Chesari v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 11247 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E019 OF 2023

AC MRIMA, J

SEPTEMBER 27, 2024

BETWEEN

KEVIN KIMUTAI CHESARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the judgment, conviction and sentence of Hon. S.N Makila (PM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E240 of 2021 delivered on 23rd February 2023)

JUDGMENT

Background:

1. Kevin Kimutai Chesari, the Appellant herein, was charged with the offence of Defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that; on diverse dates between 16th March 2021 and 6th October 2021 within Trans-Nzoia County, intentionally and unlawfully caused his penis to penetrate the vagina of MCN a child aged 15 years.

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No. 3 of 2006.

4. The particulars of the alternative charge are that on diverse dates between 16th March 2021 and 6th October 2021 within Trans-Nzoia County, intentionally touched the vagina of MCN a child aged 15 years with your penis.

5. A total of four witnesses testified for the prosecution. At the close of the prosecution's case, the Appellant was placed on his defence.

6. The Appellant was the sole defence witness. He gave sworn evidence.

7. Upon considering the totality of evidence presented, the Learned Trial Magistrate found the Appellant guilty of the main offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was subsequently sentenced the Appellant to 20 years' imprisonment.

The Appeal:

8. The Appellant was dissatisfied with the conviction and sentence. Through an Amended Grounds of Appeal, the Appellant urged this Court to quash his conviction and to set aside his sentence on the following grounds: -

    1. That the trial magistrate erred in law and in fact by failing to note that the medical report presented by the prosecution witnesses does not conclusively and strongly point to pregnancy as alleged by the victim to the accused.

    2. That the Investigating Officer herein failed to investigate or carry out investigations from both sides to prove whether there was a relationship between the accused person and the victim.

    3. That the trial magistrate erred in both law and fact by failing to note that the appellant's absolute rights were violated, infringed and contravened before being produced in court by holding him in police custody for long without cogent reasons.

    4. That the trial magistrate erred in law and fact by failing to consider the mitigation and defence of the Appellant before sentencing.

    5. That the Appellant humbly prays to adduce further mitigation during the hearing and determination of this Appeal.

The Appellant's Submissions:

9. The Appellant urged its case further through written submissions dated 7th November 2023.

10. The Appellant argued that the sentence of 20 years was informed by his absence in Court on the judgment date, a position the trial Court observed, painted him in bad light. He urged this Court to exercise supervisory jurisdiction over the trial Court's findings.

11. In rebutting the incidence of penetration, the Appellant submitted that he was never tested to confirm that he was responsible for the pregnancy. It was his case that the pregnancy was not necessarily evidence of penetration.

12. The Appellant submitted further that as per the finding of the Supreme Court in Petition *No. 15 of 2015*, *Francis Karioko Muruatetu & Another -vs- Republic* the trial Court ought to have exercised discretion in sentencing and balanced the retributive function of punishment but not sacrifice him at the altar of deterrence.

13. It was his submission that the trial Court ought to have utilized its discretionary power by considering his mitigation. Reference was made to the decision in *R-vs- Way* (2004) 60 NSWLR 168 where it was observed;

> The legislative policy was not to create a straight Jacket for Judges... (and) the amendments were not introduced as a form of mandatory sentencing, but rather were intended to provide further guidance and structure to judicial discretion.

14. In conclusion, the Appellant submitted that the sentence was illegal and inordinately excessive. It was his position that according to the evidence of PW1, there was no penetration since the external genitalia of the victim was okay and there was no discharge.

The Respondent's case:

15. The Respondent opposed the appeal though written submissions dated 6th November 20023. It was its case that, based on the decision in *Daniel Wambugu Maina -vs- Republic* (2018) eKLR, it proved penetration, age and identity of the perpetrator beyond reasonable doubt.

16. It urged that the appeal be dismissed and the trial Court's conviction and sentence upheld.

Analysis:

17. This being a first appeal, this court is duty bound to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings. (See *Okono vs. Republic* [1972] EA 74).

18. While re-assessing the evidence, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

19. Before delving into the issues, there was a preliminary issue that was raised by the Appellant. He alleged that his constitutional rights were infringed in being kept in custody more than what is legally prescribed.

20. Although quite pertinent, the issue was not raised before the trial Court as to escalate before this Court on appeal. The issue is, therefore, improperly raised. Therefore, the resolution of that issue is not within the ambit of this Court. It is a distinct issue whose resolution resides in a constitutional Court.

21. The Court now turn to the substantive issues in the appeal.

22. For the prosecution to establish the charge of defilement, it must prove beyond reasonable doubt the following critical ingredients:

    a. Age of the complainant;

    b. Proof of penetration;

    c. Identification of the perpetrator.

23. A consideration of the issues now follows vis-à-vis the evidence presented at the trial Court.

Age of the complainant:

24. The Age Assessment Report was produced as P. Exh2(a) by PW4, a Community Oral Health Officer. It was dated 13th October 2021. It approximated the complainant's age as 15 years old.

25. Further, PW2, the complainant's mother, stated that the complainant was born on 26th June 2007. A computation of the period when the defilement occurred places the complainant at the transition period between 14 and 15 years old.

26. With the foregoing evidence and having in mind the fact that there was no contest as regards the age of the complainant, it is the finding of this Court that the assessment of the Complainant's age as 15 years old was proper and it was, therefore, proved beyond reasonable doubt that the complainant was a minor in law.

Penetration:

27. Nelson Lusiola testified as PW1. He was the Clinical Officer attached at the Kitale County Teaching and Referral Hospital. He gave evidence on behalf of Fripila Olunga who had since been transferred from the Hospital.

    PW1 produced the P3 Form in evidence. Therein, he stated that his colleague saw the complainant on 13th October 2021. She complained of defilement by a person known to her. It was his evidence that upon examination, Fripila established that the Complainant's hymen was torn but her external genitalia was okay and that there was no discharge from the private parts.

28. PW1 noted, however, that the complainant was 38 weeks pregnant.

29. The complainant testified as PW2. It was her evidence that she was a Form 1 student at [Particulars Withheld] Secondary School. She averred that on 3rd March 2021, the Appellant went to her home whilst her mother was away and asked her to go with him to a neighbour's house by the name 'Dolphine' where he started touching her, undressed and eventually had sex with her. She stated that the Appellant used his private parts and inserted into her private parts.

30. It was further her evidence that in April 2021, the Appellant came yet again to Dolphine's house and they had sex again. This time she claimed that her mother had left home to attend a funeral.

31. She testified that in July 2021 the Appellant called her again and had sex. It was her evidence that they had sex about three times and realized later in school in the month of September that she was pregnant.

32. The complainant claimed that the sexual assault began when she was in Standard 8. She stated that she had not had sex with any other person other than the Appellant.

33. On cross-examination she stated that the Appellant's hand was plastered after an accident, but he used the one that was not broken.

34. From a careful reanalysis of the foregoing, the Complainant's evidence even without the Clinical Officer's is enough proof that indeed the two were involved in a sexual encounter not once but thrice between the period on March 2021 and July 2021.

35. The Complainant was candid on what happened. She was conscious of their actions and knowledgeable enough to know what they did. She stated that the Appellant inserted his private parts into hers.

36. With that, the provisions of Section 2 of the *Sexual Offences Act* come to mind. It defines penetration as follows;

> the partial or complete insertion of the genital organs of a person into the genital organs of another person

37. In this case, the Complainant's own account of the events coupled with PW1's evidence that her hymen was torn and that the complainant was pregnant was sound proof that penetration did occur.

The perpetrator:

38. The complainant's uncontroverted evidence was that she and the Appellant had three sexual encounters on diverse dates between March and July 2021.

39. The Appellant was well known to the Complainant. The evidence of identification was that of recognition.

40. The thrust of the Appellant's defence was that since he was plastered in one of his arms, after an accident, he therefore, was unable to have committed the sexual offence.

41. The nexus between the plastered arm and the Appellant's inability to commit the crime was not drawn to the satisfaction of this Court. The Appellant needed to show through medical evidence that he was unable to have sex as a result of the injured arm. That, he failed to do.

42. Moreover, the foregoing was rebutted when the complainant stated that the Appellant used the hand that was not broken.

43. The totality of the foregoing affirms the complainant's position that indeed it was the Appellant who had sex with her and eventually impregnated her.

44. Having proved the three ingredients in favour of the prosecution, this Court finds that the offence of defilement was proved and that the perpetrator was the Appellant. As such, the appeal on conviction is unsuccessful.

Sentence:

45. As regards the sentence my attention is directed to the Supreme Court decision in Petition *No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi* delivered on 12th July 2024.

46. The Learned Judges remarked on sentences in respect to offences under the *Sexual Offences Act*. They affirmed that until proper challenges were made and determination made in respect of the constitutionality of the sentences in the *Sexual Offences Act*, Courts must render such sentences without exception.

47. The Appellant herein was sentenced to 20 years imprisonment.

48. The Appellant was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offenses Act*. The penalty under Section 8(3) is prescribed as follows: -

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

49. Although the sentence was passed before the pronouncement by the Supreme Court, the trial Court, rightly so, rendered the sentence prescribed in law.

50. The appeal on the sentence equally fails.

Disposition:

51. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

52. In the premises the following final orders hereby issue: -

    a. The appeal is wholly without merit and is hereby dismissed.

    b. File marked as closed.

53. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 27TH DAY OF SEPTEMBER, 2024.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Kevin Kimutai Chesari, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.