Langat v Republic (Criminal Appeal 29 of 2015)
[2023] KECA 928 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 928 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 29 OF 2015

F SICHALE, FA OCHIENG & WK KORIR, JJA

JULY 28, 2023

BETWEEN

SAMUEL KIPRONO LANGAT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru (A. N. Ongeri, J.) dated 27th July, 2015 in HC.CR.A. No. 188 of 2011)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Nakuru, (AN Ongeri, J). The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. At the conclusion of the trial, the appellant was found guilty of the offence. He was convicted and sentenced to 22 years' imprisonment.

2. The particulars of the offence were that: on December 6, 2010 in Narok South District within the then Rift Valley Province, the appellant inserted his genital organ into the genital organ of NK (name withheld), a child aged 14 years.

3. The prosecution's case was that; the complainant, a 14-year-old girl, was herding goats when she met the appellant. The appellant was a casual worker. The appellant ordered the complainant to stop, after he had stared at her for a long time. He was holding a panga. He grabbed her by the collar and pulled off the orange skirt she was wearing. He then removed her biker and panty and penetrated the complainant's vagina with his penis. She screamed. Her father came to her rescue. The father caught the appellant in the act. The matter was later reported to the police. The appellant was arrested and charged with the offence of defilement.

4. The learned Judge in his determination held that the evidence was watertight, the father of the complainant caught the appellant red-handed in the act. The appellant was well known to the

complainant and her father, who properly identified him. The court held that the issue of contradictory evidence did not hold water.

5. The learned Judge proceeded to hold that the conviction was secure, as there was overwhelming evidence against the appellant. The court observed that, there was no legal requirement that all witnesses mentioned must be heard. That the complainant's evidence was corroborated by that of PW2, and the medical evidence on record confirmed penetration. Accordingly, the appellant's appeal was dismissed.

6. Dissatisfied, the appellant lodged the present appeal. He raised five grounds of appeal and six supplementary grounds of appeal, the latter of which he expounded upon. The grounds were that the learned Judge erred in law in: finding that his fundamental rights were not violated, even though he was not informed of his right under Article 50(2) (g) (h) of the *Constitution*; relying on a defective and duplex charge sheet; relying on inconsistent and contradictory evidence; not finding that the medical report exonerated the appellant form the offence; not finding that the exhibits were produced illegally, as they were not listed as exhibits at the time of plea taking, and because they were not kept by the police; and that the learned Judge erred in not finding that his defence was plausible and raised enough doubts.

7. At the hearing of the appeal, the appellant was in person while the state was represented by Ms. Kisoo. Parties relied on their respective written submissions.

8. The appellant submitted that at the time of plea taking, he was not informed of his right to legal representation, nor was he warned of the severity of the charges. The appellant contended that the addition of subsection (3) in the judgment came too late in the day, and a grave violation as the prosecution did not make an application for substitution. He urged that the matter be referred for retrial. The appellant also argued that he was arrested on December 6, 2010 but the charge sheet indicated that he was arrested on December 8, 2010. He deemed that to be a violation of his rights under Article 49(1) (f) (i) (ii).

9. The appellant further submitted that PW1 was not a credible witness. He also noted that no spermatozoa were found on the complainant when she was examined. The doctor who testified stated that his findings confirmed sexual activity, even though there was no laceration and the hymen was not torn. He deemed the doctor's conclusion to be inconsistent with the results of the examination. He further noted that the panga mentioned by PW1 was never recovered or mentioned by PW2 and PW4.

10. The appellant further pointed out that the alleged torn clothing was not surrendered to the police, and the complainant continued to use the same at home, thereby interfering with the evidence; that is because it was not proved that the biker and panty produced in court were the actual ones the complainant was wearing on the material day. He argued that the production of the said exhibits was irregular. The appellant attributed his tribulations to the grudge which arose when he sought to recover his salary arrears from the father of the complainant.

11. Opposing the appeal, the learned state counsel relied on the provisions of Sections 134 and 382 of the *Criminal Procedure Code*; in noting that, the charge sheet contained the statement of offence which the appellant had been charged with, and the particulars of the said offence. Counsel pointed out that the offence was read to the appellant in a language he understood and he responded thereto. It was the respondent's case that the charge sheet presented before the court met all the basic requirements of a valid charge. In any event, as that issue was not raised in the first appeal, it was an afterthought. It was the understanding of counsel that the failure to use the words "intentionally", "unlawfully" and "without consent", did not go to the substance of the charge, and the same can be curable under Section 382.

12. Counsel further submitted that not all inconsistencies and contradictions are fatal to the prosecution case. (see: *Richard Munene v Republic* [2018] eKLR and *Eric Ondeng' v Republic* [2014] eKLR). The court was told that the appellant had failed to show any contradiction in the evidence, and that the prosecution witnesses were consistent in their testimonies before the trial court.

13. Counsel submitted that when the appellant was put on his defence, he gave an unsworn testimony, which was a mere denial. The appellant had stated that he had had a disagreement with his employer over salary payment, and he therefore attributed his arrest and prosecution to a scheme which was calculated to silence him. Counsel noted that the trial court had not only captured the appellant's defence, but had proceeded to evaluate the same, and ultimately concluded that the appellant's said defence was neither plausible nor sufficient to dent the case which the prosecution had established.

14. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

> " 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."

15. We have carefully considered the record of appeal, the written submissions by both parties, authorities cited and the law. The issues for determination are whether or not the charge sheet was fatally defective; and whether or not the ingredients of the offence of defilement were proved beyond reasonable doubt.

16. The issues of violation of rights, medical evidence and irregular production of exhibits were not raised before the first appellate court; we will therefore not delve into their merits or demerits. We so hold because an appeal cannot arise out of something upon which the court appealed from had not rendered a decision, unless the appellant can demonstrate that he had raised the said issue, but the court had failed to make a determination on it. It is our further finding that the issues of any alleged contradictions and inconsistencies are matters of fact. As this court's jurisdiction is limited to matters of law only, we must refrain from delving into matters of fact.

17. The appellant contends that the charge sheet relied on by the trial court to convict him was defective. In the High Court, the appellant stated that the charge sheet was defective because it did not include the word "consent", while in the present appeal he stated that the charge sheet did not reflect the evidence in chief. The High Court did not expressly determine this ground. Counsel for the respondent conceded that, there was a typographical error on the charge sheet with respect to the date the appellant was arrested being December 8, 2010. Counsel also submitted that the failure to include the words; "intentionally", "unlawfully" and "without consent", in the charge sheet did not go to the substance of the charge and the same was curable under Section 382.

18. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law, but also to be furnished with all the necessary details of the offence, so as to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence. It follows therefore, that a charge sheet which was deficient in substance would prejudice an accused person's

right to a fair trial as provided for in Article 50(2) (b) of the *Constitution*. This was the rationale behind Section 134 of the *Criminal Procedure Code*. The Section provides that:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

19. Whether an anomaly can render a charge sheet defective was determined in the case of *Isaac Omambia v Republic* [1995] eKLR, where the court considered the necessary ingredients in a charge sheet as follows:

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

20. In determining whether a charge sheet was defective or not, this Court in the case of *Sigilani v Republic* [2004] 2 KLR, 480 stated that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence".

21. Having perused the charge sheet in this case, we note that the appellant was charged with; "defilement contrary to Section 8(1) of the *Sexual Offences Act*, No 3 of 2006". The charge sheet clearly indicated the statement of the offence that the appellant was charged with. The said offence is known in law. The charge sheet also contained the particulars of the offence. The appellant was alleged to have inserted his genital organ into the genital organ of the complainant, a child aged 14 years, on December 6, 2010 at [particulars withheld] in Narok South District. The charge sheet was not deficient in substance, and it could not therefore prejudice the appellant.

22. In the case of *Peter Ngure Mwangi v Republic* [2014] eKLR, the court stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in Yongo v R,(198)eKLR that:
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> > "In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:
> >
> > i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,

ii. when for such reason it does not accord with the evidence given at the trial."

23. In the present case, it is not in dispute that the provision stipulating the sentence prescribed in the *Sexual Offences Act* was not cited in the charge sheet. It is also not in dispute that the words "intentionally", "unlawfully" and "without consent" were not used in the particulars of the offence. The question to be determined then, is whether the omissions were prejudicial to the appellant. In the case of *Peter Sabem Leitu v R*, Cr. App No 482 of 2007 (UR) the court held that:

> "The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."

24. Section 382 of the *Criminal Procedure Code* provides that:

> "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."

25. In the case of *JMA v Republic* [2009] KLR 671, the court observed that, not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective, so as to render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], it was held that:

> "Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities."

26. In the case of *Isaac Nyoro Kimita & another v Republic* [2014] eKLR the court stated thus:

> "In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate

the charge against him or was either of them confused by the inclusion of the term "jointly" in the particulars of the charge?"

27. In the case of *John Irungu v Republic* [2016] this Court observed that:

> "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."

28. In the case of *Benard Ombuna v Republic* [2019] eKLR the court held that:

> "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

29. From our re-evaluation of the proceedings on the record, we hold the considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is clear from his defence and submissions that he understood that he was being accused of having committed the offence of defilement, against the complainant. In our view, the omissions did not render the charge sheet fatally defective. In so finding, we are guided by the decision in the case of *Willie(William) Slaney v State of Madhya Pradesh* (*supra*), where the court held:

> "We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."

30. Similarly, in the case of *Samuel Kilonzo Musau v Republic* [2014] eKLR then court held that:

> "As will be readily apparent, section 8(1) is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.
>
> In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice."

31. We are also persuaded by the decision in the case of *Thomas Aluga Ndegwa v Republic* [2018] eKLR where the court stated that:

> "We respectfully agree with the reasoning of the first appellate court. While the charge sheet may not have been drafted in the most elegant of terms, it is clear that the appellant understood the charge against him and participated in the trial. For similar reasons, we find that the appellant's right to a fair hearing under Article 50 (2)(b) of the *Constitution* was not violated".

32. From our analysis of the case herein, we find that the error in the charge sheet did not occasion a failure of justice.

33. The *Sexual Offences Act* sets out the elements of the offence of defilement as follows: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice; and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients.

34. It is not in dispute that the complainant was 14 years old. The evidence on the age of the complainant was also corroborated by the evidence of her father and the doctor.

35. The evidence of the complainant concerning the incident, was also corroborated with the evidence of her father, who the trial court found to be truthful. We therefore find that the evidence was sufficient by dint of Section 124 of the *Evidence Act*. It was on the strength of the complainant's evidence, that the appellant grabbed her by the collar, pulled off the orange skirt she was wearing and then removed her biker and panty and penetrated her vagina with his penis; and her father's evidence that he caught the appellant in the act and arrested him that the appellant was found guilty.

36. As regards the identity of the appellant, we note that he was well known to the PW1 and her father. The appellant confirmed that he was known to the complainant's father as he was his employer. This was a case of recognition.

37. We have no doubt that PW1 and her father were able to recognize the appellant. In the case of *Cleophas Otieno Wamunga v Republic* [1989] eKLR, this Court while dealing with the complexities of an identification of an assailant stated:

> "It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

38. As regards the appellant's defence, the appellant gave an unsworn testimony and chose not to call any witnesses. The court proceeded to analyse the said evidence. We find that the court extensively considered the appellant's defence.

39. From the foregoing, we find no reason to make a finding that is inconsistent with the first two courts on matters of facts. We are satisfied that the appellant's conviction was safe.

40. In the instant appeal, having considered the evidence on record and the circumstances of this case on its own merit, we are not inclined to interfere with the findings of the two courts below.

41. The upshot is that the appeal against conviction and sentence is without merit and it is hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR