Tuigong v Republic (Criminal Appeal 24 of 2015)
[2023] KECA 1099 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1099 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 24 OF 2015

F SICHALE, LA ACHODE & WK KORIR, JJA

SEPTEMBER 22, 2023

BETWEEN

JOSEPH KIPTOO TUIGONG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Kiarie, J.) dated and delivered on 27th May 2015 in HCCRA No. 94 of 2014)

JUDGMENT

1. Joseph Kiptoo Tuigong, the Appellant, is before us on a second appeal. The appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge stated that on October 4, 2010 within the former Nakuru District, the appellant penetrated the genital organ of VNL aged 6 years with his penis. At the conclusion of the trial, the appellant was sentenced to serve life imprisonment.

2. Dissatisfied with the judgment of the trial court, he lodged an appeal at the High Court which appeal was dismissed. He is now before us challenging the judgment of the High Court on grounds that the charge sheet was defective, that the evidence on record did not support the charge, that he was denied an opportunity to address the trial court in violation of the provisions of sections 213 and 319 of the *Criminal Procedure Code* (CPC), and that his defence was not considered.

3. In a nutshell, the facts of this case were that on October 4, 2010, the complainant was gleaning maize in a farm near her home with her friends when the appellant who worked in the neighbouring home accosted her, chased away her friends and asked her to lie down. He then proceeded to defile her. Unbeknownst to the Appellant, a neighbour (PW4 PK) was watching the scene from her home. Later on, PW4 asked the complainant what had transpired and the complainant informed her that the appellant had defiled her. The matter was reported to the complainant's parents who then escorted the

complainant to the hospital and reported the matter to the police. PW1 Dr Samuel Onchere examined the complainant and confirmed the parents' fears that indeed their daughter had been defiled.

4. When this appeal came up for hearing, the Appellant appeared in person while Ms Kisoo appeared for the Respondent. Both parties had filed their Written Submissions which they sought to rely on. In support of his appeal, the appellant submitted that the charge sheet was defective as the charge was based on a non-existent provision of the law, being section 8(1)(2) of the *Sexual Offences Act*. The appellant relied on the case of *Jason Akumu Yongo vs. Republic* [1983] eKLR in support of his assertion that a defective charge cannot support a conviction.

5. The appellant also submitted that the charge was neither supported nor proved by the evidence on record. He contended that penetration as an element of the offence of defilement, was not proved against him.

6. The appellant further submitted that he was not accorded an opportunity to address the court as he was entitled to under Sections 213 and 319 of the *CPC*. He argued that such an omission in procedure led to the ultimate derogation of his rights to fair hearing under Article 50(1) and (2)(g), (f) & (k) of the *Constitution*. Finally, the appellant submitted that his alibi defence was not considered by the two courts below despite his defence creating reasonable doubt in the prosecution case.

7. Ms Kisoo on her part opposed the appeal on conviction and stated that the life sentence imposed on the appellant ought to be maintained. Replying to the appellant's claim that the charge was defective, counsel submitted that the charge as was drafted complied with Section 134 of the *CPC*and even if there was any error, the same was curable under Section 382 of the CPC. According to counsel, there was no failure of justice or prejudice occasioned to the appellant. Counsel further submitted that the element of penetration was proved by the evidence of the complainant who testified as PW2 and corroborated by that of PW1.

8. On whether the appellant was denied an opportunity to address the court, counsel submitted that the provisions referred to by the appellant are not mandatory and that the appellant ought to have shown this court the prejudice visited upon him by the failure to accord him an opportunity to address the court at the close of the prosecution's case and at the conclusion of his defence. Ms Kisoo also reiterated that the evidence of the appellant was considered but the trial court found that such evidence was incapable of impeaching the prosecution case. Counsel consequently urged us to dismiss this appeal.

9. This is a second appeal and as such our mandate is spelt out under Section 361(1) of the CPC. In essence, we are only to render ourselves on matters of law. The section also provides that the question of severity of sentence is a matter of fact and not of law, save where the sentence has been enhanced by the High Court or its legality challenged. As regard matters of fact, we are required to pay homage to the findings by the two courts below, except where such findings were not supported by the evidence on record or where the findings are made as a result of a wrong application of the law. In line with this requirement, we have duly considered the record of appeal and the submissions by both parties. In our view, this appeal raises three issues, namely, whether the charge sheet was defective, whether failure to accord the appellant an opportunity to address the court was fatal to the case and whether the appellant's defence was considered.

10. In addressing the first issue, we commence by observing that Section 134 of the *CPC* defines what a proper charge sheet is. The section provides as follows:

> " 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." [Emphasis ours]

11. The appellant has taken issue with the statement of the offence which provided that he had been charged with the offence of defilement contrary to section 8(1)(2) of the *Sexual Offences Act*. In this regard, we agree with the appellant that under the *Sexual Offences Act*, there is no Section 8(1)(2). We observe that the proper way to draft the charge would have been to state that the appellant was charged with defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. That way the charge would expressly convey the offence committed by the appellant and the sentence prescribed for that offence. This Court has times without number underscored the need to have charges drafted with precision and clarity as to inform an accused person what charges he faces as well as the possible consequences. This is not a matter of mere form but a realization of a constitutional right under Article 50(2)(b) of the *Constitution* which requires that an accused person be informed of the charge, with sufficient detail to answer it.

12. Be that as it may, we have applied our minds to the charge sheet as drafted. In our view, despite the apparent error that we have noted, the charge sheet met the threshold and intention of section 134 of the CPC. From the charge sheet there is no need for extra effort for one to discern that the appellant was charged with the offence of defilement under section 8(1) of the *Sexual Offences Act*. It is equally easy for one to discern, against whom, where and when the said offence was committed. This, in our view, fulfills the intention of Section 134 of the *CPC*. The citation of sub-section (2) of section 8 of the *Sexual Offences Act* forewarned the appellant that he would be sentenced to life imprisonment if he was to be found guilty for defiling a child aged eleven years or less. That the victim was six years was clearly stated in the particulars of the charge. The appellant therefore knew from the start what he was alleged to have done and the sentence provided for that offence. We further note that the appellant did not raise this issue previously up until this moment in time. He proceeded to participate in his trial, tender his defence and prosecuted his first appeal and from the record, he appreciated the nature of the offence he was facing. Further, we do not find the appellant's challenge to the charge sheet as competent enough to impeach the insulation proffered to convictions and sentences by Section 382 of the CPC as no prejudice or miscarriage of justice was visited upon the appellant. Previously faced with a similar defect in the charge, this Court has reached the same conclusion as we have done herein. For instance, in *Samuel Kilonzo Musau vs. Republic* [2014] eKLR this Court, differently constituted, 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."

13. Our next issue for determination is whether the alleged failure to accord the appellant an opportunity to address the court upon close of the prosecution case and at the conclusion of the defence case prejudiced him. It is the appellant's contention that he was not accorded an opportunity to address the court pursuant to sections 213 and 319 of the CPC. He also argues that the failure to accord him such an opportunity infringed upon his rights to fair hearing under article 50(1) and (2) (g)(f)(k) of the *Constitution*. As for the respondent, the position is that addressing the court was not mandatory and that failure to accord the appellant an opportunity to address the court did not prejudice him or him occasion any miscarriage of justice.

14. In order to appreciate the correct position, it is necessary to reproduce section 213 of the CPC which provides as follows:

> " The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial under this Code before the High Court."

15. As regard the citation of Section 319 of the CPC by the appellant in his submissions, we only need to point out that the provision was repealed by Act No. 33 way back in 1963. The appellant in his grounds of appeal also referred to section 211 of the CPC. Indeed, sections 210 and 211 of the CPC gives an opportunity to the parties at the close of the prosecution case to do "summing up, submission or argument" before the court determines if the accused person has a case to answer or not.

16. With regard to the alleged non-compliance with section 211 of the CPC, we have perused the record and we are satisfied that the provision was complied with. We say so because at this stage, the trial court is not required to engage in a detailed analysis and reasoning for concluding that an accused person has a case to answer. What is required of the trial court is to merely assess the evidence presented by the prosecution witnesses and establish whether a prima facie case has been established against the accused person.

17. As for section 213 of the *CPC*, it donates a right to both an accused person and the prosecutor to address the court both at the close of the prosecution case and at the conclusion of the defence case. The *Criminal Procedure Bench Book* published by the Kenyan Judiciary in 2012 at paragraphs 176 to 178 of Part XVI (pages 106-107) gives guidance on the implementation of these provisions to the effect that both the prosecutor and the accused person are entitled to present submissions to the court on both the evidence and the law.

18. Section 213 of the *CPC* states that the procedure to be followed in addressing the court is that provided for the High Court. In that regard, Sections 306, 307 and 311 of the CPC come into view as they disclose what the exact procedure in the High Court is. The procedure varies depending on whether the accused person has proffered a defence or not. In *Katana Kaka alias Benson & 2 others vs. Republic* [2017] eKLR, this Court considered the stated provisions and held as follows:

> "(17) This address is what is colloquially referred to as final submissions. From a reading of the above provisions, that address is mandatory and inalienable where the accused person does not intend to give or adduce evidence. This means the accused person would have declined to testify (on oath or otherwise) or to call witness(es) to testify on his behalf. However, in the instant case, the appellants gave unsworn statements in their defence." [Emphasis ours]

19. In our view, and in consideration of Section 307 of the *CPC* which uses the words "...may sum up his case", we concur with the holding in the cited case that it is only where an accused person closes his case without adducing evidence that the address is mandatory. Of course, that is subject to whether

the accused person wishes to exercise that right or not. In our view, failure to sum up where defence evidence has been put forth is not fatal to a criminal case. An appellant who desires to impeach a trial on the basis of being denied an opportunity to put in submissions must do more. For instance, he must establish that the failure occasioned a miscarriage of justice or prejudice to him or that the trial court erred in its analysis. We are of the view that where there is failure to establish these vitiating factors, an appellate court need not quash a conviction.

20. We therefore find no merit on the contention by the appellant that the failure to accord him an opportunity to address the trial court derogated his rights to fair trial under Article 50(2) of the *Constitution*. The elements of the right to fair trial are contained in sub-articles (a)-(q) thereof. No evidence has been tendered before us to substantiate any violation of the listed rights. In this case, the appellant was present all through his case, actively participated in the trial and cross-examined the prosecution witnesses, put across his defence, and opted to give unsworn testimony. The record as is reveals nothing else but a trial conducted in a fair and impartial manner.

21. A perusal of the record discloses that the appellant's complaint that his defence was not considered is without merit. In his defence the appellant denied committing the offence and told the court that he was framed by the mother of the victim as she felt that he had displaced her from her employment. In her judgment delivered on July 26, 2011, the trial magistrate stated that:

> " The defence offered by the accused has not cast any doubt at all at the prosecution case. The same is an afterthought. The accused didn't even cross-examine the complainant's mother on her alleged bitterness as a result of being sacked by their mutual employer."

The record does indeed confirm that the mother of the child testified as PW3 and the appellant never cross-examined her about her bitterness because he allegedly took over her job. Considering the evidence adduced in totality, it is easy to agree with the trial magistrate that the appellant's defence was an afterthought. The appellant's defence never ousted the evidence of PW4 who observed his actions from a distance.

22. Finally, this being a second appeal, the severity of a sentence is not a matter within our jurisdiction but the legality of sentence is. The legality of the sentence handed down by the trial court has not been challenged. Nevertheless, considering the tender age of the victim we do not find any reason that would move us to change the sentence imposed by the trial court and affirmed by the 1st appellate court. There is therefore no reason to disturb the sentence imposed on the appellant.

23. In the circumstances, this appeal is for dismissal. The same is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR