Chiri v Republic (Criminal Appeal E049 of 2022)
[2023] KEHC 21961 (KLR) (1 September 2023) (Judgment)

Neutral citation: [2023] KEHC 21961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E049 OF 2022

HI ONG'UDI, J

SEPTEMBER 1, 2023

BETWEEN

ELIJAH WARUI CHIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment delivered by Hon. R.L Musiega RM on 11th August 2021 in Engineer SPM"s Court Sexual Offence case No. 12 of 2019)

JUDGMENT

1. Elijah Warui Chiri hereinafter referred to as 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* No. 3 of 2006.

   The particulars being that the appellant on the night of February 17, 2019 within Nyandarua County intentionally caused his penis to penetrate the anus of JMK a boy child aged 14 years. Alternatively he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

   The particulars being that the appellant on the night of February 17, 2019 within Nyandarua County intentionally caused his penis to come into contact with the anus of JMK a boy child aged 14 years.

2. The appellant denied the charges and the matter proceeded to full hearing. The prosecution called four (4) witnesses while the appellant gave an unsworn statement of defence and called no witness. Thereafter he was found guilty, convicted and sentenced to twenty (20) years imprisonment on the main count.

3. Being dissatisfied with the judgment he filed this Appeal citing the following grounds

   (i) That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.

(ii) Thatthe learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that the prosecution did not prove penetration and the age of the complainant was in doubt.

(iii) That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.

(iv) Thatthe learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the identification of the appellant was not positively proved.

(v) That, further grounds shall be adduced at the hearing of this appeal.

4. A summary of the case is that PW1 who was born on October 6, 2006 (Pexb 1) left home on February 17, 2019 (a Sunday) at 6.00pm. He went to Mutharaba and proceeded to Memo with his cousin before parting ways. While there he was called by the appellant a boda boda rider whom he knew well. They first went to his house for him to pick a jacket. Upon returning to Memo he took him to Njoroge Mkahawa hotel and bought him tea and mandazi and asked him to wait for him as he dropped his customer. He returned at 9pm and advised PW1 to go home the next day as it was late.

5. They therefore left for the appellant's house. Reaching the house the appellant covered his mouth with his hand and a piece of cloth and he lost consciousness. He woke up at around 1.00am when he found himself without a trouser as he lay on a bed. At that point the appellant was inserting his penis in his anus. The appellant was naked and he continued defiling him. At 5.00am he was taken by the appellant on a motorbike to Memo. He was told not to tell anyone what had happened.

6. He went home but could not tell his mother where he had slept because of the warning by the appellant. Upon her insistence he told her the truth. He was taken to Murungaru police station where a report was made and he recorded a statement. He explained that he knew the appellant well as he had been teaching him motor bike riding. He was born on 26th October 2006 as per the birth certificate (Pexb 1). He was examined and treated at Nyayo Ward Engineer Hospital. He identified his P3 form and PRC form.

7. PW2 (PW1's mother) stated that the boy disappeared from home that evening and never returned until the next day. After hearing his report about the appellant he took the boy to the police station then to hospital.

8. The investigating officer PW3 No. 68617 Cpl Dickson Koipiri confirmed having received a report from PW2 over this matter. He sent them to the hospital. He further received the child's birth certificate which he produced as Pexb 1. That the examination by the doctor revealed the boy had been sodomised.

9. PW4 Dr. Julius Ndwiga of Engineer Sub-County Hospital produced the P3 form which had been filled by Dr. Rotich. Mr. Chuma Mburu for the appellant did not oppose the production. The witness confirmed that the offence was sodomy and the child had lacerations. There was also feacal matter at the renal area. The boy was taken for counselling. He produced the P3 form and PRC form (Pexb 2&3)

10. The appellant in his unsworn defence stated that on February 17, 2019 he went to Memo centre in the morning. He used to work as a boda boda rider. He worked upto 5.30pm when he met the boy called M after dropping a customer. He asked him to drop him at Memo centre. On reaching Memo cenre the boy asked him to buy him tea which he did. He worked upto 10pm. He was arrested on 1st March 2019 by police officers who were with complainant's mother. He knew the complainant as a neighbour. He denied committing the offence.

11. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on June 22, 2023. On the ingredient of penetration he submitted that there was no evidence to confirm that. Further that the evidence of PW1, PW2 and PW4 contradicted itself on this, and should be discarded.

12. He stated at page 3 lines 3-4 of his submissions that "in the instant matter, I wish to submit that the age of PW1 was conclusively proved" After this he goes on to discredit the trial court for relying on the birth certificate which was allegedly not availed to him before the hearing.

13. He faulted the trial court for relying on PW1's evidence which he says was not corroborated. Reference was made to section 124 of the *Evidence Act* and the case of *Mohamed v Republic* (2208) KLR. It's his submission that the medical evidence did not support PW1's evidence. He says he was fixed by PW1 due to threats from his mother (PW2).

14. Lastly he submitted that the sentence under section 8(3) being a minimum mandatory sentence is unconstitutional in line with the decisions in:

    (i) *Joshua Gichuhi Mwangi* Criminal Appeal No. 84 of 2015 (2022) eKLR.

    (ii) *Regan Otieno Okello* Criminal Appeal No. 189 of 2016 (2022) eKLR

    (iii) *Philip Mueke Maingi & 5 others v DPP & the Attorney General* Petition No. 97 of 2021 Mombasa.

    He urged the court to review the sentence incase the appeal on conviction fails.

15. The respondent's submissions were filed by Ms Mogoi Lilian prosecution counsel and are dated 24th April 2023. She gave highlights of the evidence and submitted that PW1's age was proved as a birth certificate (Pexb 1) was produced. The child was below 18 years of age. She relied on the case of *Robin Koech v republic* (2022) eKLR in support.

16. She additionally submitted that the evidence of PW1 was supported by the evidence of the doctor (PW4) to prove penetration. PW1 was found to have feacal matter at the renal area. The doctor confirmed sodomy to have taken place.

17. It was counsel's submission that PW1 knew the appellant well. He had taught him to ride a motor cycle for a month. They went to his house and he explained what he did to him. Hence the time they were together between 5pm to the following day at 5am was sufficient for such to take place. She contended that the identification was one of recognition. Lastly the appellant confirmed having been with PW1 on the material day and even bought him tea.

18. Counsel submitted that infact the appellant's evidence corroborated that of PW1 on the issue of identification and recognition and buying of tea. Thus the trial court analysed the evidence well.

19. Finally she submitted that the sentence was given after taking into consideration all the circumstances. She urged the court to uphold the conviction and the sentence.

Analysis and Determination

20. I have carefully considered the evidence on record, the parties' submissions, cited cases and the law. The issues that fall for determination are as follows:-

    (i) Whether the prosecution proved its case to the required standard.

    (ii) Whether the sentence of twenty (20) years is lawful

Issue No. (i) whether the prosecution proved its case to the required standard:

21. This is a first appeal and this court is called upon to re-evaluate and re-consider the evidence and arrive at its own conclusion. It should also bear in mind that it did not hear nor see the witnesses and an allowance must be given for that. This was the holding in this cases of *Okeno v Republic* (1972) EA 32, *Gabriele Njoroge v Republic* (1982-88) 1 KAR 1134, *Ngui v Republic* (1984) KLR 729

22. The appellant was charged with an offence under Section 8(1) of the *Sexual Offences Act* which provides;

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement'.
>
> Further Section 8(3) of the same Act provides
>
> "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".

23. For an offence of defilement to be proved there are three (3) ingredients which must be established namely

    (a) The age of the victim

    (b) The act of penetration of the victim's genital organ

    (c) Identification of the perpetrator

24. From the evidence adduced by PW1 and PW2 plus the birth certificate (Pexb 1) it is confirmed that the date of birth of PW1 is 6th October 2006. The incident occurred on February 17, 2019. That means the child was aged 12 years plus 4 months. There may have been an error in the calculation but section 8(3) covers the age of 12-15 years of the victim

25. The appellant in his submissions tried to dispute this age of PW1 but the evidence on record is overwhelming. The learned trial magistrate and prosecutor observed and saw that PW1 was minor and that's why a voire dire examination of him was conducted before he testified. I am satisfied that PW1 was a minor born on 6th October 2006.

26. The next issue is the one of penetration which is defined under section 2 of the *Sexual Offences Act* as follows;

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person"
>
> Under the same Act, Genital Organs" has been defined to include the whole or part of the male or female genital organs and for purposes of the Act to include the anus

27. In this case PW1's complaint was that his anus was penetrated by the penis/male genital organ of the perpetrator. He reported to his mother (PW2) after a while but on the same day he landed home. He explained that he had been fearful because of the threats from the perpetrator.

28. PW1 though young gave a clear account of the experience of his encounter when he was sexually attacked. He lost consciousness. The appellant has submitted that this child should have given to the court details of how he felt, heard or perceived during the alleged incident. PW1 told the court how he

informed the perpetrator that he was feeling pain but the man kept quiet and continued defiling him. What else did the appellant want to hear?

29. Besides PW1's evidence the court heard the doctor on his findings. His evidence confirmed that the child had been sodomised. The child was found to have feacal matter at the renal area. Lacerations is not the only evidence of defilement. See *Dominic Kibet M v Republic* (2013) eKLR which was satisfied in this case

30. On the last ingredient which is identification the evidence is loud and clear. There is no dispute that PW1 and the appellant were together on the evening of February 17, 2019. He confirmed that he bought PW1 tea. It's only the bit of taking him to his house and defiling him that he denies. The appellant wants this court to believe that at his age, PW1 was the one directing him. In his defence he stated that:

    (i) He met PW1 at 5.30pm and PW1 asked him to drop him at Memo trading centre, which he did

    (ii) Upon arrival at the centre PW1 asked him to buy him tea which he did

31. The question is why he was doing all these favours for PW1 if he had no ulterior motive. PW1 explained to the court step by step what happened between him and the appellant from the evening of February 17, 2019 to early morning of February 18, 2019 and the warning he was given which created fear in him. PW1 also told the court that the appellant had been teaching him how to ride a motor cycle for one month, a fact the appellant never disputed. The child knew him even by his nickname "Premier". This was therefore a case of recognition which is stronger and more reliable than identification.

32. I find that the ingredients required to prove a case of defilement were established in this case and there is no reason to make this court interfere with the finding by the learned trial magistrate on conviction.

33. On sentence I do agree that there are some cases where the courts have held that the minimum mandatory sentences are unconstitutional. That in itself without an amendment to the statute cannot change the law. The minimum sentence of twenty (20) years is provided for under Section 8(3) of the *Sexual Offences Act*. The same is yet to be amended to accommodate the pronouncements by our courts.

34. Under section 333(2) of the *Criminal Procedure Code*, the court is obligated to take into account the time already served in custody if the convicted person was in custody during trial. In this case the appellant was arrested on March 1, 2019 and was arraigned in court on March 4, 2019. He was released on bond on 4th of June 2019. Therefore the period he was in custody was three (3) months.

35. I therefore find the sentence to be lawful less the three (3) months spent in custody, prior to the determination of the case.

36. The upshot is that the appeal lacks merit and is disallowed.

37. The following orders to issue

    (i) The conviction is upheld

    (ii) The sentence of twenty (20) is upheld less three(3) months spent in custody

38. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF SEPTEMBER 2023 IN OPEN COURT AT NAIVASHA

HEDWIG ONG'UDI

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms Ogutu- Court assistant