



**Onesmus v Republic (Criminal Appeal 32 of 2016)
[2022] KECA 53 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 53 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 32 OF 2016
DK MUSINGA, MA WARSAME & F SICHALE, JJA
FEBRUARY 4, 2022**

BETWEEN

JOEL WANGARA ONESMUS APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from judgment of the High Court of Kenya at Kerugoya
(Limo, J.) dated 27th May 2015, in HCCRA Case No. 56 of 2012)*

JUDGMENT

1. The appellant, Joel Wangara Onesmus, was charged with defilement of a girl under the age of 16 years contrary to Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence are that on 25th November, 2010 at [particulars withheld] within the then central province, the appellant intentionally and unlawfully penetrated JWM, a child aged 10 years. In the alternative, he was charged with committing an indecent act to a child contrary to Section 11 of the *Sexual Offences Act*.
2. It was the prosecution's case, that the complainant who was 10 years at the time of the incident, was playing with other children when the appellant who was her cousin called her inside his house and defiled her. He then threatened her to maintain secrecy. Her mother PW3, testified that she noticed the complainant was walking with difficulty and after examining and interrogating the child, she disclosed that she had been defiled three days prior by the appellant.
3. The complainant's parents lodged a complaint with the police and took her to the hospital. Dr. Njau Chira examined the complainant and found that she had bruising on her genitalia and on her left thigh and discharge that was indicative of a venereal infection. He also examined the appellant several days later and found that he had no visible injuries on his genitalia and no infection.
4. In his defence, the appellant stated that on the date of the incident he arrived home from Kakamega town where he had travelled to sell tomatoes. He slept in till noon, thereafter he went to Ngurubani



town and stayed there till evening. He then left for Kakamega the following day for business and when he came back two days later he was falsely accused of defiling the minor and was arrested.

5. In a judgment dated 3rd October 2011, the trial court found the prosecution had proved its case beyond any reasonable doubt and found the appellant guilty of the main charge. On sentencing, the learned magistrate noted that the age of the complainant was not proved by a birth certificate or age assessment report and proceeded to convict the appellant under section 8(3) of the *Sexual Offences Act* and sentenced him to 20 years' imprisonment.
6. Dissatisfied with that judgment, the appellant appealed to the High Court and faulted the trial court for not considering his evidence, convicting him and sentencing him to 20 years' imprisonment. The prosecutor did not oppose the appeal and maintained that the appellant was serving an illegal sentence on account that the appellant was erroneously charged with Section 8(3) of the *Sexual Offences Act* despite the evidence on record which indicated that the complainant was 10 years old. The appeal was heard by Limo, J. who in a decision dated 27th May 2015 found that: the appellant had defiled the minor; that there was sufficient evidence on record to prove that the minor was 10 years old; and that the learned magistrate erred by convicting the appellant on erroneous information given on the charge sheet. Consequently, the court dismissed the appeal, reversed the conviction of the appellant under the provisions of Section 354(3) (i) and (ii) of the Criminal Procedure Code and instead convicted the appellant under section 8(2) of the *Sexual Offences Act* and sentenced him to life imprisonment.
7. The appellant has now come to this Court by way of a second appeal citing four (4) grounds of appeal. In summary, the appellant's grounds of appeal are that the prosecution did not prove its case as the complainant's age was not proved and that the High Court erred in sustaining the trial court's findings. At the hearing, Learned Prosecution Counsel, Ms. Nanjala, opposed the appeal and submitted that the age of the complainant was never in dispute. In her view, the appeal lacked merit because there was overwhelming evidence to justify the appellant's conviction. She urged this Court to confirm the decision of the trial court, both on conviction and sentence.
8. We have carefully considered the submissions and the record of appeal. This being a second appeal, only matters of law may be considered. It is trite law that in such an appeal, the appellate court will not normally interfere with concurrent findings of fact by the two courts below unless it is apparent that it was based on no evidence at all or if no court would have reached the same conclusion, having properly evaluated evidence (see *Karingo v. R.* [1982] KLR 213.)
9. It is axiomatic that the appellant was charged with the defilement of a minor under the age of 16 years contrary to section 8(3) of the *Sexual Offences Act* and that the particulars as set out in the charge sheet in respect of the main count disclosed the offence of defilement of a child aged 10 years contrary to Section 8(2) of the *Sexual Offences Act*. The evidence led by the prosecution established that at the time when the complainant was defiled, she was 10 years old. However, the charge sheet erroneously indicated that she was 16 years old. Therefore, the charge and particulars are at variance.
10. The test for determining whether a charge sheet is substantially defective was stated by this Court in *Benard Ombuna v. Republic* [2019] eKLR:

“The test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”



11. Further, Section 382 of the *Criminal Procedure Code* provides in part:

“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.”

12. The question we must therefore consider is whether this anomaly rendered the charge defective thereby causing prejudice by way of failure of justice to the appellant. The crux of the matter is this: Would a failure of justice or prejudice be occasioned by adopting such a course as to convict the appellant of the offence under section 8(2) of the *Sexual Offences Act* given that all the ingredients necessary for the said offence have come out in evidence, although the appellant was not charged with the said offence?

13. In the celebrated Indian case of *Willie (William) Slaney v. State of Madhya Pradesh* 1956 AIR 116, 1955 SCR (2)1140 the Supreme Court stated:

“...whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.”

14. Looking at the facts of the case before us, it cannot be gainsaid that the evidence on record by the complainant, her mother and the doctor pointed to the complainant being 10 years old at the time of the incident. However, in order to arrive as to whether a failure of justice has been occasioned, it will be relevant to examine whether the appellant was aware of the basic ingredients of the offence for which he is being tried and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. The age of the victim is an essential part of the offence of defilement which forms an important part of the charge and must be proved because the prescribed sentence is dependent on the age of victim. (See Criminal Appeal No. 504 of 2010 *Kaingu Elias Kasomo v. Republic*).

15. As we have stated, it is trite that not all defects in a charge sheet will render a conviction invalid. However, the appellant was charged with a serious offence which attracts life sentence. In our view,



it was not within the powers of trial court to have convicted the appellant where there was such a variance with regards to age that struck at the root of the trial. The burden was on the prosecution, which was in possession of all the evidence which it relied to establish its case against the appellant to address the issue and determine age of the child and ask the court to make necessary amendments to the charge sheet with respect to the offences which it wished to establish against the appellant. It is a basic principle of the right to fair trial that a person must be charged with the correct provision of the law. Here the charge sheet was incorrect and the magistrate convicted the appellant for a lesser offence where evidence disclosed, he should have been charged with a more serious offence. It is fundamental issue and it goes to the right to fair trial.

16. These discrepancies were noted by the prosecution, the High Court and the trial court. They all overlooked the matter and proceeded to convict the appellant while the charge sheet and particulars were at variance. Indeed, we confirm that it is within the right of the appellate court to enhance sentence where there is evidence when the person was convicted under the wrong provision or the provision is not commensurate with the facts. But in doing so, the court must follow the correct steps and procedure.
17. First, is to record if the prosecution intends to change or substitute the sentence to a more serious sentence and give a warning. Second, that warning must be found on the record. Third, it must be brought to the attention of the appellant that if he were to proceed and the court were to find merit in the conviction, it is likely to enhance sentence and fourth, the appellant must be given an opportunity to elect whether to proceed with the appeal or not in view of the warning and that he is aware of the consequences of his actions. That was not done.
18. In the event he elects to proceed with the appeal, this must be reflected in the record; that despite warning in a language he understands, the appellant elected to proceed with the appeal. It is upon taking these steps & requirements that the appellate court is entitled to enhance or substitute the sentence by the trial court. Again, the High Court overlooked such basic principles of law.
19. In *JJW v. Republic* [2013] eKLR, the court pronounced itself as follows:

“...It is correct that when the High Court is hearing an appeal in a Criminal case, it has power to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or commencing of the hearing of his appeal that the sentence is likely to be enhanced. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement.”

20. In *John Otieno Mumbo v. Republic* Criminal Appeal No. 85 of 2011 (ur) where twenty years' imprisonment was enhanced on first appeal to imprisonment for life, this court faulted the High Court for enhancing sentence when there had been no warning given to the appellant and stated thus:

“...The record shows that he was sentenced to 20 years imprisonment by the learned trial magistrate and when he appealed to the High Court, the same was set aside and substituted by a sentence of life imprisonment. The record does not show that the learned Judge ever warned the appellant that in the event of his appeal failing, the sentence which had been imposed upon him by the trial court would be enhanced to life imprisonment. In our view, the appellant was entitled to the warning for him to consider his options which would



probably have included preparation to specifically address the issue and the eventuality. He was unfortunately not afforded that opportunity...”

21. In *Denis Kinyua Njeru v. Republic* [2017] eKLR the court in discussing the need for a warning stated thus:

“As for warning, the observation in the case of *JJW versus Republic (supra)* that this has no statutory underpinning is correct. It has evolved as good practice on the part of the court in that it accords with the principle of justice and fairness, especially in instances where an appellant is appearing in person, and there is a likelihood of the sentence being revised to his detriment.”

22. Here there is no evidence or material that the High Court administered a warning as to the steps it intends to undertake in the event that the appeal against conviction was successful. The record clearly shows that the matter had been adjourned numerous times before it was finally set down for hearing and that the court did not at any time explain the consequence of an unsuccessful appeal or give notice of enhancement of sentence to the appellant during the hearing of his appeal. Again, the appellant proceeded with the hearing without an Advocate and represented himself. The failure of the High Court to administer a warning and the consequences arising was a material failure and it goes to the root of fair trial. The absence of a warning and failure of consent and knowledge of the appellant to proceed or not to, is also a material factor that goes to the root of enhanced sentences. We think we have said enough to show that both courts below erred in the way the trial, conviction and sentence was arrived at.

23. Consequently, there was a fundamental omission on the part of the High Court which resulted in a failure of justice and we think we should interfere based on the material before us and based on how the two courts dealt with the rights of the appellant. Sustaining the sentence would go against the tenets of justice. In our view the prosecutor in the High court was right not to oppose the appellant's appeal on account of this fundamental error. We therefore set aside conviction and sentence. The appellant shall be set at liberty unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF FEBRUARY, 2022.

D.K. MUSINGA (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

