SN v Republic (Criminal Appeal 338 of 2018) [2023] KECA 624 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 624 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 338 OF 2018

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 26, 2023

BETWEEN

SN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Eldoret, Kimaru J (as then was), dated 4th October 2018) in HC. CRA No. 200 of 2013)

JUDGMENT

1. The appeal before us is a second appeal against the judgment of Kimaru J (as he then was) dated October 4, 2018, in which Silas Nyongesa (the appellant herein) had initially been charged at the Chief's Magistrate's Court at Eldoret with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No of 2006.
2. The particulars of the offence were that on 21st November 2012, at (particulars withheld), he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of FC a child of 11 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11(1) of the same *Act*. The particulars of the offence were that at the same time and place, he intentionally and unlawfully touched the private parts (vagina) of FC with his private parts (penis) a child aged 11 years.
4. The appellant denied the charge after which a trial ensued. In a judgment delivered on November 1, 2013, Hon B Kasavuli (the then Ag Senior Resident Magistrate, Eldoret) convicted him of the main charge and sentenced him to life imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on October 4, 2018, Kimaru J (as he then was), found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide an undated Memorandum of Appeal filed in Court on October 12, 2018, raising 5 grounds of appeal.

7. Subsequently thereafter the appellant filed undated supplementary grounds of appeal raising 3 grounds of appeal as follows:

    1. That the learned appellate judge erred in law by failing to find that the appellant was a minor at the time of the commission of the offence and thus the provisions of Section 191 of the Children's Act, 2001 was relevant in the present matter.

    2. That the learned appellate judge erred in law by upholding the trial court's sentence imposed upon the appellant yet it was not only harsh and excessive but also illegal in light of the unique facts and circumstances of the offence.

    3. That the learned appellate judge erred in law by failing to find that the provisions of Section 200 of the Criminal Procedure Code were not adhered to during the trial".

8. The brief facts in this appeal were largely uncontested and straightforward. PW1 who was the complainant in this case testified that on November 21, 2012, at about 1:00PM she was herding cattle when the appellant who was also there herding cattle jumped on her, removed his trouser up to his knees and removed her pant up to the thigh and inserted his private part into hers whereupon she started bleeding from her private parts.

9. That, upon the appellant seeing blood oozing from her private parts, he went away and PW1 went home and the following day she told her mother (PW2) what had transpired. It was her further evidence that she was 10 years old and that she used to see the appellant passing by their home while herding cattle.

10. PW2 was PT and PW1's mother. it was her evidence that PW1 was aged about 8 years having been born on June 6, 2004. She corroborated PW1's evidence that she used to see the appellant herding cattle in the neighbourhood. She told the trial court that on November 22, 2012, she went to wake up PW1 who did not wake up and when she went to the toilet she saw some blood and found PW1's clothes which were blood stained. PW1 told her that the appellant had raped her the previous day and threatened her with death if she dared to scream.

11. PW3 was PC Wilfred Naisanga from Yamumbi police post and the investigations officer in this case. It was his evidence that on November 22, 2012, he was at the police post when a suspect was brought by members of the public accompanied by PW1's father and an AP officer and a report was made that the appellant had raped a girl the previous day. He later charged the appellant with the current offence.

12. PW4 was Dr Cynthia Kibet from Moi Teaching and Referral Hospital. She produced a P3 Form in respect of PW1 who had a history of defilement. At the time of the examination, the degree of injury was grievous harm with injuries to her genitalia. She had a tear on the genitalia extending into the vagina and infections on the tear. There was no vaginal discharge or bleeding and high vaginal swabs revealed numerous epithelia cells and a few pus cells. Urinalysis revealed pus cells but no spermatozoa and she concluded from history and examination that the injuries were consistent with penetration into her vagina.

13. The appellant in his defence gave a sworn statement and denied committing the offence and further stated that he was slapped by a police officer who forced him to record a statement.

14. When the matter came up for plenary hearing on February 14, 2023, the appellant who appeared in person briefly orally highlighted his written submissions and fell short of abandoning his appeal on conviction and urged us to consider reducing the sentence as he had undertaken grade 1,2 and 3 of tailoring while in prison.

15. Mr Muriithi on the other hand for the State while opposing the appeal relied on his written submissions dated November 18, 2021 and submitted that the victim was a child of tender years aged 8 years and that there was need to pass a deterrent sentence. Further, that the provisions of Section 8 of the *Sexual Offences Act* were couched in mandatory terms and that the sentence provided thereof was life imprisonment and that as such, the sentence imposed on the appellant was legal. Consequently, we were urged to dismiss the appeal.

16. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

17. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In Kados v Republic Nyeri Cr Appeal No 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

18. In David Njoroge Macharia v Republic [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

> " Only matters of law fall for consideration and the court 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 also Chemagong v Republic [1984] KLR 213)."

19. As we had alluded to earlier, the facts in this case are not disputed. In our view, it has not been demonstrated that that the findings of the two courts below were not based on evidence or were based on a misapprehension of the evidence or that indeed the two courts below acted on wrong principles in arriving at the findings. Consequently, we have no reasons whatsoever to interfere with the concurrent findings of the two courts below and we will go to straight to the grounds of appeal as raised by the appellant.

20. Turning to the first ground of appeal, the learned judge of the High Court was faulted by failing to find that the appellant was a minor at the time of the commission of the offence thus the provisions of Section 191 of the Children's Act 2001 were relevant in the present matter.

21. The record shows that when the appellant was arraigned in court on December 14, 2012, he informed the court that he was 16 years. The court subsequently directed that he be held Eldoret police station for purposes of age assessment at Moi Teaching and Referral Hospital. When the matter came up again for mention on December 28, 2012, the appellant intimated to court that he was not taken for age

assessment and the court directed that he be taken for age assessment. When the matter came up for mention on January 4, 2013, the court remarked as follows:

> "I have seen the age assessment report dated January 3, 2013 which shows that the subject is aged 17 years...."

22. On September 23, 2013, after the appellant had been convicted, the court inter alia stated as follows;

> "I have considered the probation report dated September 23, 2013 showing the accused as being an adult and I order the probation officer to avail to this court documentary evidence to establish and support her social inquiry report."

23. Again when the matter came up for mention on October 16, 2013, the court remarked as follows;

> "I have considered the probation report dated September 23, 2013 and the one dated October 16, 2013 and also having looked at the age assessment report dated January 3, 2013, there is need for another age assessment to be done clearly indicating the correct age bracket since there are allegations by the probation officer as indicated in the report of September 23, 2013 that the accused is above 18 years old. I therefore order that a correct age assessment be done at Moi Teaching and Referral Hospital before final orders are made....."

24. On November 1, 2013, when the appellant was being sentenced an age assessment report dated October 16, 2013, from Uasin Gishu District Hospital indicated that the appellant was above 18 years. Additionally, probation officer's report dated September 23, 2013 and October 16, 2013, respectively showed that the appellant was an adult.

25. Subsequently therefore, the court observed that the appellant was not a minor as had been earlier contended and sentenced him to life imprisonment. It is therefore apparent that the appellant was above 18 years at the time of sentencing on November 1, 2013.

26. The learned judge while considering the issue of the appellant's age which he had raised in his appeal before the High Court stated as follows in his judgment:

> "There is an issue that the appellant put forth in this appeal; that is, in regard to his age at the time of the sexual assault. The appellant stated that he was a minor at the time of the sexual assault. He raised this issue before the trial court. The trial court referred the appellant to Uasin Gishu District Hospital to have his age assessed by a doctor. The appellant's age was assessed on October 16, 2013. According to the report, the appellant was over 18 years at the time of examination. During the hearing of this appeal, the appellant reiterated that he was minor at the time of the offence. He informed the court that he had documentary proof to establish his age at the time of the incident.This court adjourned for a day to enable the appellant present the document to court to establish he was a minor at the time of commission of the offence. When the appeared before the court on the scheduled date, he did not have any document to contradict or disapprove the age assessment report which had been supplied to the trial court. The appellant was therefore an adult at the time he committed the offence." (Emphasis ours).

27. When the matter came up for plenary hearing on February 14, 2023 before us and when probed by the Court as regards his age, the appellant informed the Court that he was now 22 years. Probed further by the court, the appellant contradicted himself and stated that he was 25 years. On December 14, 2012 when he appeared before the trial court, the appellant informed the court that he was 16 years old. If

the appellant's contention that he was 16 years on December 14, 2012 were to be taken as the gospel truth that would mean that he will be turning 27 years on December 14, 2023, which contentions do not add up since on one hand he told the Court that he was 22 years while on the other hand he stated, he was 25 years.

28. Even if it were indeed true that the appellant was a minor as at the time of commission of the offence as he contended, the provisions of Section 191 of the *Children's Act* of 2001 would still not have been applicable to him as at the time of sentencing he was already an adult.

29. In *Duncan Okello Ojwang v Republic* (2019) eKLR this Court recently stated as follows as regards Section 191 of the then *Children's Act*:

> " Section 191(1) of the *Children Act* sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judicial discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the Penal Code. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the *Children Act*. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered."

30. We think have said enough to demonstrate that this ground of appeal is without merit and the same must accordingly fall by the wayside.

31. Regarding the 2nd ground of appeal we shall revert to the same shortly as it touches on sentence.

32. The learned judge was further faulted for failing to find that the provisions of Section 200 of the *Criminal Procedure Code* were not adhered to during the trial. It was the appellant's submissions that there was no record to state or show that he was informed that he had a right to choose whether or not to recall witnesses for the purposes of cross examination.

33. On the other hand, it was submitted for the respondent that the record shows that a ruling on case to answer was delivered on March 11, 2013, in open court by the magistrate who had commenced the trial. It is the trial magistrate who placed the appellant on his defence and that the appellant did not appeal against that ruling and that it followed that the succeeding magistrate did not record any evidence from the prosecution witnesses and that as such the provisions of Section 200 (3) of the *Criminal Procedure Code* did not apply.

34. First of all, we note that the appellant did not raise this issue before the High Court. Be that as it may, the record shows that all the prosecution witnesses were heard by Hon. M.D Ireri (Senior Resident Magistrate) who heard all the prosecution witnesses and placed the appellant on his defence on March 11, 2013. Subsequent thereafter, on April 5, 2013, Hon. B. Kasavuli (then Ag Senior Resident Magistrate) took over the matter and heard the defence case.

35. It is clear from the record that when Hon B. Kasavuli took over from Hon Ireri on April 5, 2013, he did not inform the appellant of his rights pursuant to Section 200 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya. For ease of reference that Section provides:

> " 200. Conviction on evidence partly recorded by one magistrate and partly by another.

1. Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may –

    a. Deliver a judgment that has been written and signed but not delivered by his predecessor; or

    b. Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

2. Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

3. Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right

4. Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

36. Instead the record for the day shows that Mr Kirwa who was then on record for the appellant informed the court that the case may proceed from where it had reached and that the appellant would give his own defence which request was acceded to court. Clearly this was a lapse on part of the trial court.

37. That notwithstanding and from the circumstances of this case, we are not satisfied that this error was fatal to the prosecution's case for the following reasons; firstly, and as we have alluded to above the appellant was represented by an advocate. Secondly, the record does not show that the appellant by himself or through his counsel requested for recall of any witness who had previously testified and that such a request was denied. Thirdly, save for the appellant generally stating his rights to a fair trial were violated, he has not specifically demonstrated how his rights to a fair trial were violated and neither has it been demonstrated how failure to inform him of this right occasioned a miscarriage justice or prejudiced him for that matter.

38. We are alive to the fact that this Court differently constituted has on a number of occasions previously held that the provisions of Section 200 (3) of the *Criminal Procedure Code* must be adhered to and accorded to the accused personally, even if he is represented by an advocate.

39. Faced with a similar situation, this Court in the case of *Mosobin Sot Ngeiywa & Another v Republic* [2016] eKLR stated as follows:

> " While we entirely agree that a trial court has to comply with the provisions of section 200 (3) of the Criminal Procedure Code whenever a succeeding magistrate or judge takes over the conduct of a criminal case from another, in our view, where an accused person is represented by an advocate, we do not think that the communication should strictly be between the trial magistrate or judge and the accused, to the total exclusion of the defence counsel. Unlike a plea, to which an accused person must personally plead, one way or the other, the accused's advocate may communicate his/her client's instructions to the court on the issue of compliance with Section 200 of the Criminal Procedure Code."

40. We entirely agree and fully associate ourselves with the sentiments expressed by the Court in the above decision.

41. Accordingly, we are satisfied that this omission was curable under Section 382 of the *Criminal Procedure Code* and we so hold. Consequently, nothing turns on this ground of appeal.

42. Lastly, the learned appellate judge was faulted for upholding the sentence by the trial court which was harsh and excessive and illegal in light of the circumstances.

43. Before we address this ground appeal we note one disturbing aspect which was apparently not noted by the two courts below and the prosecution and which matter had in fact been raised by the appellant in the High Court but was apparently not addressed. According to the charge sheet, the appellant was charged with the offence of defilement contrary to the provisions of Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence as per the charge sheet were that he had defiled a girl aged 11 years.

44. However, according to the uncontroverted evidence on record the complainant (PW1) was 8 years old having been born on June 6, 2004. The appellant therefore, ought to have been charged with defilement contrary to the provisions of Section 8 (1) (2) which provides for defilement of a child below 11 years.

45. Be that as it may, we are of the considered opinion that this error /inadvertence or whichever way one may look at it, was not fatal to the prosecution's case and was curable pursuant to the provisions of Section 382 of the *Criminal Procedure Code* as it did not change the fact the appellant was charged with defilement and all the 3 ingredients of the offence of defilement were proved to the required standard. The offence remained defilement and the appellant was not prejudiced in any way. Had PW1 been aged 12 years and above, the situation would have been different.

46. Turning to sentencing the appellant was sentenced to life imprisonment as provided for under Section 8 (1) (2) of the *Sexual Offences Act* which is the correct provision that he ought to have been charged with.

47. The jurisprudence that has been emerging from this Court is that minimum sentences as provided for under Section 8 of the *Sexual Offences Act* fetter the discretion of a judge to impose an alternative sentence in an appropriate case.

48. We have considered the circumstances under which this offence was committed. The appellant defiled an 8-year-old girl and even threatened to kill her. The events of that fateful day will remain engraved on PW1's life and she must have been traumatized by the harrowing ordeal that she underwent courtesy of the appellant. We therefore consider the circumstances to be aggravated.

49. It is in view of the above that we find no merit in this appeal which we hereby dismiss in its entirety.

50. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF MAY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR