



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 211 OF 2013

D K M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the conviction and sentence of M.K. Mwangi (PM) in Machakos CMCR. No. 29 of 2009 on 17th July, 2013.)

JUDGEMENT

1. The appellant was on 17th July, 2013 convicted and sentenced for 10 years imprisonment for the offence of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. Aggrieved by the said judgment, the appellant filed this appeal on the following grounds:

a) That the alternative charge giving rise to the conviction was equally flawed and/or defective in particulars.

b) That the trial court erred substantially in proceeding with the case in the absence of the appellant's lawyer an injustice against the appellant.

c) That following appellant's lawyer's absconding, the trial court further erred in law and substance by failing to invoke Constitutional Article 50 (2) (h) pertaining to legal services.

d) That the evidence adduced by the witnesses were full of contradictions, inconsistencies and fabrications hence should not have been relied upon as a basis of the appellant's conviction.

2. The Appellant faced the charge of incest by male contrary to section 20 (1) of the Sexual Offences Act No. 3 of 2006 ('**the Act**'). The particulars were that the appellant on 28th July, 2009 in Machakos District within Eastern Province, intentionally and unlawfully penetrated the vagina of E.M. a child aged 4 years with his penis who was to his knowledge his niece.

3. He faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars were that the appellant on 28th July, 2009 in Machakos District within Eastern Province, intentionally and unlawfully touched the vagina of E.M. a child aged 4 years with his penis.

4. This is a first appeal. This court is thereby under duty to re-consider and re-evaluate the record afresh and arrive at its own independent conclusion. See: **Kiilu and Another v. R (2005) 1 KLR 174.**

5. The Appellant's Appeal is premised on three issues which I shall address seriatim. First, that the alternative charge giving rise to the conviction was flawed and/or defective in particulars, secondly, that his trial in the absence of his advocate was unjust and that he was convicted on contradictory, inconsistent and fabricated evidence.

6. The Appellant submitted that the particulars of the alternative charge are substantially at variance with the evidence adduced. That the words intentionally and unlawfully are not factored in the said particulars as provided for in section 6 of the Sexual Offences Act. That besides the particulars, the evidence adduced cannot sustain a conviction of indecent act of touching private parts as phrased. In that regard, the appellant cited **Sigilani v. Republic (2004) 2 KLR 480:**

“The principle of the law governing charge sheet is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.”

and in **Erro Oba v. Republic, Nakuru Criminal Appeal No. 11 of 2008** the court held as follows:-

“This appeal turns on whether the appellant who was charged and tried on a defective charge should be set at liberty since the charge drawn did not disclose any offence known in law. Section 3 (i) of the Sexual Offence Act provides as follows...In this particular case the charge as drawn by the prosecution is defective.”

7. The Respondent on the issue submitted that crimes committed under the Act carry strict offences depending on the age of the child the meaning assigned thereto in the Children Act No. 8 of 2001. That section 2 of the Children Act defines a child as any human being under the age of 18 years. That it therefore means that any charge under the Act must of necessity specify the age of the victim for purposes of sentencing. That it must be established by evidence that the victim of a sexual offence falls within the meaning of ‘child’ as defined in the Children Act, 2001. That section 2 of the Sexual Offences also defines indecent act to mean an unlawful act and which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration. Acknowledging the holding in **Sigilani** case (supra), the respondent stated that section 134 of the Criminal Procedure Code provides for what the ingredients of a charge sheet constitute, that from the onset, the appellant knew that the charge he was facing was that of incest with an alternative charge of indecent act with a minor. That the particulars were clearly spelt out including the date and place of offence and the act constituting the offence and the name of the victim. It was submitted that the mere omission of the definition section in the statement of the charge would not render the charge sheet defective. That such an omission is curable under section 382 of the Criminal Procedure Code. The Court of Appeal in **Peter Ngure Mwangi v. Republic [2014] eKLR** addressed the issue of a defective charge sheet when it held that there are two factors to be considered. One, whether or not the charge sheet is indeed defective and two, whether or not even with such defect justice could still be met. The substantive law on a defective charge sheet is section 134 of the Criminal Procedure Code. The said section provides:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

Assessment of fatality or otherwise of a charge sheet was addressed in **Yosefu v. Uganda [1969] E.A. 236** and **Sigilani Vs. Republic [2004] 2 KLR 480**. The court in both cases were of the view that a charge is fatally defective if it does not allege an essential ingredient of the offence. The respondent acknowledged that omission of the definition section in the charge sheet. It follows therefore that the charge sheet is defective. Section 382 gives guidance on whether even with such defect justice could still be met or whether the defect is curable. Section 382 of the Criminal Procedure Code provides:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings.” (Emphasis mine).

8. Applying the test above, the appellant participated in his trial in a manner to suggest he understood the charge. He cross examined the witnesses well which is an indication that he understood the particulars of the charge he faced. Further, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective. He in the circumstances cannot be said to have been prejudiced. This ground thereby fails.

9. On the issue of legal representation, the appellant submitted that as per the records, the appellant was represented by a lawyer from September, 2009 until February, 2013 when the said lawyer absconded. That the appellant was subsequently coerced to participate in the trial process in spite of the fact that he was unrepresented. That the appellant was in effect denied an opportunity of fully participating in the said trial because of ignorance, illiteracy and unpreparedness. That the appellant due to the said reason did not cross examine PW7, the doctor and did not give evidence in his defence. That the trial records did not indicate whether the court was cognizant of the lawyer’s absence and if the same in any way undermined the appellant’s trial.

10. The Respondent on the other hand submitted that under the Constitution, the state funded legal representation is a right in certain instances. That while Article 50 (1) of the Constitution provides that an accused shall have an advocate assigned to him by the state and at state expense, if substantial injustice would otherwise result, the said substantial injustice is not defined. That the provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6) of the Constitution therefore the provisions of ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. The respondent was of the view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. In view of the foregoing argument, the respondent submitted that absence of the advocate did not occasion the appellant substantive injustice as alleged.

11. The Court of Appeal in **Karisa Chengo, Jefferson Kalama Kenghak Kitsaq Charo Ngati v. Republic [2015] eKLR** while addressing the issue of legal representation cited **David Macharia Njoroge v. Republic [2011] eKLR** where it was held:

“State funded legal representation is a right in certain instances Article 50 (1) provides that an accused shall have an advocate assigned to him by the State, at the States expense, if substantial injustice would otherwise result. Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where ‘substantial injustice

would otherwise result,' persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a retrial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly, every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

The Court of Appeal added:

"Substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

12. The instant matter is distinct from those in the cited cases. It is crystal clear that the appellant here did not face a capital offence and Article 50 (1) of the Constitution cannot apply to him. That ground therefore fails.

13. Another ground which the appellant raised but was not submitted on by the appellant was that he was convicted on contradictory, inconsistent and fabricated evidence. The appellant submitted that there were contradictions in the evidence of PW1, PW3 and PW7. That PW1 stated that she never saw any blood on E.M. and never saw anything on her pants. That there was no discharge and she did not see any wound. That PW3 stated that E.M. had wetness in her vagina. That there was no blood stains but she saw sperms on E.M and PW7 stated that E.M. had traumatized vagina wall with bruises, hymen was torn and damaged, foul smelling discharge was oozing and urine test had pass cells. He proceeded to place reliance on **Dinkeraal Ramkristian Pandya v. Republic** and **Charles Kibara Muraya v. Republic Nyeri Criminal Appeal No. 33 of 2001**. From an analysis of the evidence of the three witnesses, I find that the difference or inconsistency in their evidence does not change the material fact that E.M.'s hymen was broken and that her vagina was bruised and further that the same were occasioned by the Appellant's indecent act on the minor. The Appellant's defence did not shake the prosecution evidence in any way. In this regard I borrow the holding of Justice Mativo in **Cyrus Maina Gakuru v. Republic [2016] eKLR** where he held:

"The prosecutions counsel in her written submissions urged the court to uphold both the conviction and sentence. In the lower court, the prosecution called a total of eight witnesses whose evidence is summarized below. PW1, who was the complainant narrated how the complainant raped her. PW2 informed the court that PW1 informed her that she was raped by the appellant while PW3 a brother to the complainant testified that he was informed of the alleged rape by PW2. PW7 is the Doctor who produced the P3 form. The evidence of this witness is crucial because she stated "on clothing, the undergarments were blood stained" which contradicts sharply with the contents of exhibit no 5 which was a document prepared by the government analyst dated 18 June 2014. This report concluded that:

(i) The pant was not stained with blood, semen or spermatozoa.

(ii) The underwear was not stained with blood.

(iii) The vagina swab was not stained with semen or spermatozoa.

(iv) The DNA profiles generated from the blood samples are tabulated at the end of the report.

14. The evidence of the doctor confirmed that indeed there had been some indecent act upon the minor. The evidence of all the witnesses was well corroborated and established the offence of indecent act upon a child as preferred against the Appellant. I find the trial court had properly convicted the Appellant on that alternative charge as the evidence was quite sound. Accordingly that ground fails.

15. The upshot is that this appeal lacks merit and is hereby dismissed.

Orders accordingly.

Dated and delivered at Machakos this 7th day of March, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

D K M - the Appellant

Machogu - for the Respondent

Kituva - Court Assistant