Njenga v Republic (Criminal Appeal 147 of 2017)
[2023] KECA 1585 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1585 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 147 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

NOVEMBER 10, 2023

BETWEEN

BENSON KIRANGU NJENGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decree and judgment of the High Court.at Nyeri (T.W. Cherere, J.) dated 9th June 2017 in HCCRA Case. No. 45 of 2016)

JUDGMENT

1. Benson Kirangu Njenga, (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* at the Chief Magistrates# court sitting in Nyeri. It was alleged that on 16th July, 2013 at Nyeri County, he intentionally caused his penis to penetrate the genital organ, „vagina# of C.M.K a girl aged 12 years. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charge and the matter proceeded to hearing with the prosecution, calling a total of six witnesses in a bid to discharge the burden of proof to the required standard of beyond reasonable doubt. At the close of the prosecution#s case, the trial court found that the prosecution had established a prima facie case against the appellant and consequently the appellant was placed on his defence.

3. He denied having committed the offence and stated that on 16th July, 2013 he was herding cattle and neither saw the complainant nor did he defile her as alleged. The trial court was not persuaded and the appellant was found guilty and convicted of the offence of defilement and after mitigation, he was sentenced to 21 years imprisonment.

4. Aggrieved by that decision, the appellant filed a Notice of appeal dated 20th June ,2016 raising several grounds of appeal but the High Court too, was not persuaded on the appellant#s innocence as a consequence of which the appeal was dismissed.

5. The appellant is now before as on his, possibly, last attempt to secure his freedom. He faults the learned Judge for:

> " upholding a conviction and sentence contrary to section 358 of the CPC; convicting him based on a medical report yet the officer fell short of section 50(1)(2) of the *evidence Act*; relying on evidence which was contrary to section 352(2) of the *CPC*; shifting the burden of proof on him contrary to section 107(1)(2) and failing to call crucial witnesses."

6. A recapitulation of the evidence tendered before the trial court will help place this appeal in context. In a nutshell, C.M.K, (PW1) together with her friend J.M. (PW2) went to the nearby bushes to look for a broom. While there, the appellant, who was said to be their Sunday School Teacher, found them and asked them to sit down and show him the colour of their panties. He then followed them and held them by their waists. He then picked up the bed sheet she had carried spread it down, carried her, and lay her on the sheet then he removed his trousers and removed CMK#S panties and defiled her as J.M. stood a short distance away. After he finished, he warned the girls of dire consequences if they told anybody what had happened.

7. J.M. told some of their friends and eventually the child#s mother (PW3) learnt about the incident, albeit a few days later. On checking the child#s private parts, she confirmed that the child had been defiled, and so she went to Mweiga Police Station police where the matter was reported.

8. The child was taken to hospital where she was examined, and the P3 form completed. Dr. Kituku Joyce (PW5) produced a medical report confirming that the complainant was examined on 31st July, 2013 and that the alleged offence took place on 16th July, 2013. Further that on examination it was revealed the head, neck, abdomen, and limbs were normal. The injury was approximately 4 weeks old, and the child had a broken hymen. She was treated for sexually transmitted diseases. The appellant was subsequently arrested and charged with the offences stated earlier.

9. When placed on his defense, the appellant testified that he did not defile the child and denied having seen her or her friend J.M. that day. He, nonetheless, admitted knowing the girls and the child#s mother.

10. The appellant filed homemade submissions which he relied on when the appeal came up for plenary hearing on 25th January 2023. The issues arising from the said submissions are; that the prosecution failed to prove its case as provided by sections 107 and 108 of the *Evidence Act*; the prosecution relied on the evidence of PW3 and PW4 who testified that they examined the child#s vagina and saw that the hymen was broken. The appellant asserted that the absence of hymen is not sufficient proof of penetration and placed reliance on *P.K.W v. Republic* (2012) eKLR. Further, that the trial court relied on the evidence of PW3 and PW4 to hold that the complainant had been defiled yet the medical examination was done 4 weeks later and that a broken hymen could have been caused by anything. Lastly that there was no evidence to connect him to the defilement and, therefore, urged that the conviction be quashed and the sentence be set aside.

11. In opposing the appeal, Mr. Ngetich learned counsel for the State, urged that it had proved the ingredients of defilement, which are, the age of the victim, penetration, and the identity of the perpetrator. Counsel urged this Court to find that the evidence of PW3 and PW4 was sufficient when they said the child#s hymen had been broken and that later on examination by a medical officer, it

was found the hymen had been broken. On the age, counsel urged that the victim was 12 years old as indicated in the P3 form.

12. On identification of the perpetrator, counsel reiterated that the appellant had been identified by C.K.M and J.M. (PW1) who had known him and that even C.K.M#s evidence alone was sufficient to convict since the Court was satisfied that she was speaking the truth as provided by section 124 of the *Evidence Act*.

13. In regard to section 200 of the *Criminal Procedure Code* (CPC), counsel urged that the succeeding magistrate wrote the judgment and that the record does not show whether there was compliance, however, the learned Judge in the judgment considered the issue and held that the appellant was not prejudiced by the same. We were urged to uphold the conviction and sentence.

14. We have considered the record of appeal in its entirety, submissions by the appellant and learned counsel for the State and the relevant law. This being a second appeal, the Court is restricted under section 361(1)(a) of the *Criminal Procedure Code* to consider matters of law only. The confines of the Court#s jurisdiction was aptly set out by this Court in *Karingo v. Republic* [1982] KLR 213 as follows:

> " a second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on the second appeal is whether there was any evidence on which the trial court could find as it did(*Reuben Karari S/O Karanja v. R*(1950)17 EACA 146)"

We also remind ourselves that on second appeal, the law enjoins us not to interfere with the concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Mwita v. Republic* [2004]2 KLR 60.

15. For the charge of defilement to be proved, it was incumbent on the prosecution to prove the age of the victim, the appellant as the person who committed the act, and that penetration occurred. Were these ingredients established to the satisfaction of the two courts below?

16. As to the child#s age, the prosecution urged that it had been proven as indicated in the P3 form. There is no doubt that in offenses of this nature where the age of the victim determines the nature of the sentence, it is important that the same is proved to the required standard, which is beyond a reasonable doubt. In *Hadson Ali Mwachongo v. Republic* [2016]eKLR, this Court held as follows:

> " the importance of proving the age of a victim of defilement under the *sexual offences act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim."

We appreciate the fact that the prosecution did not produce a birth certificate or a baptismal card or any other document to prove the age of the child. However, this Court has variously held that proof of a child#s age is not restricted to documentary evidence, and further that the child#s mother knows the child#s age best. The child said she was 12 years old. This was corroborated by her mother#s evidence. We have no reason to doubt the concurrent findings of the two courts below. We are satisfied that the child#s age was proved to the required standard.

17. In regard to penetration, we focus our attention to section 2 of the *Sexual Offences Act* which defines penetration in the following terms:

> " penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person.."

This means that for the element to be established there should be evidence of partial or complete insertion of genital organs of the appellant into the complainant#s genital organs. C.K.M narrated to the court how the appellant defiled her. Her evidence was corroborated by J.M. who witnessed the ordeal. It is true that the child was not taken to hospital the same day the incident happened, and a plausible explanation for that was given before the trial court.

What we need to consider is whether the child#s broken hymen was caused by the appellant by defiling her. The trial magistrate in the judgment held as follows;

> " In this case PW3 and PW4 examined the private parts of PW1 and PW2 immediately after getting the information of defilement. They gave their evidence in court that the private part of PW1 had broken hymen i.e it was through (sic) while that of PW2 was intact. As mothers and due to their age, I take judicial notice of their experience and conclude what they were telling the court was the truth. That they could tell an intact and broken hymen. The medical officer corroborated the fact that the hymen was broken. I am alive to the fact that the victim had delayed before seeing the medical officer and fresh examination was not foreseen. The medical officer confirms that the hymen can be broken by other means but on a case proportion. The probability of a medical record confirming this fact is remote. The only facts I can pick from the P3 form is medical history and treatment given to the complainant. The issue of penetration is hereby left for other evidence on record."

On its part, the High Court (Cherere J.), on the issue of penetration held as follows:-

> " In my view, there is sufficient evidence to indicate that the act of penetration by the appellant occurred against the complainant and it was been (sic) corroborated by PW2 and medical evidence, do (sic)not find any inconsistent inconsistencies in the prosecution case and the case of *Dominic Kibet Mwareng v Republic* [2013]eKLR cited by the appellant is therefore distinguishable from this case. I agree with the prosecution counsel that the evidence of penetration of the minor by the appellant was corroborated. This ground therefore fails."

18. On the identification of the appellant as the perpetrator of the offence, it is on record that the appellant was well known to the 2 girls, as he used to be their Sunday school teacher. The impugned act was performed in broad daylight. The entire incident also took a while and the girls could not have mistaken the appellant for somebody else. All three ingredients of defilement were, therefore, proved.

19. The appellant urged that he was convicted on a defective charge sheet. What was the consequence of this error in the charge sheet? Did it render the appellant#s conviction unsafe? Was the conviction based on the alleged defective charge occasion a miscarriage of justice resulting in great prejudice against the appellant? The charge read as follows;

> " defilement contrary to section 8(1)(3) of the *sexual offences act* no. 3 of 2006##

In *JMA v. Republic* [2009] KLR 671 this Court held Inter alia, that:

> " it was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the *CPC* was meant to cure such an irregularity where prejudice to the appellant is not discernible.'"

We are satisfied, that regardless of how the same was framed, the appellant was subjected to a fair trial. He understood the charge facing him very well and he fully participated in the proceedings. He did not suffer any prejudice and if there was any defect in the charge sheet, the same was curable under section 382 *CPC*.

20. On the issue of section 200 of the *CPC* not having been complied with, it is conceded that the record does not indicate whether the said section was complied with or not. We note that the learned Judge dealt with that issue as mandated by section 200(4) *CPC*. The learned Judge considered the evidence before the court and concluded that the appellant had not been prejudiced by the con-compliance of section 200 *CPC* Do we have any basis for faulting the learned Judge for the said finding?

21. We have perused the record and confirmed that the appellant had full representation of counsel when the matter was heard before the trial court. The case was heard from plea to conclusion by Hon. Wekesa. We observe, however, that when the matter was mentioned for purposes of taking a date for judgment on 10th may, 2016 the presiding magistrate was Mr. Aringo. The appellant was absent and so was his counsel who was said not to have been aware of the mention. The court prosecutor appears to have been the person who requested for the date for judgment. The issue of section 200 *CPC* was not raised. The matter was mentioned again on 19th May, 2016 in the absence of counsel for the appellant. This time, it was also mentioned before a different magistrate, Hon. Onesmus who reserved it for judgment and who eventually delivered the judgment and sentenced the appellant. It is clear from the record that neither Hon Aringo nor Hon Onesmus mentioned section 200 *CPC*. In the absence of his counsel, the appellant cannot be assumed to have known of the existence of the said provision and its import vis a vis his rights to fair trial.

22. Section 200 *CPC* provides that:

> " 200
>
> 1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-
>
> a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
>
> b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.
>
> 2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction,

the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial."

It is the duty of the trial court to inform the accused person of his rights under Section 200 *CPC*. In *John Bell Kinengeni v Republic* [2015] eKLR, this Court addressed the import of Section 200(3) at length and concluded that:-

> " the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and failure to comply with that requirement would in an appropriate case render the trial a nullity as Section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate.(emphasis added)

23. As stated earlier, the appellant was not ever informed of his rights as enshrined in the above provision. His counsel was absent when the matter was eventually given a judgment date. Had he been present and informed the court that they had no problem with another magistrate writing the judgment, then this Court would not be engaged in the present discourse. The question as to whether noncompliance with section 200 *C.P.C* was prejudicial to the appellant could only become a factor where the existence of the said provision was brought to his attention in the first place.

24. We reiterate this Court#s position in regard to section 200(3) in *Joseph Kamara Maro v Republic* [2014] eKLR where the Court held that:

> " Our summation of the above is that the appellant was informed of his rights under section 200(3) of the Criminal Procedure Code every time a new Magistrate came on board. The position in law is that a trial magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial had taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200(3) of the *Criminal Procedure Code*."[emphasis added].

From the above analysis, it is evident that failure to inform the appellant of his rights as discussed above was fatal and rendered the trial a nullity. It is unfortunate that the evidence against the appellant was,

otherwise, very strong and credible and the conviction would not have been easy to overturn. The appellant#s right to fair trial was, nonetheless, violated and we cannot countenance that violation.

25. We have anxiously considered whether an order for retrial would be in the interest of justice for both parties in this case. We note that the offence herein was committed about 7 years ago, and the witnesses# recollection of the facts could have faded.

    We also appreciate the fact that the appellant has been in prison for over 6 years, and we can only hope that he has learnt his lesson. Guided by the above considerations, we are not persuaded that a retrial will serve any useful purpose.

26. In sum, for the reasons given in this judgment, we allow this appeal and set aside the impugned judgment and order that the appellant be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

…… **JUDGE OF APPEAL**

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

DEPUTY REGISTRAR