



REPUBLIC OF KENYA



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**Nyabuto v Republic (Criminal Appeal 136 of 2017)
[2023] KECA 584 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 584 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 136 OF 2017
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MAY 12, 2023**

BETWEEN

WYCLIFFE NYABUTO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kisii
(Sitati, J.) dated 25th October, 2012 in HCCRA NO. 54 of 2009)*

JUDGMENT

1. The appellant, Wycliffe Nyabuto, was arraigned before the Chief Magistrate's Court at Kisii on September 18, 2006 and charged with defilement contrary to Section 145 of the Penal Code (repealed). The particulars of the offence were that on the 14th of September 2006 at around 9.00 am at [Particulars Withheld] Sub-location in Kisii Central District within Nyanza province, he unlawfully had carnal knowledge of FB (minor) a girl under the age of 16 years.
2. In the alternative, the prosecution preferred a charge against the appellant of indecent assault of a female contrary to Section 144(1) of the Penal Code (repealed).
3. During the trial the prosecution called 5 witnesses in support of its case. It was adduced that on September 14, 2006 at around 8.00am, the 5-year-old minor (PW4) was sent by her mother (PW2) to call the appellant's mother from her house so that they could go to the farm. When the minor arrived at the home, she did not find the appellant's mother, but she found the appellant, who was known to her. The appellant told her to enter his house, and there he defiled her.
4. When the minor went back home she informed PW2 and her sister about the incident. PW2 examined her and noticed that her genitals were red and inflamed. PW2 informed her brother (PW3) about the incident and he advised her to report the matter to the assistant chief. The assistant chief referred them to Kisii Police Station and in consequence of which the appellant was arrested. Thereafter they were



- escorted to Kisii General Hospital by a police officer where the child was examined and the P3 form which they had been issued with filled. PW1, the clinical officer who examined the minor and filled the P3 form testified that on examination of the of minor, she noted that her labia minora was hyperaemia red and tender and she was infected with gonorrhoea, a sexually transmitted infection.
5. When the prosecution closed its case, the trial Magistrate E. Olwande (RM then) found that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement denying the charges and raised an alibi defence. He also called one witness in support of his case.
 6. The trial court evaluated the evidence tendered before the court and found the appellant guilty of the alternative charge of indecent assault, and convicted him under section 11(1) of the [Sexual Offences Act](#) (SOA). The appellant was sentenced to serve 18 years' imprisonment by PL Shinyada (RM) who delivered judgment on behalf of E Olwande.
 7. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court at Kisii. Sitati, J. re-evaluated and re- analysed the evidence and set aside the conviction on the alternative charge of indecent assault and in lieu thereof convicted the appellant of defilement contrary to section 8(2) of the [SOA](#). The learned judge also enhanced the sentence from 18 years to imprisonment for life.
 8. Dissatisfied with the judgment of the High Court, the appellant has preferred this second appeal, based on 7 grounds, which we summarise as, the learned judge erred by:-
 - a. Upholding conviction based on a defective charge sheet contrary to section 214(i) and (ii) of the [Criminal Procedure Code](#).
 - b. Enhancing the sentence from 18 years to life imprisonment contrary to section 354(b) of the [Criminal Procedure Code](#).
 - c. Failing to note that the age of the complainant was not proved.
 - d. Enhancing the sentence without considering that penetration was not proved.
 - e. Conducting an unfair trial contrary to article 50(2) of the [Constitution](#).
 - f. Enhancing sentence without warning the appellant.
 9. In the end the appellant prayed that his conviction be quashed, the sentence imposed set aside and he be set at liberty, or an appropriate sentence be meted out.
 10. During the hearing of the appeal, the appellant appeared in person while the respondent was represented by Mr Okango the learned Senior Principal Prosecution Counsel. Both parties had filed written submissions which they relied on, with the Court questioning the Prosecution Counsel on certain critical issues that emerged from a perusal of the record.
 11. The appellant faulted the learned judge for relying on a charge sheet that was defective and at variance with the evidence adduced. He complained that, while the charge sheet read that he was charged with defiling a minor of under 16 years, and whose penalty in law is between 15 to 20 years, PW2's evidence on the age of the minor was contrary as she stated that the minor was 5 years old, and the court agreed with her. The appellant further contended that penetration was not proved. Moreover, the age of the minor remained doubtful due to the inconsistency in the charge sheet and the evidence given in court on the same. To the appellant therefore, the prosecution failed to prove its case beyond reasonable doubt. The appellant protested that the sentence imposed was harsh, considering the evidence advanced by the prosecution and the Supreme Court's decision in [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR.



12. During the respondent's turn, we the Court sought an explanation from Mr Okango on the confusion regarding the age of the minor seeing that the age indicated on the charge sheet was different from what which was presented in evidence. Counsel clarified that the appellant was initially charged under section 145 of the Penal Code but in the course of the trial the [SOA](#) was enacted and the state applied to amend the charge sheet, an application that was granted.
13. However, he continued, despite the amendment, the statement of the offence still indicated that the appellant was charged with defilement of a child between the age of 15 and 16, while the particulars of the offence showed the age of the child as being 5 years. Counsel contended that it was not in dispute that the minor was 5 years old, the problem was in drafting the statement and particulars of the offence.
14. The Court further took issue with the fact that after the charge sheet was amended, the trial court ordered a recall of PW1, the clinical officer who examined the minor to testify as requested by the appellant, but he was never recalled. While agreeing that PW1 was not recalled, Mr Okango insisted that the omission was not prejudicial. The Court also noted that the amended charge sheet was not on record, confirmed by counsel.
15. On sentence, Mr Okango conceded that the life sentence should be set aside and instead the appellant be sentenced to 30 years imprisonment, considering that the victim was 5 years old only, and she was infected with gonorrhoea, a sexually transmitted disease. The Court inquired whether the respondent had filed a cross-appeal or given a warning to the appellant at the first appellate court on the possibility of it urging for enhancement of his sentence. Acknowledging that no notice of cross-appeal was issued, counsel directed the Court's attention to page 43 of the record where the state informed the appellant that it was moving to ask the High Court to enhance his sentence. We sought to know whether, in counsel's opinion that warning was adequate, and whether, in fact, the prosecution should not have given written notice of the same before the day of the hearing. Mr Okango conceded the point that it would have been the most pragmatic way to approach the issue. He added that the prosecution having issued an oral notice, the High Court should have adjourned the matter to give the appellant sufficient time to consider the possible repercussions of his continuing with appeal.
16. We have considered the record of appeal as well as submissions made by the appellant and the respondent. We appreciate our role as a second appellate court and our jurisdiction, which is limited to matters of law as defined in Section 361(1) of the [Criminal Procedure Code](#). This was affirmed by this Court in [David Njoroge Macharia v Republic](#) [2011] eKLR as follows;

That being so only matters of law fall for consideration – see section 361 of the [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.”
17. The appellant complains that the learned judge erred on various grounds including, relying on a defective charge sheet to support his conviction, failing to note that the age of the minor was not proved, enhancing the sentence without warning and conducting an unfair trial contrary to Article 50(2) of the [Constitution](#). We think, that the substantive issue that falls for our consideration is whether the appellant was granted a fair trial.
18. It is common ground that the charge sheet was defective and, even though the record shows that at some point it was amended upon the enactment of the [SOA](#), the amended charge sheet is not on record



for this Court to appreciate the nature of those amendment(s). Surprisingly, it seems that despite those amendment(s) the charge sheet remained misleading.

19. We observe that the trial court noted the errors in the charge sheet acquitted the appellant on the principal charge, convicted him instead on the alternative charge. The court rendered itself as follows:-

First I noted that the charge is defective. The particulars of the charge are at variance with the statement of the offence. According to the statement of the offence, the child who was defiled was aged between 15 and 16 years old, while accordingly (sic) to the particulars the child was aged 5 years old. To compound it all her clinic card was not produced.

20. Then again the accused was charged under section 8(3) of the *Sexual Offences Act* which covers cases of defilement of child aged between 12 and 15 years while according to the particulars and the evidence of PW2 the child is aged 5 years. The proper section would therefore be section 8(1) of the *Sexual Offence Act* (sic).
21. Even if the court were to find the accused guilty of defilement under section 8(1) of the *Sexual Offences Act*, this court cannot convict for a more serious charge than one which was preferred.”
22. The High Court on its part was of the view that the evidence adduced pointed to an offence under section 8(2) of the *SOA* although that was not the offence charged. It then set aside the conviction on the alternative charge of indecent assault and entered conviction on the offence of defilement contrary to section 8(2) of the *SOA*.
23. We think that age being one of the key elements of the offence of defilement and determinative of the penalty, it was critical for the age of the minor to be clarified at the trial stage. The omission to do so prejudiced the appellant’s fundamental right to fair trial particularly as to the nature of punishment he ought to have suffered. The situation was exacerbated by the fact that upon the charge sheet being amended, the trial court failed to ensure the effective recall of PW1, the clinical officer who examined the minor, especially because the appellant had requested for the same. PW1 was a crucial witness in the trial as he would have been helpful in shading light on the actual age of the minor.
24. Section 214(1)(i) of the *CPC* is clear respecting the accused person’s right to have a witness recalled, where a charge sheet is altered;

214. Variance between charge and evidence, and amendment of charge

- (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that— [...]

- ii. Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(Emphasis ours]



- 25. Upon a meticulous perusal of the record, we are of the considered view that the learned judge erred in entering a conviction against the appellant when the age of the minor remained uncertain.
- 26. The appellant further contends that the High Court enhanced the sentence imposed on him to life without warning him. During the hearing of this matter the Court had a candid conversation with the prosecution counsel as to whether the warning the respondent claims to have given the appellant was effective. Counsel was in agreement that it was not. The said notice is found at page 43 of the record and it reads;

Mr Mutai: ... I shall be contending that there was no basis for finding on that count and not on the main count itself. The principal charge of defilement. In effect I put appellant on notice that I shall be asking for enhancement of the sentence.

Court to appellant: Having heard what the state counsel has said, do you still wish to pursue your appeal?

Appellant: I still wish to proceed with my appeal against both conviction and sentence”.

- 27. We find that the foregoing notice was not sufficient in the circumstances particularly because the appellant was not represented by counsel. We are well aware that the notice to be issued before enhancement of a sentence is not required to be in any specific form. However, it must not be lost that for such notice to be constructive and efficacious, it must be seen that the accused person truly understood its nature and potential repercussions, and that he was given time to consider the said notice or warning. In this case, apart from the notice being oral, no explanation was given to the appellant as to what it really meant to enhance a sentence. Neither is there any mention or warning that he ran the risk of life imprisonment itself, the ultimate sentence for the charge, were he to pursue the appeal. It is the learned judge herself who was duty bound give that warning. A failure to do so was a fatal non-direction in the circumstances of this case.
- 28. For these reasons, we are of the view that the oral notice or warning given to the appellant was not effective and the learned judge erred in enhancing the term sentence of 18 years to life imprisonment. Ultimately, we are not satisfied that the appellant was granted a fair trial.
- 29. The result of our consideration of this appeal is that it succeeds. The conviction of the appellant is quashed and the sentence is set aside. We have mulled over whether this is a proper case for retrial and we think not. The appellant has been in custody for over 16 years and it would not be just to set the clock back and have him face a new trial. We thus order that he shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

