Chege v Republic (Criminal Appeal 35 of 2018)
[2023] KEHC 23159 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23159 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 35 OF 2018

CW GITHUA, J

OCTOBER 5, 2023

BETWEEN

JOSEPH KIMANI CHEGE ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of Hon. J. O Magori (SPM) delivered on 14th June in SPM'S Kangema Sexual Offence Case No. 18 of 2017)

JUDGMENT

1. The Appellant, Joseph Kimani Chege was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* (hereinafter SOA) .The particulars of the offence were that on the 25th day of September 2017, in Rwathia location, within Murang'a county, he intentionally caused his penis to penetrate the vagina of SW, a child aged 7 years.

2. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the SOA .

   It was alleged that on the same date and place, he intentionally touched the vagina of SW, a child aged 7 years with his penis.

3. After a full trial, the appellant was convicted of the main charge of defilement and was sentenced to life imprisonment. Being dissatisfied with his conviction and sentence, the appellant lodged an appeal to this court Vide an undated petition of appeal filed on 26th of June 2018. An amended Petition was subsequently filed on his behalf by his advocates Ms. Kirubi, Mwangi Ben & Company Advocates on 26th of November, 2018.

4. In his amended petition of appeal, the appellant advanced a total of nine (9) grounds which mainly challenged the validity of his conviction. He principally complained that the learned trial magistrate

erred in law and fact by: Failing to record in the proceedings the language of the court during the hearing of prosecution witnesses and whether the appellant understood the same; convicting him on the assumption that the complainant's claim that he did " tabia mbaya" to her meant that she had been sexually assaulted or defiled; relying on the evidence of PW4 who was unqualified to fill the P3 form and his evidence did not connect the appellant to the offence; denying him his constitutional right to a fair trial by not allowing him to cross examine PW4 and denying him a chance to recall prosecution witnesses after the prosecution amended its charge sheet; and convicting him on contradictory and inconsistent evidence.

5. The appeal was canvassed by way of written submissions. Both the appellant and the respondent filed their written submissions on the 6th of July, 2023 and during the hearing, Mr. Mwangi Ben who appeared for the appellant and learned Prosecution Counsel for the respondent Ms. Muriu chose not to highlight their respective submissions.

6. In his submissions, the appellant faulted the trial court for convicting him on the uncorroborated evidence of the victim which emphasized that that he did "tabia mbaya" to her on a undisclosed date; that the phrase "tabia mbaya" was not equivalent to defilement.

7. It was the appellant's further submission that the trial court erred by finding that PW4's evidence confirmed that the minor had been defiled based on his evidence that her hymen was partially broken and there was some redness on her genitalia; that breakage of a hymen can be caused by a myriad of factors not just penetration by a penis; that lack of representation by counsel in such a serious offence prejudiced him and the trial court erred in not appointing counsel to represent him.

   Lastly, the appellant argued that his conviction was unsafe and should be quashed and his sentence set aside.

8. The appeal was conceded to by the state on grounds that there were procedural errors in the proceedings which adversely affected its case but curiously, the respondent proceeded to submit that the appellant was properly convicted as all essential elements of the offence of defilement were proved. The procedural errors were identified as failure by the learned trial magistrate to indicate the language of the court throughout the hearing of the prosecution case and failure to indicate the appellant's choice of language as required by Sections 197 and 198 of the Criminal Procedure Code.

9. The other procedural error identified by the respondent was that the proceedings revealed that the appellant had not been given an opportunity to cross- examine PW4.

10. This being a first appeal, it is the duty of this court to re-evaluate, re-analyse and reconsider the evidence adduced before the trial court to draw its own independent conclusion on whether or not to uphold the appellant's conviction and sentence bearing in mind that unlike the trial court, the court did not have the advantage of hearing and seeing the witnesses.

    This duty was expounded in the celebrated case of Okeno V Republic [1972] EA 32, where the court stated as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1975] EA 336). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post [1958] EA 424."

11. I have carefully considered the grounds of appeal, the rival written submissions filed on behalf of both parties as well as the evidence adduced before the trial court. Having done so, I find that the key issues arising for my determination are two fold; namely, whether there were procedural errors committed by the trial court which amounted to violation of the appellants right to a fair trial as inferred by the respondent and secondly, whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

12. Turning to the first issue, the appellant claimed in his grounds of appeal that the learned trial magistrate failed to record in his proceedings the language of the court during hearing of the prosecution witnesses, and whether he understood the language they used in their testimony. The appellant however seems to have abandoned this ground in his written submissions, as he did not make any reference to it.

13. Be that as it may, I will still address the issue since it goes to the root of an accused person's right to a fair trial as envisaged in Article 50 (2) of *the Constitution* which provides that:

> " Every accused person has a right to a fair trial, which includes the right to-
>
> a) .....
>
> b) .....
>
> m) have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

14. Section 198 (1) of the Criminal Procedure Code further stipulates that: "Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

15. A perusal of the trial court's record reveals that when the appellant was taking plea, the languages indicated on the court record were English/Kiswahili/Kikuyu and the court then proceeded to state as follows, "the substance of the charge(s) and every element thereof has been stated by court to the accused person in Kiswahili language that he/she understands....."

16. The court record further reveals that when PW1 and PW2 testified, they gave their testimony in Swahili/Kikuyu. The testimony of PW3 as per the court record was given in Swahili, whereas that of PW4, PW5 and PW6, was given in English/Swahili. Furthermore, when the prosecution amended its charge sheet on the 8th of February, 2018, the court's proceedings indicated as follows: "Charges stated to accused in Kikuyu which he understands..."

17. It can therefore be seen that the learned trial magistrate recorded in the proceedings the language that the appellant had indicated he understood which was either Swahili or kikuyu and these are the languages the prosecution witnesses used in their testimony and where English was used, it was translated to Kiswahili. The record further shows that the appellant actively participated in the proceedings by cross examining the witnesses which means that he understood the language used in the proceedings. It is thus my finding that nothing turns on that ground of appeal.

18. The appellant has also complained that he was not allowed to cross examine PW4 who was a crucial prosecution witness. However, the handwritten proceedings recorded by the trial court reveals quite the opposite. A perusal of the trial court's handwritten record shows that the appellant as a matter of fact cross examined PW4 but the cross examination was not captured in the typed proceedings and perhaps this could be the reason behind the learned prosecution's submission that the appellant was

denied an opportunity to cross examine PW4. The omission could have been caused by human error since the court's handwritten proceedings are typed manually.

19. For the avoidance of doubt, this is what PW4 stated during cross examination by the appellant at page 20 of the handwritten proceedings;

> " .....I examined the child. I did not examine you since you were not brought. My duty was to examine the child to determine whether she has been defiled...."

20. Another ground advanced by the appellant was that he was denied a chance to recall the prosecution witnesses after the prosecution amended its charge sheet on the 8th of February, 2018.

21. Section 214 of the Criminal Procedure Code empowers the court to either amend or substitute a charge at any stage of the trial before close a the prosecution case and when a charge was altered, the court was required to call upon an accused person to plead to the amended or substituted charge. The provision at sub section (ii) gives an accused person an option of demanding the recalling of witnesses for cross examination or giving their evidence afresh.

22. The record shows that the amendment referred to by the appellant was made0 after five prosecution witnesses had testified and the appellant did not apply to have any of those witnesses recalled for either cross examination or giving their evidence afresh and his application was denied by the court.

In Josphat Karanja Muna versus Republic (2009) eKLR, the Court of Appeal expressed itself as follows;-

> " On non-compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non-compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant."

23. In this case, the amendment in question was introduced to correct the provision of the law under which the appellant was charged. In my view, the amendment did not introduce a new element into the charge or changed the nature of the charge facing the appellant. Even if the court should have informed him of his right to recall witnesses considering that he was acting in person, it is my view that failure to do so did not occasion the appellant any prejudice.

24. Having found as I have above, I have come to the conclusion that none of the appellant's fair trial rights as envisioned in Article 50 (2) of *the Constitution* were violated by the trial court. The concession to the appeal by the learned prosecution counsel, Ms. Elizabeth Waruguru was thus not well founded.

25. Turning now to the second issue, the appellant has advanced the view that the evidence tendered by the prosecution was not sufficient to prove beyond reasonable doubt the charge of defilement.

It is trite that for the prosecution to sustain a charge of defilement, it must prove beyond reasonable doubt the following key ingredients;

i) The age of the victim who must be a minor

ii) Penetration

iii) Identity of the person accused as the perpetrator of the offence. See. Serem versus Republic (Criminal Appeal 108 of 2019) (2023) KECA 30 (KLR)

26. The Court of Appeal in John Mutua Munyoki versus Republic (2017) eKLR emphasized that all not some of the above ingredients must be proved beyond reasonable doubt in order to prove the offence. (Emphasis mine)

In the present appeal, the age of the minor stated to be 7 years was not contested. It was also not contested that the victim knew the appellant very well prior to the material date since they were neighbours. The victims identification of the appellant as the person who sexually assaulted her cannot therefore be open to question. What was strongly disputed was that the prosecution had proved the element of penetration.

27. The issue then that fell for determination by the lower court was whether the evidence presented by the prosecution proved beyond doubt that the appellant had defiled the victim as alleged. The appellant submitted that the trial court made an erroneous assumption that the words tabia mbaya could only mean sexual assault or defilement which was not the position; that the trial court erred in relying on the evidence of PW1 which was not corroborated and for finding that there was penetration just because the victim's hymen was found to be partially broken and there was redness on the vestibule and per-introitus.

28. Section 2 of the *Sexual Offences Act* makes it clear that penetration for purposes of proving defilement can be either complete or partial.

The Court of Appeal in Erick Onyango Ondeng' V Republic (2014) eKLR, while addressing itself to the issue of proof of penetration stated as follows: " We agree with the first appellate court that to establish defilement, it is not necessary that the hymen must be broken; even partial penetration of the female genital by male genital will suffice to constitute the offence. In TWEHANGANE ALFRED VS UGANDA (supra) the Uganda Court of Appeal expressed the same view as follows: "In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

29. Again, in Mark Oiruri Mose V Republic (2013) eKLR the Court of Appeal stated that: "Many times the attacker does not fully complete 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."

30. In this case, the victim in her evidence gave graphic details of how the appellant penetrated her genitalia. She described how he removed his trouser and underwear, undressed her, lay on top of her and proceeded to do tabia mbaya on her part of urinating obviously referring to her vagina. Although I agree with the appellant that the words "tabia mbaya" may not be directly translated in English to mean

sexual assault or defilement, it is clear from PW1's evidence that she used these words figuratively to describe the act of defilement.

31. I agree with the learned trial magistrate's finding that PW1's testimony on penetration was corroborated by the medical evidence adduced by PW4, a Clinical Officer whose evidence that he examined PW1 on 30th September 2017 was not challenged by the defence. PW4 produced treatment notes and a P3 form which showed that upon examination, he found that her vestibule and peri-introitus region was reddish and her hymen was partially broken which amounted to evidence of penetration.

32. It is important to note that according to PW4, he examined the victim five days after the alleged defilement and given PW1's description of what the appellant did to her, I have no doubt in my mind that the injuries noted on her genitalia amounted to evidence of penetration bearing in mind that as stated earlier, penetration need not be complete to establish the offence of defilement.

33. I must hasten to add that even if there was no corroboration of PW1's testimony, under the proviso to Section 124 of the *Evidence Act*, her evidence alone was sufficient to sustain a conviction if the trial court was satisfied for reasons placed on record that she was a truthful witness. On my part, I have no reason to doubt that PW1 was a credible witness.

34. Regarding the complaint that PW4 was unqualified to fill the P3 form, I will do no more than to reproduce the Court of Appeal's decision in Martin Nyongesa Wanyonyi V Republic, (2015) Eklr where the court held that a clinical officer was qualified to complete a P3 form. The court stated as follows;

> " In this regard, this Court has stated time and again that a Clinical officer possessed with the requisite qualifications as specified in the Clinical Officer Act (Training, Registration and Licensing Act (Cap 260 (Laws of Kenya) is authorized to prepare and sign the P3 form, and in so doing, is also competent to attest to the contents of the medical report produced in court."

See also : Raphel Kavoi Kiilu V Republic, (2010) Eklr.

35. In his defence, the appellant gave a very short unsworn statement in which he denied the offence saying he was implicated. He did not however give details of the identity of the person who had allegedly implicated him and for what reason. In the event that he was referring to the complainant, it is difficult to decipher what reason a 7 year old girl would have had to implicate the appellant, an adult, with such a serious offence.

36. Upon my independent appraisal of the evidence adduced in this case in its entirety, I have come to the same conclusion as the learned trial magistrate that the prosecution proved its case against the appellant beyond any reasonable doubt. I thus find that the appellant was properly convicted. His conviction is consequently upheld.

37. Turning to the issue of sentence, I find that although the appellant in his prayers implored the court to set aside his conviction and sentence, he did not advance any grounds in his petition to challenge his sentence nor did he address it in the submissions filed on his behalf. Be that as it may, I note that he was sentenced to life imprisonment which is the mandatory minimum sentence prescribed by Section 8 (2) of SOA, which is the relevant penal provision. The learned trial magistrate felt that he had no discretion to impose any other sentence apart from the minimum mandatory sentence provided for by the law.

38. Given the jurisprudence that has recently emerged from the High Court and the Court of Appeal in Joshua Gichuki Mwangi V Republic HCCRA NO. 215 of 2011 on the unconstitutionality of

minimum mandatory sentences prescribed in the SOA, I am persuaded to find that it would be in the interest of justice to set aside the indeterminate sentence imposed by the trial court and in its place pass an appropriate determinate sentence which will better serve the objectives of sentencing.

39. Having taken into account all relevant factors including the appellant's apparent age, I set aside the sentence meted out by the trial court and substitute it with a sentence of ten years imprisonment which shall take effect from the date of sentence by the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 5TH DAY OF OCTOBER 2023.

C. W GITHUA

JUDGE

In the presence of

The Appellant

Mr. Kirubi for the appellant

Ms. Muriu for the respondent

Mr. Quinteen Court Assistant