



REPUBLIC OF KENYA



KENYA LAW
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**Isiaho v Republic (Criminal Appeal 184 of 2016)
[2022] KECA 369 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 369 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 184 OF 2016
M NGUGI, PO KIAGE & F TUIYOTT, JJA
FEBRUARY 18, 2022**

BETWEEN

FREDRICK ISIAHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Kakamega
(Sitati, J.) dated 7th September, 2016 in HCCRA NO. 74 OF 2013)*

JUDGMENT

1. The appellant Fredrick Isiaho was charged, tried and convicted by the Senior Principal Magistrate's Court on a charge of defilement contrary to section 8(1)(2) of the *Sexual Offences Act* in that on the 3rd day of July, 2011 in Hamisi district within Vihiga County, he intentionally caused his penis to penetrate the anus of VI, a child aged 5 years.
2. He was sentenced to serve life in prison on 16th April, 2013. His first appeal to the High Court at Kakamega against both conviction and sentence was dismissed by Sitati J, on 7th September, 2016.
3. That dismissal provoked this appeal raising some six grounds in a memorandum of appeal filed by the appellant in person. In summary the grounds are that both courts below erred by;
 1. Miscalculating the evidence adduced.
 2. Failing to note that very crucial witnesses were not availed to testify in court.
 3. Failing to note that the case was poorly investigated, and shrouded with contradictions and inconsistencies.
 4. Failing to accord the appellant a fair trial as enshrined under Article 25(c) of the *Constitution*.



5. Failing to note that section 308 of the of the CPC was not complied with as the appellant was denied the right to cross-examine the complainant.
4. During the hearing, the appellant appeared in person whereas the respondent was represented by learned Prosecution Counsel, Mr Shitsama. Both parties sought to rely on their filed submissions.
5. The appellant contended that it was not practicable for him to break the door of a house, remove all his clothes and defile someone when there were neighbours around. He questioned the allegation that his clothes were recovered at the scene of the crime, but with no accompanying shoes or footwear. The appellant also pointed out that the High Court while analysing the evidence noted the lack of clarity on where he had come from or how he had entered the house where the complainant was, faulting the two courts below for failing to find that identification was under very difficult circumstances and by a single witness.
6. On non-appearance of crucial witnesses, the appellant criticised the courts' failure to make appropriate inferences from the prosecutions failure to avail crucial witnesses who could have shed more light in the matter. They included the complainant's mother, the person said to have alerted PW1 about the defilement, the village elder and the administrative officers to whom the offense was initially reported. He cited *Bukenya & others -vs- Uganda [1972] E.A 549* for the proposition that a conviction and sentence can be set aside if crucial witnesses are not called.
7. The appellant further blamed the investigating officer for failing to prove the age of the complainant, and to record statements of relevant witnesses, notably PW1, the village elder and the administration officers to whom the offence was initially reported. He contended that contradictions emerged in the prosecution evidence, indicating the witnesses had been coached. For instance, whereas PW1 indicated that he was arrested on 3rd July 2011, PW3 stated that he was arrested on 4th July 2011.
8. The appellant claimed that the courts below erred by failing to find that the prosecution withheld the evidence it was intending to use against him contrary to Article 50(2)(j) of the Constitution. Further, he was denied the right to cross-examine PW2 on the ground that he had given an unsworn testimony, thereby denying him the rights of a fair trial pursuant to sections 208 and 210 of the Criminal Procedure Code, In the end, the appellant beseeched this Court to allow the appeal, quash the conviction, set aside the sentence of life and set him at liberty.
9. In opposition to the appeal, Mr. Shitsama reminded the Court of its role as a second appellate court, being, to deal with matters of law only. Counsel rejected the appellant's assertion that the prosecution failed to call crucial witnesses, arguing that their absence was not prejudicial to him since they were not at the scene of the incident, and any information they had would be hearsay. Counsel disputed the appellant's argument that the case was poorly investigated, and shrouded in inconsistencies and contradictions, arguing that the complainant's age for instance, was indicated in the P3 form and affirmed by the trial court. Moreover, the alleged inconsistencies as to the nature of arrest were not glaring as to preclude the fact that the appellant committed the crime. Counsel cited section 382 of the Criminal Procedure Code in this respect, to wit;

“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:



Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.

10. On whether the prosecution failed to supply the appellant with witness statements, Mr. Shitsama submitted that whereas it was not clear whether the statements were issued or not, the appellant ought to have informed the court of the same but he failed to. As to the right to cross-examine witnesses in line with section 308 of the Criminal Procedure Code, counsel admitted that the record was not clear whether the appellant had been given an opportunity to cross-examine the complainant or whether he had waived that right. Nonetheless, contended counsel, the complainant’s unsworn evidence was corroborated by other witnesses, placing the appellant at the scene of the offense and finding him culpable. In this respect he cited this Court’s decision in *Johnson Muiruri -vs- R [1983] KLR 445*, urging us to find the appeal unmeritorious and dismiss it.
11. As rightly stated by the respondent counsel, this being a second appeal our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(a) of the Criminal Procedure Code.
12. Only rarely do we interfere with concurrent findings of fact. In *Samuel Warui Karimi -vs- Republic [2016] eKLR*, it was stated;

“This is a second appeal and this Court has stated many times before, it will not normally interfere with 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 *Chemangong -vs- R, [1984] KLR 611.*”

13. We have given due consideration to the appeal before us, the rival submissions made and the authorities cited in support of the opposing positions. We think the appeal raises the following issues for determination;
 - a) Whether the prosecution failed to avail crucial witnesses to testify.
 - b) Whether the case was poorly investigated and shrouded with contradictions and inconsistencies.
 - c) Whether the appellant was denied the right to cross-examine the complainant.
 - d) Whether the appellant was denied a fair hearing.
14. Concerning whether the prosecution failed to avail crucial witnesses, the appellant complains that the person who informed PW1 about the defilement, the complainant’s mother, the village elder and the administration officers to whom the offense was initially reported should have been called to testify. The learned judge while addressing the issue of witnesses noted, “PW1 responded to a distress call by the complainant after he was notified by a neighbour that a child was being defiled”. Indeed, PW1’s testimony was as follows;

“... I do recall on 3.7.11 at around 8pm. I was in my house and was told a child was being defiled. I came following a tenant alert. I came to the room and found that accused was escaping without clothes. He had a jeans trouser that was blue, a black shirt, inner pant that was black and white vest”.



15. From the above testimony, it is undeniable that the person who informed PW1 about the defilement should have been called to testify. He was a key witness in the matter. We also note that the proceedings implicate the mother of the complainant as an important witness. PW1 while testifying stated thus;

“The complainant’s mother took the clothes and child to Cheptulu, to hospital”.

16. Similarly, PW3, the investigating officer had this to say about the complainant’s mother;

“I investigated the matter. The complainant stated that he was with the mother. The mother indeed confirmed that”.

17. In a bid to summon the complainant’s mother to testify, the prosecution applied for warrants of arrest but apparently police officers were unable to find and arrest her. Altogether, this takes us to the contention that the case was poorly investigated, and shrouded with contradictions and inconsistencies. Certainly the failure of the mother of the complainant, and the person who allegedly informed PW1 of the defilement, to testify goes to cast doubt whether the investigations were properly conducted.

18. We also observe that the proceedings exhibit some critical inconsistencies. Starting with PW1, whereas at the beginning of his testimony he stated that the appellant was wearing blue jeans trousers, a black shirt, a black inner pant and a white vest, he later asserted that the appellant escaped while naked. Similarly, when it came to alleged recognition of the appellant, PW2, the complainant, made the following contradictory statements, “I know the accused. He is the one in the dock. I did not know him.” PW4, the clinical officer who filled the P3 form also stated that the complainant had said he had been defiled by a person known to him. PW3, the investigations officer, on the hand stated, “The clothes belonged to the suspect not accused”. The result of the foregoing contradictions is that they call the credibility of the witnesses and the reliability of the evidence adduced into question.

19. Next is whether the appellant was denied the right to cross-examine the complainant. The respondent explained, and rightly so, that the record is not clear whether the appellant was given an opportunity to cross-examine the complainant or not. In the circumstances, we are inclined to give the appellant the benefit of doubt. This Court holds the position that an accused person is entitled to cross-examine all prosecution witnesses including child witnesses who give unsworn evidence, as was held in *Gailord Yambwesa Landi -vs- Republic [2019] eKLR* (Per Musinga, Gatembu & Murgor JJA) where the Court cited with approval the decision in *Nicholas Mutula Wambua -vs- Republic, MSA CRA NO. 373 OF 2006*, as advanced by the Supreme Court of Uganda in *Sula -vs- Uganda [2001] 2 EA 556* That court stated thus;

“The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined”.



20. Nor is that all. In *HOW -vs- Republic [2014] eKLR*, (Per Onyango Otieno, Azangalala & Kantai JJA,) this Court expressed itself thus;

“In our view, unless such a child's evidence is subjected to cross-examination, it would be impossible to know whether the evidence he gives is false or not. This provision in our view strongly supports the law as above that Section 208 of the Criminal Procedure Code applies to all witnesses who give evidence and is not confined to only those witnesses who give sworn evidence. It covers children giving evidence not on oath as well”.

21. We concur with the above reasoning of this Court. Our foregoing consideration of this matter *ipso facto* answers the last issue on whether the appellant was given a fair hearing. We think not.

22. In the result, this appeal succeeds. The conviction of the appellant, which was patently unsafe, is quashed and the sentence set aside.

23. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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F. TUIYOTT

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

