



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 137 OF 2016

JOHN NDUNGU MBAI.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

(Being an appeal against the original conviction and sentence from Criminal Case Number 172 of 2015

by the Hon. F. Munguongo (RM) at Nakuru Chief Magistrate's Court)

J U D G M E N T

1. In this appeal I am confronted with the issue of a child who willingly engages in sexual intercourse with an adult.
2. Mr. Karanja Mbugua for the appellant referred me that case people felt was ignominious; **Martin Charo vs Republic [2016] eKLR** where *Chitembwe J* pronounced himself thus;

“However, where the child behaves like an adult and willingly sneaks into men’s houses for purposes of having sex, the court ought to treat such a child as a grown-up who knows what she is doing.”

and continued,

“What is of great importance is the circumstances of the case. The behavior of the complainant and his/her evidence in court usually gives the circumstances of the case.”

3. Mr. K. Mbugua argued that similar cases were on the rise and they were raising concern as men were becoming victims of these children; further, that it was expecting too much of men to keep asking the ages of girls, who actually enjoy sex and never complain until it is found out and a complaint is raised.
4. That despite the hullabaloo that accompanied the **Martin Charo** case, *Justice Chitembwe’s* Judgment had not been overturned and the case before me was in *pari materia* with that case. He urged me to find that this case and **Martin Charo’s** were not that different, and to arrive at a similar decision as the learned Judge.
5. The position of the prosecution through Ms. Kipmwei that **Martin Charo** was not a decision popular in law. That per the **Children Act** the complainant was thirteen (13) years old not mature to give consent. That the accused being the adult ought to have given advise as he knew what he was doing.
6. To this Mr. K. Mbugua responded that the authority of **Martin Charo** stood. That the position of his client was that he did not defile a minor and it was important for the court to take into consideration the circumstances of the case. That the prosecution had a role to ensure that justice was obtained.
7. On 19th August 2016 the appellant was found guilty of **defilement Contrary to Section 8(1) as read with 8(3)** of the Sexual Offence Act no 3 of 2006 and sentenced to fifteen (15) years imprisonment. He had been charged with **defilement Contrary to Section 8(1) as read with Section 8(4)**, and alternative charge of **Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act**.

8. It was alleged that he had between July 2015 and 22nd August 2015 at [particulars withheld] Nakuru County he intentionally and unlawfully committed an act of inserting a male genital organ namely penis into a female genital organ namely vagina of RM a child aged

thirteen (13) years which caused penetration.

9. In the alternative, that,

“On diverse dates between 25th July 2015 and 22nd August 2015 at Teachers’ Estate he had intentionally and unlawfully committed an indecent act with a child namely RM aged thirteen (13) years by touching her private parts namely vagina with his genital organ namely penis.”

10. The case for the prosecution was that at all material times the complainant RM was thirteen (13) years old (Date of birth 1st June 2002) and a class six (6) pupil at RP School. The complainant and the accused were well known to each other and sometime before 25th July 2015, the appellant bought the complainant a mobile phone so that they could easily communicate. She said that they would meet on the road as she came from school, sometimes she would be with her brother other times they would meet along the road at All Nations Church. She said the phone he bought her was complete with a sim card, and rejected the one the prosecution produced in court.

11. On that 27th July 2015 she said he rang at her 10.00 a.m. and they agreed to meet along the road. At 3.00 p.m. she went to the road and later he came aboard a motor bike ridden by one Karun, in this case PW7 Moses Mwangi, who said it was at 10.00 p.m.

12. They went to accused’s house, the rider left. Another man who was in the house left too. When they were left together, she told him that her parents would be looking for her but he told her he wanted to marry her. She told him she was still in school but he told her he would marry her because he knew the law. She then says;

“I then accepted when we went to sleep we removed our clothes we then did sex. He did sex on my vagina using his penis. I had never had sex again. We spent the night in the house. The following day he said I go pick my clothes from home.”

13. She said she went home. There was nobody at home. She got the keys where the family hid them, picked a few clothes then took a different route to his house. He had gone to work leaving the door unlocked. The following day he took her to his cousin’s place at [particulars withheld], then took her to his mother’s place at Miti Mingi where she stayed for two (2) weeks.

14. In the meantime, her mother and brother were looking for her. She said they would ring her on the phone the accused had bought her and she would tell them where she was but she would not go back home. The accused went for her, and took her to his new house at [particulars withheld] Teachers, where they would have sex on the nights accused was not at work.

15. So, it came to pass that on 22nd August 2015 her brother in law PW4 who had a church invited her for a *kesha*. The accused had told her not to go, but she went anyway when he was at work. She met her sister there and spent the night at her sister’s. The following day she went to church, and that is when her dad came and took her to Criminal Investigations Department (CID), then to Nairobi Women’s Hospital, then to police station. A Post Rape Care (PRC) and P3 were filled as per the evidence of **PW3 Dr. Thomas Matari**.

16. At the police station she recorded her statement and took police officers to accused’s house. i.e. **PW5 No. 54719 Sgt. Seti Ngeresa**. She took the police to where appellant was working. She identified him. He was arrested. They went to his house and recovered her clothes. Then back to the police station where **PW6 No. 54907 PC Albert Juma** the investigating officer booked both the accused and complainant in cells.

17. Her mother **AN, PW2** confirmed that she had been missing cumulatively for one month. She was present when complainant went to the church, from where they took her to the police. She was initially uncooperative. That when CID officers asked her where she was, *“she became very harsh and she said she was with “John at Kiratina.”*

18. The mother confirmed that at the time the child was missing she and her husband went to accused’s house but did not find him. She conceded that accused later went to their (PW2’s). She said they did not find complainant in appellant’s house and complainant said this was the time she was at accused’s cousins house. That the complainant’s clothes were found in the accused’s house and that was proof that she was there.

19. In his defence the accused denied the offence. He narrated how he was arrested and that the police took his house keys and must have planted the complainant’s clothes in his house so that they could frame him. He pointed out that none of his neighbours had been called to confirm that he lived with the girl. That the state did not prove that indeed he had any communication with complainant as no evidence was brought to establish the ownership of the phone brought to court.

20. In her judgment the trial court was persuaded that the appellant had convinced the complainant he would marry her. She was satisfied that the ingredients of defilement; age, penetration and identity of the perpetrator were proved, and sentenced the appellant to fifteen (15) years imprisonment.

21. He was aggrieved and filed this appeal on the following grounds;

1. THAT the Learned Senior Resident Magistrate erred in Law and in fact in trying, sentencing and convicting the appellant on the basis of a fatally defective charge sheet.

2. THAT the Learned Senior Resident Magistrate erred in Law and in fact by wholly disregarding the Appellant’s evidence and or regarding the same as evidence not worth any serious scrutiny.

3. THAT the Learned Senior Resident Magistrate erred in Law and in fact when she failed to appreciate the Appellant's evidence on the alleged arrest where he was slapped and forced to admit to being married to the complainant.

4. THAT the Learned Senior Resident Magistrate erred in fact and in Law when she disregarded all the other circumstances pertaining to the case including the time that the report was made, the length of the relationship between the Appellant and the complainant and the knowledge of the complainant's family of that relationship. (Refer to MALINDI HIGH COURT, CRIMINAL APPEAL NO. 32 OF 2015, MARTIN CHARO – VS – REPUBLIC, HON. S. J. CHITEMBWE J. on 25/4/2016.

5. THAT the Learned Senior Resident Magistrate erred further when she relied on conjecture and presuppositions not placed before her in evidence.

6. THAT the Learned Senior Resident Magistrate misdirected herself on various points of Law and fact as a result arrived at an erroneous conclusion.

7. THAT the Learned Senior Resident Magistrate erred meting out a sentence which was manifestly excessive having regard to all the circumstances of the case.

22. From the arguments of counsel in this appeal, the appellant is conceding having had sexual intercourse with the complainant. His position is that she was not a minor, by virtue of her conduct; whereby she willingly accepted his overtures, took herself to his house, had sex with him, agreed to marry him, went home and brought her own clothes, and was not restrained from leaving.

23. Counsel argued further that the purport of **Martin Charo** case is that (1) where a child enjoys sex, then she can no longer be regarded as a child for purposes of the offence of defilement and (2) that where the child has deceived the accused about her age, by her conduct then the accused cannot be held to blame (3) that the circumstances of the case are important in determining the matter.

24. In this case, it is evident that the complainant was not coerced by the appellant into sexual intercourse. But there is no evidence that she presented herself to be much older than she was; except may be the size of her body (the trial court described her as "big girl" on the record).

25. Counsel's submission that children today are sexually active and enjoy sex until they are found out, is not far -fetched. Look at the facts of this case and the facts in **Martin Charo**, and in numerous other cases involving adolescents.

26. But should that take away the guilt of the adult who willingly and knowingly engages in sexual intercourse with a child? This is the point where I differ with the submissions by counsel over the decision in **Martin Charo**. My departure is based on my understanding of the fact that we have a Constitution that defines child as any human below the age of eighteen (18) years and relevant to this case, **The Children's Act, the Sexual Offences Act**, the Victims Protection Act, which seek to apply that provision. These in my view have given childhood a legal status that comes with certain rights, privileges, protections, duties, only available to any person below the age of eighteen (18) years, I mean just like any other status created by law comes with its package of rights, obligations etc.

27. I believe that the creation of childhood as a legal status is for good reason. We bear children to ensure the existence of our species. They are our now and our future and that is why we invest both the state and the parents in their development and upbringing. The African Charter on the Rights and Welfare of the Child to which we are signatory at **Article 2**, declares,

"...for the purposes of this charter, a child means every human being below the age of eighteen (18) years."

28. Those are the same words we find in our Constitution. This child's rights are protected in a special way in Article 53 of the same Constitution. So, though Eighteen (18) years is number, it carries with it the weight of infancy, toddlerhood, early childhood, adolescence, early adulthood, with all that comes with physical, emotional, social, development and growth of a human being.

29. That number was fixed for a reason. I feel I cannot put it better than it is put in the preamble to the African Charter on the Rights and Welfare of the Child (ACRWC). It was in 1979 when the Assembly of heads of state and Government of the OAU, at its 16th ordinary session in Monrovia, Liberia, adopted the Declaration on the Rights and Welfare of the African Child, where they recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child.

30. They noted with concern

"...that the situation of most African Children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity she/he needs special safeguards and care"

They recognized,

"... That the child occupies a unique and privileged position in the African Society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding... that the child due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development and requires legal protection in conditions of freedom, dignity and security.... That the promotion of the rights and welfare of the child also implies the performance of duties on the part of everyone..."

The burden of protecting our children to ensure that they attain their full potential in our society is placed on everyone, recognizing that by virtue of their age, developmental stage, they are vulnerable.

Our **Constitution** at **Article 53** puts it plainly that the best interests of the child are paramount.

31. Certain things are forbidden for children, by the law of the land, by culture, tradition and even religion. We the adults make those rules. We put in place the systems and other adults to enforce those rules. There are different consequences for both the child and adult who violates the same. There is nowhere, in our law, where it says that the child will be treated as an adult if she crosses those lines and does the forbidden things. It says that the child will be punished and corrected in accordance with her age.

32. Children learn from the adults. There are trends now where children are having sex with other children, some ‘consensually’, others by force or beguilement. These cases are coming to court each and every day and the consequences of enforcing the law has led us to have the conversations that we need to treat them differently.

33. When it comes to adults- as a society, we have forbidden sexual intercourse between adults and children. It is the adult having sexual intercourse with the child. The adult cannot be heard, to argue that the child enjoys sex, then it is her fault. My position, and it is backed by the law, and our social norms, a child who is having sex is a child in need of care and protection whether with another child or with an adult. It is the adult who ought to protect the child and stop it. Otherwise perverts and pedophiles will have a field day recruiting children into sex and if caught, arguing that the children enjoy it and ought to be treated as adults? Children who know naught the consequences of having sex? Who do not have the physical, mental, psychological, social and even economic capability of carrying the responsibility of an active sexual life for example, pregnancy, the capability to carry and take care of another human being? Far from it. That adult is an adult. He is expected to behave, think, feel like one, to have control over his sexual desires and not to prey on children, that adult should be aware that if it is a child, he is the one in control, no matter what the child says, this is not a case of “*Mtoto akililia wembe mpe*”. It cannot be. By the age of 18 one is expected to be through with high school at least. To have developed a certain degree of maturity both physically and **ki akili**, and a degree of exposure to the world to understand some things. Till then, our law says they are out of bounds sexually.

34. The definition of defilement in our law, does not contain any element for willingness on the part of the child, for as long as there has been penetration, as defined and person penetrated is a child, then the offence of defilement and its consequences drop on the perpetrator whether or not the child enjoyed the sexual encounter. It does not matter. So it is up to the adult to resist, to call for help if need be to, run away! That is where I differ with the case of **Martin Charo except of course where it is proved that the child deceived the adult to believe she was an adult herself.** Then I would be obligated to apply s. 8(5) and 8(6) of the Sexual Offences Act.

35. There are outliers in any society. That is why **Section 11 (2) and (3)** creates the defence that the child deceived the accused. However, it lays the duty on the accused to demonstrate the steps he took to ascertain her age. He cannot simply say, she told me she was eighteen (18) years old. In this case the appellant never raised the issue of the complainant’s age in the lower court. He cannot raise it now, as it was not an issue that the lower court determined.

36. Regarding the circumstances of the case, this is even provided for under **Section 33 of the Evidence Act**. The circumstances in this case are conceded by the appellant. He wanted to marry the girl and though he knew she was not yet 18 took her in as his wife to be and had sexual intercourse with her. There is no evidence that she deceived him. The only evidence is that she was not forced to stay with him and he did not restrain her from going home.

37. The only thing for consideration is the sentence. Here the circumstances will come into play now with the **Muruatetu** Case and **Dismas Wafula Kilwake** case, in determining how the offence was committed so as to determine the sentence. In **Dismas Kilwake** the Court of Appeal held that the mandatory nature of the minimum sentences in the Sexual Offences Act were unconstitutional. The court therefor acting under s. 354(3)(b) has the powers, on appeal to reduce or increase the sentence. In this case the appellant was a first offender, there were no aggravating circumstances and he expressed remorse for the offence.

38. In upshot, the conviction is sustained.

39. Taking into consideration of the circumstances of the case, the appeal is allowed on the sentence alone. The sentence of 15 years is substituted with 8 years’ imprisonment including any period the appellant spent in remand before sentence by the lower court.

40. Right Appeal 14 days.

Dated and signed at Nakuru this 12th day of June 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Edna Court Assistant

Karanja Mbugua appellant

For state Ms. Wamboi

Appellant Present