Mwikwabe v Republic (Criminal Appeal E089 of 2022)
[2023] KEHC 27501 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEHC 27501 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E089 OF 2022

RPV WENDOH, J

MAY 10, 2023

BETWEEN

DAVID CHACHA MWIKWABE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. M. Obiero, Senior Principal Magistrate in Kehancha Magistrate's Sexual Offence Case No. E009 of 2020 delivered on 24/8/2022)

JUDGMENT

1. The appellant, David Chacha Mwikwabe, was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. In the alternative he faced a charge of committing an indecent Act contrary to Section 1 (1) of the *Sexual Offences Act*.

2. The particulars of the charge are that on diverse dates between 27th June 2020 and 26/10/2020 at (Particulars withheld) village in Kuria West Sub-County, intentionally caused his penis to penetrate the vagina of DK a child aged 13 years in the alternative, the appellant caused his penis to touch the vagina of the child.

3. The prosecution called a total of six witnesses. When called upon to defend himself, the appellant gave unsworn evidence and called three other witnesses.

4. The appellant was convicted on the main charge and sentenced to serve (20) years imprisonment. The said judgment provoked this appeal. The amended grounds of appeal are as follows; -

    1. That the appellant's rights under Article 50 (2) (g) and (h) were violated;

    2. That the charge was not proved to required standard;

3. That the court failed to consider the appellant defence under section 8 (5) of the Sexual Offence Act;

4. That the appellant defence was not considered.

5. The appellant filed submissons. On ground one, it was submitted that the court failed to inform him of his right to chose an advocate to represent him as required by the law; that PW1 testified as PW1 and DW3; that PW1 had lived with the apellant as a wife and only left because the appellant married another wife; that the issue is why it took over a year to report this matter yet the compliannat's father was aware of the affair between the appellant and the complainant.

6. As to the age of the complainant, it was submitted that it was not proved because the appellant admitted that the birth certificate was tampered with; that there were discrepancies in the complainant's evidence and the charge ; that no age assessment was conducted to ascertain PW1's age; the appellant relied on the decision of *R. v Isaac* 1965 CRA KLR 17G, where the court held that a conviction should not be based on forceful reasoning and theories but on the evidence adduced; that PW1's testimony should have been rejected.

7. The appellant also submitted that the court should have considered his defence that PW1 cheated him that she was 18 years old; that the court failed to address its mind to the credibility of PW1's testimony. He urged the court to acquit him.

8. The prosecution counsel Mr. Mulama filed submissions opposing the appeal.

9. Counsel argued that PW1 was a minor in accordance with her birth certificate Exhibit No. 1 which indicates that she was born on 25/8/2007 and was therefore 12 years 5 months as of 25/8/2007; that PW1's mother, PW3 produced a letter from the complaint's school confirming that she was aged 13 years and PW4 also estimated the age of the complainant to be 13 years. Counsel relied on the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR on how the age if a victim of defilement should be proved; that PW4 confirmed that the complainant's hymen was broken and she was pregnant. Counsel submitted that the issue in the case was not paternity but the offence of defilement. He relied on the case of *Flappyton Mutuku Ngui v Republic* (2014) eKLR where it was held that DNA is not necessary to prove defilement.

10. On Article 50 (2) (g) and (h), counsel submitted that under Article 50 (2) (h) the right to legal representation at the State expense is not an automatic right but qualified because an accused has to prove that he/she will suffer substantial injustice if the counsel is not provided; that the appellent has not demonstrated what injustice he has suffered. Under Article 50 (2) (g) it was contended that though the court did not inform the appellant of the said right, he was released on bond on 12/11/2020 and engaged services of Mr. Mudeyi Advocate who came on record on 20/11/2020 and applied for witness statments but he never apepared for trial; that the duty to inform the appellant of the right was overtaken by events. That when the appellant appointed counsel of his choice, it was the counsel's contention that the said right was not breached and relied on the decision of *Karisa Chengo v Republic* (2017) eKLR.

11. Prosecution Counsel further submitted on the failure by the court to conduct a voire dire examination of the complainant though not explicity pleaded in the appeal. Counsel relied on Section 19 (1) of the Oath and statutory Declaratuon Act which requires voire dire to be conducted on children of tender age i.e. a child of fourteen (14) years old and below. Counsel also relied on *Maripettloonkomok v Republic* (2016) eKLR in which it was held that voire dire examination was a must for children of tender years but failure to do so would not per see vitiate the entire prosecution case but that evidence

taken without voire dire cannot be used to convict an accused person; that where there is independent evidence to support the charge then the court can uphold the conviction.

12. Counsel urged that failure to conduct a viore dire examination is not fatal to the prosecution case as there is other independent evidence to support the charge.

13. On sentence: It was submitted that the sentence is legal and the court exercised its discretion; that there no exceptional circumstsnce to warrant the interference with the sentence by the court. Counsel urged the court to dismiss the appeal in its entirety.

14. This being a first appeal, it behoves this court to re-examine all the evidence tendered in the trial court, analyse it and come to its own conclusions but always bear in mind that this court neither saw nor heard the witnesses testify. This court is guided by the decision of Okeno v Republic (1972) EA 32.

15. The prosecution case is that PW1, D. K. A girl aged fourteen (14) years old is the complainant and she told the court that the appellant is her boyfriend, their affair having began in January, 2020; that in October, 2020, they met at Mitume Church in [Particulars Withheld] and he asked her to go and take shelter from rain at his place. She spent the night at his home and they had sex and they started to live together as husband and wife. They stayed for two (2) months and when a pastor informed her that her father was looking for her, she went to stay with her sister in Migori for a while and returned to the appellant's home. She later decided to leave the appellant's home when he married another wife. She informed her father about it and the father reported to the police and they found both appellant and complainant and arrested both. She was taken to hospital and she was found to be seven (7) months pregnant. She gave birth in December, 2020.

16. PW2 KMM is the father of the complainant. He stated that she was born in 2007. He recalled that on 27/1/2020, the complainant went for a hair cut with her sister MS; that the sister went back home but she did not. She later came in the evening and when asked where she had been, she explained that she had gone for a hair cut. When she came back with in appropriate hair cut, PW2 sent her back to get a proper one. The next day the girls went to school and only MS returned home. He reported to school that she was missing and the police station. He started to search for her and even met the appellant and asked if he had met the complainant but he denied. He later learnt that the appellant was living with the complianant and he reported to police station, but the appellant got wind of it and hid the complainant till October when he reported to the Children's office and police officers from (Particulars withheld) arrested both the appellant and complainant and they were taken to Kehancha police station. PW2 stated that the appellant fled after the first arrest.

17. PW3 (4) George Oluoch, is a clinical officer at Migori Hospital . He confirmed that the complainant was found to be eight months and two weeks pregnant and was expected to give birth on 13/12/2020. He found that the hymen was broken but not fresh tear.

18. PW4 (5) PC Abraham Cherio Ngetich recalled being at the station on 26/10/2020 when one MM reported that David Chacha had taken his fourteen (14) years daughter as a wife. PW4 proceeded to David Chacha's home and arrested him.

19. PW5 (6) PC MK of Kehancha Police Station, is the investigating officer in this case. She saw the report of defilemnt in the OB on 24/10/2020. The complainant was taken to he station accompanied by the father and she recorded a statement; that the complainant claimed to have been married to the apepllant. PW6 also escorted the complainant for examination and she was found to be pregnant. She charged the appellant.

20. When called upon to defend himself the appellant gave unsworn statement. He said that the complainant's father allowed him to live with the complainant as husband and wife; that he was forced to live with her and was arrested after eight (8) months.

21. DW2 mj a relative of the appellant confirmed that the minor stayed with them for nine (9) months and left. She admitted that the appellant and complainant lived together for nine months after which the appellant was arrested.

22. Having considered all the grounds of appeal, the evidence tendered in the trial court and the rival submisisons, I think that I should first consider the alleged violation of the appellant's rights to fair hearing under Article 50 (2) (g) and (h) of the *Constitution* first. The said provisions are as follows:-

> " 50(2) 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 his right promptly.

23. It is importanat to look at the trial court's record to ascertain whether the court complied with the above provisions. The appellant was arraigned before the court on 29/10/2020 for plea. The court did not inform the appellant of his right to choose an advocate to represent him as required. However, on 20/11/2020, before the trial commenced, counsel, Mr. Mudeyi came on record for the appellant. Counsel applied for legible witness statements to be supplied to him. The said counsel never attended court again even when the trial commenced on 10/3/2021 and the appellant did not complain that his counsel be contacted or the court wait for his counsel. He proceeded in person. By dint of Article 25 (c) of the *Constitution*, the said right cannot be derogated. It is a mandatory requirement that the trial court comply and inform an accused of his right to choose counsel. It is also required that an accused be infromed of the said right to legal represenattion by an advocate of his choice promptly.

24. In *Mphukwa v S* (CA& R369 / 2014 (2012), the court held:-

> " ... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid".

25. In *Joseph Kiema Philip v Republic* (2019) eKLR J. Nyakundi affirmed the above position and added that the court has a duty to record that it has complied with the said requirement. The court also said that the accused should be informed of the right promptly when it said:-

> " ... the earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings; that is the first hearing."

26. As submitted by the prosecution counsel, though the court did not inform the appellant of the said right, the appellant was aware of his right and he did exercise the said right six months before the hearing commenced. In this case, I am of the considered view that the appellant having excersed his right to

chose an advocate, failure by the court to inform him of the said right did not breach this right to fair trial.

27. In regard to the right under Article 50 (2) (h) it is required that an accused be informed that an advocate may be assigned to him/her by the State at the State expense if 'substantial injustice' would otherwise result. From the wording of that provision, the said right is conditional. It must be demonstrated that "substantial injustice" will result to the accused if counsel is not provided at State expense. At present, in Kenya, only persons charged with murder and children in conflict with the law are entitled to free legal counsel at State expense. Any other person who needs counsel at State expense needs to demonstrate that 'substantial injustice' will be suffered by him. The Supreme Court in Petition 5 of 2015 *Karisa Chengo v Republic*, the court identified situations that may lead to substantial injustice for example when it said at paragraph 94 that:-

> " In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:
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> (i) the seriousness of the offence;
>
> (ii) the severity of the sentence;
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> (iii) the ability of the accused person to pay for his own legal representation;
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> (iv) whether the accused is a minor;
>
> (v) the literacy of the accused;
>
> (vi) the complexity of the charge against the accused;

28. In *Sheria Mtaani Na Shadrack Wambui vs Office of Chief Justice & Another; Office of the Director of Public Prosecutions*, (2021) eKLR the court observed " ..... legal representation is a qualified constutitonal right"

29. In determining substantial injustice, the court looks at the seriounses of the case, its complexity and ability of the accused to conduct his own defence. In this case, the appellant did not demonstrate that he was inhibited in any way. He cross examined the witnesses and gave his defence and even called a witness. The appellant has not demonstrated that his right under Article 50 (2) (h) was violated.

30. The appellant faced a charge of defilement. To prove that charge, the prosecution has to prove:-

1. That the complainant is a child;
2. Proof of penetration;
3. Identity of the perpetrator.

Age;

31. PW1 testified that she was fourteen (14) years old. A birth certfiicate was produced as PEXNO. 1. It shows that the complainant was born on 25/8/2007. The birth certificate had been obtained

on 18/92017. By the time the incident allegedly occured between 27/1/2020 to 26/11/2020, the complainant was fourteen (14) years old. PW2 who was wrongly named as PW3, the complainant's father, confirmed that PW1 was born in 2007. It is settled law that the age of the victim or of defilement can be proved by birth certificate, the parent / guardian or medical evidence. In the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR the court held:-

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

32. See also *Francis Omuroni v Uganda* Criminal Appeal No. 2 of 2020. The age of the complainant was proved be 14 years and therefore a minor.

Of Penetration:

33. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

44. In *Mark Oiruri Mose v Republic* (2013) eKLR, the court considered what constitutes penetration when it said:-

> " ... in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ...."

35. PW1 told the court that she lived with the apepllant as husband and wife and that she agreed to get married to him. PW1 did not state exactly what happened between her and the appellant but she was found to be pregnant by PW3 and she gave birth in December, 2020. Penetration is not in issue because even the appellant admitted that they lived with the complainant for eight months. He confirmed that he lived with her as a husband and wife and therefore engaged in sexual intercourse as a result of which the complainant conceived. Penetration was proved.

Identity of the perpetrator

36. Identity of the perpetrator did not arise because the appellant admits to having lived with the complainant for eight months. His defence is that the father of the complainant had allowed it but PW2 told the court that the complainant had dispappered from home and he had been searching for her when she was found with the appellant.

37. In his submisisons, the appellant purported to raise a defence under Section 8 (5) of the *Sexual Offences Act* which provides as follows:-

> " It is a defence to a charge under this Section if ...

a. It is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence: and

b. The accused reasonably believed that the child was over the age of eighteen years.

c. The belief referred to in subsection 5 (b) is to be determined having regard to all circumstances, including any steps the accused person took to ascertain the age of the complainant."

38. The claims that the complainant cheated the appellant that she was of age were never raised in the defence in the trial court. It cannot be raised at this stage in submisisons. Besides, DW2 told the court that the complainant told her that she was in class seven. A child in standard seven is ordinarily a minor. If that is the case, then the appellant should have investigated to confirm whether or not the complainant was of age before purporting to marry her.

39. The trial court allowed the complainant to testify as Defence witness (DW3). I do not know under what provision of law the complainant could be called as both the prosecution and defence witness. The complainant must have come back to change her statement after being influenced by the appellant or his family as the court observed. An examination of the birth certificate shows clearly that it had been obtained in 2017 before this case in 2020. In any case, as earlier observed, the appellant did not raise the defence of PW1 being of age of maturity. The evidence of DW3 is of no consequence.

40. The prosecution counsel raised the issue of the failure by the trial court to conduct a voire dire examiantion of PW1 in accordance with Section 19 (1) of the *Oaths and Statutory Act*. As properly submitted, failure to conduct voire dire on a child of upto fourteen (14) years does not per se, vitiate the prosecution case. See *MaripettLoonkomok v Republic* (2016) eKLR . The court said:-

> " 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 case where voire dire is not conducted, but there is suffient independent evidence to support the charge the court may still be able to uphold the conviction. (See *Athumani Ali Mwinyi v R* Criminal Appeal No. 11 of 2015)."

41. In the instant case, apart from PW1's testimony, the appellant did not deny the association between the appellant and complainnnat, and DW3 confirmed it. Besides, there was circumstantial evidence of the complainant's pregnancy and subsequent birth of a child. Failure to conduct a voire dire examination was not fatal to the prosecution evidence.

42. In the end, this court is satisfied that the trial court arrived at the correct verdict when it found that the offence of defilement was proved to the required standard of beyond any reasonable doubt. I affirm the conviction.

43. As for the sentence, I take into account the fact that a child was born out of the said unlawful relationship. However, people like the appellant who prey on young children must be discouraged at all costs. It is immaterial that the complainant lived with tthe appellant as a wife. Being a child, she

had no capacity to consent to marry. The appellant took advantage of the complainant and must face the music. Having said all the above, I hereby set aside the sentence of twenty years. I substitute the sentence with fifteen years imprisonment to commence on 24th August, 2022. The appeal partially succeeds to that extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 10TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Owuor for the state

Appellant Absent

Ms. Emma/ Phelix – Court Assistant