



**GMR & another v Republic (Criminal Appeal E022 & E028 of 2020  
(Consolidated)) [2022] KEHC 12066 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E022 & E028 OF 2020 (CONSOLIDATED)**

**TW CHERERE, J**

**JUNE 30, 2022**

**BETWEEN**

**GMR ..... 1<sup>ST</sup> APPELLANT**

**JKM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence in Nkubu Criminal  
Case S.O 42 of 2018 in by Hon. J.Irura (PM) on 26.11.2020)*

**JUDGMENT**

1. GMR (G) and JKM (J) were charged with the offence of child prostitution contrary to section 15 (d) of the *Sexual Offences Act*. The particulars of the charge were that:
  1. On October 31, 2018 at Nkubu Township in Imenti South Sub-County within Meru County being aunt and family friend respectively to AK a child aged 15 years took advantage of their influence to procure her for sexual intercourse

**Prosecution case**

2. Complainant stated that she lived with her aunt G who was a friend to J She stated she was born on 30th June, 2003 and was 16 years and in form 3 when she testified in 2020. She recalled that on October 27, 2018, G gave her 100/- and sent her to J who gave her the telephone number of one Silas whom she called, they met at [Particulars Withheld] Bar in Nkubu and had sexual intercourse. It was her evidence that with the persuasion by G and J, she on November 14, 2018 set on a journey to Mombasa with Silas. That on the way, Silas told her she was being looked for and asked her to go back home which she did. In cross-examination, complainant denied she had sexual intercourse with Silas. She also denied that G and J had asked her to have sex with Silas so that she or G and J could get money from him.



3. Subsequently, Silas was charged in Nkubu SO NO 43 OF 2018 with defiling the complainant but she exonerated him and he was acquitted. G and J were also charged with the offence the subject of this appeal. They were convicted and each was sentenced to serve 5 years' imprisonment.
4. I have considered the appeals in the light of the submission for the parties and I have deduced the following issues for determination.
  - (1) Whether the charge sheet is defective
  - (2) Whether prosecution case was proved to the required standard

**(1) Whether the charge sheet is defective**

5. Concerning the first issue, Appellants argue as a matter of law that the charge sheet as drafted is defective for the reason that they were charged with the offence of Child Prostitution which is unknown in law. The correct offence they argue is Benefitting from Child Prostitution. Section 15 of the *Sexual Offences Act* provides as follows:
  15. Child prostitution  
Any person who—
    - a. knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;
    - b. acts as a prisoner of a child for the purposes of sexual intercourse or for any form of sexual abuse or indecent exhibition or show;
    - c. induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show, by means of print or other media, oral advertisements or other similar means;
    - d. takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
    - e. threatens or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
    - f. intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this Act with a child by any person;
    - g. gives monetary consideration, goods, other benefits or any other form of inducement to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show, commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.
6. A reading of the foregoing section reveals that the offence that accrues from the commission of any of the acts specified thereof including subparagraph (d) which is the subject of this appeal is that of Benefitting from child prostitution and not Child Prostitution that Appellants were charged with.



7. In the case of *Isaac Omambia v Republic*, [1995] eKLR, the court considered the ingredients necessary in a charge sheet and stated as follows:

“In this regard, it is pertinent to draw attention to the following provisions of Section 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

8. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR, quoted the Isaac Omambia case with approval and further stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that: “In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”

9. Looking at the charge sheet as framed, there is no doubt that it is defective in form. The issue that follows for determination is whether the charge sheet, though defective communicated to the Appellants the nature of the charge facing them to enable them to fully respond to it in their defence.

10. In the case of *Peter Sabem Leitu v R*, Cr App No 482 of 2007 (UR), the Court was dealing with a similar situation and it held thus:

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial” We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

11. Having considered the particulars of the charge sheet, I find that it clearly communicated the charge that Appellants were accused of and hence they were neither prejudiced nor was their fundamental right to a fair trial violated.



## 2. Whether prosecution case was proved to the required standard

12. In considering this second issue, the court record reveals that Appellants were convicted after the learned trial magistrate found as follows:

“That the accuseds knowingly took advantage of the relationship they had with the complainant for purposes of causing the complainant to be sexually abused.”

13. The person that had allegedly sexually abused the complainant was one Silas Muriungi Ndatho. As stated hereinabove in this judgment, the said Silas was charged in Nkubu SO No 43 of 2018. In acquitting him, the trial magistrate stated as follows:

“In the circumstances of this case, I find that the prosecution built its case on suspicions. The accused was implicated by the complainant’s aunt – GM, who also made a report at the police station. That she had suspected that the accused and the complainant had travelled to Mombasa. I find that suspicions alone, however strong they may be, can never be of probative of an offence.”

14. The trial court record in Nkubu SO No 43 of 2018 reveals that complainant in that case who is the same complainant against the Appellants denied that she was defiled by Silas. She also denied that G and J had asked her to have sex with Silas so that she or G and J could get money or any other benefit from him. She additionally denied that any money or benefit was paid to her or G and J.

15. The fact of causing the complainant to be sexually defiled is central to the charge of Benefitting from Child Prostitution. Having perused the record of the trial Court, this Court observes that at the beginning of her testimony, Complainant denied that the Appellants had caused her to be sexually abused. The same record reveals that before the conclusion of her testimony, complainant was taken to Ripples International for what the trial court referred to as guidance and counselling and when she returned to court, she implicated Appellants in the commission of the offence.

16. The evidence by the complainant properly evaluated falls in the category of what the Court of Appeal described in *Ndungu Kimanyi v Republic* [1979] KLR 282 that:

“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he/she is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he/she is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”

17. The variance between the testimony by complainant before and after she was taken to Ripples International properly evaluated ought to have created an impression in the mind of the court that the witnesses was either being economical with the truth or was untruthful and her evidence ought to have been treated with caution.

18. From what is stated hereinabove, it is apparent that the complainant only implicated Appellants after she was committed to Ripples International. The guidance and counselling that the trial magistrate referred turned out to be a session of rephrasing the complainant’s evidence to implicate the Appellants.



19. In the case of *Burunyi & Anor vs Uganda* Cr Appeal No 1968 EA 123, Sir Udo Udoma the then CJ held:

“It is not the duty of the court to stage-manage cases for the prosecution nor is it the duty of the court to endeavor to make a case against an accused where there is none. In a criminal case, the court cannot enter into the arena. The only duty of the court is to hold the scale to see that justice is done according to law on the evidence before it.”

20. From the foregoing analysis, I find that the trial magistrate erred by unnecessarily straying into the arena of the prosecution and by attempting to make a case for the Prosecution where there was none.

21. In the end, I find that that the prosecution case was not proved beyond any reasonable doubt and Appellants conviction was unsafe and against the weight of evidence.

22. Accordingly, this appeal succeeds. The conviction is quashed and the sentences set aside.

**DATED AT MERU THIS 30<sup>TH</sup> DAY OF JUNE, 2022**

**WAMAE. T. W. CHERERE**

**JUDGE**

**Appearances:**

**Court Assistant - Morris Kinoti**

Appellants - Present

For 1<sup>st</sup> Appellant - Mr. Wamache for Okubasu, Munene & Kazungu LLP Advs

For 2<sup>nd</sup> Appellant - Mr. Sandi for B. G. Kariuki & Company Advocates

For the State - Ms Mwaniki (PPC)

