AT v Republic (Criminal Appeal 63 of 2022)
[2023] KECA 1393 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1393 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 63 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

NOVEMBER 24, 2023

BETWEEN

AT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Malindi delivered by Justice Reuben Nyakundi, J on 15th September 2021 in Criminal Appeal No. 48 of 2019)

JUDGMENT

1. The Appellant herein, AT , was charged before the Lamu Principal Magistrate's Court in Criminal Case No 42 of 2016 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on April 25, 2015 and May 5, 2015 in Lamu East sub county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MS, a child aged 15 years old. In the alternative, the appellant faced the charge of indecent assault, the particulars being that on the same dates at the same place he intentionally and unlawfully committed an indecent assault with a child aged 15 years by rubbing his penis against the vagina of MS.

2. The appellant pleaded not guilty to both counts at the trial and the matter proceeded to full trial. Upon consideration of the evidence, the learned trial magistrate found the appellant guilty of indecent act contrary to section 11(1) of the *Sexual Offences Act* and sentenced the appellant to 20 years' imprisonment. His appeal to the High Court in Garsen Criminal Appeal No 48 of 2019 was dismissed in its entirety on September 15, 2021.

3. The facts of the case were that the complainant herein was a step daughter of the appellant. From the evidence of the complainant, the appellant was staying in the farm while the mother was staying in town. During the school recess, the appellant persuaded the complainant and her sister to accompany him to the farm. It was during their stay at the farm that the appellant first forcefully defiled the

complainant on their way to the forest. Thereafter, a series of defilements of the complainant by the appellant took place whenever the appellant got an opportunity to be alone with the complainant under threats by the appellant to harm both the complainant and the mother should the complainant disclose the same. As a result, the complainant did not disclose the appellant's actions to her mother.

4. According to PW1, the complainant's uncle and a brother to the mother of the complainant, JAH, he was informed by the Complainant's mother that the Appellant had "ruined" PW1's nieces. He became suspicious that something was going on between the appellant and the complainant since one of the Complainant's sister had gotten pregnant. He reported his suspicions to the area chief who got in touch with PW4, the chairlady of a non- governmental organisation called Sauti ya Wanawake. The matter was escalated to the children's officer, one Mr Ndolo, and it was agreed that further investigations be conducted into the matter. Accordingly, a report was made to the police and the complainant was taken to Faza Hospital for examination. Upon being examined by PW3, Mohamed Soiyanga, a clinical officer based at Faza Sub-District Hospital it was found that the COmplainant's private parts had lacerations on the vaginal floor estimated to be 24-28 hours old and her hymen was broken. The doctor classified the complainant's injury as maim. The Complainant was then interrogated and upon being assured of confidentiality by PW3, the complainant, who was initially unwilling to disclose how she got the said injuries due to the threats by the appellant, opened up and disclosed that they were as a result of several acts of defilement by the appellant. The age assessment revealed that at the time of her testimony in court she was 17 years old. That placed her age at 15 years old at the time of the incident. P3 form, treatment notes and the age assessment report were produced before the trial court as exhibits.

5. The investigations into the matter were carried out by PW5, Sgt. Kanyaic Wanderi, who took over the same from Cpl Patrick Mutua who had been transferred. He took the witnesses statements and collected the documents. The appellant, who had initially disappeared, was eventually apprehended by members of the public, and was charged with the said offence.

6. Upon being placed on his defence, the appellant in his sworn evidence, while admitting that the complainant was his step- daughter and that the complainant accompanied him to the forest, stated that the case was based on hatred by his wife. In a rather bizarre testimony, he stated that that he got involved in a love affair with one Duri who together with her husband, he had accommodated earlier on in his house; that he intended to legitimise the said relationship with blessing from his wife; that he did not know that his wife was unaware that one of her daughters was his lover; that upon realising this, he tried to bring that relationship to an end but the said daughter was unhappy hence the bad blood.

7. In her judgement, the learned trial Magistrate, (hon Njeri Thuku) found, based on this Court's decision in *Amedi Omurunga v Republic* [2014] eKLR, that the charge sheet was defective since the complainant being aged 15 years, the appellant ought to have been charged under section 8(1) as read with 8(3) of the *Sexual Offences Act* and not section 8(1) as read with 8(4) under which the Appellant was charged. She further formed the view that from the evidence tendered, the appellant ought to have been charged under section 43 of the *Sexual Offences Act*. She proceeded to find the Appellant not guilty of the main charge of defilement but found that since it was proved that the complainant was a child and that there was evidence of injuries to the complainant's genitalia, the offence of indecent act was proved. It was on that basis that the appellant was sentenced to 20 years' imprisonment.

8. Aggrieved by that decision, the appellant lodged an appeal to the High Court in which he complained that the learned trial magistrate erred in law and fact in arriving at her finding on conviction and sentence without considering that the offence of defilement was not proved beyond reasonable doubt; that the learned trial magistrate erred in law and in fact by making a finding on his conviction and sentence without considering that the prosecution's case was marred by contradictions; that

the learned trial magistrate did not consider section 214 of the *Criminal Procedure Code*; that the learned trial magistrate did not consider his defence. In his amended grounds, the appellant faulted the learned trial magistrate for giving the appellant a harsh and excessive mandatory sentence of twenty years' imprisonment and that his mitigation was not considered. In his judgement, the learned Judge (Nyakundi, J) found that there was evidence of penetration established by the complainant and corroborated by the medical evidence; that from the evidence, the complainant was indeed defiled; and that the conviction was well founded since the Complainant's age was proved to have been 15. As regards the sentence, the learned Judge found that though the Act prescribed the minimum sentence as 15 years, the learned trial magistrate gave the reasons for enhancing the same to 20 years and found no misdirection or wrong exercise of discretion to call for varying the sentence. He accordingly confirmed both conviction and sentence.

9. Still unhappy, the Appellant lodged the present appeal before us which appeal we heard on this court's virtual platform on July 24, 2023 during which the appellant appeared in person from Shimo La Tewa Prison while learned Assistant Director of Public Prosecution, Mr Mulamula, appeared for the respondent. Apart from the submissions filed by the appellant, he urged us to consider the period served of 7 years. Mr Mulamula also relied on his submissions and urged that the 20 years' imprisonment sentence was sufficient and that the 7 years the appellant had served may be taken into account as well as the years he spent while in custody. In his view, there were aggravating circumstances such as the threat by use of a knife and the fact of repeat defilements.

10. In his written submissions, the appellant contended that the complainant's testimony that eventually crystalized the charge found against him did not specify the exact time of the offence and was therefore unreliable; that he did not comprehend the import of prosecution's application for amendment on November 16, 2016 and expunging the initial evidence of the Complainant during trial; that although *voire dire* examination was conducted, the credibility and capacity of the child to take oath and stand was never established by the trial court and the High Court overlooked the same; that both the trial magistrate court and the High Court considered an inappropriate sentence and imposed a sentence that was double what is essentially prescribed by the *Sexual Offences Act*. Thus the appellant urged this Court to quash the conviction and in the event that the conviction is confirmed, the sentence is adjusted accordingly.

11. In his written submissions, Mr Mulamula contended that though the learned trial magistrate found that the main charge was not proved due to the defect in the charge sheet, the alternative charge of committing an indecent act with a child contrary to section 11(1) was sufficiently proved. As regards the sentence, Mr Mulamula submitted that the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic*, Petition Number 15 of 2015 is not applicable to other offences other than the punishment under section 204 of the *Penal Code*. It was submitted that the first appellate court took into consideration offences under the *Sexual Offences Act* fall under the category of mandatory minimum sentences. According to him, when the matter went to the first appellate court, the evidence on record was re-evaluated and the court found no misapplication of principle or law in appropriating the sentence at hand and this therefore led to the High Court upholding the same as it was safe under the law. Thus the respondent's closing remarks were that the sentence of 20 years' imprisonment handed over to the appellant was safe within the law as the trial court exercised its discretion as per the relevant principles justifying the same. The respondent prayed that this court does find that the conviction was safe and sentence not only lawful but deserving in the case and upholds the same in dismissing the appeal.

12. We have considered the material placed before us in this appeal. Before us is a second appeal and we are cognisant of the limitation of our role under section 361(1) (a) to consider issues of law only as

opposed to 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 as follows:

> "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."

13. 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."

14. 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."

15. It was similarly held in Karani vs R [2010] 1 KLR 73 that:-

> " 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."

16. We are also guided by the decision in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 where it was held thus:

> "As this court has stated many times before, it 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. That would mean that the decision is bad in law, thus entitling this court to interfere."

17. The determination of this appeal must therefore be based on the above principles.

18. From the appellant's submissions, the issues of law that fall for determination before us are whether there was a defect in the charge sheet in the failure by the prosecution to state the exact time of the offence; whether it was proper for the court to allow the prosecution to expunge part of the evidence adduced by the Complainant; whether *voire dire* examination was properly conducted; and whether the appropriate sentence was imposed on the appellant.

19. Apart from the issue of sentence, the other issues are being raised before us for the first time as they were not raised before the High Court. This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR held as follows:

> "....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."

20. The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant's grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lowers courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof.

21. In deference to the appellant, we will however, briefly deal with the said issues. As regards *voir dire* examination, we find that since the Complainant was 17 years old at the time of her testimony, *voir dire* examination was unnecessary and therefore any errors omitted during that examination were immaterial. In *Odhiambo vs Republic* (Criminal Appeal 85 of 2016) [2022] KECA 1082 (KLR) (7 October 2022) (Judgment) this Court dispelled the notion that voire dire examination is required for all witnesses under the age of 18. The Court stated:

> "...the trial magistrate decided to conduct a voir dire examination of the complainant "because she appeared to be below 18 years old." This was a misapprehension of the law, as voir 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. A child of tender years is, in the absence of special circumstances, one of an age or apparent age of 14 years and below."

22. Regarding the omission to state the time of the offence in the charge sheet, we appreciate the fact that section 134 of the *Criminal Procedure Code* requires in mandatory terms that every charge should be precise and abundantly clear to the appellant. It 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."

23. As to what amounts to defects in a charge sheet, this Court in *Yongo v Republic* [1983] KLR, 319 stated as follows:

> "In our opinion a charge is defective under section 214(1) of the *Criminal Procedure Code* where:

a. it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

b. it does not, for such reasons, accord with the evidence given at the trial; or

c. it gives a misdescription of the alleged offence in its particulars."

24. However, it is not every defect in a charge sheet that is fatal to a charge. As appreciated by this Court in *Obie Kilonzo Kevevo v Republic* [2015] eKLR:-

> " The test applicable by an appellate court when determining firstly the existence of a defective charge and secondly its effect on the appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant."

25. In this case, the appellant clearly participated in the trial and cross-examined the witnesses. He neither raised the issue before the trial court nor at the first appellate stage in the High Court. In our view no miscarriage of justice was occasioned to the appellant by the use of "various dates" in the charge sheet.

26. As regards the application by the prosecution that the initial testimony of the Complainant be expunged from the record, while that may have been an irregularity taking into account the fact that no reason was given for such a move, the record does not show that that application was granted. The subsequent evidence given by the same witness, in our view, would be in form of a recall of a witness. We agree that there was an irregularity in the manner in which the trial court conducted the proceedings before it. We, however find that since on both occasions the appellant had the opportunity of and did cross-examine the said witness, and as the appellant did not allege that the complainant was couched in giving her testimony on the second occasion, the irregularity was curable pursuant to section 382 of the *Criminal Procedure Code*.

27. Regarding the sentence, the learned trial magistrate was of the view that from the evidence, the appellant ought to have been charged with an offence under section 8(1) as read with 8(3) of the *Sexual Offences Act* instead of section 8(1) as read with 8(4) of the same Act considering the age of the complainant. In her view, this was fatal to the principle charge. In light of what we have stated above, this omission was not necessarily fatal to the charge. We are surprised that the High Court, sitting as a first appeal failed to correct this patent error. While this Court does not interfere with the findings of fact, we hold that where the decision arrived at by the two courts below is plainly wrong, this Court has a duty to correct such an error as long as that correction is not prejudicial to the Appellant.

28. In our view, the appellant ought to have been convicted of the offence of defilement. Accordingly, we dismiss the appeal but substitute the appellant's conviction of indecent act with defilement. We however do not interfere with the sentence imposed by the trial court as affirmed by the High Court.

29. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR