Rashid v Republic (Criminal Appeal 90 of 2021)
[2023] KECA 596 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 596 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 90 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

MAY 26, 2023

BETWEEN

HASSAN ABDULAHI RASHID ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 22nd February, 2019 in HC. CR. A No. 122 of 2016)

JUDGMENT

1. The appellant, Hassan Abdulahi Rashid was charged before Makadara Law Court, Nairobi, with the offence of defilement, contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*. The particulars were that, on unknown dates between June 2013 and April 9, 2014 at [Particulars Withheld] along Kirinyaga Road within Nairobi county, the appellant intentionally caused his penis to penetrate the vagina of the complainant, TW, a child aged 8 years.

2. Before we consider the appellant's grounds of appeal, we note that by dint of provisions of section 361 of the *Criminal Procedure Code*, this court must be confined to issues of law only as set out in *Karani v R* [2010] 1 KLR 73, where the role of the second appellate court was succinctly set out, wherein this court expressed itself as follows: -

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they

were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

3. We thus find it imperative in summary form, to restate the prosecution case before the trial court as well as the appellant's defense.

4. The facts giving rise to the instant appeal are that on diverse dates between the months of June 2013 and April 9, 2014 at [Particulars Withheld] along Kirinyaga Road within Nairobi county TW, (PW1) a child aged 8 years was at her friend's house when the appellant locked her friend, S, in the bedroom and remained with the complainant in the sitting room. He asked her to remove her clothes but she declined. He then proceeded to remove the clothes himself and threw the complainant on the bed, inserted his penis into her vagina, and later told her to go home. It was PW1's testimony that he had done this to her severally. She later told her mother who took her to Nairobi Women's Hospital.

5. This account of the events was repeated by PW2, NWM the complainant's mother who informed the court that on March 22, 2014 the complainant's teachers asked her to visit the school. Upon visiting, the minor, who was in class 3, narrated the ordeal and said the appellant had been sexually assaulting her and her friend, since they were in class 2. She further testified that the minor was examined and the results revealed that she had been defiled. On asking her daughter, why she had not reported the matter to her, the minor said that the appellant had threatened to kill her if she told her mother, hence she decided to keep quiet out of fear.

6. PW3 M I, the complainant's teacher at [Particulars Withheld] primary school stated that the appellant began coming to the school to pick up a student by the name of S; she noticed S was walking with difficulty and reported to the head teacher who summoned the child's grandmother; the latter reluctantly came and at first, denied the defilement claims against Hassan, the appellant, who was her nephew; that later she came to school and admitted that she had taken the minor to hospital and it had been confirmed that she had been defiled; she also saw the complainant walking with difficulty and upon inquiry, the complainant told her that the appellant had also been defiling her.

7. PW 4, PC Ann Oundo, testified that she received a report of the defilement incident from the complainant and her mother; that she took the witness statements and the examination records; she also learnt that S had been taken to Wajir, and the appellant had gone underground until May 21, 2014 when he was seen in Eastleigh; that the appellant was brought to Central police station and later charged in court.

8. PW 5, Dr Joseph Maundu testified that on April 10, 2014, he examined the complainant and found the external genitalia to be normal but her hymen was not intact. He opined that the torn hymen was as a result of external pressure and produced the P3 form.

9. On his part, the appellant upon being put on the defence, denied committing the offence, and gave sworn evidence.

10. He testified that he worked at Mandera shopping centre making sofa sets and stayed in Eastleigh; that on May 21, 2014, a lady customer told him that an Asian whom he had worked for before in 2013 wanted to see him; they went to the Asian's house at River Road; that while there, as the Asian was preparing tea, two men entered, caught him and ordered him not to leave; he asked for their identification papers and they told him not to be clever; that they identified themselves as police officers, but were in civilian clothes and accused him of spoiling school girls; they placed him in their vehicle where he met a lady whom he did not know, but who told him that even if he was released, she would kill him.

11. He stated that he was taken to Central Police Station where he was assaulted; that he heard a policeman call out "msenge, msenge" as people were asking who that was; that a girl later came into the room and pointed at him saying he was the one, but that he did not know who the girl was; he was then charged in court, and did not call any witness.

12. The trial court convicted and sentenced him to life imprisonment, and aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by L. Kimaru, J (as he then was.) In the judgment dated February 22, 2019, the trial judge upheld both the conviction and sentence, thus precipitating this second appeal.

13. The appellant lodged a notice of appeal on January 9, 2020 and has proffered the instant appeal by filing an un-dated ground of appeal containing 5 grounds. The grounds are that the trial judge erred in law in that: the court affirmed the conviction yet the age of the minor was not established; that the prosecution's evidence had contradictions and inconsistencies; failing to observe that the evidence of the prosecution did not meet the evidentiary threshold and failing to consider that section 169(1) of the *Criminal Procedure Code* was contravened.

14. The appellant has also filed an amended ground of appeal which has no date.

    The grounds are that the trial judge erred in law; by failing to find that the charge sheet was defective; that the elements of the offence were not proved (age and penetration); by relying on the evidence of PW1 whose integrity was questionable; by failing to find that the charge against the appellant was full of contradictions and by failing to find the voir dire was badly conducted.

15. When the matter was called out for hearing, both the appellant and state counsel sought to adopt their written submissions.

16. The appellant submissions can be summarized as follows: as regards the defective charge sheet, he submits that he was charged with a wrong provision of law, that is defilement contrary to section 8 (1) (4) of the *Sexual Offences Act*; that not only was the charge duplex, but it was also for a victim over 16 years of age while in the instant matter, the minor was aged eight (8) years; that penetration was not proved as PW1 testified that the appellant would tell S to go inside the bedroom and she would stay in the sitting room and that the appellant threw her on the bed; that the medical opinion of PW5 differed with the medical evidence from Nairobi Women's' Hospital; that the judge's holding that he believed the complainant was erroneous; that age assessment of the complainant was not done; that PW1 was not a credible witness; that there were contradictions when it came to the date of the offence; and that the voir dire was not properly conducted.

17. The submissions by the state can be summarized as follows: that as a second appeal, only matters of law fall for consideration by the court; that the elements of the charge and the ingredients of the offence which the prosecution was under a burden to prove, were all discharged by cogent evidence; that the complainant's age was established as 8 years by PW2 who was the mother of the complainant, by PW3 the complainant's class teacher and PW5 who medically examined PW1 and estimated her age to be 8 years; and that all the ingredients of the offence were proved beyond reasonable doubt.

18. Having duly considered the record, the judgments of the two lower courts, the appellant's grounds of appeal, and submissions of the appellant and counsel for the Republic, we start by reminding ourselves of the approach that this court takes when it is invited to interfere with the concurrent findings of the trial court and the first appellate court. As already stated, this being a second appeal, this court is restricted to addressing itself to matters of law only. The court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or

they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings.

19. We have revisited the record on our own and considered it in light of the rival arguments set out in the submissions by the appellant and the response by the state. In our opinion, four issues arise for our consideration:

    i. Whether voir dire was properly administered before the testimony of PW1 was received as evidence;

    ii. Whether the charge sheet was defective;

    iii. Whether the first appellate judge discharged his mandate properly and

    iv. Whether the prosecution's case was riddled with contradictions and inconsistencies.

20. With regard to the administration of the *voir dire*, when PW1 took the witness stand at the commencement of the trial before H. Ndungu CM on January 19, 2015, the sequence of the conversation between PW1 and the trial magistrate reads as follows:

> " My name is TW. I am eight years old. I am a pupil at [particulars withheld] . Formerly, I was attending [particulars withheld] primary school. I am in class 4. I am a christian by religion. I do attend Sunday school on Sunday. I do not know what an oath is. I have been taught it is wrong to tell lies. If I tell lies, God will punish me.
>
> Court: The witness appears intelligent and clearly understands the nature of an oath. She will give sworn evidence "

21. It is evident from the above that the trial magistrate did not reflect in the record the questions put to PW1 during the *voir dire* administration but reflected her responses to those questions. The need for the administration of voir dire on minor witnesses before the reception of their testimonies especially in criminal trials is entrenched in section 19 of the *Oaths and Statutory Declarations Act* cap 15 Laws of Kenya. This provision does not in itself provide for the specific format to be applied.

22. In *Sula v Uganda* [2001] 2EA 556 the Supreme Court of Uganda approved two formats. The first one is where the trial court can write down the questions put to the witness and the answer of the witness in the first person in the words spoken by the witness in a dialogue form and then make its conclusion after the dialogue. In the second format, the court may omit to record the questions put to the witness but record the answers verbatim in the first person and then make his conclusion thereafter.

23. In *Patrick Kathurima v Republic* [2015] eKLR, this court stated as follows:

> " It is best, though not mandatory, in our context that the questions put and the answers given by the child during *voir dire* examination be recorded verbatim as opined by the English Court of Appeal in *Regina v Compell (Times)* December 20, 1982 and *Republic v Lalkhan* [1981] 73 CA 190 for the benefit of the appellate court which must satisfy itself on whether that important procedure was properly followed."

24. There was however no hard and fast rule that in all cases where *voir dire* procedure had not been strictly administered the prosecution case stood vitiated. Each case has to depend on its own set of facts and that is why this court in *Patrick Kathurima v Republic* (supra) further held that:

> " The trial magistrates' failure to reflect on the record the questions put to HW during the voir dire examination was not therefore per se fatal to the prosecution case. The sustainability or otherwise of the prosecutions' case solely depended on whether the evidence on which it was anchored met the thresh hold of proof beyond reasonable doubt."

25. In the instant case, the minor gave sworn evidence and was subjected to cross– examination by the appellant. The trial court satisfied itself that the minor was intelligent and understood the meaning and nature of the oath and further gave sworn testimony. The trial judge also upheld the trial magistrate's findings of fact. In its appellate jurisdiction, this court would have no reason to doubt what the trial court said about the demeanor of the complainant. The appellant had challenged the mode in which the voir dire was administered but we find and so hold that it the failure to record the questions and the answers verbatim by the trial magistrate and as upheld by the first appellate court was not fatal to the prosecution case. The record is clear that the PW1 was taken through the voir dire examination and the trial magistrate found that she understood the duty to tell the truth, Therefore, this ground of appeal has no merit

26. On the second ground on the charge sheet being defective, the appellant submitted that he was charged with a wrong provision of law, which was defilement contrary to section 8 (1) (4) of the *Sexual Offences Act*. He adds that not only was the charge duplex but also that the provision used was for a victim over 16 years of age while in the instant matter, the minor was of the age of eight (8) years. The question that begs would be, did the charge sheet give information as to the nature of the offence charged and whether the appellant was prejudiced or the same occasioned any miscarriage of justice. A cursory reading of the charge sheet reveals that the charges were clearly brought out hence no prejudice could have been suffered by the appellant. Moreover, the appellant participated in the trial and he cross examined the witnesses, was aware of the charges facing him, and did not raise any objection regarding the charges that he faced. The first appellate court on this issue held:

> " In the present appeal, it was clear to this court that the defect noted by the appellant was not fatal to the prosecution's case. The charge contained information which set out the offence that the appellant was charged. It contained particulars of the charge that the appellant was being called upon to answer to. The defect in the penal section of the charge sheet did not prejudice the appellant. The same is curable under section 382 of the Criminal Procedure Code.... It was clear to this court that the appellant knew the charge that he was facing. He able defended himself during the entire trial. The particulars set out in the charge clearly enabled him to defend himself."

27. It is old hat that some errors in a charge sheet are curable if they result in no prejudice to the accused. Section 382 of the *Criminal Procedure Code* provides:

> " 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."

28. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, we reach our own independent conclusion, where we agree with the holding of the first appellate court, that the appellant was not prejudiced in any way by the defect. Indeed, he was able to understand the charge he had been charged with as he fully participated in the proceedings. We find no reason to disturb that finding.

29. On the third ground of whether the first appellate judge discharged his mandate properly or put differently, whether the ingredients of the offence of defilement were proved, the trial judge concurred with the findings of the trial magistrate, that the prosecution had indeed established to the required standard. It is trite law that the elements to be proved are penetration, age of the complainant and identity of the perpetrator.

30. As regards penetration, the appellant avers that penetration was not established as required by law. He submitted that the complainant only testified that the appellant used to tell S to go inside the room and she would stay in the sitting room. Also, she testified that the appellant threw her in bed. The trial court found:

> " I have perused the said P3 form in relation to the evidence of the doctor. In his findings, the hymen of the child was broken (not fresh) and she had discharges. In his opinion, this was probably as a result of external force being exerted from outside. The only external force testified as to by the complainant herein were acts of defilement by the accused, the broken hymen and discharges confirm the act of penetration."

31. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:

> " The complainant was taken to hospital where it was established that she had indeed been sexually assaulted. Her hymen was missing. It was not fresh. The P3 form was produced by PW5 Dr Joseph Maundu. This court therefore holds that the prosecution indeed established to the required standard of proof beyond any reasonable doubt that the complainant was penetrated."

32. Further, PW3 testified that the appellant would go to pick up the complainant at wrong hours; that she noticed the child walking with difficulty and inquired; the complainant told her that the appellant had been molesting her sexually; the complainant's grandmother later confirmed that to be true; she confirmed the admission documents of both the complainant and S showed they were 8 years old. PW5 testified that upon examination, the external genitalia were normal and hymen was not intact; that she had a discharge and, in his opinion, the torn hymen was as a result of external pressure exerted from outside. This evidence when pieced together, points to the offence of defilement. We thus find that this element of the offence was proved as held by the trial magistrate and upheld by the trial Judge.

33. The appellant's position is that the prosecution failed to establish the age of the complainant. With regard to the age of the complainant, the trial judge had this to say:

> " The complainant herself testified that she was eight (8) years old at the time of the incident... Her mother PW2 confirmed her age. Although, no documentary evidence was produced in court to establish the age of the complainant, this court formed the view that the evidence

by the prosecution witnesses indeed established to the required standard of proof beyond any reasonable doubt the age of the complainant to be 8 years."

34. The appellant has relied on several cases in his submission that age assessment was not done. The appellant cited the case of *Francis Omuroni v Uganda*, criminal appeal No 2 of 2000, in which the court held that medical evidence was paramount in determining the age of the victim and the doctor was the only person who could professionally determine the age of the victim in the absence of any other evidence. With regards to this issue, we note that there was ample evidence on the age of the complainant as PW2 who the mother was stated that PW1 was 8 years and the same was confirmed by PW3 and PW5 who medically examined the complainant and estimated her age to be 8 years. Thus, all these go to disprove the appellant's averments. This court took the same position in *Mwalango Chichoro Mwanjembe v Republic* [2016] eKLR where it held that:

> " The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*, Cr Appeal No 19 of 2014 and *Omar Uche v R*, Cr App No 11 of 2015..... We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

35. On the identity of the appellant, the trial judge concurred with the trial magistrate's rejection of the appellant's assertions that he had not been properly identified. The trial magistrate had no doubt that the appellant was well known to PW1, PW2 (complainant's mother) and PW3 (complainant's class teacher). The first appellate judge also found that from the evidence adduced, it was clear that the complainant had interacted with the appellant for a long time and the court could not discern any reason why the complainant pointed to the appellant as the perpetrator if indeed he did not sexually assault her.

36. Having gone through the record, and the judgments from both the lower court and the first appellate court, we find that the judge was very thorough in his re-analyzing of the record before him and we find no fault in the approach taken by the trial judge.

37. On the fourth ground, the appellant has made heavy weather of the prosecution's evidence being riddled with inconsistencies and being contradictory. He specifically flags the evidence of PW2, PW3 and PW5. A cursory reading of the record will reveal that the evidence of PW2, PW3 and PW5 is consistent to the effect that the appellant defiled the complainant. PW2 testified that PW1 in the presence of her teachers stated that the appellant had been laying on both her and her friend on the mat, after removing their clothes and lying between their legs; that he would insert his penis in her making her feel pain. We find no contradiction or inconsistency with these pieces of evidence, if anything, when considered in totality, they supplement each other and point to the appellant as having committed the offence of defilement against the complainant.

38. We note that the trial judge considered in great detail every complaint the appellant raised on appeal before him. He gave sound reasoning of his holding and the reasoning was well balanced and we find no fault in the approach taken by the 1st appellate court. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellant.

39. Having dealt with the above issues, the upshot of the foregoing is that the appeal fails on each and every ground and is hereby dismissed.

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

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR