Chaka v Republic (Criminal Appeal E028 of 2022)
[2023] KEHC 1513 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1513 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E028 OF 2022

FG MUGAMBI, J

FEBRUARY 14, 2023

BETWEEN

NGOA TSUMA CHAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Sandra Ogot, SRM dated 10th December 2021 in Sexual Offence Case No. 36 of 2019 at the Senior Resident Magistrates Court at Msambweni)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to 20 years' imprisonment for the offence of Defilement contrary to section 8(1) read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 1st October 2019 and 14th November 2019 in Mwereni Location of Kwale County, he intentionally and unlawfully caused his penis to penetrate the vagina of AM, a child aged 15 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The Appellant now appeals against the conviction and sentence as set out in the Amended Petition of Appeal filed on 29th December 2022. The Appellant also relies on his written submissions. The Prosecution opposed the appeal through the written submissions of its counsel filed on 20th January 2023.

3. During trial the Prosecution called two witnesses. PW1, the complainant testified that she was 16 years old. She gave a detailed account of the events on that fateful day. She explained how she had been with the company of her mother leaving the farm but stopped at another farm to enquire whether there was casual work. It was there that she met the Appellant and his friend. She worked at the farm until

around 6pm and had to wait for her wages for the hours worked. It is at this point that the Appellant approached her and harassed her into having sex with him before the farm owner eventually arrived and paid her wages. During this time, she testified that the Appellants friend had left and only came back later after they were done. It was her testimony that she took the Appellants telephone number and actually contacted him and eventually had sex with him on another two occasions. She identified the Appellant as the man who had defiled her. PW2, was the complainants mother who confirmed that her daughter was 16 years of age. She did not know the Appellant and had never met him and only got to know him when he was arrested for the offence. The medical doctor and investigating officer did not testify. According to the trial court records, the witnesses did not attend court after a number of adjournments forcing the prosecution to close its case without their testimony.

4. The trial court found that the Appellant had a case to answer and put him on his defence. The Appellant testified that he was arrested after walking along a path with the complainant on the fateful day that he is accused of having defiled her. He stated that when she got to her home she entered the compound and he proceeded before being arrested.

5. In his submissions to support his appeal, the Appellant argues that the learned trial magistrate did not subject the Appellant to a *voire dire* examination as required under section 19 of the *Oaths and Statutory Declarations Act*. He invites the Court to find that the complainant was a child as defined under the *Children Act* and to take into account the provision in section 2(1) of the *Sexual Offences Act* which makes reference to the *Children Act* for the definition of a child. It is his case that the trial court ought to have carried out the *voir dire* examination before admitting the complainants evidence. It is also his case that the unsworn evidence of the complainant could not be safely relied upon to sustain a conviction, devoid of corroboration and that the Prosecution had failed to call two critical witnesses. The Appellant states in his submissions that there was inconsistency in the evidence given by PW1 and PW2 as to whether the Appellant 'touched' the complainant or indeed penetrated her. Finally, the Appellant argues that he had been sentenced to the mandatory penalty under 8(3) despite the fact that the law on sentencing requires that the trial court looking at all the circumstances, to apply its discretion in determining a proportionate sentence. He prays that the sentence be reviewed.

6. The Respondents on the other hand argue that the ingredients for defilement had been proven beyond a reasonable doubt. The age of the complainant had been established as 15 years. The penetration was proved by the complainant's testimony. I note that the Respondent's submissions refer to a medical report and to the vior dire examination. I note that according to the court record the voir dire examination was not conducted and the medical report was also not produced. The Respondents have referred this court to the decision in *Geoffrey Kioji v Republic*, Nyeri Criminal Appeal No. 270 of 2010 in support of the argument that medical evidence is not mandatory in defilement cases. Finally, the respondent's argument is that the complainant was conversant with the appellant and had positively identified him at the trial. The Respondents argue that the sentence imposed is therefore lawful and justified.

7. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v Republic* [1972] EA. 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* [1972] EA. 32). Depending on the facts and circumstances of the case, the first appellate court may come to the same conclusions as those of the lower court or it may rehash those conclusions. There is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (See *David Njuguna Wairimu v Republic* [2010] eKLR). Against this background, I have

considered the evidence before the trial court both for the prosecution and defence and reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel. The following grounds of appeal crystalize for determination:

a. Whether the trial court erred in law by failing to conduct a voir dire examination of the complainant

b. Whether the lack of medical evidence and testimony by the investigating officer vitiates the trial

c. Whether the sentence was lawful, justified and proportionate

Whether the trial court erred in law by failing to conduct a voir dire examination of the complainant

8. It is not contested that AM gave sworn evidence and was not subjected to a voir dire examination. The age of AM is important in addressing this first limb. The learned trial magistrate believed the testimony by the complainant and confirmed by the complainant's mother that AM was 16 years and therefore 15years at the time the offence was committed. The trial court relied on the case of *Musyoki Mwakavi v R* [2014] eKLR where it was stated that: Apart from medical evidence the age of the complainant may also be proved by birth certificate, the victim's parents or guardian and observation or common sense....'. On this basis the age of the complainant had been proven beyond reasonable doubt.

9. The need to subject young witnesses of tender age to voire dire examination is founded under section 125(1) of the *Evidence Act* which deals with competency of witnesses generally as well as section 19(1) of the *Oaths and Statutory Declarations Act* deals with the aspect of reception of evidence from witnesses of tender age. The critical question then becomes, when should a voir dire examination be conducted? The Appellant invites this court to find that the same should have been conducted in the instant case, before taking the testimony of a 16-year-old. The Court of Appeal in the case of *Patrick Kathurima v Republic* (2015) eKLR stated as follows:

> "We take the view that this approach resonates well with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen years remains a reasonable indicative age for purposes of section 19 of *Cap 15*. We are aware that section 2 of the *Children's Act* defines a child of tender years to be one under the age of ten years. The definition has not been applied to the *Oaths and Statutory Declarations Act* cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes"

10. Further, the Court of Appeal had this to say in the case of *Maripett Loonkomok v Republic* [2016] eKLR

> ". . . That the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination. It follows from a long line of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that: - "In appropriate cases where voir dire is not conducted,

but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

In the view of the foregoing I find no fault with the trial court in not conducting a voir dire examination and this ground therefore fails.

Whether the lack of medical evidence and testimony by the investigating officer vitiates the trial

11. It can be discerned from the trial court record that the complainant's medical examination results were not presented to the court. In the same vein, the investigating officer did not also testify at the trial. These were crucial witnesses and in their absence, the Prosecution therefore relied on circumstantial evidence. It is now well settled that corroboration is not required in sexual offences. The history behind these amendments is that the law required corroboration in sexual offences and yet these are offences which are not committed on the 'roadside' so as to attract eye witnesses. In a binding decision by the Court of Appeal in *JWA v Republic* (2014) eKLR it was stated as follows: - "We note that the appellant was charged with a Sexual offence and the provision of Section 124 of the *evidence Act*, clearly states that corroboration is not mandatory.

12. In a case depending exclusively on circumstantial evidence, the Court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilt from the circumstantial evidence to be sure that there are no other co-existing circumstance which would weaken or destroy the inference." See *Mwangi v R* (1983) KLR 522, 523. I note in this regard the sentiments of the learned trial magistrate at p 7 of the judgment that 'I am convinced that she is speaking the truth and I am equally convinced that they had sex. I am also convinced that the first time she was pestered into it .....'. I would be extremely cautious to interfere with this finding noting that I have not had the advantage of seeing or hearing the witnesses. Further in the same page the learned trial magistrate notes that the 'accused has provided mere denials in his defence. The same was very lacklusture at most, lacking in imagination at the very least and not supported by evidence of any kind'. In the circumstances I note that the Appellant confirms having seen the complainant on the material day but stating that she branched off the route to go home. AMs evidence and that of her mother is that the complainant did not get home until much later that day, after the Appellant had defiled her. I find that the facts as explained by the complainant are incapable of explanation upon any other hypothesis than that of the guilt of the Appellant.

13. As to whether medical evidence is mandatory for a conviction for defilement to stand, I rely on the case of *Geoffrey Kioji v Republic*, Nyeri Criminal Appeal No. 270 of 2010. The Court of Appeal held that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under provision to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for the belief."

14. Finally, I am also cognisant of the provisions of Section 143 of the *Evidence Act* that, "No particular number of witnesses shall in the absence of any provision of law to the contrary, be required for the proof of any fact"

15. Upon carefully going through the evidence adduced at the lower court I find that the appellant was convicted on the basis of cogent and credible evidence of the complainant PW1. The appeal on conviction has no merits. I now turn to the sentence.

16. The Appellant was sentenced under the provisions of section 8(3) of the *Sexual Offences Act* which provides that: 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. This is a mandatory sentence. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. In *Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR it was stated that:

> '...To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences

17. In the same vein, sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R*., and *Wilson Waitegei V Republic* [2021] eKLR).

18. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender's responsibility over third parties should affect the sentence. There is a sound argument also for first-time offenders, for instance, who are not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence is hefty enough to punish and deter others from the heinous crime. (See *BW v Republic* KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR, *Christopher Ochieng v Republic* KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014). The Appellant was provided an opportunity to mitigate in the trial court where he stated that he had a pregnant wife, that he was recovering from a road traffic accident and that he was the family's sole bread winner. The trial court noted at page 23 that the pre-sentence report 'is very favourable towards the accused', although the terms of the report are not detailed. In this instance, the converse is also true that the Respondent, a 21-year-old adult, obviously took advantage of a 15-year-old school going girl instead of guiding her.

19. The provisions of section 333(2) of the *Criminal Procedure Code* are also critical and as it is the duty of this court to ensure that the sentence meted is lawful. The trial magistrate when sentencing the Appellant ordered that the sentence would run from the date of conviction thereby not taking into account the period served in custody. I am guided by the Court of Appeal in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR. The court stated as follows:

> " By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence".

20. The *Judiciary Sentencing Policy Guidelines* (2014) also provides guidance on this as follows:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

21. In the end, having taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above and the Appellant's mitigation on appeal and the period spent in pre-trial custody, I uphold the conviction and substitute the sentence of 20 years with a commensurate sentence of 15 years' imprisonment from the date of arrest, being 15th November 2019.

SIGNED, DATED AND DELIVERED AT NAIROBI

THROUGH VIRTUAL PLATFORM

THIS 14TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE