



REPUBLIC OF KENYA



KENYA LAW
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**AM v Republic (Criminal Appeal 305 of 2013)
[2023] KECA 1270 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1270 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 305 OF 2013
F SICHALE, FA OCHIENG & WK KORIR, JJA
OCTOBER 27, 2023**

BETWEEN

AM APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (A.O. Sewe, J.) delivered and dated 30th July 2018 in HCCRA No. 162 of 2012)

JUDGMENT

1. AM, the appellant, was charged with the offence of attempted incest contrary to section 20(2) of the *Sexual Offences Act*. He also faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to serve 40 years in prison. He was dissatisfied with the judgment and sentence of the trial court and lodged an appeal to the High Court. On 30th July 2018, the High Court dismissed his appeal in its entirety. The appellant is now before us on a second appeal raising grounds that he was convicted on a defective charge sheet; that the elements of the offence of incest were not proved; that his constitutional rights were violated as he was in police custody for more than 24 hours before being charged in court; and that his defence was not considered.
2. In summary, the prosecution's case as presented at the trial was that on the night of 10th November 2010, while the complainant's mother was away, the appellant went to the bedroom where the complainant and her siblings were sleeping. He whisked away the complainant into his bedroom, placed her on his bed, removed her clothes and attempted to defile her. According to the prosecution, the complainant's birth certificate established that the appellant was her father. Later on, the complainant informed her mother of the ordeal. Alongside PW1 LN, the complainant's mother escorted the complainant to Moi Teaching and Referral Hospital (MTRH) where she was attended to by PW2 Dr. Cynthia Kibet who confirmed that there was an attempted defilement of the complainant.



- The appellant was re-arrested from members of the public by PW3 Corporal James Mulema who proceeded to investigate the matter and eventually charged him in the magistrate's court.
3. When this appeal came up for hearing, the appellant appeared in person while Ms Kimaru appeared for the respondent. Parties had filed their written submissions which they sought to rely on. The appellant submitted on four grounds, the first one being that his right to fair trial was violated because the prosecution did not supply him with witness statements despite the trial court making an order to that effect. He argued that as a result, he was forced to take part in the trial without having the statements. He relied on the cases of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR and *Republic v Ward* [1993] ALL ER 557 to urge that failure to supply witness statements infringes on an accused person's rights under Articles 50(2)(b), (c) & (j) and 25(c) of *the Constitution* and an acquittal should ensue.
 4. The second issue submitted upon by the appellant was that his conviction was vitiated by a defective charge sheet. The appellant argued that the amended charge sheet did not comply with the provisions of sections 134 and 137 of the *Criminal Procedure Code* and was also not in consonance with the evidence on record.
 5. The appellant's third point was that the evidence of PW1, PW2 and PW3 was taken prior to the admission of the amended charge sheet and therefore such evidence ought not to have been considered in convicting him.
 6. Finally, the appellant submitted that the evidence on record fell short of establishing all the elements of the offence. He pointed out that the evidence of identification and attempted penetration was not sufficient to support his conviction. He also argued that the prosecution failed to call a crucial witness. In that regard, the appellant stated that the complainant's mother who was the first person to receive the report from the complainant was not called as a witness. According to the appellant, this omission rendered the evidence of the complainant and PW1 questionable. The appellant therefore urged us to allow his appeal in its entirety.
 7. Ms Kimaru for the respondent relied on her submissions dated 25th August 2021. Responding to the appellant's assertion that he was not supplied with the statements of the witnesses, counsel reiterated that the appellant did not raise any issue with regard to the statements before the trial court or at the first appeal. According to counsel, that the appellant had not established any prejudice that he suffered and that on the contrary, the appellant participated in the proceedings and even cross-examined witnesses. Counsel urged that there being no prejudice suffered by the appellant, there no was no reason to quash his conviction.
 8. In response to the submission that the evidence of the witnesses who had testified prior to the amendment of the charge sheet ought to have been excluded from the trial court's judgment, counsel relied on section 214 of the *Criminal Procedure Code* to submit that the law allowed the prosecution to substitute a charge sheet at any stage before the close of its case. Counsel further submitted that the appellant was accorded an opportunity to re-call witnesses after the amendment of the charge and he opted not to recall any witness. Counsel consequently argued that the amendment of the charge was proper and within the law.
 9. Finally, in response to the appellant's 3rd and 4th arguments, counsel for the respondent relied on section 143 of the *Evidence Act* to submit that the prosecution was not under an obligation to call a specific number of witnesses to prove any fact. Counsel relied on the case of *Julius Kalewa Mutunga v Republic*, CR Appeal No. 31 of 2005 to buttress this point.



She also submitted that the question of the credibility of a witness is an issue of fact which is not within the purview of this Court. In conclusion, counsel urged that this appeal should be dismissed in its entirety.

10. This being a second appeal, section 361(1) of the *Criminal Procedure Code* limits the scope of our mandate to matters of law. Findings of fact are not for us to indulge in and ought to remain as concurrently established by the two courts below save for instances where such conclusions of fact are vitiated by either misapprehension of evidence on record or misapplication of the law. Several decisions of this Court confirm the above statement, among them being *Adan Muraguri Mungara v Republic* [2010] eKLR where it was stated that:

“ Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 *Criminal Procedure Code*). As this Court has stated many times before, it has a duty 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. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

11. Upon carefully reviewing the grounds of appeal, the record of appeal and the submissions by the parties, the issues arising for our determination are: whether the charge sheet was defective; whether there was failure to call a crucial witness and if so, the effect of such failure; whether the appellant’s right to fair trial was violated; and, whether the prosecution discharged its burden of proof on all the elements of the offence.
12. The appellant has raised an issue with the amended charge and submits that it was defective. He advances two reasons in support of this submission, namely, that the charge as amended was not in consonance with the evidence on record and that he did not consent to the amendment of the charge. Section 214(1) of the *Criminal Procedure Code* provides for amendment of charges as follows:

“ Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—

- i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
- ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross- examination.”

13. Our understanding of the above cited provision is that amendments to charges are allowed before the close of the prosecution case as long as an accused person is called upon to plead afresh to the altered charge and given an opportunity to have the witnesses who have testified recalled to give evidence



afresh or for further cross-examination. In *Jason Akumu Yongo v Republic* [1983] eKLR, this Court interpreted section 214 as follows:

“The question is therefore whether the amending section of the Code can be applied where the evidence is at variance with the charge, and in our view it can. We therefore do not think that the wording of the section, bearing in mind its marginal note, precludes an amendment of the charge in a case of this nature, but its provisions should be strictly observed.

Unfortunately, though the magistrate recorded that he had complied with Section 214, and that the amended charge was read to the appellant, he did not record that the requirement under the second proviso, namely the appellant’s right to recall the witnesses, was also complied with. This he should have done, particularly as regards Robert, who gave the only material evidence.”

14. In the appeal before us, the application to amend the charge was made on 27th April 2017 when the prosecution was remaining with the evidence of one witness. The record shows that the appellant opposed the prosecution’s application to amend the charge but upon the objection being overruled by the magistrate, he opted not to recall any witness. In the circumstances, we find that the trial court duly complied with provisions of section 214 of the *Criminal Procedure Code* when admitting the amended charge sheet. We also find that the appellant was not prejudiced at all since he fully participated in the hearing, proffered his defence and also voluntarily opted not to recall any witness. The decision as to whether to recall witnesses who had testified belonged to the appellant and he cannot now turn around and blame the trial court or the prosecutor when he clearly went on record that he did not want any witness recalled. This ground of appeal therefore fails.

15. The second issue for determination is whether there was failure to call a crucial witness. The appellant submitted that the prosecution failed to call a critical witness being the mother of the complainant. According to the appellant, the evidence of the complainant’s mother was important as she was the first to get the report of the incident from the complainant and later on transmitted the information to PW1. On this issue, section 143 of the *Evidence Act* provides as follows:

“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.”

16. In *Joseph Kiptum Keter v Republic* [2007] eKLR this Court stated that:

“*Bukenya v Uganda* [1972] EA 549 clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

17. In *Timothy Kipngetich Kangongo v Republic*, Eldoret CR Appeal No. 65 of 2018, this Court stated on the same issue as follows:

“It is therefore clear to us that in considering the effect of the failure to call a witness, the court ought to consider the evidence adduced *vis-à-vis* the evidence of the witness who was not availed. To deliver on this task, it is imperative to consider the elements of the offence charged and then assess whether the evidence on record proved all the prerequisite elements. In a charge of defilement, the key elements are age of the complainant, proof of penetration and identity of the perpetrator.”



18. In the charge of attempted incest, the prosecution is required to prove the identity of the perpetrator, attempted penetration, and the proximate blood-relation between the complainant and the perpetrator. In this case, the complainant's mother was not an eyewitness. The best her evidence would have served was to strengthen the prosecution case by corroborating that which was already on record. Without that evidence, can one say that the evidence on record was not sufficient? We answer in the negative. For the purposes of the proviso to section 20(1) of the *Sexual Offences Act*, the age of the complainant was proved by way of the evidence of the complainant, PW1 and the complainant's immunization card. The relationship between the complainant and the appellant was likewise established by the same evidence. This evidence was sufficient and well corroborated. As for the identity of the appellant, the evidence by the complainant was that of recognition of a person well known to her prior to the incident. Pursuant to the proviso to section 124 of the *Evidence Act*, which allows for a conviction to ensue in sexual offences based on the believable evidence of the victim, the trial court correctly relied on that evidence. As for the attempted penetration the evidence of the complainant was corroborated by that of PW2 confirming that indeed there was an attempt to penetrate the victim. The foregoing analysis also dispenses with the fourth issue. The outcome on this particular issue is that the appellant's claim that the testimony of the prosecution witnesses was contradictory is without merit. We therefore find that the prosecution discharged the burden of proof.

19. The third issue is whether the appellant's right to fair trial was violated. He contends that his right to a fair trial was violated as he was not supplied with witness statements hence being forced to participate in the trial and cross-examine witnesses without prior understanding of the case against him. We note that before the first appellate court, the appellant's contention on infringement of rights was premised on the rights under Articles 49(f) and 50(2)(g) & (h) of *the Constitution*. In this appeal, the appellant has now shifted goals and is alleging infringement of rights under Article 50(2)(b)(c) & (j) of *the Constitution*. How are we to render ourselves on this alleged infringement being raised for the first time on a second appeal? In all fairness, this is a mere afterthought. Be that as it may, we find that even if no witness statements were provided, the appellant never raised this issue with the trial court or the first appellate court.

Furthermore, he actively participated in the trial and cross-examined witnesses. He was therefore aware of the charge that faced him. We find that he suffered no prejudice on that account.

20. The upshot of the foregoing is that this appeal is without merit and is for dismissal. We so order.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF OCTOBER, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

