**Kupata v Republic (Criminal Appeal 61 of 2022)**
**[2023] KECA 702 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 702 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MALINDI**

**CRIMINAL APPEAL 61 OF 2022**

**P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA**

**JUNE 9, 2023**

**BETWEEN**

**KAHINDI CHARO KUPATA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Malindi delivered by R. Nyakundi, J. on 16th August 2021 in High Court Criminal Appeal No. E017 of 2020)***

**JUDGMENT**

1. The Appellant, Kahindi Charo Kupata was charged before the Chief Magistrates Court at Kilifi with one count of Defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act*, hereinafter *SOA*. The particulars of the charge were:

> " On January 25, 2019 at 1600 hours at Vitengeni location, Ganze Sub-County Kilifi County intentionally and unlawfully caused his genital organs to penetrate the genital organ of MK a child of 9 years contrary to Section 8(1) and 8(4) of *Sexual Offences Act*."

2. He was also charged with the alternative charge of committing an indecent act with a child contrary to Section 11(1) of *SOA*.

3. The summary of the case is as follows: The victim in this case was MK, who was PW1 and a Class 2 pupil. She was 9 years old when the incident occurred as evidenced by her birth certificate Pexh1. She said she knew the Appellant before as he was a friend of her uncle and visited him often. On January 25, 2019 PW1 was returning home from school at 1 pm when she met the Appellant riding his boda boda. He offered her a lift home but instead took her to the bush where he tore her panties and defiled her. The Appellant then held her by the throat and threatened to do bad things to her if she told anyone.

The Appellant abandoned her in the bush. She testified that during the defilement and thereafter she felt Itchy. She also saw blood and felt in pain following the ordeal.

4. PW1 did not report to her sister, SKK, PW2 until three days later. PW2 stated that on the day of the incident PW1 arrived home unusually late that evening. She did not eat dinner and had difficulty walking. However, when PW2 asked her if there was anything wrong she said she had a cold. PW2 she took PW1 to the doctor after reporting to the police on January 29, 2009, one day after PW1 told her what had happened.

5. PW3 DC a business lady, was the mother of PW1. She told the court that PW1 was born on September 24, 2008. She learnt of the defilement on January 28, 2019 from PW2.

6. PW4, Dr Velda Ndaro from Kilifi Hospital. She saw and examined PW1, a 9 years old girl, on January 29, 2019 who told her that the incident took place on January 25, 2019. She noted that her hymen was broken and she had perianal tears running from the clitoris to the anal area. There was a discharge of blood mixed with puss in her vagina. She filled her P3 Form Pexh2 on February 8, 2019. She produced PRC form filled on January 30, 2019 as Pexh3.

7. The Appellant gave an unsworn defence in which he said that he was 19 years old. He said that he was a DJ and a boda boda rider. That he left home for the stage on the January 28, 2019, where he saw PW2 and her husband and recalled he had carried them to Chonyi for a funeral but that they did not pay for his services. He said that at the time he had threatened to report the matter to the police. He said that he was shocked by the accusation, which he denied.

8. The issue raised before the learned trial magistrate was that the evidence adduced by the victim and PW2 was a frame-up, as PW2 owed him money which she had declined to pay. Secondly that the failure to call the investigating officer of the case was fatal to the prosecution case.

9. Hon SD Sitati, the learned trial magistrate, delivered his judgment on September 12, 2019. He found that PW1 knew the Appellant and his profession before the incident. He found that the age of the victim was established by her mother, PW3 who gave the date of her birth as January 24, 2008, and identified the birth certificate in support. He found that the prosecution established the ingredients of the offence by proving that the victim was a child of 10 years at the time, that there was penetration and that the Appellant was positively identified as the perpetrator of the offence. He found that the victim's description of how the Appellant attacked her, how he inserted his penis in her sexual organ, and how she felt itchy and pain during and after the sex, and how thereafter she saw blood confirmed that the Appellant defiled her.

10. He noted that the victim's age was proved by the Birth Certificate and PW3 her mother was 10 years, given her date of birth was September 24, 2008 and the date of incident was January 25, 2019, and not 9 years as the mother stated in evidence. He noted that the Appellant was charged under Section 8 (4) of the *SOA* that was not the correct sub-section. He observed that the correct penal section was Section 8(2) given the victim's age. He found the error occasioned was curable under Section 382 *Criminal Procedure Code*, as the Appellant had not suffered any injustice.

11. The learned trial magistrate did not find that failure to call the investigating officer was fatal as the evidence adduced by the prosecution sufficiently proved all the ingredients of the charge. He also found that the case was not a frame up, that the victim impressed him as telling the truth and therefore believed her evidence. He proceeded to convict the Appellant under Section 8 (1) as read with Section 8 (2) of the *SOA* and sentenced him to 40 years imprisonment after considering the Probation Report, which declared him a repeat offender of a similar offence.

12. The Appellant was aggrieved by the judgment and sentence imposed by the trial court and so filed a first appeal before the High Court. He faulted the trial magistrate for convicting him while his arrest was not established, the age of the victim was not proved, that the medical evidence did not support the charge, that his defence was not considered, that there were contradictions in the prosecution case on the dates offence occurred, and finally that the sentence imposed was harsh and excessive.

13. The learned Judge, placing reliance on the cases of *R v Dyer* [1985] 2 KLR; *Buru v Republic* [2005] 2 KLR 533 considered the jurisdiction of a first appellate court, which he stated precluded it from interfering with findings of fact of the trail court unless they were not based on factual and legal basis.

14. On the issue of identification, the learned Judge found that the evidence of the victim was sufficient, as she knew the Appellant before. Placing reliance on Section 124 of *Evidence Act*, the learned Judge considered the victim's description of what the Appellant did to her, tearing her panties, inserting his penis and defiling her after which he abandoned her in the bush and found that the evidence proved that there was penetration and that the Appellant was the perpetrator. That in the circumstances corroboration was not necessary. He also found that the evidence of medical examination corroborated the victim's evidence on penetration.

15. On the Appellant's defence that he was framed by PW2 due to a debt, the Judge discounted the allegation finding that the evidence of all the prosecution witnesses support that PW1 had been defiled, and not that a debt was owed to the Appellant. The learned Judge found 'no specific errors on any of the witness statements omission or contradiction in the prosecution evidence based on what they stated on oath before the trial court.'

16. As for the sentence, the learned Judge found that Parliament prescribed life imprisonment for the offender who defiled a child of 11 years and below. He found that the learned trial magistrate was exercising his discretion when he sentenced the Appellant to 40 years imprisonment. He found the sentence legal and that there was no legal or other ground to interfere with it. He upheld the conviction and confirmed the sentence.

17. The Appellant, being aggrieved by the judgment of the High Court lodged this second appeal before us. The appeal was heard through this Court's virtual platform on theFebruary 14, 2023. The Appellant was present in person from Shimo La Tewa Prison. The learned Principal Prosecution Counsel Ms Mwaura was present for the State. The Appellant relied on his written submissions and supplementary grounds dated February 7, 2023 and did not wish to highlight them.

18. Ms Mwaura relied on her written submissions dated and filed on February 13, 2023. In the submissions, counsel drew our attention to the Section 361 of the *CPC* and urged that by dint of that provision, this being a second appeal, the appeal was limited to matters of law alone. She relied on *Samuel Warui Kanini v Republic* [2016] eKLR. On the appeal, counsel urged that the Appellant was positively identified in court by the PW1 who knew him before as friend of her uncle and who frequented their home. She urged that the prosecution evidence was cogent, consistent and corroborated. In reliance to *Dickson Elia Nsamba Shapwalta & Anor v Respondent*. (Tanzania case) Criminal Appeal No 92 of 2007, counsel urged that the High Court found that PW1 was defiled by the Appellant, and that it had nothing to do with fare owed or services rendered to PW2 & PW6. She urged that the prosecution proved every element of the offence of the charge and the sentence meted out was lawful.

19. On the issue of sentence is a matter of fact. She urged that the High Court considered sentence and found that there was no basis, whether legal or factual, to interfere with the trial court's exercise of discretion. She urged us to dismiss the appeal in its entirety.

20. This being a second appeal our mandate is limited by Section 361(1) (a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Njoroge v Republic* [1982] KLR 388 it was held by this Court on the said mandate on a second appeal:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

21. As to what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR characterised the three elements of the phrase "matters of law" thus:

> " (a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> (b) the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record; and
>
> (c) the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

22. This Court however held in *Jonas Akuno O'kubasu v Republic* [2000] eKLR that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles." [Emphasis ours].

23. We have a duty, as held by this Court in *Adan Muraguri Mungara v Republic* [2010] eKLR:

> " ... to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings."

24. The grounds of appeal raised before us were seven. The two courts below were faulted for:

i. Failing to note that voire dire examination as not conducted.

ii. Failing to see that the charge was defective.

iii. Failing to note that the medical evidence did not support the charge.

iv. Failing to see the complainant was untruthful in her evidence and thus the conviction was not safe.

25. The first appellate court was faulted for:

v. Failing to address the numerous contradictions and omissions in the prosecution case.

vi. Failing to find that the crucial evidence of the investigating officer was not presented before the trial court.

vii. Failing to find the sentence imposed against him was harsh and excessive.

26. On the defective charge, relying on section 137 of the *Criminal Procedure Code* (hereinafter CPC), the Appellant urged that he was charged with defilement contrary to Section 8 (1) as read with Section 8(4) of the *SOA*. That there was no amendment of the charge throughout the trial. That as the penal section prescribed for a sentence of 15 years, and he was sentenced to 40 years, then the charge was defective. He urged that what the learned trial magistrate should have done was to call for amendment under Section 214 of the *CPC*.

27. The State did not address this ground. We note that the Appellant did not raise this issue before the first appellate court.

28. The Appellant was charged under Sections 8(1) and 8(4) of the *SOA*. After hearing the entire evidence, the learned trial magistrate in his judgment made the finding:

> " Having found the age of the victim to be 10 years, I further find that the penal section 8 (4) of the *Sexual Offences Act*, 2006 cited in the Charge Sheet in the main count is curable under Section 382 of the *Criminal Procedure Code*, Cap 75, since it did not occasion any miscarriage of justice on the accused person. The correct Section 8 (2), which, in any event, this Court will have to consider at Sentencing, in the event that it convicts the accused person."

29. Section 382 of the *CPC* falls under Part XII, under the title 'Supplementary Provisions Irregular Proceedings, and provides as follows:

> " Finding or sentence when reversible by reason of error or omission in charge or other proceedings 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."

30. Section 8(1) of the *Act* is the provision that creates the offence of defilement while section 8(4) prescribes the punishment for defilement of a girl aged 16 years and above. As the charge alleged that MK was aged 9 years, the charge should have referred to Section 8 (2) of the *SOA* as the punishment section.

31. Section 137 of the *CPC*, which sets out the rules for framing charges and informations requires a charge or information to commence with the statement of the offence describing the offence briefly and in plain language and without stating all the essential elements of the offence. Where the offence charged is one created by an enactment, the statement of the offence is required to contain a reference to the

section of the enactment creating the offence. This is the provision that the Appellant contends was the foundation of his conviction and as it was violated, the charge was defective.

32. As section 137(a)(iv) of the *CPC* makes it abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the *Code* focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice. The question is whether the charge has occasioned a miscarriage of justice.

33. In *George Njuguna Wamae v Republic*, Crim App No 417 of 2009 this Court stated as follows regarding the effect of section 382 on defects alleged in the charge:

> " By dint of this provision, to reverse the findings of the courts below on account of an error, omission, or irregularity in the charge, we must be satisfied that such error, omission or irregularity has occasioned a failure of justice, and in making that determination, we must consider whether the issue being raised now could have been raised at an earlier stage in the proceedings. We are of the considered opinion that there was no failure of justice and that the appellant did not suffer any prejudice arising from the manner in which the statement of offence was framed in the charge sheet. The offence with which he was charged was clearly disclosed as robbery with violence contrary to section 296(2) of the Penal Code...More importantly, this is the kind of objection which, under the provision to section 382, should have been taken at the earliest opportunity before the trial court if the appellant considered the charge to be defective or otherwise lacking in clarity."

34. We are satisfied that in this case, the Appellant was not occasioned any prejudice and that there was no miscarriage of justice. As the learned trial magistrate observed, the defect in the charge was the omission to quote the correct penal provision, and that he would still consider it at the time of sentence, if he convicted the Appellant, which he did. In addition, the Appellant did not raise this issue at the earliest opportunity, at the trial, or failing that at the trial. We agree with the learned trial magistrate that the irregularity in the charge was one that was curable under Section 382 of the *CPC*. The Appellant fully appreciated the offence with which he was charged, as is evident from his cross- examination of the prosecution witnesses.

35. The Appellant faulted the learned trial magistrate for failure to conduct voire dire examination of the PW1. While placing reliance on Section 19 of *Oaths and Statutory Declarations Act* and the case of *John Muiruri v Republic* [1982] KLR 445, the Appellant urged that the court was duty bound to establish if the victim had capacity to testify and understands the nature of an oath. That the only way to form that opinion on through voire dire examination of the child witness. Further, placing reliance on Peter Kariga Kiume v Rep. (citation not provided) and Rep. v Lalkan (1981) KLR 73 urged that it was required that the questions put to the child witness be recorded, which the trial court failed to do.

36. The Appellant did not raise this issue before the trial court or the first appellate court. Nonetheless, we shall consider it. PW1 was a child of 9 years, thus was a child of tender years, and before the receipt of her evidence voire dire examination was required. We have examined the proceedings before the trial court and find that indeed voire dire examination was conducted with the answers of questions put to PW1 recorded. What was not included are the questions put to PW1. The Appellant is therefore challenging the adequacy of the process under taken by the trial court.

37. In *Odhiambo v Republic* (Criminal Appeal 85 of 2016) [2022] KECA 1082 (KLR) (7 October 2022) this Court set out the purpose of a voire dire examination thus:

> " The trial magistrate decided to conduct a voire dire examination of the complainant "because she appeared to be below 18 years old." This was a misapprehension of the law, as voire dire is required only when the proposed witness is a child of tender years so as to establish the competence of the witness' to testify intelligibly and to establish whether she understands the nature of an oath and the obligation to tell the truth."

38. We have considered the ruling of the trial court after examining PW1. He indicated that he was satisfied that the witness understood the duty to tell the truth and therefore took her evidence on oath. From her evidence as recorded by the court, it is clear that indeed PW1 was intelligent enough to testify. She responded clearly to examination in chief, and even the cross examination by the Appellant. We are satisfied, contrary to the Appellant's complaint there was procedural compliance, and that the flaws if any, are as to form, and did not occasion any prejudice to the Appellant, or miscarriage of justice.

39. The other ground raised was that the evidence of the victim fell below the required threshold, and that the evidence of identification was insufficient. This is a question of fact that ought to have been dealt with by the two courts below. As a second appellate Court, we must pay deference to the concurrent findings of fact by the courts below. Both courts are on record that PW1 was a truthful witness, and that her evidence had established that the Appellant defiled her. The courts found that the prosecution evidence as a whole was consistent and corroborative and established the charge against the Appellant beyond any reasonable doubt. We find no basis of departing from the concurrent findings of both courts.

40. As to failure to avail the investigating officer in reliance to *Bukenya v Uganda* [1972] EA 544, is equally a question of fact. The trial court and the first appellate court considered this issue and found that the evidence adduced by the prosecution, even without that of the investigating officer, was sufficient to sustain a conviction. We have no basis of departing from their concurrent findings.

41. On sentence, the Appellant relied on Al*i Abdalla Muranza v Republic* Criminal Appeal No 259 of 2012 in which this court examined the implications of excessive sentence to the health of a convicted person where the sentence if served, would go beyond the life expectancy of the convict. The Court delivered itself thus:

> " In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years."

42. This case does not aid the Appellant. The Appellant in the cited case was 36 years when he was sentenced to 40 years imprisonment. The Appellant in this case was only 19 years old at the time of conviction and sentence, and the argument of the Court in the cited case does not fit this case.

43. Having considered this appeal, we find that it has no merit and is accordingly dismissed in its entirety.

44. Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023.**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**