



REPUBLIC OF KENYA



**Otoro v Republic (Criminal Appeal 142 of 2018)
[2023] KECA 585 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 585 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 142 OF 2018
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MAY 12, 2023**

BETWEEN

DUNCAN ONYANGO OTORO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Migori (Mrima, J.) dated 25th February, 2016 in HCCRA No. 65 of 2015)

JUDGMENT

1. The appellant, Duncan Onyango Otoro, was the accused person in the trial before the Chief Magistrate's Court at Migori. The charge sheet, as amended, simply read that he was charged with the offence of defilement of a girl contrary to section 8(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that between the 14th and 17th day of November, 2014 at Owich sublocation in Nyatike District of Migori County, Duncan Onyango Otoro caused his penis to penetrate the vagina of NEN, a girl aged of 13 years. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge. As it will emerge shortly, the framing of the charge sheet is one of the points taken up on this appeal.
2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to twenty (20) years imprisonment.
3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.



4. The High Court (Mrima, J) dismissed the appeal and upheld the conviction and sentence in a judgment dated February 25, 2016.
5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. He has raised three (3) grounds in his homegrown memorandum of appeal, which are that:
 1. The appellate court erred in law to uphold both conviction and sentence as held by the judgment of the trial court which was based on defective charge.
 2. The appellate court failed to appreciate the decision of the trial court which was made without giving the accused person an opportunity to be heard on the new charge under section 8(1)(3) of the *Sexual Offences Act*, from the initial charge under section 8(1)(2) of the *Sexual Offences Act*.
 3. The appellate court erred in law to appreciate that the trial court and prosecution failed to avail crucial witnesses to disclose the evidence before it on how PW1 and the accused were arrested.
6. The appeal was argued by way of written submissions by both parties. During the virtual oral hearing, the appellant appeared in person, whereas learned counsel, Ms Odumba held brief for Mr Okango for the respondent. Both parties relied on their submissions.
7. The appellant contended that he was convicted on the basis of a defective charge and argued that the superior court failed to take the same into consideration when it upheld his conviction and sentence. He argued that his right to a fair hearing was contravened when the prosecutor made an application to have the charge sheet amended for purposes of correcting the complainant's age. He contended that after the charge sheet was amended, the prosecution ought to have called witnesses in that regard.
8. The appellant argued that the amendment of the charge sheet by the prosecutor resulted in the failure to give him an opportunity to be heard on the new charge under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He contended that the amendment was not within his knowledge and according to him, he was charged with an offence under section 8(1) as read with section 8(2) of the *Sexual Offences Act* but was convicted and sentenced under section 8(3) of the Act; which action was prejudicial towards him. He further contended that the trial court failed to comply with the relevant provisions of the law and instead, formed an unbalanced view of the evidence before it regarding the age of the complainant.
9. Lastly, the appellant argued that the prosecution failed to avail a crucial witness, Seline Atieno Ogola (the appellant's step- mother), who would have testified on how both him and the complainant were arrested. He argued that she was the one who caused their arrest by reporting the matter to the assistant chief and failure to summon her as a witness, left "the whole spectrum of this case open and vitiated the test and weight of the case". In this regard, the appellant relied on the decision in *James Mwangi v Republic* (1983) eKLR 327, 331 and *Kingi Ole Yenko v Republic* 1121 of 1971.
10. Opposing the appeal, Ms Odumba reminded the court of its role as a second appellate court, being, to deal with matters of law only. She argued that the issue of the defective charge was addressed by the two lower courts. She stated that the two lower courts rightly held that while there was a defect in the charge sheet, which did not include the appropriate penalty section, the same did not prejudice the appellant; and further, the appellant did not demonstrate how that defect was prejudicial towards him.
11. Secondly, counsel rejected the assertion by the appellant that he was denied an opportunity to be heard on the new charge. She argued that the defective charge sheet was amended before the prosecution closed its case and thereafter the appellant was put on his defence and his right under section 211 of the *Criminal Procedure Code* was explained to him, but he instead chose to leave the matter to the court.



12. Thirdly, regarding failure to call Seline Atieno Ogolla as a witness, counsel relied on the High Court decision in *Republic v Cliff Macharia Njeri* [2017] eKLR which cited the leading case of *Bukenya & others v Uganda* 1972 EA 549 on the principles to consider in determining the issue of crucial witnesses. In that case, it was held that it was not necessary to call all the people who know something about the case. She submitted that the appellant did not show how the failure to call Seline Atieno Ogolla prejudiced him or how her testimony would have helped his case. In any case, counsel opined that in hindsight, her testimony would have helped bolster the prosecution case. Ultimately, she argued that failure to call her did not prejudice the appellant.
13. Lastly, counsel took cognizant of the fact that the appellant was not represented by counsel, in which regard she opined that he may not be privy to the emerging jurisprudence on the unconstitutionality of mandatory minimum sentences under the *Sexual Offences Act*, which was akin to what he was given. Counsel noted that while the appellant did not outrightly appeal against his sentence, she noted that one of the prayers in his memorandum of appeal was that his sentence be set aside. Consequently, she urged the court to re-consider the mandatory minimum sentence imposed on him and proposed that the same be reduced to a sentence of ten (10) years imprisonment.
14. However, during the oral hearing, counsel differed with Mr Okango with whom she held brief and contended that the twenty (20) years imprisonment meted upon the appellant was justifiable due to the fact that the complaint was a young girl aged 13 years.
15. As rightly stated by the respondent’s counsel, this being a second appeal, our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare and exceptional occasions well delimited in our case law that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and 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 *Chemangong v R*, [1984] KLR 611.”
16. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.
17. Having perused the record, we have noted that the issue of the defective charge was substantively addressed by the two lower courts. The trial court found that defect did not prejudice the appellant as the amendment only affected the penalty section and not the section that disclosed the offence of the appellant. Further, the defect did not prevent the appellant from preparing his defence. The superior court in turn associated itself with the trial court’s position and noted that section 8(1) of the *Sexual Offence Act* created the offence of defilement while the other subsections were relevant in guiding courts on sentencing, thus, they only come into play once the ingredients of the offence of defilement are not proved in the first instance. In this regard, the superior court relied on this court’s decision in *Nyamai Musyoki v Republic* [2014] eKLR, where this court, differently constituted, held that the test for whether a defective charge sheet caused prejudice to an accused person is substantive not technical: the question to ask is whether the accused person was charged with an offence known to law; and whether the charge sheet, as framed, gave him, in clear and unmistakable terms, sufficient notice and information about the allegations he was facing in order to mount a defence. The court clarified that “if a defective charge is followed by a series of other procedural or substantive mistakes



and which in particular affect the rights of the accused person or the defect goes into the root of the charge and distorts it in a way that the accused cannot understand the charge, then the court ought to be reluctant to apply section 382 of the *Criminal Procedure Code* to cure the defect.” In the present case, we agree with the High Court and the trial court that the defect in the charge sheet was a harmless error as it did not cause any failure of justice. Consequently, the charge sheet was curable under section 382 of the *Criminal Procedure Code*.

18. Secondly, the appellant claimed that he was not given an opportunity to be heard on the new charge. We note that the appellant was originally charged under “section 8(1)(2) of the *Sexual Offences Act*.” Of course, no such section exists in the *Sexual Offences Act*. The prosecution made an application to amend the charge sheet on June 30, 2015. The application was allowed and the learned trial magistrate required the appellant to take plea to the amended charge sheet, as the law requires. The amendment brought the charges into consonance with a material aspect of the prosecution case – the age of the victim. Unfortunately, however, as discussed above, even as reframed, the charge sheet had a minor defect by omitting the penalty section.
19. After the appellant pleaded not guilty to the charge sheet as amended, the prosecution recalled the investigating officer, PW6, who produced the age assessment test. The witness was, then, made available to the appellant for cross-examination. The record shows that the appellant had no questions for the witness in cross-examination. The appellant did not, also, make any request for any of the witnesses to be recalled. Finally, the appellant was put on his defence. He gave an unsworn statement in which, in essence, he asked the court to determine the case based on the evidence received. In these circumstances, the appellant’s claim that he was not given an opportunity to be “heard” on the amended charge is unavailing.
20. The final argument the appellant raised before us was that a crucial witness was not called, and that a negative inference should be drawn against the prosecution under our decisional law spawned from *Bukenya & others v Uganda* 1972 EA 549. . We need not reach this argument because the appellant has only raised that argument before us for the first time; it was not raised on first appeal. Our limited remit as a second appellate court means that we cannot consider this new-found argument at this stage.
21. Consequently, based on the above analysis, we find that the appellant was properly convicted on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*.
22. As regards sentencing, we take note of the respondent’s counsel submission on the emerging jurisprudence on the unconstitutionality of mandatory minimum sentences under the *Sexual Offences Act*. See, for example, *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Joshua Gichuki Mwangi v Republic* [2022] eKLR. The respondent’s counsel recommended a review of the sentence downwards to ten (10) years imprisonment.
23. Considering the totality of circumstances in this case, we are of the view that the statutory minimum sentence of twenty (20) years imprisonment imposed is excessive in this instance. While the offence is objectively serious considering that it has the potential to affect the minor for a long time, we did not find any aggravating factors. On the other hand, the extenuating factors included the fact that the offence was not committed in a particularly cruel or depraved fashion; the appellant is a first offender; and was quite youthful at the time. We are certain that if the trial court had the discretion to consider these factors, it would have imposed a more lenient punishment.
24. All considered, we, therefore, dismiss the appeal against conviction and substitute the sentence imposed with a sentence of ten (10) years imprisonment. The sentence will be computed to begin on



November 17, 2014 since that is when the appellant was placed in police custody as he remained in remand during the pendency of the trial.

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

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

