IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO P., M'INOTI & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 46 OF 2016

BETWEEN

DICKSON MBOLOI MBITHI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (Jaden, J.) dated 25th November 2014

in

H.C.CR.A. No. 386 of 2012)

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JUDGMENT OF THE COURT

This appeal was heard remotely through Skype on 27th April 2020 because of the challenges posed to the administration of justice by the Covid-19 pandemic. ***The appellant, Dickson Mboloi Mbithi***, participated through a video link to ***KitengelaPrison*** where he is serving his term of imprisonment, whilst his two advocates, ***Mr. Asitiba*** and ***Ms. Mwaniki***, as well as ***Mr. Hassan Abdi*** for the Director of Public Prosecutions, similarly connected from Nairobi. We are grateful to the appellant and counsel for demonstrating that the challenges of the Covid-19 pandemic are not insurmountable and that with goodwill and co-operation, the administration of justice cannot be defeated by this pandemic.

On 25th November 2014 the High Court at Machakos dis-missed an appeal by the appellant against his conviction and sentence for the offence of rape contrary to ***section 3(1)*** of the ***Sexual Offences Act***. Earlier on 23rd June 2012, the ***Principal Magistrate's Court*** at ***Kajiado*** had convicted the appellant for the said offence and sentenced him to 20 years imprisonment.

In this second appeal, which by dint of ***section 361 (1) (a)*** of the ***Criminal Procedure Code*** must be confined to matters of law only, the appellant impugns the judgment of the High Court on three fronts, namely violation of his constitutional right to fair trial, failure of the prosecution to prove its case be-yond reasonable doubt, and conviction on the basis of a defective charge sheet.

The background to the appeal is that on 29th March 2012, the appellant was charged that on the previous day, at ***[particulars Withheld]*** area in ***Namanga Division*** of ***Kajiado County***, he raped ***NLK (the complainant)***. After the appellant pleaded not guilty to the charge, the prosecution called 7 witnesses to prove its case. The thrust of that evidence was that on 28th March 2012 at 8.00 am, the complainant was herding her goats a short distance from her home when the appellant, who was wearing a red jacket, red T-shirt, black trouser and white shoes and whom she had never met before, accosted her and asked for information on where to buy alcohol and bhang. After the complainant informed him she did not know, the appellant grabbed her, knocked her down, tore up her clothes and raped her. In the process the com-plainant sustained injuries on her neck.

After the ordeal the complainant went back to her home where she reported to her family and neighbours, among them ***NP (PW2), KL (PW3), TT (PW5)*** and ***SP (PW6),*** that she had been raped by a stranger. She described the clothes the appellant was wear-ing and stated that he was carrying a cudgel *(rungu)*. The complaint was attended to at ***Namanga Health Centre*** as a search party made up of among others PW3, PW5 and PW6 assembled and started looking for the appellant. They caught up with him at ***[Particulars Withheld]*** area, about 2 kilometres from the scene. His clothes matched those described by the complaint and he was carrying a *rungu*. On seeing the party the appellant attempted to flee, but he was arrested and handed over to the police.

Ann Kinyua (PW3), a clinical officer at Namanga Health Centre produced a ***P3 form*** which indicated that when the complainant was examined on the date of the incident, she had bruises around her neck and her genitalia had secretions and was also bruised. The prosecution produced as exhibits the torn clothes that the complainant was wearing on the material day as well as the *rungu* that was in the appellant's possession.

When he was put on his defence, the appellant readily admitted that he had sexual intercourse with the complainant on the material day, but stated it was consensual. It was his defence that he had previous consensual sexual liaisons with the complainant, who was his illicit lover. He added that he had met the complainant the previous day when he gave her ***Kshs 200***, but they did not have sexual intercourse because she had a tooth-ache. On the material day, after having sexual intercourse, he gave the complainant ***Kshs 100***, which she refused to accept. He also confirmed that he was arrested about 2km from the scene by three men who wanted to collect the money that he allegedly owed the complainant.

The trial court did not believe the appellant's defence and having satisfied itself that the prosecution had proved its case beyond reasonable doubt, convicted and sentenced him as we have already stated, which conviction and sentence were subse-quently upheld by the High Court.

In support of his appeal, the appellant's learned counsel, ***Mr Asitiba*** and ***Ms Mwanik***i, submitting in turns, contended that the first appellate court erred in failing to hold that the appellant's right to fair hearing was violated. They contended that the appellant's right to fair trial was violated in two respects, first by failure of the two courts below to critically analyse and evalu-ate his defence. Counsel argued that the court's characterisation of the appellant's defence of consensual sexual intercourse as an afterthought amounted to failure to analyse and properly evaluate the evidence, which was a violation of the right to a fair trial. They added that the two courts below did not give any reason why they disbelieved the appellant's defence, which was in violation of ***section 169*** of the ***Criminal Procedure Code.***

Secondly, it was contended that the appellant's right to a fair trial was violated by the failure of the State to avail him the services of an advocate at its expense as demanded by ***Article 50(2) (h)*** of the ***Constitution***. While conceding that the right in question is not absolute, counsel contended that the appellant was entitled to the right to an advocate as he stood to suffer great injustice. Relying on ***Francis Karioko Muruatetu & Another v. Republic (2017) eKLR***, counsel submitted that the right to fair trial is not just a fundamental right, but also the cornerstone of a democratic state and that by dint of ***Article 25*** of the Constitution, it is an inalienable right which cannot be derogated from or limited.

On the second ground of appeal it was contended that the prosecution did not prove lack of consent on the part of the complainant beyond reasonable doubt. Counsel submitted that the appellant's defence of consensual sex and the payments he made to the complainant raised reasonable doubt as regards lack of consent on the complainant's part. In counsels' view, the injuries on the complainant's neck could be explained as the result of "a deal gone sour".

Lastly on the third ground of appeal, counsel submitted that the charge sheet was defective because it only charged the appel-lant with rape contrary to ***section 3(1)*** of the ***Sexual Offences Act***, without the words "*as read with section 3(3)"*. That omission, counsel argued, was a violation of ***section 134*** of the ***Criminal Procedure Code*** and rendered the charge fatally defective. It was further contended that the defect could not be cured under ***section 382*** of the ***Criminal Procedure Code*** be-cause the omission was prejudicial to the appellant. For all those reasons, counsel urged us to allow the appeal, quash the conviction and set aside the sentence, which he argued was not justified. ***Mr Hassan*** for the respondent opposed the appeal, submitting that the appellant had not stated with precision how his right to fair trial was violated. He added that the issue of violation of the right to fair trial was a mere afterthought because the appel-lant did not raise the matter either before the trial or the first appellate court.

On evaluation of evidence and rejection of the appellant's defence, counsel submitted that the two courts below made con-current findings that the appellant's defence was an afterthought and that the appellant had not placed anything before this Court to justify interference with the findings and conclusions of the two courts below. It was counsel's view that the prosecution had proved lack of consent on the part of the complainant beyond reasonable doubt and that in reaching that con-clusion, the courts below took into account, among others, the injuries that the appellant inflicted on the complainant.

Regarding the charge sheet, counsel submitted that the de-fect in question was curable under ***section 382*** of the Criminal Procedure Code and that the appellant had not demonstrated that he had suffered any prejudice because of the omission of the punishment section in the charge sheet. Accordingly, he urged us to find no meat in the appeal and to dismiss it in its entirety.

Those are the respective positions urged by both sides. We propose to consider the three grounds of appeal in the sequence in which the appellant presented them. However, as a preliminary issue, we must reiterate that in a second appeal which is on issues of law only, the Court will reject invitation to delve into matters of fact and to re-evaluate evidence as the first appellate court did. This Court is bound by the concurrent findings of fact made by the two courts below and will not interfere with those findings unless it is demonstrated that no reasonable tribunal could have reached those findings in light of the evidence on record. It is on that basis that in ***Boniface Kamande & 2 Others v. Republic [2010] eKLR***, the Court stated thus:

> *"On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be ex-pected to base any decision on it."*

The first issue is whether the appellant's right to a fair trial was violated when the two courts below rejected his defence of consensual sex. This issue is closely intertwined with the appellant's second ground of appeal in which he contends that the prosecution did not prove beyond

reasonable doubt that there was lack of consent to sexual intercourse on the part of the com-plainant. Accordingly we shall address the two issues together.

With respect, as presented, the appellant's argument comes perilously close to asserting that every time a court does not believe the evidence of a party, that amounts to violation of the right to fair trial. But that is exactly what the court is supposed to do; to consider and weigh the evidence adduced by the parties, which oftentimes is inconsistent and contradictory, and determine which evidence is credible and which is not. In this appeal, both courts below took time to consider the evidence presented by the prosecution to support lack of consent on the part of the complaint as well as that of the appellant in support of consensual sex.

The trial court, in rejecting the appellant's defence, ex-pressed itself as follows:

> *"I tend to disagree with the accused person's defence on the issue of PW I having consented to the penetration. The P3 form herein shows that PW I sustained bruises around the neck due to strangling. Her evidence…was that on scream-ing the accused person held her neck during the ordeal. PW 2 who saw her immediately stated that PW I had a swollen face and blood drops from her mouth. Further the torn maroon skirt and red flower khanga/lesso P Exhibit 2 and 3 herein produced in court are a clear indication that the consent was not voluntary (sic). If indeed they were in a relationship then the injuries to the neck and the [torn clothes] could not arise. I therefore dismiss the defence on record for being unmeritorious. The accused person did not raise the issue of KShs.300/- he allegedly gave PW I earlier on. This is an afterthought. The upshot of all this is that the prosecution have proved the charges against the accused person beyond reasonable doubt."*

On its part, the first appellate court re-evaluated the evidence and on the issue of lack of consent, came to the same conclusion as the trial court. It expressed itself thus, on the issue:

> *"The appellant in his defence case did not deny that he had sex with the complaint on the material day. The appellant's assertion is that it was consensual sex. However, his evidence that the disagreement concerned the amount of money that he was to pay the complainant cannot be believed. This is because of the strong evidence from the pros-ecution witnesses that establish otherwise. The complainant's evidence that she screamed was corroborated by PW5 TT and PW6 SP. Virtually all the prosecution witnesses testified that the complainant's clothes were torn and that the complainant had injuries. The evidence of the complainant's screams coupled with the evidence of the torn cloths and bodily injuries are not consistent with consensual sex."*

What the record shows is that contrary to the appellant's submissions, the two courts below did not disregard his defence or dismiss it offhand. Instead, they considered it and disbelieved it and gave cogent reasons why the appellant's defence was not credible. We are satisfied that there is no basis to interfere with the concurrent findings of the two courts below that the complainant did not consent to sexual intercourse with the appellant and that the appellant indeed raped her. We are also satisfied that the offence was proved beyond reasonable doubt.

As regards the right of the appellant to legal representation, the Supreme Court in ***Republic v. Karisa Chengo & 2 Others [2017] eKLR***, considered ***Article 50(2)(h)*** of the Constitution and held that the right to an advocate at State expense is to be en-joyed pursuant to the constitutional edict and not progressively; that the right is not limited only to accused persons charged with capital offences; and that the right is available if substantial injustice would otherwise result. The Court concluded thus:

> *"[I]t is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevita-bly, there will be instances in which legal representation at the expense of the State will not be accorded in criminal pro-ceedings. Consequently, in view of the principles already ex-pounded above, it is clear that with regard to criminal mat-ters, in determining whether substantial injustice will be suf-fered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:*
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> *(i) the seriousness of the offence;*
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> *(ii) the severity of the sentence;*
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> *(iii) the ability of the accused person to pay for his own legal representation;*
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> *(iv) whether the accused is a minor;*
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> *(v) the literacy of the accused;*
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> *(vi) the complexity of the charge against the accused".*

As the respondent contends, this issue ought to have been raised before the two courts below to address, on the basis of the considerations tabulated by the Supreme Court, whether substantial injustice was likely to result. Be that as it may, the trial of the appellant took place in 2012 and as this Court stated in ***Moses Gitonga Kimani v. Republic*** and ***Hamisi Swaleh Kibuyu v. Republic***, ***Article 261*** of the Constitution as read with the ***Fifth Schedule*** thereof required Parliament to enact legislation within a period of 4 years from 28th August 2010 to give effect to ***Article 50*** of the Constitution. The appellant's trial was within that period provided by the Constitution for the

establishment of a legal aid framework. Parliament has since enacted the ***Legal Aid Act 2016*** providing the framework for giving effect to ***Article 50(2) (h).*** In these circumstances we are not persuaded that there is basis for nullifying the appellant's conviction on the arguments advanced in this ground of appeal.

That leads us to the last ground of appeal, namely whether the charge sheet was defective for failure to refer to the punishment section. In upholding the validity of the charge sheet, the first appellate court reasoned thus:

> *"The appellant was charged under section 3(1) of the Sexual Offences Act. Although the charge sheet does not state "as read with section 3(3) of the Sexual Offences Act, this is not an error that did not prejudice the appellant. The error is cur-able under section 382 of the Criminal Procedure Code. The sentence is within the law."*

As has been stated time and again, the focus of ***section 382*** of the Criminal Procedure Code is not formal compliance with the rules of framing charges, but on whether any error, omission or irregularity in the manner in which the charge is framed has occasioned failure of justice. The provision insulates a finding or sentence of the trial court from challenge on account of any error, omission or irregularity in the charge, unless such error, omission or irregularity has occasioned a miscarriage of justice. The appellant is also obliged to raise his complaint at the earliest op-portunity. See ***George Njuguna Wamae v. Republic, Cr. App. No. 417 of 2009*** and ***Daniel Lutta v. Republic, Cr. App. No. 141 of 2014***.

In ***Amondi Omunga v. Republic, Cr. App No. 178 of 2012,*** this Court addressed a similar complaint like that raised by the appellant, where the charge sheet cited only the punishment sec-tion without reference to the provision creating the offence. The Court held that the defect was curable under ***section 382*** of the Criminal Procedure Code. Similarly, in ***John Irungu v. Republic***, ***Cr. App. No 20 of 2016,*** in rejecting an argument like that advanced by the appellant, the Court stated:

> *"As section 137(a)(iv) of the Criminal Procedure Code makes abundantly clear, the rules of framing the charge are not cast in stone. The Code contemplates that there may be variations, so long as there is substantial compliance with the rules."*

Ultimately we agree with the first appellate court that the failure to refer to ***section 8(3)*** of the Sexual Offences Act did not occasion the appellant any miscarriage of justice in view of the clear statement of the offence and the particulars that were provided.

Regarding sentence, the appellant was sentenced to twenty years imprisonment. ***Section 8(3)*** of the Sexual Offences Act prescribes a sentence of not less than 10 years, but which may be enhanced to life imprisonment. The trial court did not refer to any factors that justified a sentence of imprisonment double the number of years prescribed by the Act, granted the record indi-cates that the appellant had no previous record. The basis for exercise of discretion in sentencing should be clear, otherwise the exercise will appear to be arbitrary. On its part the first appellate court merely upheld the sentence of the trial court with-out considering the basis upon which the 20 years imprisonment was imposed. For that reason, we are justified in interfering with the sentence.

Accordingly we dismiss the appellant's appeal against conviction in its entirety. We however allow his appeal against sentence, set aside the sentence of imprisonment for 20 years, and substitute therefor a sentence of 10 years imprisonment with effect from the date of conviction. It is so ordered.

Dated and delivered at NAIROBI this 24th day of July, 2020

W. OUKO, P.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR