Kazungu v Republic (Criminal Appeal E004 of 2023)
[2023] KEHC 25869 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25869 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E004 OF 2023

AK NDUNG'U, J

NOVEMBER 30, 2023

BETWEEN

KHAMISI TSUMA KAZUNGU ALIAS MAGAZINE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Kaloleni PM Sexual Offences Case No E044 of 2021– R Amwayi, SRM)

JUDGMENT

1. The Appellant, Khamisi Tsuma Kazungu alias Magazine was convicted after trial of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. On 28/11/2022, the Appellant was sentenced to twenty (20) years imprisonment.

2. The particulars were that on diverse dates between 01/01/2021 and 15/10/2021 in Kilifi County within coast region, intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of LTM a child aged 13 years.

3. Being dissatisfied with the conviction and the sentence, the Appellant appealed to this court challenging the conviction and the sentence *vide* an amended petition filed on 11/08/2023. The conviction and the sentence are being challenged on the following grounds;

    i. That the learned magistrate erred by failing to find that the prosecution did not prove their case to the required standard.

    ii. The learned magistrate erred by failing to find that his Constitutional rights to fair trial under Article 50(g) and (h) were violated.

    iii. The sentence imposed was harsh and excessive since it was applied in mandatory terms, failed to consider the Appellant's mitigation and the circumstances of the case.

4. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the age of the complainant was not proved in that the charge sheet indicated that PW1 was 13 years old whereas she testified that she was 17 years old. She stated that she was born in the year 2006 and later changed to 2004 therefore the evidence on age was contradictory. PW2's evidence was also compounded with uncertainty as he stated that PW1 was born in the year 2008 and further stated that she was born in the year 2004. He submitted that the Birth Certificate produced by PW2 was suspicious in that an original copy was not produced in court and further, it was issued the day the incident is alleged to have happened on 15/10/2021. Therefore, given the contradictions in PW1 and PW2 testimony and the fact that the Birth Certificate produced in court was not a certified copy, the age of the complainant remained unproved. Further, the Birth Certificate was obtained for the purpose of incriminating the Appellant for it beats logic why it was issued on the same day the alleged incident is said to have happened.

5. On penetration, he submitted that the findings by the Clinical Officer that the hymen was broken hence prove of penetration could not be conclusive proof of penetration. Further, the evidence of the complainant fell short of what she saw, heard or even felt, therefore, the prosecution failed to prove penetration. On identity of the perpetrator, he submitted that the DNA report was not produced by the maker and did not bear a stamp from the Government Chemist. Furthermore, the DNA report was to determine paternity and not penetration.

6. He further submitted that the complainant behaved in a manner that suggested that she was an adult and he should not be castigated for he was duped by PW1. That the defence under section 8(5) of the *Sexual Offences Act* to apply, courts should have regard to the circumstances of the case including the steps taken by the accused. However, this did not mean that the Appellant had to prove the steps he took beyond reasonable doubt. It was therefore unfair to sentence someone to 20 years imprisonment yet the complainant was enjoying the relationship and engaged in consensual sex. The circumstances of this case revealed that the complainant was not forced but voluntarily engaged in sex, did not complain and therefore her behaviour was that of an adult and not of a child. Further, the Appellant was 19 years old at the time whereas the complainant was 17 years hence it was not a case of an adult taking advantage of a child but two children having a relationship.

7. He submitted that the trial court failed to inform him of his right to have representation by a counsel of his choice or to have one assigned to him by the state pursuant to Article 50(2) (g) (h) of *the Constitution* thereby occasioning the Appellant substantial injustice. On the sentence, he submitted that the 20 years imprisonment did not commensurate with the facts and circumstances of the case. Further, the sentence under section 8(3) takes away the court's discretion to impose a lesser sentence and is in contravention of the constitutional edicts. With this, he urged the court to quash the sentence or substitute it with a lenient one.

8. For the Respondent, it is submitted that the defence evidence did not controvert the prosecution's evidence to accord the Appellant the benefit of doubt. As to the sentence, counsel stated that the same was lawful. That there were no discrepancies and irregularities in the evidence against the Appellant since the evidence against him was cogent and corroborative and proved all the requisite elements beyond reasonable doubt. That there was positive identification of the Appellant and there was prove of penetration through PW1's testimony that was corroborated by medical evidence. Further, the trial court analysed the defence evidence and rightly found that it was unsubstantiated. That the Appellant did not raise the defence under section 8(5) of the *Sexual Offences Act* during the cross examination of the prosecution's witnesses.

9. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

10. I have read and considered the evidence as recorded before the trial court. In doing so, I have taken cognizance that I never saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions of the parties and case law cited.

11. In summary, the evidence before the trial court was as follows. The complainant testified as PW1. She stated that she was a pupil in class seven. She was 17 years old born in the year 2006 on 09/01/2006 (as per the written record). The Appellant was their neighbour and they were in a relationship which started in January 2021. The Appellant approached her while on the road and told her that he loved her. In February, 2021, he invited her to his house and instructed her to go at 9.00pm where he found him alone. They went to bed. She undressed by removing her biker and the panty. The Appellant also undressed by removing his trouser and shirt. They then had sexual intercourse while on bed. She stated that the Appellant made her lie on the bed on her back while facing up and then had sexual intercourse with her by penetrating her vagina using his penis.

12. They had sexual intercourse severally. She testified that she would sneak out at night to go to the Appellant's house and after sometime, she noticed she was pregnant. She told her mother and she was taken to hospital where it was confirmed that she was pregnant. Thereafter they reported the matter to the police. She further stated that she gave birth to a baby boy.

13. On cross examination by the Appellant, she testified that he lives alone and they met on the road on her way from school. On re-examination, she stated that the Appellant was the father to her child. He was their neighbour and had known him for a long time.

14. PW2 was the complainant's father. He testified that the complainant was in primary school and in class 7. That she was born in the year 2008 and not 2006 or 2004. He produced her Birth Certificate as Pexhibit2. He knew the Appellant who was their neighbour. He testified that he was informed by the school management that the complainant was among the six pupils who were pregnant and he was given a letter by the Chief to report to the police. The complainant informed him that the Appellant was responsible for her pregnancy. The Appellant was arrested. He testified that he did not know that the complainant would sneak out and go to the Appellant's house.

15. PW3 was the Clinical Officer. He testified that he examined the complainant and noticed that she was 29 weeks and 9 days pregnant. Further, there was proof of penetration since her hymen was broken. Other tests were negative. He stated that there was proof of penetration since the girl was pregnant. He filled the P3 Form and produced it as Pexhibit1, Treatment Notes as Pexhibit3, Scan Report as Pexhibit4 and Lab Results as Pexhibit5.

16. PW4 was the Investigating Officer. She testified that a report of defilement was made and she interrogated the complainant who informed her that the Appellant approached her in January 2021, seduced her but she declined. The Appellant pursued her and they started an affair where she would visit the Appellant's house and have sexual intercourse. They had sexual intercourse on several occasion and in May 2021, she realized that she was pregnant. That a DNA test was conducted that confirmed that the Appellant was the biological father of the complainant's child. She produced the DNA Report as Pexhibit7.

17. The Appellant in his unsworn testimony testified that he was at his place of work when he was arrested. He denied committing the offence. He stated that the charges were due to a dispute and grudge between

the complainant and his father. They had a land dispute and on the same day he was arrested, they had quarrelled.

18. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

19. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

20. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

21. In the present appeal, the Appellant position is that the age of the complainant was not proved to the required standard on account that the charge sheet indicated that the complainant was 13 years old whereas the complainant testified that she was 17 years born in the year 2006 which she later changed to 2004. PW2 further contradicted the complainant's testimony as he stated that the complainant was born in the year 2008 and he further stated that she was born in 2004. Further, the Birth Certificate that was produced was a copy, it was not certified and it was issued the day the incident is alleged to have happened on 15/10/2021. Therefore, given the contradictions in PW1 and PW2 testimony and the fact that the Birth Certificate produced in court was not a certified copy, the age of the complainant was not proved.

22. The Birth Certificate produced by PW2 was a copy. There is no indication from the trial record whether an original was produced or whether the trial magistrate had an advantage of seeing the original copy of the Birth Certificate. The copy was not certified as required by section 66 of the *Evidence Act*. This is a legal requirement when permitting the production of secondary evidence if primary evidence, which is the document itself, is not produced for the inspection of the court and the contents of the document are sought to be proved by secondary evidence under section 64 of the *Evidence Act*. The Court of Appeal in *Wambui v Republic* (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) while dealing with a similar issue stated thus;

> ...and we think that he is quite plainly right in arguing that what was produced was not a document that could be relied on in proof of the complainant's age.

23. It is trite law however that, where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in *Jackson Mwanzia Musembi v Republic* [2017] eKLR quoted with approval its earlier decision in *Evans Wamalwa Simiyu vs. R* [2016] eKLR held that:-

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*."

24. Further, in *Thomas Mwambu Wenyi v Republic* (2017) eKLR the Court of Appeal cited with approval *Francis Omuromi vs. Uganda*, Court of Appeal Criminal Appeal No.2 of 2000 which held that:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

25. In *Evans Wamalwa Simiyu* (supra) the Court of Appeal observed that –

> " As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

26. What emerges from the authorities is that whilst the best evidence of age is the Birth Certificate followed by Age Assessment, the minor's parent's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Here, the minor testified that she was 17 years old born on 09/01/2006 as per the written record. If she was born in 2006, it would mean that she was 15 years and not 17 years. The father testified that the complainant was born 0n 09/01/2008 and at no time did he state that the complainant was born in 2004 as the Appellant alluded. This means that the complainant was 13 years old at the time the offence was committed. The P3 Form produced by the Clinical Officer indicated that the estimated age of the complainant was 13 years.

27. Following the quoted decisions above, it follows that the apparent age according to the evidence adduced in the lower court places the complainant in the age bracket of 13 years. Hence, the complainant's age was proved to fall under that age bracket and this means that she was a child for the purpose of *Sexual Offences Act*.

28. As regards proof of penetration, the Appellant submitted that the findings by the Clinical Officer that the hymen was broken hence prove of penetration was wrong since a broken hymen is not conclusive proof of penetration. Further, the evidence of the complainant fell short of what she saw, heard or even felt, therefore, the prosecution failed to prove penetration.

29. The complainant testified that when they went to bed, she removed her biker and the panty. The Appellant removed his trouser and shirt. They remained naked and they had sexual intercourse while on bed. She stated that the Appellant made her lie on her back while facing up. He then had sexual intercourse with her by penetrating her vagina using his penis. They had sexual intercourse on several occasions.

30. The evidence of the complainant was clear in that she described the act of having penetrative sexual intercourse in that the Appellant penetrated her vagina using his penis. She did not just state that they had sexual intercourse as the Appellant suggested in his submissions.

31. PW3 testified that he examined the complainant. He stated that there was proof of penetration since her hymen was broken and the pregnancy test was positive. He further stated that the pregnancy was as a result of penetrative sexual intercourse which proved penetration. He stated that the complainant was 29 weeks 6 days pregnant.

32. Upon careful review of the evidence, am satisfied that there was enough evidence collaborating the Minor's evidence that penetration indeed did occur. This moves me to the last ingredient requiring proof, that is, whether the Appellant was the one who defiled the complainant.

33. The trial magistrate while convicting the Appellant linked the Appellant to commission of the offence due to the DNA results since the results showed that the Appellant was 99.99+ the biological father of the complainant's child. The Appellant in his submissions submitted that the DNA Report was not produced by the maker and did not bear a stamp from the Government Chemist. Further, the DNA Report was to determine paternity and not penetration since the fact of rape is not proved by way of DNA but by way of evidence.

34. It is true that the DNA Report that was produced as Pexhibit7 was not produced by the maker but by the Investigating Officer. This denied the Appellant the chance to interrogate the maker of the report on the findings thereto. Further, no basis was laid as to why the Government Chemist was not able to attend court and testify. In the circumstances, the Prosecution failed to comply with the provision of section 77 and section 33 of the *Evidence Act* and thus the trial court ought to have regarded the DNA report as inadmissible and could not therefore be used to link the Appellant to the offence.

35. Nevertheless, the complainant and the Appellant were not strangers, a fact that the Appellant did not deny. The complainant did not name anyone else as her defiler apart from the Appellant. The Appellant in his submissions before this court raised a defence of deception under section 8(5) and (6) of the *Sexual Offences Act*. He claimed that the complainant behaved in a manner that suggested that she was an adult and he should not be castigated for it for he was duped by PW1. On the whole, the available evidence leaves no doubt in the identification of the Appellant as the perpetrator of the act and he indeed seems to confirm it in his attempt to raise the defence of deception which I address hereunder.

36. As to the defence of deception, it is noteworthy that it was not raised during the prosecution case or even the defence case. It was first raised on appeal. It is trite that an accused who wishes to rely on this defence must lay such a basis during trial as was held by Mrima J *in Irene Atieno Ochieng V Republic* [2017] eKLR thus;

> " An accused person who wishes to take advantage of the defence in Section 8(5) and (6) of the *Sexual Offences Act* must lay such a basis during the trial. When such a serious defence is raised later, more so on appeal, that denies the prosecution the opportunity to interrogate the same by way of cross-examining the accused person and the other witnesses and that visits an injustice to the victim. Further an Appellant who raises such a defence for the first time on appeal, or an accused person who raises it for the first time when placed on defence, runs the risk of the defence being treated as an afterthought and the defence may not be of much assistance to such a party."

37. It therefore follows that the defence of deception is not available to the Appellant at this juncture.

38. The Appellant further argued in length that his right under Article 50 (2) (h) of *the Constitution* was infringed in that he was not informed of his right to be assigned a counsel at State expense thereby occasioning him substantial injustice. Article 50(2)(h) of *the Constitution* provides that;

> " every accused person has the right to a fair trial, which includes the right...to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

39. It is crystal clear from the above that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. Our courts in interpretation of this have severally stated that substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another. See for example Supreme Court Petition No. 11 of 2017, *Charles Maina Gitonga -vs- Republic* (2018) eKLR where it was observed that: -

> " ...legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provision of the repealed constitution and that under section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial."

40. In discussing what is substantial injustice, the Learned Judges in *Karisa Chengo & 2 Others v. R*, Criminal Appeal Nos. 44, 45 & 76 of 2014 observed as follows: -

> " It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia* case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the State obligation to provide legal representation arise."

41. It therefore follows that the Appellant's claim under this head fails.

42. On the sentence, the Appellant was sentenced to 20 years imprisonment. Section 8(3) of the *Sexual Offences Act* states that;

> " (3) 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."

43. The charge therefore carries a minimum sentence of 20 years imprisonment. In sentencing the Appellant, the trial magistrate considered the Appellant's mitigation. It is trite law that sentencing is

at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270).

44. The Appellant did not demonstrate any of the above factors. The sentence was legal and any attempt to import the application of the *Muruatetu* decision in this matter is not helpful to the Appellant as *Muruatetu 2* clearly states that as of now, the decision only applies to murder cases.

45. With the result that the Appeal herein fails and is dismissed in its entirety.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER 2023

A.K. NDUNG'U

JUDGE