



REPUBLIC OF KENYA



**Mwangangi v Republic (Criminal Appeal 028 of 2022)
[2023] KEHC 2091 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 028 OF 2022
F WANGARI, J
FEBRUARY 16, 2023**

BETWEEN

BEATRICE KASYOKA MWANGANGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment, conviction and sentence
by Hon. I.G. Rubu (R.M) in Mwingi SO Case No. 023 of 2020.)*

JUDGMENT

Background

1. The appellant was charged with the offence of benefitting from a child prostitution contrary to section 15 (d) of the *Sexual Offences Act*. Particulars of offence that on June 16, 2020 at about 4pm, at (withheld) at Mwingi township within Kitui County, being a close friend to DM aged 14 years, CK aged 16 years, RM aged 16 years took advantage of the minors to procure them for sexual intercourse.
2. The appellant was convicted and was sentenced to serve an imprisonment term of 10 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant lodged this appeal. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana*, as cited by Mativo J in *Makau v Republic* as hereunder;
 - a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
 - b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.



- c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial Court has breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
3. Also in *Okeno v Republic* and *Kiilu & ano. v Republic* , the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.
 4. The Court of appeal has also pronounced itself on this issue. In Civil Appeal 79 of 2012 *Peter M. Kariuki v Attorney General* where the court held inter alia as follows: -

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”
 5. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the charge and sentenced her to serve a 10 year imprisonment term.

Summary of evidence

6. RM (PW 1) one of the complainants give evidence that on the material date the accused person whom she referred to as Jane came to their home and requested her to take her somewhere. She accompanied the accused. On their way they met the co-complainants and they all boarded a motorcycle and went to Café Kazuri hotel in Mwingi. Upon arrival, the accused introduced them to some men whom the accused seemed to know. She later left them with the men. She said each of the complainant had a man and they went to a lodging. The witness said that she consented to having sex with the man, and they spend the night together. The following morning, the men left and promised the complainants that they would come back. Instead the police came they and were arrested.
7. On cross examination she said she knew the accused person as Jane. They had not been told what they were going to do when they left their home. She said she spent the night because she was afraid of covid curfew, and she chose not to go home. The complainants were taken to hospital. P3 form filled indicated she was 17 years old.
8. EMK, PW2 the mother to PW1 give evidence that on the material date, she came home to find the daughter missing. The following morning, she reported to the chief. She was informed that her daughters had left with their neighbour called Jane. She identified the accused as Jane who was her neighbor. The witness was later informed by the police that her daughters had been arrested and she was requested to accompany them to the police station. That is when PW 1 disclosed that the accused had asked her to accompany her to a place where they took alcohol, some food and men were called to join them. She said PW 1 was born on 8/8/2006.
9. Doctor Curtis Alice, PW3 produced P3 forms in respect to the complainants on behalf of Dr. Thiakunu, who prepared the P3 forms. She gave evidence that all the complainants had had previous



sexual activities. They all admitted it was not their first time to have sex and they were sexually active. She produced the P3 forms as exhibits. She said that the penetration was not forced

10. Safi Barre PW 4, the investigating officer gave evidence that they received information from members of public that there were some schoolgirls in a lodging. They proceeded to the lodging where they found the complainants outside the lodging together with the accused person. After interviewing the girls, they said they were taken by the accused person and they spend the night with some men. The girls were taken to hospital for examination. Two of the complainants later runaway and they were not traced to come and testify in court. On cross examination she said the girls were not taken by force by the accused person. She was not aware if the accused person received any financial benefit from the men who defiled the girls and no person at the lodging recorded a statement. She said the members of public they did not want to be witnesses
11. In her defense the accused, DW1, gave evidence that on the material day she spent her day at her place of work. Later in the evening, she went and met her boyfriend at Cool Breeze Bar. They had some drinks and she later went to her home at around 8:00pm. She said she does not know Hosanna Guest House. The following morning after she left her house she came across the 3 complainants whom she knew physically as they were neighbors. Upon greeting them, police officers appeared and she was arrested on allegation that she had procured the girls for sexual intercourse. She told the police that she did not know the girls but they did not listen to her.
12. She said there's no witness from Hosanna Lodge that testified of her presence at the lodge. Some complainants did not testify. She said the charges against her are false and she was only arrested after she was found with the girls. She said she never saw the girls on the alleged date of commission of the crime. On cross examination she said she met the complainants on the morning of 16/6/2020.
13. Peninah Mwangangi, DW2, give evidence that on the material day she had asked the accused person to plait her hair, and the accused plated her hair up to 5:00 PM. Her boyfriend called her and she left. The following day she came to learn that the accused person had been arrested. When she went to visit her, the accused person still maintained her innocence.

Grounds of appeal

Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds as hereunder;

- i. That the learned magistrate erred in law and in fact by basing the conviction on evidence that was below the standard of proof.
- ii. That the learned trial magistrate erred in law and fact by failing to consider the appellant defence.
- iii. That the learned magistrate erred in law and in fact finding that the prosecution has proved its case beyond reasonable doubt.
- iv. That the learned trial magistrate erred in law and in fact by disregarding the appellant evidence and forcing them to proceed with matter violating their constitutional rights on fair hearing.
- v. That the learned trial magistrate demonstrated open bias by forcing the appellant to proceed with the hearing of the matter without their advocate when he was aware they were represented from the beginning.
- vi. That the learned trial magistrate failed in law and fact by disregarding the appellant submission and arguments therein.
- vii. That the learned magistrate erred in law and fact by shifting the burden of proof to the appellant.



- viii. That the trial magistrate failed in law and fact by not finding the prosecution case was full of contradictions.
- ix. That the trial magistrate erred in law and fact when he failed to consider the fact that the appellant did not benefit from the child prostitution contrary to section 15 (d) of the *Sexual Offences Act*, No. 3 of 2006.
- x. That the learned trial magistrate erred in law and fact when she considered extraneous matters not in evidence to sentence the appellant.
14. The parties were directed to put in their written submissions by 1/2/2023. At the time of writing the judgment, only the appellant had filed her submissions.

Issues for determination

15. I have accordingly considered the evidence and I deduce the following as the issues for determination: -
 - a. Whether the offence of benefiting from child prostitution was proved beyond reasonable doubt;
 - b. Whether the conviction and sentence meted against the appellant is safe.

If offence of child prostitution was proved

16. On the first issue, section 15 (d) of the *Sexual Offences Act*, No. 3 of 2006 under which the charge is founded provides as follows: -

Any person who—

 - 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;..... commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.
17. Causing a minor to be sexually defiled is central to the charge of child prostitution. In so doing, it is imperative to first determine whether the age of the victims falls within the bracket of minors. It is settled that in cases falling under the *Sexual Offences Act*, the ascertainment or conclusive proof of age is a necessary ingredient that must be proved beyond doubt. From the record, it is not in dispute that no birth certificate was produced.
18. In *Rophas Furaha Ngombo v Republic*, the Court of Appeal held that the manner in which age may be proved is not confined to production of a birth certificate or by undertaking age assessment. In the present case, age assessment reports were produced as exhibits and in relation to PW1, the report estimated her age between 14 and 16 years. This confirms that PW1 was a minor at the time of the incident.
19. Having analysed the evidence tendered before the trial court, did the appellant cause the minors to be sexually defiled? In answering this question, evidence of PW1 is crucial. She told the court how the appellant requested her to accompany the appellant somewhere. It was on their way when they met the other minors whom the appellant equally requested to join them. They boarded a motorcycle and ended up at Café Kazuri Hotel. From the hotel, they moved to a lodging called Hosana Guest House where they were joined by men. PW1 clearly stated that the appellant asked the men to choose any of the girls and for PW1, she was chosen by one Jeff whom she slept with and had sex.



20. PW4 confirmed that when they went to the lodging, they found the appellant with the girls. In her defence, the appellant attempted to show that she does not know Hosana Guest House and that she slept at her house on 16/6/2020. However, this was debunked by PW4 as he confirmed that they arrested the appellant while she was with the girls at the said guest house. She equally attempted to show that she was arrested while greeting the minors. Police officers do not just arrest for no reason and equally, they cannot pick out on random people. I thus dismiss the appellant's defence.
21. It is not in dispute that the appellant is an adult. As an adult, she ought to have acted responsibly and not expose the minors to sexual exploitation. She thus took advantage of her influence over the minors. I thus uphold the Lower Court's finding that the ingredients constituting the offence of child prostitution were proven beyond reasonable doubt. On identification, I equally agree with the Lower Court's finding that PW1 was well known to the appellant thus the issue of mistaken identity does not rise.
22. On the second issue, the trial court having convicted the appellant, it proceeded to sentence her to ten (10) years imprisonment. As per the Sexual Offences Act, this is the minimum prescribed sentence. It has been held that the mandatory minimum sentence as prescribed in the Sexual Offences Act takes away the judicial discretion of courts in passing an appropriate sentence. In Rophas Furaha Ngombo (above), the Court of Appeal reviewed a minimum mandatory sentence of 15 years and substituted it with a sentence of 8 years. The Trial Magistrate having considered the appellant's mitigation meted out the statutory 10 years.

Sentence

23. Being guided by the Court of Appeal decision, it is my view that the sentence passed against the appellant deserves to be reviewed downwards. Although PW1 confirmed that she consented to having sex and that she had not been forced, she was not legally capable of consenting to sexual intercourse. Nonetheless, the appellant stated in mitigation that she was young, had just recently delivered, was remorseful and sought leniency. It was confirmed that she was a first offender. In those circumstances, I consider a custodial sentence of 2 years would be reasonable punishment.

Conclusion

24. In conclusion therefore, the appeal on conviction fails. The appeal on sentence succeeds to the extent that I set aside the sentence of 10 years and substitute therefore sentence of 2 years from the date of conviction on May 25, 2022.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

Pauline Mwaniki for State

Appellant present

Court Assistant - Guyo

