Omondo v Republic (Criminal Appeal 89 of 2018)
[2022] KECA 703 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 703 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 89 OF 2018

PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA

APRIL 28, 2022

BETWEEN

FRED OMAR OMONDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret (Ngenye, J.) dated 18th September 2014inEldoret HCCRA No. 59 of 2011)

JUDGMENT

1. The appellant was charged before the Principal Magistrate's Court at Eldoret with defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars were that on 25th June 2010 at Marigat Township in Marigat District within Rift Valley Province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CS a girl aged 12 years, in violation of the said Act.

2. The appellant denied the charges and a trial followed. The trial was concluded after four prosecution witnesses, the appellant and one defence witness were heard. In his judgment, the trial magistrate identified the issues as whether there was penetration as defined by the Act; and, if there was penetration, whether the perpetrator had been identified; and what was the defence of the accused.

3. The trial magistrate found that the evidence of PW1, the clinical officer, indicated that there was mild labial laceration, that the girl's hymen was perforated, and that there was vaginal secretion attached to the vaginal wall. PW1 concluded that there was penetration. The trial magistrate also found that the complainant went into detail as to how the accused had taken her into a room behind his workshop and did "*tabia mbaya*" to her and had told her parents as much; that the complainant's evidence was forthright and free of any contradiction; and that the court was entitled to rely on such evidence even in the absence of other material evidence implicating the appellant.

4. The trial magistrate did not believe the appellant's sworn statement that this case was prompted by a business rivalry with the girl's parents and was meant to frame the appellant. The trial magistrate doubted whether the girl's parents would inflict such injuries upon their daughter merely to frame the appellant. The appellant's defence could not withstand the weight of the evidence presented by the prosecution.

5. The trial magistrate found the appellant guilty of the offence and convicted him accordingly. However, he noted that since the complainant was 12 years of age at the material time, the appellant ought to have been charged under Section 8 (3) and not 8 (2) of the *Sexual Offences Act*. The trial magistrate held that this error was not fatal to the case because the ingredients of the section creating the offence, that is Section 8 (1), had been established while sub-sections (2), (3) and (4) were the penal sections that guide the court in sentencing and not in establishing the offence. As a result, the appellant would be dealt with under section 8 (3) of the Act. The trial magistrate sentenced the appellant to 20 years' imprisonment.

6. Dissatisfied with the conviction and sentence, the appellant lodged an appeal in the High Court at Eldoret. The appellant faulted the trial magistrate for convicting him under Section 8 (1) as read with 8 (3) because he had not pleaded to the charge and the magistrate amended the charge in the course of his judgment without the knowledge of the prosecution and defence. He contended that the trial magistrate had no jurisdiction to convict the appellant under Section 8 (1) as read with 8 (3) since it was impracticable to comply with the mandatory provisions of Section 214 (1) of the *Criminal Procedure Code* (CPC).

7. Further, the conviction was prejudicial to his legal and constitutional rights; and that the amendment of the charge at time of writing the judgment was unfair, unjust, illegal, and vitiated the whole trial. That the particulars of the offence in the charge sheet failed to support the main charge preferred against the appellant and the charge was therefore defective and bad in law.

8. It was also the appellant's contention that no age assessment report or birth certificate was produced to confirm the age of the complainant and therefore the court's conclusion that the complainant was aged 12 years had no legal basis. The trial magistrate erred in law and in fact by relying on medical evidence that was not credible. The trial magistrate misunderstood and misapplied the provisions of section 124 of the *Evidence Act*. The appellant finally contended that the findings of the trial magistrate were against the weight of the available evidence.

9. In her judgment, the learned judge held that, to the extent that the proper sub-section was not cited in the charge, technically the charge was rendered defective; however, that the defect was properly addressed by the trial court. The appellant was throughout aware of the charge facing him as spelled out under Section 8 (1), while the subsequent subsections only prescribe the penalties based on the age of the complainant. The trial court having arrived at the conclusion that the complainant was aged 12 years at the material time, the court could only convict the appellant under Section 8 (3).

10. The learned judge held that Section 186 of the CPC also cures the error; and that Section 214 of the CPC only provided for an amendment of the charge during the trial and before the close of the prosecution case. Further, the learned judge noted that Sections 179 to 191 of the CPC fall under the head "Convictions for Offences other than those charged" clearly indicating that the courts may convict a person on an offence they are not charged with. The learned judge cited as an example Bwana Kombo Muhati v Republic [2000] eKLR where this Court held that the trial magistrate rightly found the appellant therein guilty of indecent assault of a girl under Section 144 (1) of the Penal Code yet the appellant was originally charged with attempted defilement of a girl contrary to Section 145 (2) of the *Penal Code*.

11. The learned judge held that PW1 did not give contradictory testimony on the medical examinations he conducted. As for the issue of proving the age of the complainant, the learned judge held that the complainant herself stated that she was 12 years, as did her biological parents PW3 and PW4. The charge sheet indicated that the complainant was aged 12, and the court which had an opportunity to see the complainant did not doubt her age. The learned judge found no reason to doubt that that was her age.

12. Regarding whether defilement was proved, the learned judge observed that the only evidence relied on by the court apart from the medical evidence of PW1 was that of the complainant. The trial court was satisfied that the complainant was truthful and invoked the provisions of Section 124 of the *Evidence Act* where a court is allowed to convict an accused based on the sole evidence of an alleged victim of a sexual offence, where the court is satisfied that the alleged victim is telling the truth. The learned judge found no reason to interfere with the trial court's finding and was satisfied beyond any reasonable doubt that the appellant was the culprit. The learned judge therefore upheld the conviction and sentence.

13. Still dissatisfied with the decision of the High Court, the appellant lodged the present appeal. This appeal is premised on the grounds that the two courts below erred in law and in fact by:

    a) Failing to hold that the charge sheet was defective.

    b) Denying the appellant, a fair trial as per the provisions of the *Constitution* of Kenya.

    c) Failing to hold that the evidence tendered by all witnesses was not credible to prove the case beyond reasonable doubt.

    d) Shifting the burden of proof from the prosecution to the appellant.

    e) Failing to hold that this case was full of contradictory evidence.

    f) Failing to consider the appellant's defence in their judgments.

14. Both the appellant and the respondent have filed submissions addressing their rival positions. On the issue of the charge sheet, the appellant contended that the charge sheet was defective because he was charged under Sections 8 (1) as read with 8 (2) of the *Sexual Offences Act* and yet he was convicted and sentenced under Section 8 (1) as read with 8 (3) of the Act. The prosecution and the court were all aware of the defect in the charge. The trial magistrate did not cite any law which guided him to presume the charges and to convict the appellant, thereby using his powers contrary to Articles 21, 25, 27, 28, 29 and 50(2) of the *Constitution*.

15. The appellant faulted the learned judge for concluding that although the proper sub-section of the law was not cited 'technically' rendering the charge defective, the defect was properly addressed by the trial court. The appellant reiterated that Section 214 of the *CPC* would only apply during the hearing and not at the close of the prosecution case, and that he could not be blamed for not complaining about the defect because he was a layman, and that this was the responsibility of the trial court as per Section 275 (2) of the *CPC*.

16. The appellant contended that it was very important that the charges be amended and read back to him to plead to them under Sections 281 and 282 of the *CPC*. That being eventually convicted under a different sub-section was a total miscarriage of the law that could not be cured, and it amounted to denial of fair trial. He relied on *Mohamed Bashir v Republic* [1950] KLR for the proposition that, when an amendment to a charge is made during the hearing of an inquiry and the accused is not asked to plead to the substituted charge, the charge would be declared a nullity. The appellant also submitted

that he was denied access to copies of police statements and exhibits to enable him to challenge the prosecution evidence, particularly on the age of the complainant.

17. The appellant further submitted that PW5, the investigating officer, did not conduct any investigations as mandated by law. His testimony was very shallow and he never told the court whether he recorded any witness statements, and this may have been why the trial court did not have witness statements to furnish the appellant with. That this was a prosecution irregularity amounting to a miscarriage of justice and warranting an acquittal and/or a retrial of the appellant.

18. The appellant relied on *Opicho v Republic* [2009] KLR 369 for the proposition that in general, a retrial would be ordered only when the original trial was illegal or defective; and each case must depend on its own facts and circumstances, and an order for a retrial should only be made where the interests of justice required it.

19. The appellant contended that the age of the complainant was not conclusively proved. No birth certificate, baptism card, health clinic card, or an age assessment report was produced before the honourable court. It was not enough to rely on the evidence of PW3 and PW4 that the complainant was 12 years old because they neither produced any proof that they were the complainant's biological parents. The appellant insisted that the evidence of PW3 and PW4 that the complainant was defiled was based on hearsay which cannot form the basis of conviction. Failure to call one Geoffrey who told PW4 that he had seen the complainant at the workshop confirmed how the appellant was framed. The appellant relied on *Peter Gitau Muchene v Republic Nairobi* HCCR No. 364 of 2006 for the proposition that an adverse inference is to be made where the prosecution fails to call a key witness.

20. The appellant submitted that PW2 did not establish what kind of clothes the appellant allegedly removed and how long it took her to dress up after the act as she heard someone enter the workshop, along with other issues which the appellant perceived as pertinent. The appellant contended that PW2 was subject to coaching and lied to the court, and that being a child of tender years, there was no requirement that her evidence should be believable where there is evidence to the contrary.

21. The appellant also questioned the reliability of the evidence of PW1 who examined the complainant after days and whose evidence, the appellant contended, did not connect the appellant to the incident. The medic did not specify the time the penetration had taken place nor whether the injuries were fresh or old. The appellant submitted that the two lower courts disregarded his evidence that he was framed because of a business rivalry.

22. Mr. Onkoba, Prosecution Counsel, filed submissions for the state in opposition of the appeal. Counsel submitted that the appellant has not clearly stated which aspect of the right to fair trial enumerated under Article 50 (2) of *Constitution* was violated; and that this issue was not raised in the trial or the first appeal. The issue that the appellant was never supplied with witness statements is an afterthought meant to subvert justice. The appellant was ready for the hearing and he adequately cross-examined witnesses.

23. On the issue of the defective charge sheet, Counsel submitted that the elements to be proved in the offence of defilement of a child are in Section 8 (1) of the *Sexual Offences Act*. All the elements were satisfied by the prosecution. The appellant did not suffer any prejudice due to the error in the charge sheet as the same was rectified by the trial court and upheld by the first appellate court. As per Section 382 of the *CPC*, the appellant did not point out any prejudice he may have suffered as a result of the irregularity.

24. Counsel submitted that the key ingredients for the offence of defilement of a child – age of the complainant, proof of penetration, and proof that the appellant was the perpetrator – were proved

beyond reasonable doubt. Regarding age, Counsel relied on the case of *Richard Wahome Chege v Republic* Criminal Appeal No. 61 of 2014 where this Court held that age is not primarily proved by production of a birth certificate, and that the age was proved in that case by the biological mother and supported by evidence of the doctor.

25. Counsel submitted that the findings in the P3 form indicated that there was penetration in terms of Section 2 of the *Sexual Offences Act*. On the issue of identification, Counsel cited *Ogeto v Republic* [2004] KLR 19 for the proposition that, a fact can be proved by a single identifying witness except that such evidence must be admitted with care where circumstances for positive identification are found to be difficult. The appellant was no stranger to the complainant, as the complainant used to be sent to the appellant's workshop to collect timber for firewood; and the appellant was a friend of the complainant's father.

26. Regarding corroboration of the complainant's evidence, Counsel cited the proviso to Section 124 of the *Evidence Act* and the case of *J.W.A v Republic* [2014] eKLR to the effect that, the court can convict an accused on the strength of the sole evidence of the alleged victim of a sexual offence, if the court is satisfied that the alleged victim is telling the truth. Counsel submitted that the complainant's statement was nonetheless corroborated by her mother PW3 who saw injuries on her vagina; and the P3 form filled by the doctor.

27. In a second appeal, the Court ought to confine itself to matters of law, as provided under Section 361 (1) (a) of the *Criminal Procedure Code*. We should therefore not interfere with concurrent findings of the fact unless it is shown that the findings of fact by the two courts below are based on no evidence.

28. Whether the appellant was accorded a fair trial as provided under Article 50 (2) of *Constitution* and related issues were raised for the first time in this second appeal, yet the appellant had the opportunity to raise the issues at the at the trial and the High Court. These issues include the alleged denial of witness statements and exhibits; and the alleged failure of the investigating officer to conduct investigations. This Court in *John Kariuki Gikonyo v Republic* [2019] eKLR had the following to say about completely new issues raised in a second appeal:

> " The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203. of 2009; held as follows:
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> " ....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."
>
> In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."
>
> These issues therefore, ought not to be entertained at this stage.

29. On the issue of the defective charge, this Court in *Benard Ombuna v Republic* [2019] eKLR had the following to say about consideration of defects in a charge sheet:

> " 13. Be that as it may, as this Court appreciated in JMA v R [2009] KLR 671 that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective so as to

> render any conviction a nullity has been established, both in our jurisdiction and other jurisdictions. In that regard, the Supreme Court of India in Willie (William) Slaney vs. State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], held that:-
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> "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 the labyrinth of insubstantial technicalities."

30. The object of a charge is to give the accused notice of the matter he is charged with and to convey the necessary information that will enable him to make his defence or prepare his case before court (See *Amos Omondi Ojwang v Republic* [2020] eKLR). As was stated by this Court in *Isaac Nyoro Kimita & another v Republic* [2014] eKLR, when considering the effect of defective charges, the aim of a court of law is not to be hyper technical, but rather to do substantive justice in each case in line with Article 159 of *the Constitution*. Further, it must never be lost that the victim of the crime too has rights and the law should not be applied in a manner that diminishes or takes away those rights. A balance is struck by not laying undue weight on insubstantial technicalities.

31. In the present case, the omission to cite sub-section 8 (3) which prescribes the sentence, along with the sub-section 8 (1) that spells out the ingredients of the offence, is not enough to render the appellant's conviction a nullity. The defect in the charge sheet was technical and did not cause the appellant any prejudice.

32. It was clear to the appellant throughout the trial that he was charged with the offence of defilement. As rightly concluded by the learned judge, the defect was curable under Section 186 of the *Criminal Procedure Code*. The conviction is further insulated by Section 382 of the *Criminal Procedure Code* which provides that:

> " ...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."

33. It was the appellant's contention that the evidence of all witnesses was not credible to prove the case beyond reasonable doubt. The appellant contended that the age of the complainant was not sufficiently proved; that no birth certificate, baptismal records, age assessment reports or other such documents were produced to corroborate the evidence to the effect that the complainant was 12 years old. The learned judge was however satisfied by the statement of the complainant herself, the statements of her biological parents, the information in the P3 form to the effect that the complainant was of the apparent age of 12 years, as well as the trial court's own assessment that her age was not in doubt. The appellant has advanced no proper reason for us to interfere with these findings. The learned judge also correctly found that the evidence of PW1 and the P3 form produced was sufficient proof of penetration. There was no contradiction in the evidence of PW1 as alleged by the appellant.

34. Regarding identification of the appellant as the perpetrator, the learned judge found no reason to interfere with the trial court's reliance on the evidence of the complainant to convict the appellant on the strength of Section 124 of the *Evidence Act*. Similarly, there is no reason for this Court to interfere with the trial court's assessment, affirmed by the first appellate court, that the complainant's evidence was forthright and free from contradictions. In *Nelson Julius Karanja Irungu v Republic* [2010] eKLR this Court held that:

> " As this court has stated before, when it comes to credibility of witnesses an allowance must be given that the trial court was in a better position to make that judgment as it saw and heard the witnesses."

35. The appellant's complaint that the two courts below disregarded his defence cannot be sustained. There was no evidence to indicate that there was a business rivalry between the appellant and the complainant's parents. The evidence of DW2 was of no help as she only learnt of the events after the arrest of the appellant.

36. The charge against the appellant was proved beyond any reasonable doubt. The conviction was sound and sentence lawful. The appeal is therefore dismissed.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022

P. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR