



REPUBLIC OF KENYA



KENYA LAW
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**Henry v Republic (Criminal Appeal E056 of 2023)
[2024] KEHC 10352 (KLR) (21 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E056 OF 2023
GL NZIOKA, J
AUGUST 21, 2024**

BETWEEN

THOMAS NYANGIRITA HENRY APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the decision of Hon. J Ndengeri, Senior Resident Magistrate
vide Chief Magistrate Criminal Case S/O No. 22 of 2018 delivered on 31st July 2022)*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (herein "*the Act*"). The particulars of the offence read that on 5th day of April 2018 within Nakuru County, the appellant intentionally and unlawfully caused his fingers to penetrate the genital organ namely; vagina of MWM, a girl aged 9 years old.
2. He was also charged in an alternative count with the offence of indecent act with a child contrary to section 11(1) of the *Act*. The particulars thereof are that, on 5th day of April 2018 within Nakuru County, intentionally and unlawfully caused his fingers to come into contact with the genital organ namely vagina of MWM, a girl aged 9 years old.
3. The charges were read to the appellant and he pleaded not guilty. The case proceeded to full hearing. However, in the course of the trial, the charge sheet was amended wherein the appellant was charged with the offence of sexual assault contrary to section 5(1) (a) (i) and (2) of the *Act*. The particulars thereof remained as earlier stated that; on 5th day of April 2018 within Nakuru County, intentionally and unlawfully caused his fingers to penetrate the genital organ namely vagina of MWM, a girl aged 9 years old.



4. The appellant was also charged with an alternative charge of performing an indecent act with a minor contrary to section 11(1) of the Act. That, on 5th day of April 2018 within Nakuru County, intentionally and unlawfully caused his fingers to come into contact with the genital organ namely vagina of MWM, a girl aged 9 years old.
5. The appellant maintained a plea of not guilty when the amended charges were read to him. The prosecution's case proceeded to full hearing with evidence led to the effect that, on 5th day of April 2018 MWM (herein "the complainant"), a child aged nine (9) years old was playing outside a salon where the appellant was operating a barbershop.
6. That, she was in the company of her friend called K. That, K's father took her home leaving the complainant alone. That the appellant asked her to accompany him to the salon cum barbershop but she refused fearing her mother would beat her. However the appellant pulled her into the barbershop, lowered her pants and inserted fingers into her private parts.
7. That after the incident, the appellant released her to go home and when she reached where her mother was the mother noticed that the complainant's trouser was not zipped and the belt was open. She inquired into the matter and the complainant told her what had happened. The mother took her to the hospital and reported the matter to the police station. Thereafter investigations commenced, the appellant was arrested and charged accordingly.
8. At the close of the prosecution case, the appellant was placed on his defence. In a sworn statement he denied committing the offence and told the court to take note that, he did not participate in the commission of the offence. That he was charged due to malice.
9. In cross-examination he admitted he used to see the complainant playing outside the barbershop and that the complainant's mother worked in a nearby salon. He further conceded that the complainant went to the barbershop where he was working but denied the allegation that her mother went there. That he only saw the complainant's mother the day she went to the barbershop in the company of other salon ladies. Further, the owner of the barbershop had a grudge with the complainant's mother. However, he agreed that he did not have a grudge with the complainant's mother or the victim.
10. At the conclusion of the case, the trial court delivered a judgment dated 31st July 2022 in which the appellant was found guilty as charged on the main count of sexual assault and sentenced to serve a custodial sentence of seven (7) years.
11. However, the appellant is aggrieved by the decision of the trial court and appeals against it based on the following grounds: -
 - a) That the Learned Trial Magistrate erred in law in convicting the appellant without taking directions after the Amendment of the charge sheet.
 - b) That the Learned Trial Magistrate erred in law in convicting the appellant on charges that were defective in relation to the facts and/or particulars of the Amended charge sheet.
 - c) That the sentence was manifestly harsh, oppressive and excessive in the special circumstances of this case.
 - d) That the evidence on record could not support the charges and the resultant conviction and sentence.
 - e) That the learned trial magistrate did not grant the appellant an option of fine and/or a non-custodial sentence.



12. The appeal was opposed by the respondent based on the grounds of opposition dated 18th December 2023 which states: -
 - a) That the charge sheet was proper before court and not defective.
 - b) That all the ingredients of the offences which includes age, identification and sexual assault were sufficient proved beyond reasonable doubt. The prosecution witnesses' testimony corroborated.
 - c) That the sentence imposed on the appellant was as provided by law in line with the circumstances of the offence.
 - d) That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.
13. Subsequently, the appeal was disposed of vide filing of submissions. The appellant in submissions dated, 18th January 2024 abandoned grounds (3) and (4) of and argued on grounds (1), (2) and (5) of appeal.
14. The appellant identified four (4) issues for determination as: -
 - a. Whether the learned trial Magistrate erred in both law and facts in convicting the appellant without taking directions after the amendment of the charge sheet.
 - b. Whether the learned trial magistrate erred in law in convicting the appellant on charges that were defective in relation to the facts and/or particulars of the amended charge sheet.
 - c. Whether the evidence on record could not support the charges and resultant conviction and sentence.
 - d. Whether the learned trial Magistrate did not grant the appellant an option of a fine and/or non-custodial sentence
15. The appellant submitted on the first issue that, the trial court failed to inform him and/or his advocate of his right to recall PW1 the complainant after the amendment of the charge sheet, which is contrary to the provisions of section 214(1)(ii) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, and in violation of Article 50(2) of the Constitution of Kenya.
16. That, the complainant was the key witness to the case and the failure to recall her to testify or be cross-examined after amending the charge sheet greatly prejudiced the appellant's case and led to his conviction and sentence.
17. The appellant relied on the case of; *Director of Public Prosecutions v Swazuri & 24 Others* (criminal Revision E003 of 2023)[2023] KEHC 22153 (KLR) (14 September 2023) (Ruling) where the High Court stated that, the court jurisdiction to order the amendment of a charge under section 214(1) of the Criminal Procedure Code is unfettered the only condition being that the accused shall be called upon to plead to the amended charge, and have witnesses recalled to testify afresh or to be cross examined.
18. He further relied on the case of; *Richard Charo Mule v Republic* Nairobi Court of Appeal Criminal No. 135 of 2004 where the court stated that failure to comply with section 200(3) of the *Criminal Procedure Code* ought to render a trial a nullity.
19. The appellant urged the court to allow the appeal based on section 200(4) of the Criminal Procedure Code and the case of; *Mercy Mugure v Republic* [2018] eKLR where the High Court held failure by



- the succeeding Magistrate to comply with section 200(3) of the Criminal Procedure Code infringing the appellant's right to fair hearing under Article 50 of the Constitution and therefore all subsequent proceedings were unconstitutional and could not stand.
20. On the second issue, the appellant argued that, the amended charge sheet was defective in the facts and particulars as he was not informed of his right to recall witnesses.
 21. On whether the evidence of record supported the charge and the resultant conviction and sentence, the appellant submitted that the trial Magistrate completely ignored his evidence and solely relied on the prosecution evidence without cautioning itself that, the prosecution evidence was adduced by a child while other witnesses were not present nor saw what happened.
 22. Lastly, on failure by the trial Magistrate to grant the appellant a non-custodial sentence, the appellant reiterated his mitigation in the trial court and argued that, there were no aggravating circumstances, that he was a first offender, and that no one was harmed and/or deprived of their right before, during and/or after the commission of the offence.
 23. He cited Regulation 7.19 of the *Sentencing Guidelines* Gazette Notice No. 2970 which states that a trial court should consider a non-custodial sentence considering the gravity of the offence and therefore the sentence was harsh and capricious.
 24. However, the respondent vide submissions dated 18th December 2023, argued that, the charge sheet was not fatally defective as the charge was supported by the correct particulars and was not in variance with the evidence adduced and therefore the appellant was not prejudice in any manner.
 25. The respondent submitted that, the prosecution proved the elements of the offence being age, identification and sexual assault, beyond reasonable doubt. That, the birth certificate proved the victim was a minor, while the P3 for produced by the doctor indicated the victim had lost her hymen through sexual assault. Further, identification was by way of recognition as the minor knew the appellant well.
 26. Finally, the respondent submitted the sentence of seven (7) years imprisonment was in accordance with the law thus lawful. Further, taking into account the age of the minor the trial court had discretion to enhance the sentence but chose not to and imposed the present sentence which is lenient in the circumstances.
 27. At the conclusion of hearing of the appeal and considering the arguments and submissions by the parties, I note that the role of the first appellate court as held by the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32, is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that this court did not benefit from the demeanour of the witnesses.
 28. As regard the instant matter, I have considered the appeal in the light of the material placed before the court and I note that, the charge of sexual is provided for under section 5 (1) of the *Act* which states as follows: -
 - 1) Any person who unlawfully—
 - (a) penetrates the genital organs of another person with—
 - (i) any part of the body of another or that person; or
 - (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;



- (b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

29. To revert back to this matter, the appellant has raised basically three grounds that no directions were taken after the charge was amended as to his rights to recall the complainant who had testified and as a result charges were defective. Further there was no adequate evidence to support the charge and/or the sentence meted out was harsh and he was denied a non-custodial sentence.
30. The appellant submits that he was not informed of his right to recall witnesses after amendment of the charges. However, as he rightfully points out in his submissions, section 214(1)(ii) of the *Criminal Procedure Code* states that it is the accused who has the right to demand that any witness who had testified before the charge is amended be recalled. It is not for the court to move suo moto to do so.
31. It is also noteworthy that the appellant was represented by the learned counsel Mr. Musili who never applied for recall of the complainant. Hence that ground of appeal has no substance.
32. Furthermore, section 200 of the *Criminal Procedure Code* does not apply to amendment of charges. It applies where a matter is taken over by a succeeding Magistrate. In the instant matter, the record of appeal clearly indicates at page 34 of the record of appeal that the subject provisions were adhered to.
33. As regard the argument that the charges were defective in that the appellant was not informed of the right to recall witnesses. The court finds the same equally lacks substance as the provisions applicable for framing charges are clear under section 134 and 137 of the *Criminal Procedure Code* and do not support the arguments advanced. The court notes that the charges were properly framed in form and substance and when read out, the appellant responded thereto appropriately and accordingly.
34. As to whether the prosecution adduced adequate evidence to support the charge, I find that, the evidence of PW3 Benjamin Kuria a clinical officer from Naivasha Sub-County Referral Hospital who produced the medical report stated that, when he examined the complainant, he noted that her hymen was missing. He further stated that, she had bruises on the labia minora, and concluded that, there was partial penetration.
35. He also produced a PRC form filled by Bethwell Omondi, a clinical officer which reflected similar clinical findings as in the p3 form. In re-examination, the doctor stated that it is not usual for a nine (9) year-old child to have lost her virginity and that, the vaginal examination of the complainant revealed that, she had been fingered and thus sexually assaulted.
36. The afore evidence was not rebutted and based on the definition of "penetration" under the Sexual Offences Act, that it means the partial or complete insertion of the genital organs of a person into the genital organs of another person, I find the element of penetration was proved.
37. The complainant also testified that the appellant inserted fingers in her private parts. The appellant admits that he was with the complainant at his place of work. None one else was there. The child was found with her trouser opened and she immediately told her mother upon inquiry what the appellant had done. Why would the child lie? And if the appellant did not do anything to her, why would the doctor find that there was evidence of penetration into her private which was injured.
38. In addition, PW2 JWM testified that when she went looking for the complainant, she was told the complainant was at the appellant's barbershop and she saw the appellant leave the shop. That upon learning of what had happened she returned to the appellant's shop but he had locked and left.



39. PW3 LW who was operating a salon attached to the appellant's barbershop confirmed that the complainant and other children used to go to the salon and barbershop to play. That on the material date she saw the complainant and one K at the salon. Thus the evidence of this witness confirms the fact that the appellant had an opportunity with the child on the material day and could have committed the offence.
40. Further although PW3 stated that she left with the complainant and K and told them to go home, evidence has it that K was picked by the father and the complainant remained.
41. Based on the afore evidence and I find and hold that the evidence advanced by the appellant is a mere denial. He does not advance any reason why the complainant a young child or the mother would frame him yet he acknowledged that there was no bad blood between them.
42. As a result, I find the conviction verdict was safe and decline to interfere with it.
43. In relation to sentence I note that the sentence of the offence is provided for under section 5 (2) which states: -
- “ A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.”
44. Pursuant to the afore the sentence of seven (7) years herein is unlawful and I set it aside and substitute with a sentence of ten (10) years imprisonment from the date of sentence in the trial court but to consider the period spent in custody if any.
45. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 21ST DAY OF AUGUST 2024.

GRACE L NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Ouma for the appellant

Mr. Ndiema for the respondent

Ms. Ogutu: court assistant

