RN v Republic (Criminal Appeal 54 of 2021)
[2023] KECA 1081 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1081 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 54 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

SEPTEMBER 22, 2023

BETWEEN

RN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Malindi (Hon. Justice Chitembwe Said Juma) dated and delivered on 22nd July, 2015 in the High Court Criminal Appeal No.37 of 2015 Arising from the Original trial by Hon. L. N. Wasige in Kilifi SRM Cr. Case No.1210 of 2010)

JUDGMENT

1. This is a second appeal by the Appellant. According to the amended charge sheet dated 27th July, 2012, the Appellant was charged with the offence of incest contrary to section 20

    1. of the *Sexual Offences Act* No.3 of 2006, the particulars of the offence being that the Appellant on diverse dates in the month of July, 2011 in Kilifi County caused his penis to penetrate the vagina of PMD, a juvenile aged 7 years who was to his knowledge his niece. The Appellant pleaded not guilty to the charge. After hearing the Appellant was convicted by the trial court and sentenced to life imprisonment. His appeal to the High Court was dismissed on 2nd July, 2015 thereby provoking the present appeal.

2. This, therefore is a second appeal and our mandate, which is limited by Section 361(1) (a) of the *Criminal Procedure Code*, is to consider issues of law as opposed to factual matters that have been tried by the first court and re-evaluated on first appeal and concurrent findings arrived at; unless it is demonstrated that the two courts below 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 that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court therefore has a duty to

pay homage to concurrent findings of fact made by 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, in which event, the decision is bad in law, thus entitling this court to interfere. See *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007; *Njoroge v Republic* [1982] KLR 388; and *Karani v R* [2010] 1 KLR 73.

3. It is clear that there is a duty imposed on the first appellate court of re-evaluating and re-analysing the evidence placed before the trial court and arrive at its decision cautious of the fact that it was not the trial court and therefore, unlike the trial court had no benefit of seeing the witness testify hence incapacitated in terms of gauging the demeanour of the witnesses and allowance must be given for this. See *Okeno v Republic* [1972] EA 32.

4. However, the failure by the first appellate court to undertake that duty, a duty imposed by the law, elevates the otherwise factual matters to a matter of law. This Court therefore held in *Jonas Akuno O'kubasu v Republic* Kisumu Criminal Appeal No. 69 of 1999 [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].

5. At times, where the question involved is that of mixed fact and law, it is not easy to distinguish the two. The Supreme Court therefore clarified what constitutes "matters of law" in relation to this Court's jurisdiction as the second appellate court, in *Gatirau Peter Munya v Dickson Mwenda Kithinji and 3 others* [2014] eKLR where the three elements of the phrase "matters of law" were identified 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."

6. Our determination of this appeal must therefore be based on the above principles and we shall briefly revisit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their legal mandate as is required of them.

7. The facts of the case are that when PW2 (mother) left to Mombasa to attend an interview, she left the complainant (PW1) with her siblings, at PW1's aunt and sister to PW2. According to PW1, at night while asleep she heard someone enter the room and the person removed her pants and inserted what PW1 called his tuputupu and inserted into her tuputupu. When the Complainant screamed, his aunt went to the room, switched on the lights and upon seeing nobody in the room, asked them to continue sleeping. In the morning, when the Aunt had gone to work, and while the Complainant's brothers were sleeping, the Appellant who was the Complainant's Auntie's husband told the Complainant to follow him into his bedroom whereupon the Appellant removed his tuputupu and inserted it into the Complainant's tuputupu while holding the Complainant's mouth with his hand to stop her from screaming. The Appellant then cleaned the Complainant using a bed sheet and asked to sleep after threatening to kill her should she disclose the incident to the Complainant's Aunt. Upon the return of

PW2, the following day, the Complainant disclosed the incident to her friend and the friend disclosed the same to PW2 who asked the Complainant what had happened and the Complainant divulged what transpired.

8. PW2 confirmed that on 28th November, 2011, when she returned from her interview, the Complainant informed her that she was unwell and she saw blood in her urine. However, as the Complainant used to be sickly, she took her for treatment and the Complainant was treated and was discharged. The Complainant however confided in her friend what had occurred and her friend in turn divulged the information to PW2's househelp who in turn relayed the information to PW2. Upon inquiring from the Complainant, the Complainant confirmed that the Appellant had defiled her while she was left with PW2's sister. PW2 then reported the matter at Kilifi Police Station where she was told to take the Complainant for examination. After examination, PRC Form together with P3 Form were filled in. According to PW2, the Complainant was born on 8th February, 2004.

9. Upon medical examination, it was revealed that the Complainant's hymen was broken though no other abnormality was noted. PW3 exhibited documents in support of this testimony. When the incident was reported at Kilifi Police Station on 28th November, 2011 at about 4pm, PW4 who was the gender officer at the station recorded the statements and launched the investigations and issued the Complainant with a P3 form which was eventually filled in at Kilifi District Hospital. According to her the examination revealed that the Complainant, was born on 10th February, 2004, and she exhibited her card.

10. Upon being placed on his defence, the Appellant testified that that the Complainant was his niece, being a daughter to his wife's sister. It was his evidence that he was unaware of the alleged offence and denied having committed the same. He denied that the Complainant was taken to his house during the month in question and insisted that he was wrongly accused.

11. In her judgement, the learned trial magistrate found that the Appellant and the Complainant were related, the Complainant being the Appellant's niece; that the Complainant was defiled; that the Complainant was 7 years old in July, 2011; and that the Complainant positively identified the Appellant, her uncle as the one who defiled her. The Appellant was accordingly convicted of the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. He was sentenced to life imprisonment, the trial court taking the view that the sentence was the one mandatorily prescribed.

12. Upon his appeal to the High Court, the Court (Chitembwe, J) found that the Appellant was 7 years old at the time of the incident; that the Complainant lost her hymen during penetration; that it was the Appellant who defiled the Complainant; and that the life sentence was sanctioned by the law. He therefore found the appeal unmerited and dismissed it in its entirety.

13. The Appellant is aggrieved by the High Court judgment and has proffered a second appeal premised on 7 Amended Grounds of Appeal. We heard the appeal on the Court's virtual platform on 14th March, 2023 during which the Appellant appeared from Kamiti Maximum Prison. Though Justice Defenders had instructed Learned Counsel Mr Obwogi to appear for the Appellant, the Appellant decided to prosecute his appeal on his own while Ms Mutua held brief for Mr Okemwa, Snr. Assistant Director of Prosecutions. Both the Appellant and the Respondent filed their submissions which they relied on entirely.

14. According to the Appellant, PW1 was not his niece since she was not a daughter to the Appellant's brother or sister to fall within the definition under Section 22(a) or (b) of the *Sexual Offences Act* thus making the conviction unsafe and in breach of Article 25(a) and (c), 47(1) and 159(2) (e) of *the Constitution*. In the Appellant's view, convicting him under a wrong charge vitiated the trial process. Reliance has been placed on the cases of *David Mwingirwa v R* Criminal Appeal No.23 of 2015,

WOO v R HCCRA No.81 of 2015, *ZWO v R* HCCRA No.30 of 2017 and *J. Njagi v R* HCCRA No.30 of 2017.

15. It was the Appellant's case that there was no fair trial envisaged under Articles 25(c) and 50(1) of *the Constitution* since the charge sheet was defective as the particulars of the charge differed with the evidence tendered in court since the charge sheet did not specify dates when the crime was committed. The Appellant in support of his submissions relied on *Peter Nkonge Gatundu v R* HCCRA No. E004 of 2020 and *Stanley Muriuki v R* HCCRA No. 1 of 2015.

16. The Appellant took issue with the authenticity of the PRC Form and submitted that it should have been excluded for lack of an official seal/stamp; that it was prepared 4 months later from the alleged date of the offence and no explanation was given; that it was not supported by treatment notes yet the Prosecution alleged that PW1 was treated in July, 2011. According to the Appellant filing the P3 Form on 5th January, 2012 and PRC Form on 29th November, 2011, 2 months and 4 months respectively later from the date of the alleged offence was suspicious and malicious. The Appellant asserted that the Prosecution breached Section 11 of the *Evidence Act* in presenting inconsistent facts. Reliance has been placed on the Court of Appeal case of *David Mwangirwa v R* and *Francis Muniu Kariuki v R* (2017) eKLR.

17. The Appellant, while conceding that PW1's age was proved through the Health Card, asserted that it is not enough to establish culpability or to found a conviction. According to the Appellant, the Prosecution breached Article 50(2)(j) and 50(2)(k) of *the Constitution* for not disclosing to the Appellant in advance the PRC Form and challenging the PRC evidence presented by PW3. To the Appellant, this was contrary to Article 47(1) of *the Constitution* and Sections 354(2) and 392 of the *Criminal Procedure Code*. Reliance has been placed on the case of *John Waweru Njoka v R* Crim Appeal No.155 of 2001 KLR 175 and *James Agalomba Kigika v R* (2017) eKLR.

18. It was further submitted that PW2's (mother) evidence was not corroborated; that PW3 did not personally examine PW1 and relied on unofficial PRC Form; that the Appellant was ambushed by the production of the PRC Form which was not availed to him earlier; that the preparation of the P3 Form six months later was not supported by treatment notes; that the Learned Trial Magistrate did not comply with Section 124 of the *Evidence Act* that requires corroboration of evidence; that the Prosecution failed to call PW2's sister (Mama Sada) or Sada's nanny to make a fair determination. Reliance was placed on the case of *Bukenya & Others v Uganda* (1972) EA 549 and the case of *James Agalomba Kigika v R* (2017) eKLR on the proposition that they were crucial witnesses.

19. The Appellant also took issue with the manner in which his advocate conducted the matter and took issue with the inadequate preparation by the said advocate. In his view this was in violation of Article 50(5) (a) of *the Constitution*. Reliance was placed on the case of *Charles Wamukoya v R* CR Appeal No. 72 of 2013, *Elias Kiamati Njeru v DPP* HCCRA No. 11 of 2015 and *Victor Mwendwa Mulinge v R* CA CR Appeal No.357 of 2012.

20. Regarding the sentence upheld by the Learned Judge, the Appellant submitted that the mandatory sentence violates Article 50 of *the Constitution* on fair trial as read with Sections 216 and 329 of *Criminal Procedure Code* and reliance was placed on the case of *Francis Matonda v R* (2019) eKLR, *Charo Ngumbao Gududu v R* (2011) eKLR, *Evans Wanjala Wanyonyi v R* (2019) eKLR, *Philip Mueke Maingi v R* Crim Appeal No. 46 of 2020 and *Benjamin Kahindi Changawa v R* Cr Appeal No.99 of 2019.

21. The Appellant submitted that he is 56 years and the average life span in Kenya is only about 60 years such that mandatory and harsh sentence are constitutionally untenable. According to the Appellant, his life in prison has transformed him and during the said period he has attained an LLB Degree from

the University of London and anticipates to write a book after leaving prison to shed light on the criminal justice system and living a crime free life. According to the Appellant, his family visits him at the prison and they are ready to receive him back. It was his submission that he will be an asset to the society and urged the court to quash the conviction, set aside the sentence and order for his release.

22. On behalf of the Respondent, it was submitted that the evidence was that the complainant was niece to the Appellant hence their relationship fell in the category listed under Section 20(1) of the *Sexual Offences Act* No.3 of 2016; that the particulars were clear as the offender's name, date, place and relationship were indicated in the charge sheet; and that the evidence adduced in the trial supported the particulars in the charge sheet; and that the charge sheet had enough information in compliance with Section 134 of the Criminal procedure Code. Reliance has been placed on the case of *Peter Ngure v R* (2014) eKLR.

23. According to the Respondent, the Appellant was accorded the opportunity to cross-examine the medical practitioner on the P3 Form hence the evidence was admissible under Section 42 of the *Evidence Act* and that even without the medical evidence, PW1's evidence was sufficient pursuant to Section 124 of the *Evidence Act* as appreciated by the case of *Stephen Nguli Mulili v R* (2016) eKLR. According to the Respondent, Articles 25,27,28,50,157 and 159 of *the Constitution* were well observed since the Appellant was represented by an advocate, a fair trial was accorded to him as he was given time to challenge the Prosecution evidence and has not demonstrated how he was discriminated. According to the Respondent, it was not necessary for the Learned Trial Magistrate to invoke Section 89(b) of the *CPC* since it was found that the formal charge had disclosed an offence and proceeded to hear the Prosecution and defence cases. The Respondent urge the court to uphold the conviction and sentence.

Analysis And Determination

24. We have considered the issues raised in this appeal. The issues that arise for determination are whether PW1 was a niece of the Appellant; whether the charge sheet was defective for failure to disclose the exact date of the offence; whether the particulars in the charge sheet varied with evidence adduced by Prosecution witnesses; whether the Prosecution breached Article 50(2)(j) and 50(2)(k) of *the Constitution* for not disclosing to the Appellant in advance the PRC Form and challenging the PRC evidence presented by PW3; whether the Prosecution's failure to call other witnesses deprived the court of the evidence to make a fair determination; whether the Prosecution proved beyond reasonable doubt the offence of incest against the Appellant; and whether the sentence of life imprisonment was lawful.

25. As we stated at the beginning of this judgement, this is a second appeal and restated the circumstances under which this Court interferes with the concurrent findings of fact by the two courts below. Apart from that this Court is not entitled to interfere with the findings of the High Court unless the issue raised was taken up before the first appellate court. This Court in *Alfayo Gombe Okello v. Republic* [2010] eKLR had this to say about the issue:

> "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

26. The predecessor to this Court in *Alwi Abdulrehman Saggaf v Abed Ali Algered*i [1961] EA 767 held that the course of taking a point of law, which has not been argued in the court below, on appeal ought not to be followed unless the court is satisfied that the evidence upon which they are asked to decide

established beyond doubt that the facts, if fully investigated, would have supported the new plea. The justification for that holding was that:

> " The appellate jurisdiction is conducted in relation to certain well-known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the argument it is the invariable practice of the appellate tribunals to require that the judgements of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially a final Court of Appeal, are increased and strengthened by the opinions of the learned Judges who have considered these matters below. To acquiesce in such attempt as the appellants have made in this case is in effect to undertake decisions which may be of the highest importance without having received any assistance at all from the judges in the courts below."

27. There is however a limited avenue where the decision in question is manifestly contrary to the law or *the Constitution* such as where the sentence imposed is manifestly illegal since a Court of law cannot close its eyes to a manifest illegality since this Court is bound by the National Values and Principles of Governance in Article 10 of *the Constitution*which oblige us, in interpreting any law, to inter alia, be bound by the rule of law.

28. In this case, most of the complaints by the Appellant are directed at the decision made by the trial court rather than the decision of the High Court. In our view, we cannot in all fairness overturn the High Court's decision based on challenges taken against the decision by the trial court when those challenges were not taken before the High Court, sitting in its appellate capacity. This Court is only clothed with an appellate jurisdiction and under Article 164(3) of *the Constitution* the powers of this Court are restricted to hearing appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. This is reinforced by Section 3(1) of the *Appellate Jurisdiction Act* which provides that:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.

29. We cannot, under the guise of exercising our jurisdiction pursuant to the foregoing provisions, purport to sit on an appeal against the decision of the Magistrate's Court in the absence of a decision having been made on the issue in the High Court exercising its first appellate jurisdiction.

30. It is therefore our view that the only issues that fall for determination before us are whether PW1 was a niece of the Appellant; whether the Prosecution breached Article 50(2)(j) and 50(2)(k) of *the Constitution* for not disclosing to the Appellant in advance the PRC Form and challenging the PRC evidence presented by PW3; whether the Prosecution's failure to call other witnesses deprived the court of the evidence to make a fair determination; and whether the sentence of life imprisonment was lawful.

31. As regards the first issue, Section 20(1) of the *Sexual Offences Act* No.3 of 2006 provides:

> (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:.."

32. Section 22(2) of the *Act* provides;

> (2) In this Act –

a. "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

b. "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;..."

33. Since the operative word in Section 20(1) of the *Sexual Offences Act* is "means" as opposed to "includes", this Court cannot expand the definition of "niece" to include the daughter of a sister in law as in this case. Accordingly, we agree with the Appellant that he ought not to have been charged with the offence of incest. Instead he ought to have been charged with the offence of defilement. Since the Complainant was found to have been 7 years old at the time of the offence, under that Section, the sentence provided is a prima facie mandatory life sentence. However, under incest, the law provides that a person convicted is liable to be sentenced to life sentence. The phrase "liable to" has been interpreted to denote the maximum. A similar position was adopted in *D W M v Republic* [2016] eKLR where the Court held that:

> " As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

34. It therefore follows that had the Appellant been properly convicted, he would have, subject to what we state hereinbelow, been sentenced to life imprisonment.

35. The question that arises is whether, had the first appellate court properly addressed its mind to this legal issue, it would have arrived at a different conclusion. This is because 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:

36. It is therefore clear that by convicting the Appellant of the offence of incest, the Appellant benefited from the wrong application of the law and the facts. Section 361(2) and (4) of the *Criminal Procedure Code* provides that:

(2) On any such appeal, the Court of Appeal may, if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its judgment or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary.

(4) Where a party to an appeal has been convicted of an offence and the subordinate court or the first appellate court could lawfully have found him guilty of some other offence, and on the finding of the subordinate court or of the first appellate court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the subordinate court or by the first appellate court a conviction of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the subordinate court or by the first appellate court as may be warranted in law for that other offence.

37. In this appeal, we agree with the Appellant that the appropriate offence with which the Appellant ought to have been charged should have been defilement contrary to section 8(1) and (2) of the *Sexual Offences Act*. We therefore set aside the Appellant's conviction of the offence of incest and substitute therefore defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act*. Under the said provisions the Appellant was liable to be sentenced to life imprisonment.

38. The next issue is whether the Prosecution breached Article 50(2)(j) and 50(2)(k) of *the Constitution* for not disclosing to the Appellant in advance the PRC Form and challenging the PRC evidence presented by PW3. As rightly submitted by the Respondent the Appellant had the benefit of legal representation. The issues being raised in this ground ought to have been raised before the trial court. Having not been raised, we cannot deal with it in this appeal. Although the Appellant has heaped blame on the advocate who represented him before the trial court, there is no basis upon which we can find that his defence was not properly conducted, assuming that we have such powers in the first place.

39. As to whether the Prosecution's failure to call other witnesses deprived the court of the evidence to make a fair determination, the law in section 143 of the *Evidence Act* is that:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

40. The law, as we understand it, is that the prosecution is not obligated to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt. Therefore, whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive. The failure to call some of the witnesses is only relevant where the evidence adduced is barely adequate to support the offence. In this case, it has not been submitted that that is the case. In any case, the two courts below having been satisfied that the evidence was adequate, we have no power to interfere with their concurrent findings of fact.

41. The next issue is the issue of the sentence. To the extent that the life sentence meted out by the two courts below for the offence is an indeterminate sentence, we are inclined,consistently with the Supreme Court decision in *Francis Karaoke Muruatetu & another v Republic* [2017] eKLR and the decision of this Court in *Julius Kitsao Manes v Republic,* Malindi Criminal Appeal No. 12 of 2021, to interfere with the sentence.

42. We accordingly, dismiss the appeal on conviction but set aside the life sentence imposed on the Appellant. We substitute therefore a sentence of 25 years from the date of his conviction by the trial court.

43. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF SEPTEMBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR