Mbura v Republic (Criminal Appeal E029 of 2022)
[2022] KEHC 14626 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14626 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E029 OF 2022

LM NJUGUNA, J

OCTOBER 26, 2022

BETWEEN

PETER MUGENDI MBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against sentence by Hon. W. Ngumi in PM Sexual Offence Case No. 49 of 2020 delivered on 12.04.2022))

JUDGMENT

1. The appellant herein was charged with offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*.

2. The particulars of the charge were that on diverse dates in the month of March,2020 in Mbeere North sub county, within Embu County unlawfully and wilfully caused his private part namely penis to penetrate the vagina of DWN, a child aged 15 years.

3. The trial court convicted the appellant and sentenced him to serve fifteen (15) years imprisonment.

4. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are as listed on the face of the petition.

5. When the appeal came up for hearing, the court gave directions on filing of submissions which directions both parties complied with.

6. The appellant chose to argue all the grounds together and as such, submitted that the conviction was based on a defective charge sheet in that, the same charge sheet carried two charges that the accused had been charged with and there was no indication that the charges were consolidated. That the learned trial magistrate in her judgment referred to counts 1 and 2 and further, the appellant was convicted in terms of count 1 and given that the charge sheet did not contain two counts, the appellant did

not therefore know what count or charge he was defending. That when the appellant was arrested on October 1, 2020 and arraigned in court on October 2, 2020, he took plea on count 1 and that it is not clear whether count 2 was read to the appellant. However, the appellant was told to prepare for hearing which proceeded by taking evidence of PW1 notwithstanding the fact that apart from the charge sheet, the appellant had not been supplied with other important documents. It was his case that he was ambushed and thus was not given ample time to prepare his defence and as such, there was a miscarriage of justice.

7. On whether the complainant was a child at the material time, it was submitted that the investigating officer never produced the birth certificate and that the same is not part of the record herein. Further, the investigating officer was the right person who ought to have produced the said birth certificate. That the age of the complainant was not conclusively established and that, the evidence tendered by the prosecution was not sufficient to sustain a conviction. Reliance was placed on the case of *Martin Charo v Republic* Criminal Appeal No 32 of 2015. It was submitted that defilement is not proved by paternity of the child in question but where DNA is conducted, it must have a bearing on defilement. That this was a perfect case where the DNA testing would have been best, since the same could have corroborated the charges herein. On sentencing, it was submitted that the appellant was sentenced to serve 15 years which is a mandatory minimum sentence and as such, the trial court did not exercise its discretion on the same. In the end, the appellant prayed that the appeal herein be allowed.

8. In regards to grounds 1,2,5,6 and 8, the respondent submitted that the ingredients of defilement were proved. It was submitted that PW1 stated that on March 3, 2020 at around 9.00 p.m. she went to the appellant's home and they had sexual intercourse thrice that night and that they did not use protection. PW4 who examined the complainant testified that there was penetrative sexual intercourse and the same was further corroborated by the P3 and PRC Forms. The respondent relied on the case of *Faustine Mchanga v Republic* [2012] eKLR and further, a birth certificate was produced to prove that the complainant was indeed a minor aged 15 years. In regards to the identity of the appellant herein, it was submitted that he was a person well known to the complainant in that, they not only met on March 3, 2020 but on subsequent dates including September 20, 2020 when the appellant gave the complainant tablets that led to her abortion. Further, the respondent submitted that in response to the ground that the charge sheet was defective, the respondent conceded that indeed there was variance in regards to the age of the complainant and that the same was addressed by the trial court in that the court observed that there was no prejudice suffered by the appellant herein. Reliance was placed on the case of *Daniel Mugambi v Republic* [2016] eKLR. That the court took the view that the age disparity was only to be considered for the purposes of sentencing and as such, the ground as advanced is not merited.

9. In reference to the ground on DNA, it was submitted that the test is not mandatory or necessary to establish an offence of defilement. That the same principle was enunciated in the Court of Appeal case of *AML v Republic* [2012] eKLR and on sentence, it was submitted that the appellant was convicted under section 8(4) of the *SOA*, yet the evidence presented revealed the proper section ought to have been 8(3) which carries a higher sentence. The respondent thus placed reliance on the case of *Hudson Ali Mwachungo v* R Mombasa Court of Appeal Criminal Appeal No 65 of 2015. That the sentence meted out was the least that could be passed in the present circumstances. In conclusion, this court was urged to find that the grounds of appeal fronted are not merited.

10. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(4) "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction be sentenced to imprisonment for term of not less than fifteen years."

11. In determining the appeal herein, this court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the trial court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify. An appellate court will not interfere with or tamper with the trial court's judgment or decision regarding either conviction or sentence unless it finds that the trial court misdirected itself as regards its findings of facts or the law. [See *Okeno v Republic* {1972) E.A, 32at page 36, *Pandya v Republic* {1957} EA 336, *Shantilal M. Ruwala v Republic* {1957} EA 570 & *Peter v Sunday Post* {1958} EA 424.36, Pandya v Republic {1957} EA 336, Shantilal M. Ruwala v Republic {1957} EA 570 & Peter v Sunday Post {1958} EA 424].

12. The elements of the offence of defilement which the prosecution must prove beyond reasonable doubt are:

    i. Age of the complainant;

    ii. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    iii. Positive identification of the assailant.

13. But before delving into whether the same were proved by the prosecution, the appellant has submitted that his conviction was based on a defective charge sheet in that, the charge sheet carried the two charges that the accused had been charged with and there was no indication that the charges were consolidated. That the learned trial magistrate in her judgment referred to counts 1 and 2 and further, the appellant was convicted in terms of count 1 and given that the charge sheet contain two counts, the appellant did not therefore know what count or charge he was defending. That, he was not accorded a fair hearing in that, he was not supplied with other important documents and further, he was ambushed in that he was not given ample time to prepare for the hearing which was a miscarriage of justice.

14. Looking at the charges, there is no doubt that they were in separate charge sheets in as much as the charge preferred were related as they emanated from the same transaction. That notwithstanding, it is clear from the record that both charges were read out to the appellant separately and that he pleaded to two separate charges as was read to him. Further, the charge sheets clearly spelt out the particulars of the two offences that the appellant was charged with. I will independently lift them verbatim as follows:

    1st charge: Defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006; and

    2nd charge: Killing unborn child contrary to section 223(1) of the *Penal Code*.

15. The appellant in his view has urged this court to consider that the said charge sheets are defective and as a result, quash his conviction and further set aside the sentence meted out by the trial court.

16. Section 134 of the *Criminal Procedure Code* outlines the manner in which a charge shall be fashioned which is:

> " 134. 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 charged." [Underlining mine for emphasis].

17. I have perused the record and I note that the alleged defect referred to by the appellant is the fact that the two charges were never consolidated and thus it remained unclear to him when the trial court referred to the two charges interchangeably as counts in her judgment. In my view, the test for determining whether a charge is defective is a substantive one and not a formalistic one. The ultimate test by this court is whether such a defect occasioned a miscarriage of justice to the appellant.

18. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR, quoted 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 Yongov 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."

19. The Court of Appeal in the Peter Ngure's case (*supra*) was further guided by the case of *Peter Sabem Leitu v R*, Cr App No 482 of 2007 (UR) where the Court held that:

> " 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." [See Court of Appeal decision in *Obed Kilonzo Kevevo v Republic* [2015] eKLR.]

20. In my view therefore, it was clear from the charge sheet what charge/s the appellant faced and as such, I humbly hold the view that there was no ambiguity on the same since he understood so well the charges that he was facing.

21. In regards to the second charge where the appellant faced the offence of Killing unborn child contrary to Section 223(1) of the *Penal Code*, I note that the trial magistrate in her judgement held the view that the section of the law under which the appellant was charged, disclosed a different offence which was not supported by evidence and that both were at variance. The trial court therefore proceeded to acquit the appellant herein under section 215 of the *CPC*.

22. Of importance to note is the fact that the second charge the appellant faced was Killing unborn child contrary to section 223(1) of the *Penal Code* and it therefore remains unclear why the trial magistrate in her judgment referred to the offence of threatening to kill which she further proceeded to determine.

23. But even assuming that the appellant was charged with the offence of threatening to kill contrary to Section 223(1) of the *Penal Code*; of importance to note is that if the evidence adduced by the

prosecution supported the charge of Killing unborn child contrary to Section 223(1) of the *Penal Code*, there would have been no prejudice caused to the appellant as long as he appreciated the charges facing him at that particular moment in time. [See Section 179 of*CPC* ; Court of Appeal in *Robert Mutungi Muumbi v Republic* [2015] eKLR ; *Idah Nzisa Kikubi & another v Republic* [2021] eKLR]

24. Section 134 of the *Criminal Procedure Code* which requires in mandatory terms that every charge should be precise and abundantly clear provides that:

> 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 charged.

25. In this case, the appellant was charged with the offence of Killing unborn child contrary to section 223(1) of the *Penal Code* and further, the evidence adduced by the prosecution in my view, supported the said charge. I am guided by the decision in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR the Court expressed itself as hereunder:

> "I have said elsewhere that the answer to this question must begin with section 382 of the *Criminal Procedure Code*. In material part, it provides that:
>
> .... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any injury or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

26. Further, Section 382 of the *Criminal Procedure Code* provides as follows:

> "382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

27. It is my finding therefore that there was no miscarriage of justice against the appellant as a result of the errors as noted in this judgment and further, the reasoning of the trial magistrate on inconsistent evidence which was in my view incapable of occasioning any miscarriage of justice to the appellant as the same were not material at all.

28. Further, the appellant has submitted that he was not accorded a fair hearing in that, he was not supplied with other important documents and further, he was ambushed in that he was not given ample time to prepare for the hearing which was a miscarriage of justice.

29. In determining the same, Article 50 (2) (j) of the *Constitution* is relevant. This article guarantees an accused person a right to be informed in advance of the evidence to be relied on by the prosecution during the trial and to have reasonable access to that evidence.

30. The prosecution's duty of disclosure was discussed by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v Republic*, [2008] eKLR. The court noted that the prosecution is required to provide an accused person in advance of the trial with "all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

31. Further, in the persuasive authority of *Dennis Edmond Apaa & Others v Ethics & Anti Corruption Commission*, [2012] eKLR the court (Majanja J) held that:

> " The words of Article 50(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to Have Adequate Time And Facilities To Prepare A Defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received."

32. I will now examine the question whether the appellant was given a fair trial under Article 50 of the *Constitution*. This lays the foundation for all trials and minimum guarantees, the accused person is entitled to in so far as ensuring the protection and preservation of the rights embodied in Article 50.

33. The challenge to the constitutionality of the appellant's came as a result of the interplay between Articles 50 (2) (b), (c) and the provisions of the *Criminal Procedure Code* on trials. The broad band rights under these Articles relate to

(b) right to be informed of the charge, with sufficient detail to answer it.

(c) To have adequate time and facilities to prepare a defence.

(g) To choose and be represented by an advocate and to be informed of this right promptly if substantial injustice would otherwise result, and to be informed of this right promptly

(m) To have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

34. However, it is important to note that the right of an accused person to a fair trial must be balanced with the victim of the offence's right to access justice and the public interest generally. This was the import of the Court of Appeal's decision in *Kamau Mbugua v Republic*, [2010] eKLR where the court stated as follows in respect of an accused's right to a fair hearing within a reasonable time:

> The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions. ..... "

35. In the case herein, and upon further perusal of the record, I find that the trial court did not conduct pre-trial conferencing to ensure that the appellant herein had the necessary documents to participate in the trial process. [Also See *Patrick Wasike Kuyudi v Republic* [2022] eKLR]. From the record, there is no indication whether the appellant was provided with witnesses' statements and the material

necessary for him to adequately prepare his defence. I say so for the reason that on October 2, 2020, he was arraigned in court when he took plea and thereafter, the state counsel made an oral application to have the evidence of the complainant taken not withstanding that prior to that, the prosecution had informed the court that the mandatory documents would be supplied to the appellant in due course. The court proceeded to order that the appellant be supplied with statements, to study them and prepare for hearing and thereafter the hearing proceeded. It is my view that it was incumbent upon the court to inform the appellant herein of his rights this being a criminal case.[See *Joseph Ndungu Kagiri v Republic* [2016] eKLR].

36. On sentencing, the principles were set in the case of *R v Scott* (2005) NS WCCA 152, Howie J Grove and Barn JJ explained the principle of sentencing thus:-

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..... one of the purposes of punishment is to ensure that an offender is adequately punished.... a further purpose of punishment is to denounce the conduct of the offender."

37. In the case herein, the law as it stands provides for a minimum sentence of fifteen years and which sentence the court did mete out on the appellant. I am guided by the directions given by the Supreme Court on July 6, 2021 in Petition No 15 & 16 (Consolidated)- *Francis Karioko Muruatetu & Another v Republic* and further stipulations provided for under section 8(4) of SOA. In this regard, can this court affirm the said sentence meted by the trial court given the circumstances under which the trial was carried out?

38. In view of the foregoing, I find that the appellant's right to a fair trial was violated. In the premises, I hereby quash the conviction and set aside the sentence and remit back the file to the trial court for retrial but before a different magistrate.

39. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF OCTOBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent