Kipkirui v Republic (Criminal Appeal E052 of 2021) [2023] KEHC 2061 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E052 OF 2021

JWW MONG'ARE, J

MARCH 9, 2023

BETWEEN

PETER CHEPKWONY KIPKIRUI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. N Wairimu in Eldoret CMCR 95 of 2017 delivered on 11th September 2018)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 18th May, 2017 in Wareng District within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the anus of EC, a child aged 10 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11 of the *Sexual Offences Act*. The particulars of the offence were that on 18th May, 2017 in Wareng District within Uasin Gishu County, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely anus of EC, a child aged 10 years.
3. The Appellant pleaded not guilty and the matter proceeded to full hearing. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate, upon finding that the prosecution had failed to satisfy the ingredients for the offence of defilement, convicted the Appellant of the alternative charge and sentenced him to 10 years imprisonment.

4. Being aggrieved with the conviction and sentence, the Appellant instituted the present appeal vide a petition of appeal dated 5th August, 2021. The appeal is premised on the following grounds;

1) Thatthe learned magistrate erred in law and fact in failing to find that prosecution violated the cardinal principle of arraigning the Appellant before court within 24 hours as required by *the constitution* of Kenya 2010. The Appellant was arrested on 20/5/2017 and brought before court on 22/5/2017, the prosecution did not offer an explanation by way of sworn affidavit as to why the Appellant could not be brought before court within the stipulated 24Hrs.

2) Thatthe learned magistrate erred in law and facts in failing to find that the maximum sentence of indecent act is 5yrs with a fine Kshs. 50,000 as provided by law. The sentence of 10 years imprisonment was illegal and nullity.

3) Thatthe learned magistrate erred in law and fact in failing to find PW2,the mother to the complainant, witness evidence together with that of PW1, where unbelievable and the same were not proved beyond reasonable doubt.

4) Thatthe learned magistrate erred in law and fact in failing to find that the identification of the perpetrator of the indecent act was not proved beyond reasonable doubt and that the mother to the complainer PW1 was allegedly beaten up to coerce her in saying the Appellant did bad things to her the previously yet the complainant was not found in the house of the Appellant.

5) Thatthe learned magistrate erred in law and fact in failing to find the failure to call the area chief as a witness was fatal to the prosecution case and in failing to draw an advance inference against the prosecution as laid down in Bukenya & others in Uganda,(1972) E.A 549

6) Thatlearned magistrate erred in law and fact in failing to find that the evidence of PW2 amounted to inadmissible hearsay in breach of the direct evidence in section 63 of the *evidence act*, cap.80.

7) That the learned magistrate erred in law and fact in failing to find that the penetration of the victim was not established to the required standard of proof beyond reasonable doubt and no satisfactory medical evidence was tendered by the prosecution to the fact of the penetration of the victim.

8) That the learned magistrate erred in law and fact in failing to find that there was failure to comply with section 210 and 211 of the *criminal procedure code*, cap. 75

9) Thatthe learned magistrate erred in law and fact in failing to follow the judicial sentencing policy Guidelines [2016] in failing to find that the imposition of the minimum sentence negated the entitlement and essence of mitigation which was provided for in law.

10) Thatthe learned magistrate erred in law and fact in failing to find that the conviction and the sentence of indecent act was not proved beyond reasonable doubt.

11) Thatthe learned magistrate erred in law and fact in failing to comply with the provisions of article 50 (2) (g) and (h) of *the constitution* of Kenya 2010 by prior

to the trial commending informing the Appellant of the right to choose to be represented by an advocate and to be considered for assignment of one at the expense of the state considering that the matter was complex and the gravity of the prescribed sentence was that of life imprisonment and having regard to consideration of substantial injustice resulting to the Appellant

Parties filed submissions on the appeal.

Appellant's Case

5. The Appellant submitted that the trial magistrate erred in failing to note that he had been arraigned in court after 24 hours, violating his constitutional rights. Further, that the evidence of PW2 and PW1 was contradictory and PW1 was coerced to testify against him. It was his case that the trial magistrate failed to call the chief as a witness and that the evidence tendered was shoddy. The Appellant contended that the trial magistrate erred in law in failing to comply with section 210 and 211 of the Criminal Procedure Code.

Respondent's Case

6. Learned counsel for the Respondent opposed the appeal and submitted that there was no violation of the Appellant's constitutional rights as he was arrested on 20th May, 2017 and arraigned in court on 22nd May, 2017. He explained that the date of arrest was on a Saturday and the earliest he could be arraigned was on 22nd May, 2017.

7. In response to the allegation that the Appellant's right to be assigned an advocate was violated, the Respondent submitted that it is not an absolute right and cited the case of *Delphis Bank Ltd v Chatt & 6 others* [2005] and the case of *Zachariah Okoth Obado & 2 Others v George Luchirinaj Wajackoyah* [2019] eKLR in support of this submission.

8. Learned counsel for the state submitted that the complainant was able to identify the perpetrator as they hail from the same village and he was with him during the day. Further, that the evidence of the witnesses was corroborative and as such, the alternative count was proved beyond reasonable doubt. He urged that the penalty for committing an indecent act with a child is an imprisonment of not less than ten years therefore the court should uphold the conviction and sentence.

9. Upon considering the petition of appeal, the submissions of the parties and the authorities tendered, the following issues arise for determination;

    1) Whether the Appellant's constitutional rights were violated

    2) Whether the trial court complied with Section 210 and 211 of the Criminal Procedure Code

    3) Whether the prosecution proved its case to the required standard

    4) Whether the sentence was harsh or excessive

Whether the Appellant's constitutional rights were violated

10. Article 49 of *the Constitution* states as follows;

    An arrested person has the right:-

    (f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

11. The Appellant was arrested on 20th May, 2017 which I have determined was a Saturday. It follows that he could only be arraigned in court on a Monday. As such, there was no violation of his constitutional rights in his arraignment in court.

12. Article 50(g) & (h) of *the Constitution* state as follows;

Every accused person has the right to a fair trial, which includes the right

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

I agree with the submissions of the Respondent that the right to counsel in criminal cases is not an absolute right and I am guided by the courts holding in the case of Delphis Bank Ltd vs Chatt & 6 others (2005) and the case of Zachariah Okoth Obado & 2 Others vs George Luchirinaj Wajackoyah (2019) eKLR in support of this submission.

13. In any event the right to counsel in Kenya is limited to capital offences such as Murder and Treason. It is not every criminal case before the court that the state has a duty to provide legal representation if the accused does not is not able to afford one, and to my mind, the case before this court is not one of them. I find that the Appellant was not in any way deprived of his constitutional protection by the failure by the state to provide him with legal representation during the trial at the lower court.

Whether the trial court complied with section 210 and 211 of the Criminal Procedure Code

14. Section 210 of the Criminal Procedure Code provides;

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

Section 211 of the Criminal Procedure Code provides;

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

I have perused the record of appeal and as per page 27 of the proceedings contained at page 38 of the record, the trial court complied with section 211 of the Criminal Procedure Code. Having found that the Appellant had a case to answer, the provisions of section 210 do not apply. This ground is therefore moot.

Whether the prosecution proved its case to the required standard

15. The conviction of the Appellant was based on the single witness evidence of a victim being the complainant. PW4, the clinical officer who examined the complainant, testified that there were no injuries but concluded that he could not rule out penetration. This is what led the trial court to find that the prosecution had failed to prove the main charge.

16. Section 2 (1) of the *Sexual Offences Act* defines an 'indecent act' as follows:-

> " Indecent act means an unlawful intentional act which causes:-
>
> Any contact between any part of the body of a person with the genital organ, breast or buttocks of another, but does not include an act that causes penetration;
>
> Exposure or display of any pornographic material to any person against his or her will."

17. From the record of the court, and specifically the testimony of the complainant, there is nowhere where it is stated that there was any contact between the body of the Appellant and the complainant. Faced with a similar scenario in Criminal Appeal No. 3 of 2019 HC Migori Hon. A.C Mrima J held as follows:

> " As to whether there was any contact between any body part of the Appellant with the genital organ, breast or buttocks of the complainant which act however did not cause any penetration, I must say that I have re-read the proceedings severally and did not see anywhere where the complainant alleged that the Appellant touched her genital organ, breast or buttocks. The complainant talked of the Appellant having had sex with her twice, an allegation which the trial court rejected for lack of proof and no appeal was lodged against the finding. The complainant was not led to describe how the sexual act unfolded and which part of her body was touched by which part of the body of the Appellant. With such state of evidence, I do not see how the offence of committing an indecent act with a child was proved. A trial court should not assume that once it finds no evidence of commission of the principal charge of defilement then the lesser charge of committing an indecent act with a child must have been committed. Every offence has the same threshold of being proved beyond any reasonable doubt."

18. The medical evidence having failed to prove penetration, could not corroborate whether there had been any contact between the bodies of the Appellant and the complainant. Section 124 of the *evidence act* expresses itself on evidence of a single witness as follows;

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration 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."

19. The upshot of the foregoing is that the prosecution did not prove its case to the required standard. It is my considered view that the conviction was unsafe in the circumstances.

20. In the circumstances the court finds that the Appeal has merit and is hereby allowed. The conviction is quashed and the Sentence is vacated and set aside and the Appellant is set at liberty forthwith unless he is otherwise lawfully held. It is so ordered!

DELIVERED, DATED AND SIGNED ON THIS 9TH DAY OF MARCH 2023

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J.W.W.MONGARE

JUDGE

Delivered virtually in the presence of

1. Appellant-absent
2. Mr. Rop holding brief for Ms. Okok for the Respondent
3. Brian Kimathi – court assistant

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J.W.W.MONGARE

JUDGE