Chengo v Republic (Criminal Appeal 13 of 2021)
[2024] KECA 235 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 235 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 13 OF 2021

S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

SAMUEL KARISA CHENGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 14th April 2020 in H.C.CR.A No. 9 of 2019)

JUDGMENT

1. This is a 2nd appeal from the judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) dated 14th April 2019 in Criminal Appeal No. 9 of 2019 in which the learned Judge upheld the judgment of the Senior Resident Magistrate's Court (Hon. Wasige, SRM) in Criminal Case No. 4 of 2018 on both conviction and sentence imposed on the appellant.

2. The appellant had been charged in the Senior Principal Magistrate's Court at Kaloleni in Criminal Case No. 4 of 2018 with the offence of defilement of a child contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The appellant was also charged with the alternative offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The particulars of the offence with which the appellant was charged are that, on 7th February 2018 at (Particulars withheld) village, (Particulars withheld) Location, (Particulars withheld) Sub County in Kilifi, the appellant intentionally and unlawfully committed an act which caused his penis to penetrate the vagina of A.K, a child aged 16 years. The particulars of the alternative charge are that the appellant intentionally and unlawfully committed an act which caused his penis to touch the vagina of AK, a child of 16 years.

4. The prosecution called four witnesses, including PW1, the complainant, who testified that the appellant is her cousin, and who was well known to her; that, on 7th February 2018, she had gone to school in the morning, but was sent home for lack of school fees; that she found the appellant together with an aunt of hers; that, when her aunt left, PW1 went into a house within their compound where she kept her clothes; that the appellant followed her and barred her from getting out of the house; that he drew a knife and threatened to kill her if she screamed; that the appellant removed her skirt and panties and defiled her, threatening to kill her if she told anyone what had happened; that, in the evening, PW1 told her sister-in-law, one FG, who informed the appellant's mother of the complainant's ordeal; and that she reported the matter at Kaloleni police station after which she was taken to Mariakani Hospital for medical examination.

5. PW2 – AKR, a cousin to the complainant and of the appellant, testified that, on the evening of 7th February 2018, he received a call from his wife, informing him that the appellant had defiled the complainant.

6. PW3 – Mwangolo Chigulu, a senior clinical officer at Mariakani Hospital, stated that he examined the complainant on 9th February 2018 and found that she had been defiled prior to being brought to the hospital; that she had a normal unkempt external vagina, loose vaginal sphy muscles, and that her hymen was broken; and that she had whitish discharge from her vagina. The Clinical officer's conclusion was that the complainant was defiled despite late reporting. He produced the P3 form and the treatment notes in evidence.

7. PW4 – Sergent Hadija Kenga, the investigating officer, essentially reiterated the foregoing testimonies as reported to her.

8. In his defence, the appellant gave an unsworn statement and denied having committed the alleged offence. He admitted being related to the complainant. He stated that, while at home on 19th February 2018 at around 11.00 pm, police officers knocked on his door, entered and arrested him without giving him reasons for the arrest. His defence was that the allegations leveled against him were trumped up due to a land dispute between his family and that of the complainant; and that Pw 2 (their cousin – AKR) stood to benefit tremendously if he (the appellant) was jailed.

9. In her judgment dated 15th November 2018, the trial court (Wasige, SRM), found the appellant guilty as charged and sentenced him to fifteen (15) years imprisonment. According to the learned Magistrate, "all the elements of defilement were proved … that the prosecution has proved its case beyond reasonable doubt that the accused defiled PW1."

10. Dissatisfied with the decision of the trial court, the appellant lodged an appeal to the High Court of Kenya at Malindi in HCCA No. 9 of 2019. In its judgment dated 14th April 2019, the High Court (R. Nyakundi, J.) dismissed the appellant's appeal and upheld the trial court's judgment on both conviction and sentence.

11. Aggrieved by the decision of Nyakundi, J., the appellant moved to this Court on appeal initially on 3 grounds set out in his undated memorandum of appeal, but which were subsumed in the 6 grounds contained in his undated supplementary memorandum of appeal, which was filed on 17th October 2023 without leave of the Court as required under rule 67(1) of the *Court of Appeal Rules, 2022*.

12. Rule 67 reads:

    67. (1) An appellant may, at any time with the leave of the Court, lodge a supplementary memorandum of appeal.

(2) .....

(3) A person lodging a supplementary memorandum under this rule shall cause a copy thereof to be served on the respondent.

13. Even though the appellant's supplementary memorandum of appeal was lodged without leave as required under rule 67(1), the State did not object thereto despite failure or neglect on the appellant's part to seek leave to lodge the undated supplementary memorandum of appeal, which raised new grounds of appeal not canvased in his original memorandum of appeal. In the circumstances, we take comfort in the provisions of Article 159(2) (d) of the *Constitution* with a view of according the appellant the opportunity to conduct his 2nd appeal without undue technicalities of procedure.

14. Moreover, we find nothing on record to suggest that the appellant's supplementary memorandum of appeal was not served upon the Respondent as required under the mandatory provisions of rule 67(3) of this *Court's Rules*. That might explain why the Respondent did not object thereto, but was prepared to make their submissions in opposition to the appeal. Notwithstanding the procedural infractions on the part of the appellant, we will nonetheless pronounce ourselves on the points of law that merit consideration on a 2nd appeal.

15. The revised grounds on which the appellant's appeal is anchored are that the learned Judge erred in law: in failing to consider that the appellant was denied his right to information prior to taking plea in breach of Article 50(2) (a), (b), (j) and (m) of the the *Constitution*; in failing to consider that there was no proper identification at the scene of crime; by not considering that there were massive contradictions and invariances in the testimonies of PW1, PW2 and PW4; by failing to find that penetration was not proved; by failing to note that the prosecution did not discharge its burden of proof; and in failing to observe that the demeanor of the minor victim was not recorded in the proceedings.

16. In support of his appeal, the appellant filed undated submissions citing 3 authorities, including the case of *Julius Kioko Kivuva v Republic* [2015] eKLR, submitting that the prosecution failed to prove penetration through the clinical officer (PW3). The remaining two cases are unverifiable on eKLR. In addition to the foregoing, the appellant submitted that the trial court erred in failing to record in its proceedings reasons for its satisfaction that the victim of the offence was telling the truth.

17. Opposing the appeal, learned State Counsel Ms. Valerie Ongeti, filed written submissions and list of authorities dated 19th October 2023 citing 5 judicial authorities, including the cases of *George Opondo Olunga v Republic* [2016] eKLR highlighting the ingredients required to prove the offence of defilement – identification or recognition of the offender, penetration and the age of the victim; Richard Munene v Republic [2018] eKLR, highlighting the effect of contradictions and inconsistencies in the evidence of prosecution witnesses; *Wilson Waitegei v Republic* [2021] eKLR and *Dismas Wafula v Republic* [2018] eKLR, submitting that the Court has the discretion to interfere with the sentence imposed on the appellant, having regard to the Sentencing Guidelines, 2023.

18. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In *Kaingo v Republic* [1982] KLR 213, the Court stated:

> "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."

19. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on 6 main issues raised in

the memorandum of appeal and the supplementary memorandum of appeal, namely: whether the appellant was identified as the person responsible for the offence with which he was charged; whether the appellant was accorded a fair hearing in the trial Court; whether there were substantial contradictions and inconsistencies in the evidence of prosecution witnesses to render the appellant's conviction unsafe; whether the prosecution proved the charge of defilement against the appellant; whether the prosecution discharged its burden of proof to justify the appellant's conviction; and whether the trial court recorded its reasons for believing that the complainant was telling the truth.

20. On the 1st issue as to whether the appellant was identified as the person responsible for the offence of defilement with which he was charged, it is noteworthy that the complainant is a cousin of the appellant with whom they lived in the same compound and were continually in contact. He is well known to her and, moreover, the incident occurred in broad daylight at about 9.00 am. In the circumstances, the complainant's evidence of recognition is unassailable and left no doubt as to the assailant's identity.

21. In view of the foregoing, the appellant's submission that he was not properly identified does not hold. He was not a stranger to the complainant, and neither were the circumstances such as would have impaired his recognition as the assailant. Addressing itself to the issue of recognition, this Court in *Peter Musau Mwanza v Republic* [2008] eKLR expressed itself thus:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

22. In the same vein, Madan J.A in *Anjononi and Others v The Republic* [1980] KLR had this to say on the matter:

> "... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. Turning to the 2nd issue as to whether the appellant was denied the right to fair trial as guaranteed by Article 50 of the *Constitution*, we find nothing on the record to suggest that he was tried in contravention of the *Constitution*, or that he was denied the right to information prior to taking plea in breach of Article 50(2) (a) (b) (j) and (m).

24. We hasten to observe that this is a new point of law raised on 2nd appeal to this Court. The appellant's undated submissions in the High Court on his 1st appeal do not allude to this ground. It is also noteworthy that, after the State had filed its submissions to the High Court on 22nd August 2018, the appellant filed his submissions along with an application to amend his grounds of appeal on 11th September 2018 to include the ground that he was not accorded a fair hearing by reason of the alleged denial of information prior to taking plea. However, his application was struck out for failing to have his supporting affidavit commissioned. Even though the court granted him 14 days to file a proper application, he failed or neglected to do so.

25. We take to mind this Court's decision in *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR where the Court observed:

> " Where the applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first- instance determinations without the benefit of the input of the court from which the appeal arises...
>
> Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court."

26. The appellant's lamentation that he was not informed of the charge, with sufficient detail to answer it, and that he was not informed in advance of the evidence the prosecution intended to rely on, and to have reasonable access to that evidence before he took plea, is an issue that was resolved before the trial court. The proceedings in the trial court show that the appellant requested for witness statements on 26th February 2018 when the case came up for mention before hearing on 9th April 2018 when the appellant confirmed that he was ready to proceed. To our mind, raising the same issue to bolster his ground of appeal that he was denied the right to information prior to taking plea in breach of Article 50(2) (a), (b), (j) and (m) is without basis.

27. On the 3rd issue as to the alleged "massive contradictions and invariances" in the testimonies of PW1, PW2 and PW4, it is clear from the record as put to us that this is yet another issue raised for the first time on 2nd appeal to this Court. In any event, the appeal before us is confined to points of law, leaving the trial court's findings on factual evidence open to challenge on 1st appeal to the High Court. Put differently, this Court's mandate on 2nd appeal does not extend to the duty to re-assess, analyse or re-evaluate the evidence leading to the impugned decision. Suffice it to observe that the appellant has made no attempt to highlight what constitutes the alleged contradictions and inconsistencies, just in case they raise points of law deserving of this Court's attention.

28. Turning to the 4th issue as to whether the prosecution proved as against the appellant the ingredients of defilement, the record of appeal is clear on the issues raised by the appellant at the trial court, in the High Court, and on appeal to this Court. In summary, the appellant did not pose in the trial court any challenge to the prosecution evidence on the ingredients of the offence of defilement – identification, penetration and the age of the victim (see *George Opondo Olunga v Republic* (*supra*)).

29. The first time any of the ingredients of the offence of defilement was challenged was on the appellant's 1st appeal to the High Court where he questioned the age of the complainant. In the impugned judgment, the High Court, having considered her school admission records and an age assessment report, found that the complainant was 17 years of age. That brought the matter to rest and, in any event, the issue of age is not raised in the present appeal.

30. Penetration as an ingredient of defilement is raised for the first time on 2nd appeal to this Court. We need not overemphasise that this is a matter of factual evidence on which we cannot pronounce ourselves on 2nd appeal. For the avoidance of doubt, penetration, which is a matter of evidence is defined in

section 2 of the *Sexual Offences Act* as "... the partial or complete insertion of genital organs into the genital organs of another person" (see *EE v Republic* [2015] eKLR; and *Bassita v Uganda* S.C. Criminal Appeal Number 35 of 1995) where the court held that penetration is proved by direct or circumstantial evidence, usually by the victims' own evidence and corroborated by the medical evidence or other evidence, which falls outside our remit on 2nd appeal.

31. Turning to the 5th issue as to whether the prosecution discharged its burden of proof to justify the appellant's conviction, which may be a matter of either law or fact, the appellant contends that penetration was not proved and that, therefore, the prosecution did not discharge its burden of proof to justify his conviction. This contention hinges on factual evidence and takes us one step back. Penetration, as a matter of evidence, can only be the subject of determination on evidence adduced at the trial court, or determined on 1st appeal to the High Court. Likewise, the ground of appeal on this score fails.

32. On the 6th and final issue as to whether the trial court recorded its reasons for believing that the complainant was telling the truth, the appellant contends that the complainant's demeanor was not recorded so as to show the reasons for which the trial magistrate believed that she was telling the truth. Far from the appellant's contention, extract from the trial court's proceedings on 9th April 2018, the Magistrate stated:

> " I have orally examined the complainant minor who informs me she is 17 years old. She is in class 7 at (particulars withheld) primary school. She is aware of her court environment and understands the importance of telling the truth in court. She also understands the meaning of taking oath. I note that she is not a child of tender years. She shall be sworn."

33. In her Judgment, the Magistrate had this to say of the complainant, which settles the matter:

> " Having been the trial magistrate, I had the benefit of observing the demeanour of PW 1 and I am satisfied that she told the truth in court."

34. Having carefully examined the record of appeal, the grounds on which it is anchored, the rival submissions, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails in its entirety and is hereby dismissed. Accordingly, the Judgment of the High Court of Kenya at Malindi (R. Nyakundi, J.) delivered on 14th April 2020 in HCCRA No. 9 of 2019 is hereby upheld.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024.

S. OLE KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR