Chirchir v Republic (Criminal Appeal E017 of 2023) [2024] KEHC 5151 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E017 OF 2023

SM MOHOCHI, J

MAY 15, 2024

BETWEEN

FESTUS KIPKOECH CHIRCHIR .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against Conviction and Sentence in PMCR SO No. 75 of 2020 -Molo, Republic v Festus Kipkoech Chirchir, delivered by A. Mukenga, S.R.M. delivered on 23.03.2022)

JUDGMENT

1. The Appellant herein, Festus Kipkoech Chirchir, being dissatisfied with the judgment of Hon. A. Mukenga, Principal Magistrate Molo delivered on 23rd March 2023 vide Molo Chief Magistrate's Criminal (Sexual Offence) Case No. 75 of 2020, Appeals to this Court against the whole of the aforesaid conviction and sentence on the following grounds; -

   i. That, the learned magistrate erred in law and fact, in finding that the prosecution had proved their case beyond reasonable doubt.

   ii. That, the learned magistrate erred in law and fact, in finding the ingredients of defilement had been proved against the Appellant.

   iii. That, the learned trial magistrate erred in law and fact in, failing to note and appreciate the contradictions in the prosecution evidence.

   iv. That, the learned trial magistrate erred in law and fact, in shifting the burden of proof to the Appellant.

   v. That, the learned trial magistrate erred in law and fact, by basing her decision on speculation, guess work, circumstantial evidence and evidence not on record.

vi. That, the learned trial Magistrate erred in law and fact, by ignoring the evidence of the Appellant tendered in defence.

vii. That, the learned trial Magistrate erred in law, in sentencing the Appellant to twenty-five (25) years imprisonment which sentence was too severe considering the circumstances.

2. This Court has a legal obligation to re-analyse, re-evaluate and assess the evidence adduced in the Lower Court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the four witnesses testify. See Okeno vs Republic {1972) E.A, 32at page 36, Pandya vs Republic {1957} EA 336, Shantilal M. Ruwala vs Republic {1957} EA 570 & Peter vs Sunday Post {1958} EA 424.

3. The prosecution called seven (7) witnesses. PW1 was the complainant. She testified that on 20th June, 2020 at 4:00 p.m, she went to the home of F (PW5) who was sick to assist her with household chores. The Appellant is a brother to F who was also in the homestead. While she was doing her chores, the Appellant came and told her that F was calling her. The complainant did not believe him and continued with her chores. The Appellant went and had a brief conversation with F whereupon he came back to her and called her again. When he called her the second time, the complainant followed him to the house. F (PW5) who was also in the same compound encouraged her to follow the Appellant saying that even her she went through the same ordeal.

4. The Appellant took her to the house where he locked the door, and had sexual intercourse with her. After the ordeal, the Appellant left her in the room. The complainant put on her clothes and went home where she lived with her sister (PW3). She did not report the incident to anyone for fear of being beaten. However, the following day, she disclosed to her sister about the incidence. Her sister confronted F who denied the incident. Some village elders came to the home but the complainant did not know what they talked about. Eventually, the complainant's brother in law reported the matter to the police station.

5. PW2 was VK n, the brother in law to the complainant. He testified that on 20th June, 2020, he went back home at 7:00 p.m and learnt about the incident. He called the assistant chief and informed him of the matter who promised to come the following day and deal with the matter. The assistant chief did not come but instead called after three days instructing PW2 to take the child to hospital. PW2 reported the matter to the police station and also took the child to Keringet Hospital for treatment.

6. PW3 was KC , a sister to the complainant. She recalled that on 20th June, 2020 at 10:00 a.m, the complainant went to F 's home to help her with uprooting potatoes. She came back home at 1:00 p.m and returned to F 's house at 2:00 p.m. The complainant took too long at F 's home and PW3 went to check on her. PW3 called out her name but the complainant did not answer. At the same time, the she saw F running away towards the Appellant's house. The Appellant came out of the house and stood at the door. PW3 asked him where the complainant was but the Appellant kept quiet. The complainant came out of the Appellant 's house but on seeing PW3, she rushed back inside. F removed the complainant from the Appellant 's house. Then F and the complainant went to the farm to harvest sugarcane.

7. The complainant returned home at 6:00 p.m limping and frail looking. The following day, she told PW3 that the Appellant had defiled her.

8. PW4 was BKK , the brother in law to the Appellant. He testified that on 24th June, 2020, PW2 came and told him that the Appellant had defiled the complainant. The following day, he called a meeting between his family and that of the complainant. Then he took the Appellant to hospital for

examination to confirm if the allegations were true. All the tests turned out negative. Then he took the Appellant to the police station where he was arrested.

9. PW5 was F. She testified that on 18th June, 2020, she was not feeling well. The complainant came with two other girls and helped her with house chores. PW5 rewarded her with sugarcane. On 20th June, 2020, the complainant once again came and assisted PW5 to till the potato farm. At 1:00 p.m, the complainant went back to her home for lunch. She returned to PW5's house at 4:00 p.m with some food which they shared together. At that time, the Appellant had gone to the shamba to ferry the potatoes. PW5 sent the complainant to the shamba to get sugarcane and as her reward for the help.

10. PW5 was left alone in the house doing some cleaning. Then she went to the toilet. When she was outside the toilet, she heard the complainant's sister calling her. The complainant was hiding behind a tree. PW5 told the complainant not to hide. PW5 then cut a sugarcane for her and she went home.

11. On 24th June, 2020, PW5 received a report that the Appellant had defiled the complainant. On 28th June, 2020, they were summoned to the police station where the Appellant was arrested.

12. PW6 was Corporal Emily Maritim who investigated the case. She issued the P3 form and recorded witness statements. The Appellant was brought to the police station by his uncle while witness statements were being recorded. The complainant pointed him out as the person who defiled her. She escorted the complainant and the Appellant to Londiani Sub-County hospital where they were examined and their P3 forms filled. The investigating officer produced the complainant's birth certificate as an exhibit.

13. PW7 was Justus Oigo Mosera, a Clinical Officer from Londiani Sub-County Hospital. He testified that he examined the complainant on 28th June, 2020 with allegations of having been defiled on 20th June, 2020 by the Appellant. She was on her period. Her hymen was broken. He also examined the Appellant and filled his P.3 form.

14. The Appellant was put on his defence. He gave an unsworn statement. He denied defiling the complainant. He stated that, if indeed he had defiled her, she would not have delayed in reporting the matter and seeking medical help. He stated that the complainant had formed a habit of laying false allegations against people and then demanding for money to withdraw the allegations. He also stated that his house is near the road and if indeed he had committed the offence, the complainant would have screamed for help.

Appellant Submissions

15. The Appellant summarized and raised the following issues for determination:

    a. Whether the Prosecution proved its case as against the Appellant beyond all reasonable doubt;

    b. Whether the learned trial magistrate failed to note and appreciate the contradictions in the prosecution evidence.

    c. Whether the learned trial magistrate based her decision on speculation, guess work and circumstantial evidence.

    d. Whether the Learned trial magistrate was obligated to explain to the Appellant his right to legal representation under article 50 (2) (g) of *the Constitution* of Kenya, 2010.

    e. Whether the trial Magistrate considered the accused person's Defence.

    f. Whether a sentence to serve 25 years imprisonment was excessive in the circumstance.

16. As to whether the prosecution proved its case as against the Appellant beyond all reasonable doubt, it is the Appellant's submission that, there was no evidence tendered before the trial Court to warrant a conviction in the offence of defilement.

17. That, the prosecution's case was marred by inconsistencies and uncorroborated evidence.

18. That, in sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the Trial Court, can, without corroboration, found a conviction.

19. That, Section 124 of the *Evidence Act* makes this quite clear:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth." [Emphasis added]

20. That, there is no any other evidence in implicating the Appellant to the said offence save for the evidence of PW1, who is a minor. The only other present witness to the alleged offence was PW5 whose testimony was completely ignored by the trial magistrate.

21. That, it is not in dispute that, the complainant was with PW5 at PW5's home on the material date of 20th June, 2020. It was PW5's evidence that at around 4:00PM she was having a meal with the complainant and the accused person had gone to the farm to ferry potatoes hence not present. It is evident that the accused person was not present at the time of commission of the alleged offence. The trial magistrate failed to appreciate the conflicting testimonies of the complainant and PW5, the two persons who were undeniably present at the time the alleged offence was committed.

22. As to whether the learned trial magistrate failed to note and appreciate the contradictions in the prosecution evidence? the Appellant submits that, the complainant testified that on the material day of the incident, she was doing house chores at PW5's home when she was lured by the Appellant into his room. She proceeded to state that the accused had sexual intercourse with her before leaving her in the room. It was the complainant's testimony that after that alleged incident, she dressed up and left for home where she lived with her sister, PW3. She then only told PW3 about the incident the next day on 21st June, 2020 because she feared being beaten by PW3.

23. That, PW3 on the other hand alluded to be present at the scene of the incident in her testimony. She testified that the complainant had taken too long at PW5s home prompting her to go look for her. She further stated that she saw the complainant leave the Appellant's house and on seeing PW3 the complainant rushed back inside to hide. The complainant was then flushed out of the accused's house before she accompanied her to the farm to harvest sugarcane. Going by PW3's testimony, she was present during this entire time and must have seen the complainant accompany PW5 to the farm to harvest sugarcane.

24. That, PW3 at least ought to have noticed that the complainant was limping and frail looking when she accompanied PW5 to the farm. PW3 only noticed the complainant limping and looking frail when she returned to their home at 6:00PM. PW2, the complainant's brother-in-law testified stating that he

returned home on 20th June, 2020 at 7:00PM and immediately learnt about the incident. On learning about the incident, he proceeded to call the assistant chief notifying him of the matter.

25. The Appellant urges the Court to notice that the PW1, PW2, PW3 & PW5 all gave conflicting accounts of the incident. PWI, the complainant alleged to have been defiled by the Appellant before leaving for her home without mentioning her sister coming to look for her or even finding her at the Appellant's home. She further remained quiet about the incident until the following day.

26. That, PW2 on the other hand stated that he returned home on 20th June, 2020 and discovered about the incident on the very day and notified the assistant chief. PW2 failed to disclose from whom he learned about the incident because neither the complainant nor PW3 testified that they had told him of the incident. PW3 stated that the complainant had been found at the accused's house and that she returned home limping and looking frail. Despite these telltale signs, PW3 failed to interrogate her sister to establish what had happened and only learned of the alleged defilement the following day when the complainant told her the same.

27. The Court of Appeal in Erick Onyango Odeng' v. Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred u. Uganda Criminal Appeal No. 139 of 2001, [2003| UGCA, 6 in which it was held as follows:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

28. The Appellant submits that, that the prosecution case was marred with inconsistencies that cannot be swept under the carpet. The trial magistrate erred in not appreciating these contradictions.

29. As to whether the learned trial magistrate based her decision on speculation, guess work and circumstantial evidence? The Appellant submits that the Trial Court in its finding, as to whether the Appellant was the perpetrator of the alleged offence, the learned trial magistrate relied solely on the testimony of PWI. It was her finding that the fact that PW1 identified the Appellant as the perpetrator that they had sexual intercourse which she found sufficient to prove that the Appellant was indeed the culprit. This, in our opinion, is reliance on circumstantial evidence.

30. In dismissing the Appellant's defense, the learned trial magistrate went into guesswork and speculations as to what might have happened. She held "...in the intervening period, there is evidence from the complainant and the accused person's brother-in-law of having a meeting in a bid to resolve the matter out of Court. " PW4 testified that her after being notified of the said allegations, he called out a meeting to ascertain if the allegations were indeed factual. He even went ahead to conduct medical tests on the Appellant which all turned out negative and when summoned by the police, he handed the Appellant over to them. At no point in his testimony did he mention that, he made attempts to resolve the incident out of Court as per the trial magistrate's judgment. These were guess work and speculations on the part of the trial magistrate who proceeded to convict the accused person.

31. As to whether the learned trial magistrate was obligated to explain to the appellant his right to legal representation under Article 50 (2) (g) of *the Constitution* of Kenya, 2010.

32. That, Article 50 (2) (h) provides that:

> " an accused person has a right to have an advocate assigned to him or her at State expense if substantial injustice would otherwise result."

33. That, Article 50 (2) (g) provides that an accused person has a right to choose, and be represented by, an advocate, and to be informed of this right promptly. That, there is no evidence from record to show that the learned trial magistrate informed the accused of this right considering the nature of the offence faced.

34. As to whether a sentence to serve twenty-five (25) years imprisonment was excessive in the circumstance. The Appellant submits that, the learned trial magistrate sentenced the Appellant to 25 years imprisonment. The Appellant is a young man in his early twenties and has his entire life to live ahead of him. The trial Court also failed to take into account that the Appellant has no previous criminal record. Considering the circumstances of the offence and the mitigating factors, the sentence meted upon the Appellant was excessive.

35. The Appellant therefore pray that this Court in the event that it upholds the conviction exercises its powers and review the sentence of the trial Court.

36. The Appellant submits that, the Learned Magistrate misapprehended the law by involving herself in extraneous issues and declined to consider credible evidence by the Defence and therefore the conviction and sentence are unwarranted.

Respondent Case

37. Despite repeated opportunities to file written submissions the Respondent failed to comply with the Court directions depriving this judgment of their input.

Analysis and Determinations

38. The only Issue presenting itself is, whether the trial Court proved the offence against the Appellant beyond reasonable doubt?

39. This was an Appeal contesting the Conviction and Sentence on the Appellant for a trial that lasted from the 28th June, 2020 to the 23rd March, 2023 almost three years.

40. The Appellant represented himself and at no point in the three years of trial, did he crave for the Courts leave to obtain legal representation.

41. The Appellant alleges that, his fair trial rights were contravened of not being informed of his right to legal representation. While the Court observes that, the Appellant was not informed by the Court of his right to legal representation, the transgression is curable by seeking appropriate relief before the constitutional Court. The right to be represented by an advocate of own choice does not equate to the right to legal representation at the expense of the state.

42. In Republic Vs Karisa Chengo & 2 Others [2017] eKLR, cited by the appellant, the Supreme Court considered the issue of legal representation at state expense and stated inter alia that:

> " The right to legal representation at state expense, under the said Article, was a fundamental ingredient of the right to a fair trial and was to be enjoyed pursuant to the constitutional edict without more. However, in accordance with the language of *the Constitution*, this

particular right was not open ended but only became available “if substantial injustice would otherwise result”.

43. An established framework exists whereby; an accused person can apply under Section 40 of the *Legal Aid Act* No. 6 of 2016 for legal representation at state expense.

44. The failure to inform the Appellant of his right to legal representation did not jeopardize the Appellants case in any way. In fact, the Appellant cross examined most witnesses in a robust manner.

45. On the issue of the complainant’s uncorroborated testimony, I am guided by the provisions of Section 124 of the *Evidence Act* which provides as follows;

> “ Corroboration required in criminal cases
>
> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the Court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the Court is satisfied that the alleged victim is telling the truth.”

46. It is trite law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony, corroboration is unnecessary. As was held in Johnson Muiruri vs. Republic, (1983) KLR 445 as follows;

> “ Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration.”

47. In the present case, the trial magistrate rightfully utilized the evidence of PW5 and PW3 to corroborate the Complainants evidence placing her at the material time in the Appellant’s house.

48. This Court would hasten to add that PW5 was not a passive, but rather was an active accomplice of the Appellant who ought to have been charged together with the Appellant. It would be foolhardy to then expect the evidence PW5 to be without fault. For an adult woman to entice a twelve (12) year old to be defiled by her brother is something that did not escape this Courts attention.

49. My re-evaluation of the entire evidence reveals, an extremely diligent and professional judicial officer who did not base her decision on speculation, guess work, circumstantial evidence and evidence not on record, this Court is saddened of an Appellant who embarks on an attempt to besmirch the Court as a way out. This Court is appalled of this unfortunate ground by the Appellant which goes to the root of his attitude and personality. This ground is dismissed pronto.

50. With regards to the ground of shifting the burden of proof to the Appellant? This Court is of the considered view that, a “prima facie” case was established against the Appellant thereby placing him to his defence. The opportunity to defend oneself in criminal proceedings is the hall mark of the right to fair hearing as is enshrined in Article 50(2), his defence was properly considered and accordingly

dismissed, the Appellant's defence evidence could not displace the overwhelming evidence presented by the prosecution. No burden of proof was shifted to the Appellant.

51. This Court sadly note of the Appellant language; attitude as can be deciphered from the pleadings from the Trial Court all the way into this Court. The reference to the victim as an adult expected to rush and report the crime committed upon her or running of an extortion racket by a twelve (12) year old girl, who has a habit of falsely accusing men of defiling her!!!!." These to me is telling of the Appellant who is not and has not, been remorseful of his crime, the Prison correctional program should be deployed to full use in his aid.

52. As regards sentence, it is clear that the Court cannot hear an appeal on the severity of sentence. However, the Court can hear an appeal on sentence if it is erroneous in law. An error of law can arise, inter alia, from the manner in which a Trial Court exercises its discretionary jurisdiction on sentencing. If in imposing the sentence the Court acted on the wrong principle of law or committed some errors of law or misdirected itself in some respect, or the exercise of discretion is plainly wrong in the sense, inter alia, that no reasonable Court could exercise its discretion in such a way an appellate Court can interfere with the exercise of judicial discretion on the principles stated in Mbogo v Shah [1968] EA 93.)

53. In Evans v Bartlam [1937] AC 473, a decision of the House of Lords cited by Sir Clement De Lestang V.P. in Mbogo v. Shah, (supra) Lord Atkin said in part at p. 480-481:

> " ..and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and duty to remedy it."

54. Lord Atkin's dictum to the effect that the power of an appellate Court to interfere with the exercise of discretion by a Trial Court is not limited to only consideration of the ground of error of law and can interfere on other grounds to avoid injustice, has often been cited as representing the modern thinking.

55. Section 8(3) of the *Sexual Offences Act* provides for a minimum sentence for the offence of rape but also gives discretion to the Court to enhance the sentence to life imprisonment.

> " 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."

56. The Sentence imposed is lawful and is the minimum provided and the Court considered the Appellant's mitigation as well as the aggravating factors including the offence being serious and a barbaric offence meted on an innocent girl of tender years whom the Appellant ought to have protected. The complainant shall remain with the trauma and scars for the rest of her life.

57. In view of my analysis and determination of the issues discussed above, the conclusion becomes irresistible that I find no merit in the argument that the learned Trial Magistrate misdirected himself on the law or the evidence, nor do I find any basis to hold, that he erred in arriving at the conviction and the sentence. The up-shot is that this appeal against both conviction and sentence is dismissed.

58. The Conviction is thus upheld and the twenty (20) year Sentence confirmed as imposed to run from the 28th June 2020.

SIGNED, DATED AND DELIVERED AT NAKURU* ON THIS 15TH DAY OF MAY 2024

....

MOHOCHI S.M

JUDGE

In the Presence of;

Ms. Schola, C.A

Appellant

Ms. Jackie Kisoo, Prosecution Counsel for the Republic

Mr. Siagi, Advocate for the Appellant