



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R MWONGO, J)

CRIMINAL APPEAL NO. 7 OF 2018

PETER CHARAGO.....APPELLANT

VERUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the Original Conviction and Sentence of 25/10/2013 in Criminal Case No 1822 of 2012 in the Chief Magistrate's Court, Naivasha, (R. Riary –RM)

JUDGMENT

Background

1. The appellant herein appeals to this court on the following grounds:

- 1. That the learned trial magistrate erred in fact and in law when she convicted the appellant yet failed to appreciate section 42 of the sexual offences act no. 3 of 2006.***
- 2. That the learned trial magistrate erred in fact and in law when she acted on irregularly conducted trial which was shoddy and unable to sustain a conviction.***
- 3. That the learned trial magistrate erred in fact and in law when she convicted the appellant yet failed to analyze the defense alongside the prosecutorial evidence as required of her thus she was not fair which left the appellant prejudiced.***
- 4. That the learned trial magistrate erred in fact and in law by not analyzing the defense alongside prosecutorial evidence in order to come up with her finding.***

2. The appellant had been charged with the offence of defilement contrary to section 8(1) as read with **section 8(4)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the 26th day of June 2012 at Songoroi area Gilgil in Nakuru County, he intentionally and unlawfully caused penetration of his genital organ (penis) into the genital organ (vagina) of R A a child aged sixteen years. In the alternative, he was charged with the offence of indecent act contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the latter offence were that on the 26th day of June 2012 at Songoroi area Gilgil in Nakuru County, the accused intentionally and unlawfully caused penetration of his genital organ into the genital organ of R A a child aged sixteen years.

3. After a full hearing, the trial magistrate found the accused guilty under the defilement charge and convicted him to 15 years in prison. He was acquitted the accused under the alternative charge of indecent act with a child.

4. Briefly, the facts are that the appellant and the complainant were found in the house of the appellant, her teacher, on the night of 26/6/2012, allegedly having sex. She said she was born on 23/10/1995, meaning that she was sixteen years old at the time of the alleged offence. At the time the complainant testified on 20//8/13 she was two years shy of eighteen. She admitted that she was the appellant's girlfriend and had on that day had sex with the appellant. She also stated that she had had sex with him on two occasions before that day. That the first time she had sex with him, she testified, he had removed her from school and she was in her uniform. According to her, it was the appellant who broke her virginity.

5. PW1, the complainant's father, found the complainant missing at about 10.00pm on the material night. It was not the first time she had gone missing. He eventually went to the centre to ask her classmate and as he was passing the appellant's house he heard her voice. He went to the door and he closed it using shutter. He led the school chairman and other neighbours and they went into the house. They found the complainant, dressed, and seated on the bed.

6. PW4 Sgt Pamela Otieno testified that she was called to Eburu Patrol Base where she found the appellant and complainant in cells. She took both of them to the police station and thereafter to hospital. She noted that as they were headed to the police station after arrest, the two were laughing together, sharing food and acting like a couple. During interrogation, the complainant kept calling the accused sweetheart and boyfriend.

7. PW5, Dr. George Ngari, of Gilgil Hospital produced the P3 form on behalf of his colleague. It showed that the external genitalia were normal, there were no bruises or lacerations on vagina, no sperm were seen. However, the hymen was torn. He also produced the PRC form which also showed that the hymen was missing. The complainant's birth certificate was produced as Exhibit 1, the P3 form as Exhibit 2 and the PRC form as Exhibit 3.

8. In his defence the appellant testified that the complainant visited him at about 9.15 on the material night when he heard a knock on his door, and found the complainant there. He gave her a seat and asked her what she wanted at night, but she did not answer. After about ten minutes he heard knocking on his door and as he tried to open it he found it had been locked from the outside. He asked the people to open the door but they refused. After about two hours, the father came to the house and he and the complainant were arrested and taken to hospital. He denied that he defiled the complainant. He also asserted that none of the evidence available proved that he had defiled the complainant.

9. Upon considering the appeal and the submissions, the issues which arise in this appeal are as follows:

- a. Whether the complainant consented or could consent to the sexual act in terms of **section 42** of the **Penal Code**
- b. What are the consequences of failure to conduct a *voire dire* examination in this case
- c. Whether the amendment of the charge sheet and failure to advise on right to address court constituted an abrogation of the accused's right to fair trial
- d. Whether the trial magistrate adequately considered the evidence of the appellant

Consent

10. The appellant's argument was that the complainant acted as an adult and that that is a defence in the case of defilement. He further argues that court concluded that the complainant was an adult by putting on record the words 'PW2 adult female states in Swahili.' He relies on **Martin Charo v Republic [2016] eKLR** where the court held that the child behaved as an adult and therefore the accused person should not have been found culpable. He does not contest the age of the complainant, he just states that the complainant acted as an adult.

11. He also raised the issue of consent and submitted that the complainant willingly engaged in sexual intercourse with him. She went to his house voluntarily, and there was no evidence that she was coerced in any way. He urged the court to take this into account.

12. It is now well established that the age of the complainant is a critical ingredient in the offence of defilement, and must be proved beyond reasonable doubt. In **Stephen Nguli Mulili v Republic [2014] eKLR** the Court of Appeal clarified and distinguished the proof of age for purposes of establishing that the complainant as a victim below the age of 18 years and proof of age for purposes of sentencing. The legal position is clearly that the offence of defilement is committed once it is established that there was an act of penetration or partial penetration with the victim who is below the age of 18 years.

13. The law presumes that a child being one who is below the age of 18 years is incapable of giving consent to sex. Thus, in the offence of defilement, consent cannot be used as a defence. In **Luka Waithaka Ndegwa v Republic [2017] eKLR**, R. Lagat-Korir, J. stated,

"I do not agree with the Martin Charo case that the conduct of the child is relevant to the offence of defilement. Children are among the vulnerable members of our society by reason of their age, their inability to protect and provide for themselves and also are unable to appreciate dangerous situations. It is for these reasons that the law presumes that they are incapable of consenting to sexual intercourse. In enacting this provision, the legislature was only discharging its duty to act in the best interest of the child.

Therefore once it is proved that the complainant was below the age of 18 years the offence is completed and it is immaterial that she or he consented to sex. The defence afforded by section 8 (5) of the Sexual Offences Act does not refer to consent, but rather to reasonable belief that the complainant was above the age of majority. Counsel relied on Section 8 (5) of the Act which provides that:-

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.

Section 8 (6) of the Sexual Offences Act states as follows:

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

That she consented to the sexual intercourse is not sufficient to exonerate the appellant of the offence. It is not the consent of the child that exonerates the appellant from the offence but the reasonable belief that she was above the age of majority therefore capable of consenting, and the evidence of steps taken to establish this fact. There was no evidence of any steps that the appellant took to ascertain the age of the complainant. This ground of appeal must fail.

14. Unless there is proof that the complainant deceived the appellant, any sexual act between the two is treated as non-consensual sex and therefore amounted to defilement, as the complainant was a child under the age of 18 years and incapable of giving consent in law. Even where a minor behaves like an adult, the law still recognizes that person as a child.

15. The above issue closely ties in with the following issue concerning whether the trial court adequately considered the defence evidence, to which I now turn.

Whether the trial court adequately considered the evidence of the appellant

16. The appellant's case is that he did not defile the complainant. His evidence was that he was innocently talking with the complainant on the material night. The trial magistrate at page 29 of the record, set out the appellant's defence.

17. At pages 30-31 of the record, the trial magistrate analysed the evidence as follows:

“The minor is found at the accused's place at night. The person who is his teacher. The minor says accused was her lover but she denies this. Though prosecution witnesses talked of 10.00pm accused talked of around 9.15pm, still, at 9.15pm, it was late. When minor arrives, he questions her but the next thing, he gives her a seat. The father says that he had been looking for the minor since 10.00pm. That notwithstanding, accused informed the court that the father arrived ten minutes after offering the minor a seat. What were they doing through this time before the father arrived? The minor alleges that she was defiled by the accused who was her lover. The circumstances of the case are questionable. It is obvious that the accused was not offering the minor any school lessons during this time. The medical evidence i.e. the PRC form, treatment notes and P3 form do confirm that the minor was defiled and no force was involved.

Though the minor stated that the accused was her boyfriend, the accused denied it but their conduct after arrest revealed otherwise. They were literally behaving like a couple with the minor calling her boyfriend.if this was not the position then the accused would have behaved otherwise. This even explains why no force was involved. It clearly comes out that the two were having an affair”

18. In my view, this analysis makes sense and the conclusion reached is reasonable. In her cross examination, the complainant said that the appellant had sex with her but it was not a routine for her to come to his place. That he was her boyfriend and teacher. That she came to his place as he had told her that evening when she was coming from school, so as to make love. That he never asked her age.

19. The appellant did not deny that he was the complainant's teacher. He had been entrusted with the safety and educational mentorship of PW1 as her teacher. Instead, he entertained her for a visit in his house late at night, and from the medical evidence, he instead took advantage of his role and became a predator. In this case, the learned trial magistrate was correct to find the appellant guilty.

Absence of a Voir dire examination

20. The appellant argues that it was a gross error for the court not to conduct a *voir dire* examination of PW2 since she was a child of tender years. In **Shaban Mutua Kiptui v Republic [2017] eKLR** the question arose as to who is a child of tender years. The court stated:

“The Sexual Offences Act and the Oaths and Statutory Declarations Act are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap KolilvR(1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase “a child of tender years” meant a child under the age of 14 years. The only statutory definition of a “child of tender years” is section 2 of the Children Act where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick KathurimavR, Criminal Appeal No.137 of 2014 and in Samuel Warui KarimivR Criminal Appeal No.16 of 2014 stated categorically that the definition in the Children Act is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. 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.”

21. Thus the position is that the complainant was not a minor of tender years, defined as a child below fourteen years of age, since it was proved by her birth certificate that she was aged sixteen years at the time of the incident. Accordingly, there was no legal requirement for her to undergo a *voir dire* examination.

Ambush by amending defective charge sheet and failure to advise on right to address court

22. The last two grounds are combined as they are on alleged procedural defects. The appellant argues that firstly, the prosecution ambushed the appellant by amending the charge sheet without informing him. Secondly, that the trial magistrate failed to accord the appellant a fair hearing by not informing him that he had a right to address court after the close of both the prosecution case and his case. Thirdly, that on account of the magistrate stating after the prosecution case that a prima facie case had been established and putting the appellant on his defense, this shows that the magistrate's mind had been predetermined on the guilt of the appellant.

23. On the first concern, the amendment of the charge sheet which the appellant complains of is one made on the brief circumstances of the

case in the alternative charge. The amendment itself is the cancellation of the date of the incident indicated there as 27th June 2012 to read 26th June 2012. I note that the charge with which the appellant was convicted is that of defilement. Nothing therefore arises from the amendment, and no prejudice was suffered by the appellant.

24. With regard to the complaint that the appellant was not informed of his right to address the court after the close of the prosecution and defence cases, **section 213 CPC** provides:

“The prosecutor or his advocate and the accused and his advocate shall be entitled to address the court in the same manner and order as in a trial before the High Court”

25. From the above provision, it is clear that the parties in a criminal trial have a statutory right to address the court at the close of their respective cases. However, there is nothing in the provision that places a statutory obligation on the court to notify the defence or prosecution of the right to address the party. In my view, whilst it is clear that it would be good practice for the court to advise unrepresented litigants of this right, the court’s failure to advise a party of such right cannot be deemed as a denial of the right.

26. With regard to whether or not a prima facie case had been made out and whether in expressing such position the trial magistrate was biased: it is the statutory responsibility of the court to determine and state whether or not a prima facie case has been made out. That responsibility is placed on the court to protect defendants in criminal cases from undergoing an unnecessary full trial where the prosecution’s evidence is insufficient to require a response from the defendant.

27. A prima facie case in a criminal matter is defined from the principles in the landmark case of **R.T. Bhatt v Republic [1957] EA 332 – 335** where the Eastern Court of Appeal stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one, which on full consideration might possibly be thought sufficient to sustain a conviction. This is perilously near suggesting that the court will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere scintilla of evidence can never be enough, nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a prima facie, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

28. In examining similar situations like ours the English Court in **Republic v Prazad [1979] 2A CRIM R 45 King CJ** held the very same standard on a prima facie case:

“I have no doubt that a tribunal, which is judge of both law and fact, may dismiss a charge at any time after the close of the case for the prosecution, notwithstanding that there is evidence upon which the defendant could lawfully be convicted, if that tribunal answers that the evidence is so lacking in weight, and reliability that no reasonable tribunal could safely convict on it.”

29. In a persuasive authority decided by a Malaysian Court in **PP v Dato Seri Anwar bin Ibrahim No. 3 of 1999 2CLJ 215 at pgs 274 – 275** Augustine Paul J made the following succinct observations on prima facie cases:

“A prima facie case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence, must be such that, if rebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.”

30. The Federal Court of Malaysia also delved into the discussion on a prima facie case and interpretation of section 180 of the Criminal Procedure Code in the case of **PP v Mohamed Radzi bin Abu Bakar [2005] 6MLJ 399**. The court set out guidelines for the trial court at the close of the prosecution case as follows

(i) The close of the prosecution case, subject the evidence led by the prosecution in its totality to a maximum evaluation, carefully scrutinize the credibility of each of the prosecution’s witnesses. Take into account all reasonable inferences that may be drawn from the evidence if the evidence admits of two or more inferences, then draw the inferences that is most favourable to the accused.

(ii) Ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent, I am/prepared to convict him on the evidence now before me? If the answer to that question is YES, a prima facie case has been made out and the defence should be called. If the answer is NO, a prima facie case has not been made out and the accused should be acquitted.

(iii) After the defence is called, the accused elects to remain silent, then convict.

(iv) After defence is called, the accused elects to give evidence, then go through the steps set out in May v Public Prosecutor [1963] (MLJ 263). In this case in our Kenyan situation the trial court should proceed by calling the accused to defend himself by electing on any of the steps laid down under section 306(2) as read with section 307 of the Criminal Procedure Code.”

31. Applying the above principles, it is clear that courts must, in accordance with section 307 of the CPC, declare whether or not the prosecution has made out a prima facie case before putting the accused on his defence. I therefore cannot agree with the appellant that the trial Magistrate already had a preset mind against the appellant. The Magistrate followed the procedure laid down in the law, analyzed the evidence on record and found that a prima facie case had been established. Further, the appellant was allowed to address court after prosecution case by giving his defence and also given a chance to mitigate during judgment.

32. Accordingly, the trial magistrate cannot be faulted as the trial was properly conducted.

Disposition

33. Having considered all the appellant's grounds of appeal, and also having carefully reviewed the evidence on record, I find that on the basis of the available evidence, the learned magistrate correctly convicted the appellant.

34. Accordingly, the appeal is dismissed.

35. Orders accordingly.

Dated and Delivered at Naivasha this 7th Day of March, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Peter Charago Appellant in person
2. Mr. Koima for the State
3. Court Clerk - Quinter Ogutu