Chepkwony v Republic (Criminal Appeal E039 of 2024) [2024] KEHC 15629 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E039 OF 2024

RE ABURILI, J

DECEMBER 5, 2024

BETWEEN

KELVIN CHEPKWONY .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal arising from the Judgment, conviction and sentence passed on 25th March, 2024 and 8th April, 2024 respectively by Hon M.N. Olonyi, Resident Magistrate in Tamu SPM SO Case No. E022 of 2023)

JUDGMENT

1. The appellant herein 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 on the 6th September 2023 within Kericho County intentionally caused his penis to penetrate the vagina of DC, a child aged 15 years.
2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.
3. When the charges were read out to the appellant, he pleaded not guilty and the case was set down for hearing. The prosecution called four (4) witnesses in support of its case. The appellant gave unsworn testimony denying the offence.
4. In her judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt and proceeded to convict the appellant and subsequently called for a presentence report which was filed on 4/4/2024. She considered the mitigations and the report and sentenced the appellant to serve 20 years' imprisonment.

5. Aggrieved by the sentence imposed, the appellant filed his petition of appeal dated 14th May 2024 raising the following grounds of appeal;

   a. That the sentence is manifestly excessive in view of the circumstances of the case.

   b. That the learned trial magistrate erred in both the law and facts by not admitting the doctor's evidence that exonerated the appellant from the offence.

   c. That the trial magistrate erred in both the law and facts by relying on evidence that was marred with contradictions and inconsistencies hence making the convict unsafe.

   d. That the learned trial magistrate erred in both the law and the facts by convicting the appellant with un-collaborated evidence which was also doubtful and the same should have failed.

   e. That the learned trial magistrate erred in both the law and facts by failing to make an independent opinion in the burden of prove as required in law.

   f. That I apply for a copy of Court proceedings to enable me raise more important grounds.

6. The appellant also filed supplementary grounds of appeal raising the following grounds:

   a. That the trial court erred in law and in fact in not declaring PW2 a hostile witness and that PW2 declaration as a vulnerable witness was unprocedural and an abuse of court process pursuant to section 31 SOA No. 3 of 2006 and section 307 CPC. Hence unfair trial.

   b. That the trial court erred in law and in fact in not making a finding that penetration was not proved beyond reasonable doubt.

   c. That the trial court erred in law and in fact in not making a finding that the age of the complainant was not proved beyond reasonable doubt.

   d. That the trial court erred in not delivering judgement.

   e. That the appellant's constitutional right envisaged in Article 50 (2) (j) was breached.

7. The appeal was canvassed by way of submissions.

The Appellant's Submissions

8. The appellant submitted that PW2 did not qualify to be treated as refractory witness under section 152 CPC and thus the court and prosecution were partial and at all sots used dubious means to gather support for the case. The appellant thus submitted that the tenets to a fair trial under Article 50 were breeched and infringed.

9. The appellant submitted that penetration was not proved as the DNA test excluded the appellant as the biological father of the child and the medical examination carried out on 16th July 2012 was too remote to connect the appellant to the defilement as it was carried out a year and 5 months after the incident.

10. It was submitted that the clinical officer did not express any opinion apart from not fresh torn hymen that the complainant was defiled 6 days continuously without a condom and further there was nothing to show that the complainant lost her hymen 6 days prior to the examination.

11. It was further submitted that the probation officer report showed that the complainant had another defilement case in court and as such the broken hymen could not be attributed to the appellant, the net effect being that the prosecution failed to prove penetration.

12. It was submitted that the complainant denied the birth certificate presented in court stating that she had her real birth certificate and that at this time she ought to have been declared a hostile witness.

13. The appellant further submitted that the testimony of PW2 was marred with contradictions and inconsistencies that were inconsequential to conviction specifically on the fact that she had never had sex prior to the incident yet the probation report and aftercare presentence report showed that the complainant had a prior defilement case.

14. The appellant submitted that the age of the complainant was in doubt resulting into a manifestly excessive sentence of 20 years as the complainant denied the Birth Certificate presented in court and wanted her own certificate.

15. It was further submitted that the birth certificate produced in court showed that the complainant was born on the 7th March 2008 while the incident happened on the 6th September 2023 thus the complainant was 15 years and 5 months and consequently the appellant's sentence ought to have been between 16 – 18 years.

16. The appellant submitted that from the evidence there was no judgement on record and further that his rights under Article 50 (2) (j) were breached as he was not given the statements of the prosecution witnesses.

The Respondent's oral Submissions

17. Mr. Marete Principal Prosecution Counsel for the State submitted opposing the appeal against conviction and sentence as all ingredients of the offence were proved beyond reasonable doubt. It was his testimony that the victim knew the appellant through his friend v and further that her age was similarly proved.

18. Mr. Marete testified that the doctor testified that the hymen was broken though not fresh. He further testified that the 20 years' imprisonment was lawful.

Analysis & Determination

19. The role of the first appellate court is now well settled as was stated in the case of Okeno v R [1977] EALR 32 and later in Mark Oiruri Mose v R [2013] eKLR among other many decisions that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

20. The evidence before the trial court was as follows: PW1, SS, the complainant's father testified that on the 6th September 2023 at 5pm he sent the complainant to get vegetables but she did not return so he reported the same and the complainant was found 6 days later in Kadeliba in the company of the appellant.

21. The complainant was PW2 and after being taken through a voire dire examination, she was found not to understand the meaning of an oath and thus she gave unsworn testimony. The complainant was subsequently stood down and eventually testified through an intermediary, her father PW1.

22. It was her testimony that on the material date, she had gone to get vegetables at the Centre and was in the company of her friend Ivy who was with one Victor. She testified that they left with Victor to his place where v called the appellant whom they went and met at the Centre after which she left with the appellant to his house where they ended up spending the night.

23. The complainant testified that she slept with the appellant and had sex. She testified on the clothes she and those that the appellant had and how the appellant removed her inner wear and how he had sex with her after which they slept. She testified that they stayed in the appellant's house for 6 days out of which they had sex for 5 days. When shown a copy of her birth certificate in court the complainant testified that she had another different birth certificate other than the one in court that showed that the date of her birth was the 5th. The complainant was then stood down.

24. The complainant was subsequently recalled and she reiterated her previous testimony. She testified that she had never met the appellant prior to the incident and further that the appellant professed his love for her severally during the time they were having sex and further that he promised to make her his wife. She testified that she was born on the 7th March 2008 and that the Birth Certificate in court was hers.

25. PW3 Kipyegon Alex Ngetich a Clinical Officer testified on a P3 and PRC form filled by his colleague regarding the complainant. It was his testimony that on examination, the complainant's hymen was not intact though it was not a fresh tear. He testified that the complainant's vagina did not have any laceration.

26. PW4 No. 105xxx PC (W)Rose Loye the investigating officer reiterated what the complainant had told her and testimony. She produced the complainant's Birth Certificate as P Exh 3.

27. In his defence, the appellant gave an unsworn testimony in which he testified that on the 12th September 2023 he met the complainant at a club and that the complainant wanted to have sexual relations with him and was claiming Kshs. 500 but he informed her that he had Kshs. 200. He testified that they eventually had sex and in the morning of 13th September 2023 when it was time to pay up, he offered the complainant Kshs. 200 which angered her and she went and reported the incident to the police and he was subsequently arrested. The appellant testified that the complainant undertook this business with her parents where they have someone arrested on allegations of defilement so as to extract money from the individual.

28. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:

    a. Whether the appellant's constitutional rights guaranteed by Article 50 (2) (j) of *the Constitution* was breached.

    b. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and

    c. Whether the sentence imposed was excessive and harsh or unconstitutional.

29. The appellant averred that his constitutional right envisaged in Article 50 (2) (j) of *the Constitution* was breached as he was not given copies of the statements of the prosecution witnesses.

30. Article 50(2)(j) provides: -

> " (2) Every accused person has the right to a fair trial, which includes, the right-(j)to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;"

31. This right was clarified by the Supreme Court of India in Natasha Singh v CBI[2013] 5 SCC 741 as follows:

> “Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized”.

32. The operative words in article 50(2)(j) are; “to be informed” and “to have reasonable access” to “the evidence the prosecution intends to rely on”.

33. According to Mativo J. in Joseph Ndungu Kagiri v Republic [2016] eKLR.

> “Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence. The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling *the Constitution* and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.”

34. The court record reveals that the appellant took part in the proceedings and even proceeded to carry out his defence by cross-examining the prosecution witnesses. The appellant cannot therefore turn around and tell this court that his right to a fair trial as far as being supplied with witness statements was concerned was violated which application he failed to make before the trial court and further, as explained hereinabove, the appellant was well conversant with the proceedings which he took part in.

35. Accordingly, I find that this ground of appeal remained unsubstantiated and is thus dismissed.

36. As to whether the prosecution proved its case beyond reasonable doubt, 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. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.

37. The appellant's identity is not in issue; he was properly identified by the complainant who went on to describe the manner of dressing that he had at the initial time they met.

38. Regarding the complainant's age, PW4, the investigating officer testified that the complainant was 15 years old. She produced a copy of the complainant's birth certificate as PEX 3 showing that the complainant was born on the 7th March 2008 meaning that by the time of the offence the complainant was 15 years 5 months old. The complainant also testified that she was born on the 7th March 2008.

39. In Kaingu Kasomo v Republic, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

40. Rule 4 of the Sexual Offences Rules of Court Rules is explicit that:

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

41. The Prosecution in this case produced the best evidence before the lower court to proof the complainant's age. That evidence cannot be faulted and was not controverted.

42. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified on how the appellant removed her inner wear and how he had sex with her after which they slept. She testified how the appellant kept on making her promises during that time that he wanted her to be his wife.

43. On his part the appellant did not deny having sex with the appellant but rather that the complainant charged him for the same and only reported the incident to the police after he failed to pay her the agreed amount of Kshs. 500.

44. Despite the appellant's own admission of having sex with the complainant, he faulted the trial court's failure to deem the complainant a hostile witness as prejudicial to his case and further impugned the trial court's use of an intermediary as being in breach of sections 31 and 32 of the *Sexual Offences Act*.

45. In the instant case, the victim gave unsworn testimony that the appellant was the one who defiled her. Furthermore, the prosecution prayed that she testifies through an intermediary, her father, which she did after the concept of intermediary was explained to him.

46. Under the *Sexual Offences Act*, the term "intermediary" means a person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness, and may include a parent, relative, psychologist, counselor, guardian, children's officer or social worker. The question is: was PW1 testifying in any of the capacities aforesaid?

47. The Court of Appeal in MM v Republic [2014] eKLR as cited in the Court of Appeal case in Nahashon Otieno Odhiambo v Republic [2019] eKLR explained that:

> " The role of an intermediary is provided for in subsection 7 of section 31 namely, to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed; and to request the court for a recess. It is difficult for a child or indeed a victim of a sexual attack to publicly relive the most traumatic and humiliating

experience of their lives in order to get justice, more so, if they have to be subjected to the rigors of daunting and intimidating cross- examination. The thinking behind the enactment of section 31 was, in our view, to moderate these traumatic effects in criminal proceedings. It is clear from sections 31 (2) and 32 that, first and foremost it is the duty of the prosecution to ascertain the vulnerability of the witness and to apply to the court to make that declaration before appointing an intermediary. In addition, the court, as we have earlier observed, can on its own motion, through voir dire examination, declare a witness vulnerable and proceed to appoint an intermediary. Any witness (other than the one to be declared vulnerable) can likewise apply to the court for the declaration. The application must not be granted merely because the victim is young or too old or appears to be suffering from mental disorder. The court itself must be satisfied that the victim or the witness would be exposed to undue mental stress and suffering before an intermediary can be appointed."

48. In practice, an intermediary may be an expert in a specified field or a person who, through experience, possesses special knowledge in an area, a social worker, a relative, a parent or a guardian of the witness. An intermediary is a medium through which the accused person or complainant communicates with the court. In my understanding, the evidence to be presented is not that of the intermediary himself or herself but that of the witness relayed to court through the intermediary.

49. The intermediary's role is to communicate to the witness the questions put to the witness and to communicate to the court the answers from the victim to the person asking the questions, and to explain such questions or answers, so far as necessary for them to be understood by the witness or person asking questions in a manner understandable to the victim, while at the same time according the victim protection from an unfamiliar environment and hostile cross- examination; to monitor the witness' emotional and psychological state and concentration,; and to alert the trial court of any difficulties.

50. I am satisfied that PW1 testified as an intermediary of the complainant. I see no error with the testimony so far.

51. Further the appellant impugned the complainant's testimony on account that it was not corroborated or backed by medical evidence.

52. From this evidence, the only evidence connecting the Appellant to the act was that of the Complainant since there was no independent eye witness evidence adduced. It is not in doubt that the evidence of a minor requires corroboration and in this regard the Court of Appeal in Bernard Kebiba vs. Republic [2000] eKLR stated that:

> "The law on corroboration in sexual offenses is not in dispute any more in our courts. There is requirement for corroboration in all sexual offenses. It is however, a rule of practice only. Though a strong rule of practice, it has not acquired the force of law. In appropriate circumstances, where the trial court is satisfied that the complainant is speaking nothing but the whole truth, the court may convict without corroboration. In such a situation however, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where, however, the court feels that there is need for corroboration, the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary, the benefit of doubt must be given to the accused and acquittal must result."

53. It is therefore clear that corroborative evidence or material ought to confirm, ratify, verify or validate the existing evidence and must emanate from another independent witness or witnesses. It must affect the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

54. In this case there was clearly no material corroborating the Complainant's testimony. That however, is not the end of the matter. In sexual offences, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, found a conviction. Section 124 of the *Evidence Act* makes this quite clear:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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." [Emphasis added]

55. As earlier stated, it is not lost on this court the appellant's own testimony that he had sex with the victim but that they disagreed on payment of the same.

56. The evidence adduced clearly shows that penetration was proved beyond reasonable doubt and I hold as so.

57. Further, I have considered evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged by the appellant in his appeal. I therefore find no material contradiction in the evidence adduced by the prosecution witnesses. In any case, the Court of Appeal in the case of Richard Munene v Republic [2018] eKLR stated as follows on contradictions in evidence:

> 'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'

58. Accordingly, in this case, I find that the assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. I therefore find that the prosecution proved the element of penetration beyond reasonable doubt.

59. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 and that the conviction of the appellant for the said offence was sound.

60. As to whether the appellant's sentence was excessive and harsh as submitted, in Alister Antony Pariera v State of Maharashtra, as cited in the case of Margrate Lima Tuje v Republic [2016] eKLR the court held that:

> 'Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

61. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term not less than 20 years.

62. The principle laid down by the Supreme Court Francis Karioko Muruatetu & Another v Republic [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with *the Constitution*. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which are a mandatory minimum should also be considered unconstitutional on the same basis. See Jared Injiri Koita v Republic [2019] eKLR.

63. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of *the Constitution*. See Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and Jared Koita Injiri v Republic, KSM CA Criminal Appe84567890al No 93 of 2014 [2019] eKLR

64. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated interalia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court.

65. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory. This is further backed by the recent Supreme Court decision in Republic v Joshua Gichuki Mwangi v Republic [2024] e KLR.

66. In his mitigation, the appellant stated that he was the eldest in his home and that her family depends on him for upkeep. He further testified that his younger siblings also rely on him and as such he sought forgiveness. Taking into consideration all the above, I find that the sentence imposed on the appellant was lawful and not unconstitutional.it is upheld.

67. The upshot of this is that I find that this appeal lacking in merit save that as the appellant was in custody from the time of arrest to sentencing, I invoke the provisions of section 333(2) of the Criminal Procedure Code and order that the 20 years imprisonment shall be calculated from the date of arrest on 14/9/2023 according to the charge sheet dated 18/9/2023

68. Signal to issue.

69. The lower court file to be returned forthwith.

70. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE