identity of the perpetrator is what is challenged. This begs the question as to whether the evidence on the appellant's identity as the perpetrator of the offence is cogent and sufficient. The appellant held the position that the evidence on record was insufficient to establish the fact that he committed the offence. He also questioned the approach taken by the trial court and the first appellate court in analyzing the evidence surrounding this issue. The appellant's view is that the two courts erred in their analysis of the evidence thereby arriving at a conclusion not supported by the evidence on record.
16. In this regard, the first appellate court addressed the issue of identity of the assailant from the last paragraph of page 8 all through to the 1st paragraph of page 12 of the judgment. The Judge concluded that the offence was committed when there was no sufficient light in the room; that PW2 was an unreliable witness and also not truthful; that the appellant's alibi defence was a fabrication and a desperate attempt to get himself off the hook; and, that the complainant positively identified the appellant as the person who sodomized him.
17. We agree with the Court's finding that the only evidence on record pertaining to the identity of the assailant is that of PW1. It was only PW1 and his cousin called Toto who were in the house at the time of the offence. The relevant part of the evidence of PW1 which appears at pages 4 and 5 of the typed proceedings is as follows:

“... On 23/8/12 I was sleeping at Maggy's place i.e. my aunty with Toto Maggy's child. We had finished eating supper we went to sleep and Tiodo put off the lamp and went to watch football. He does that every Friday. That's Tiodo (points at the accused). I know him ...

Then I heard a loud knock at the door and a man entered the house. I thought it was Tiodo because he had gone outside ... Toto put on the lamp but the man held it and switched it off. We did not see the person well... The man then did tabia mbaya to me... I heard him speak and his voice was different from that of Tiodo... Toto told me that the voice was not of Tiodo. We started to scream after the man left nobody came. Later Tiodo came and switched on the lamp. I was still feeling pain and was crying. He saw us and shook his head. He told us to tell him what happened but we did not tell him. He shook his head again. I and Toto was left in our room and Tiodo went to Maggy's room. Tiodo went to sleep at my auntie's place...I knew him before... I saw his face and recognized him. He has never done it to me before.”
18. From the evidence reproduced above, the following aspects are clear. That the appellant always stayed at the house where the complainant slept and that every Friday, he would leave the minors in the house, lock the house from outside and head out to watch a football match. That the appellant always shared a bed with PW2 in that house. That both PW1 and Toto did not recognize the voice of the assailant and were clear that the voice of the assailant was not that of the appellant.



19. Upon reviewing the judgments of the two courts below, their conclusion that the appellant was identified was based on the fact the appellant went to sleep in the house of PW2 and was still there the following day. This is captured in judgment of the trial court as follows:

“This is evidence given by a 6-year-old child who says he left him to spend the night at her aunty (PW2’s) house and when she came back the following morning, she found the accused still sleeping on her bed when she had run for supposed safety to Alice’s place. That bit alone fully corroborates the evidence of PW1 (6 year of age) that the night he was defiled, the accused was the only one who was in that house and there is no evidence that any other person managed to enter the house where the two children were sleeping since it is only PW2, the accused and the children who were spending in the house.”

On the same point, the first appellate court stated that:

“The complainant told the court that it was himself, his aunt Maggy PW2, and Toto were sleeping in the room. The appellant, changed the equation on the day he was sighted to have slept on PW2’s bed. Obviously, neither “Toto” nor PW 2 could have defiled the child, given the nature of the injuries sustained on the complaint and the complainant did explain that it was a man.”

The two courts also emphasized and gave weight to the fact that the complainant was aged six years.

20. With respect, we find ourselves of a different view with the approach and conclusion of the two courts as reproduced above. From the evidence of PW1, it is clear that the appellant was an inhabitant of the house where the incident took place. His presence in that house was therefore not out of the ordinary. This is captured in the evidence of PW1 who stated that the appellant left them in the house every Friday as he went to watch football matches. PW1 also confirmed that the appellant usually slept in the same bed with PW2. The conclusion arrived at by the trial court that it was only the appellant who went to that house on that day is also not correct. This is contrary to the evidence of PW1 who stated that when the appellant left to watch the football match another man, whom he was not able identify, came to the house and committed the heinous act. The identity of the assailant cannot therefore be established based on the evidence on record. It would be an injustice for a resident of the house to be implicated in an offence simply because he was the last to leave before the commission of the offence and the first to return after the offence had committed; and in a situation where the complainant, being a person well acquainted with the appellant, testifies that he did not recognize the voice of the assailant as that of the appellant.

21. In our view, the chain of the evidence on record cannot be used to imply identification of the appellant. The evidence places him at the scene of crime but does not prove his identity as the assailant. He was at a place where he lived.

This amounted to mere suspicion that it could have been the appellant. However, it is a legal norm in criminal law that a conviction cannot be based on mere suspicion as was the case against the appellant. On this point, this Court in *Joan Chebichii Sawe v Republic* [2003] eKLR expressed itself as follows:

“The suspicion may be strong but this is a game with clear and settled rules of engagement. The prosecution must prove the case against the accused beyond any reasonable doubt. As this Court made clear in the case of *Mary Wanjiku Gichira v Republic* (Criminal Appeal



No 17 of 1998)(unreported), suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.”

22. The next issue for our determination is whether sections 210 and 211 of the *Criminal Procedure Code* were properly complied with. It is sufficient to state that Section 210 provides for the acquittal of the accused person where, at the close of the prosecution’s case, it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence. We do not discern any relevance of the provision to the appellant’s appeal and neither was any argument advanced by the appellant as to how the said provision was violated by the trial magistrate. We will leave the issue of this provision at that and say no more.

23. We turn to the alleged non-compliance with Section 211(1) of the *Criminal Procedure Code*. The provision states:

“(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).”

24. The provision of Section 211 is exercisable on two limbs, procedurally and substantively. The substantive limb requires the court to make up its mind as to whether a case has been made against an accused person. The procedural limb provides how the court is to comply with the substantive aspect as well as the manner the court should proceed once it pronounces that the accused person has a case to answer. The appellant argues that the trial court erred in its appreciation and compliance with this provision.

25. The proceedings of the trial court on 29th July 2015 read as follows:

“Ruling

From the evidence of prosecution witnesses a prima facie case has been out against the accused person. The accused person was the only one who was sighted by PW1 and PW2 after the incidence. The accused did not bother to know what had befall the minors and his conduct betrays the demeanour. The question of grudge was brought to fore at the station when the arrest was effected. It is my finding that the accused has a case to answer and I accordingly I place him on his defence. Ruling signed, dated and delivered in open court in presence of Bosire for accused and Mr. Kamau for state. Section 211 CPC complied with. [sic] accused: I will give sworn evidence. I won’t call witnesses.

Court: Defense hearing on 12/10/15”

26. From the excerpt reproduced above, we note that the appellant was represented by counsel. We also note that in the last sentence of the ruling, the court duly noted that it had complied with Section 211 of the Criminal Procedure Code. We therefore have no doubt that the court duly complied with the procedural aspect of Section 211 of the *Criminal Procedure Code*. We add that it is always sufficient for the court to comply with Section 211 and proceed to note the compliance on the record.



27. We, however, must point out that for a prima facie case to be deemed to have been established, the evidence tendered by the prosecution should be that which a reasonable tribunal, properly directing itself on it, without more, can convict. To achieve this, the evidence should be able to establish all elements of the offence charged. If this standard is not attained, the court must not place an accused person on his defence, for doing so defeats the overriding principle that the burden of proof always lies with the prosecution. Placing an accused person on defence in the face of insufficient evidence amounts to shifting the burden of proof in the hope that the accused person may in his defence seal the loopholes in the prosecution's case. We have found it necessary to engage in this discussion based on our finding on the issue of the identification of the perpetrator of the offence. From the onset, the evidence tendered by the prosecution failed to establish the element of the identity of the perpetrator which is one of the three elements required to be proved in offences of defilement. We will however not stress much on this point as the subsequent discussion will decide the fate of compliance with Section 211 of the *Criminal Procedure Code*.
28. Procedurally, we are convinced that the trial court duly complied with Section 211 of the Criminal Procedure Code. However, we have to question the manner in which the trial court complied with the substantive aspect of the provision. As far as compliance with the substantive aspect of Section 211 is concerned, it is our understanding that if the court is convinced that the accused person ought to be put on his defence, the trial court need not go into deep analysis of the evidence and the law as the court did herein. Such an in-depth analysis is more often called for in instances where no prima facie case has been established against an accused person. Such an analysis serves to flesh out the reasons why the accused person has been acquitted without being placed on his defence. This position has been reiterated by this Court in several cases. In *Anthony Njue Njeru v Republic* [2006] eKLR the Court pointed out that:
- “We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned Judge did here unless the Court concerned is acquitting the accused person.”
- Similarly, in *Charles Kipkurui Chepkuony v Republic* [2016] eKLR, the Court addressed the scope of the ruling on a case to answer as follows:
- “The opportunity to defend oneself is an integral part of the fair trial guarantees built into the criminal justice system and we have no hesitation stating that when, as here, a trial court expresses what appear to be settled and firm views indicative of the accused person's culpability after improperly conducting a deep evidentiary analysis, the appearance of preconception and predetermination is unacceptable and goes to make a travesty of the ensuing defence. It makes it a hollow ritual because the court seems to have already made up its mind and this strikes at the very heart of the accused person's right to be heard in his own defence and renders the trial a mistrial and a nullity.”
29. To add our voice to this, a trial court is under no obligation to give elaborate reasons on why or what factors have informed the decision to put an accused person on his or her defence. Giving elaborate reasons is susceptible to lead to two extreme and unfortunate outcomes. First, the appellant's defence will be blocked and rendered valueless. The second possible outcome is that the case for the defence might be given a boost by the court pointing out what the accused person needs to do in order to satisfactorily answer the prosecution case. Back to the case before us, the trial court's ruling on a case to answer was a deep evidential analysis to an extent that the court pointed out to the perceived omissions of the appellant. The court appeared to have made its mind on the appellant's culpability. This, we



must say, was an absurd occurrence and an assault on the procedural dictates meant to guarantee the right to fair trial. From what was stated in the trial court's ruling, it was obvious that the appellant would be convicted and asking him to make his defence was just a ceremonial compliance with the trial procedures. It therefore follows that the appellant's argument that his defence was not considered by the trial court is well- founded.

30. It is therefore our finding that the manner in which the trial court complied with Section 211 of the Criminal Procedure Code failed to meet the threshold of the right to fair trial as the appellant's defence can be said to have had no impact on the mind of the court which had been made at the close of the prosecution's case. The question then that we need answer is whether prejudice resulting from this error is curable under Section 382 of the Criminal Procedure Code. The provision states:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

31. The test applicable under the above quoted provision is that for an appeal to be allowed on account of error, omission or irregularity, the said error, omission or irregularity must be one which occasions a failure of justice. In addition to that, it must be an error, omission or irregularity to which an objection at the earliest stage of the proceedings would not have sufficed to cure it. In the present case, we are convinced that the irregularity occasioned in the manner of compliance with Section 211 of the Criminal Procedure Code resulted into a failure of justice. The question then is whether an objection would have sufficed during proceedings to cure this defect. We answer in the negative. The nature of this irregularity is one which even if an objection was raised, the impact would not be reversible. The negative impact of the outcome was irreversible in nature and the damage caused was only open to interrogation in an appeal. We sit as an appellate court dealing with issues of law and this is one of them. Therefore, even if this matter was not canvassed on first appeal, it still falls within our remit to address it.

Subsequently, we find this irregularity incurable. Our decision on this issue is fortified by the decision in Charles Kipkurui Chepkuony (*supra*).

32. Having found in favour of the appellant on all the issues we identified for determination, it follows that the appeal succeeds. As a result, we allow this appeal. The appellant's conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF APRIL, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

