



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 78 OF 2017

LUCIA KASISA MULINGE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from the judgment, conviction and sentence of Honourable E. Agade (Ms) RM on the 30/10/2015 in Kangundo SPM's SO case nos. 16 of 2015)

BETWEEN

REPUBLIC.....COMPLAINANT

VERSUS

LUCIA KASISA MULINGE.....ACCUSED

JUDGEMENT

1. The appellant, **Lucia Kasisa Mulinge**, was charged in the Senior Principal Magistrate's Court at Kangundo in Sexual Offences Case No. 16 of 2015, with 2 Counts, both of which were in respect of the offence of Benefiting from Child Prosecution Contrary to Section 15(a) of the **Sexual Offences Act**. The particulars of Count 1 were that on diverse months of May and November, 2015 at Kanzalu Location in Kangundo District within Machakos County, the appellant knowingly permitted MNT, a child aged 17 years to remain in her house to be sexually abused while the particulars of Count 2 were that on diverse years between the year 2013 and 2015 at Kanza Location in Kangundo District within Machakos County, the appellant knowingly permitted NWM, a child aged 15 years to remain in her house to be sexually abused.

2. Pursuant to the provisions of section 179 of the **Criminal Procedure Code**, the appellant was convicted of the offence of exploitation of prostitution contrary to section 17 of the **Sexual Offences Act** and was sentenced to serve 5 years in custody.

3. Aggrieved by the conviction and sentence the appellant lodged this appeal based on the following grounds:

1. **The Learned Trial Magistrate erred in law and fact and misdirected herself in convicting the appellant in the absence of medical evidence.**
2. **The Learned Trial Magistrate erred in law and fact and misdirected herself in amending the charge sheet at the time of writing judgement and without giving either the prosecution or the appellant a chance to be heard on the said amendment.**
3. **The Learned Trial Magistrate erred in proceeding to convict the appellant on an offence other than that charged outside the provisions of the applicable law.**
4. **The Learned Trial Magistrate erred in law and fact and misdirected herself in failing to make a finding on the truthfulness of the complainants.**
5. **The Learned Trial Magistrate erred in law and fact and misdirected herself in convicting the appellant while relying on the uncorroborated evidence of the complainants.**
6. **The Learned Trial Magistrate erred in law and fact and misdirected herself in convicting the appellant on a charge which was not proved to the required standard.**

7. The Learned Trial Magistrate erred in law and fact and misdirected herself in disregarding the appellant's mitigation.

4. According to PW1, **N W**, she used to work for the appellant as a farm hand where she lived for two years between 2014 and 2015. According to her on one occasion after she spent the night at the appellant's farm, her father ordered her to return where she had come from, upon which the appellant asked her to stay there in order to avoid issues at home. According to the witness, they were five girls, having found the other girls there and the appellant used to bring them men to sleep with. She identified one of the girls as **N**. According to her, the men would come daily both during the day and at night she used to sleep with the men during the night and they would be paid Kshs 200 by each man which would be received by the appellant. It was however her evidence that the appellant threatened that she would kill them if they revealed the goings-on. The witness testified that as a result she got pregnant in the 1st year but was assisted to abort by the appellant. Thereafter she continued in the said transaction till 2015 during which period she slept with several men including the appellant's husband's brother who made her pregnant. It was her evidence that the attempts to have her rescued by her mother were thwarted by the appellant.
5. PW2, **M W**, was the father of PW1. According to him, PW1 stayed with the appellant since 2013 when she was 15 years old after having problems in attending school. Upon learning that PW1 was staying with the appellant, he attempted to intervene but the appellant would abuse him. According to him, the appellant was married in the same home as his daughter. At one point he reported the matter to the village elder and PW1 was removed from the appellant's home but she returned there. By the time PW1 was finally removed therefrom she had gotten pregnant and the appellant had assisted her procure abortion. According to PW2, PW1 and other girls called **N T** and **M N** used to loiter at night and go to drinking clubs and attempts by PW2 to take her home were fruitless as she would run to the appellant's home. However his attempts to rescue PW1 were meant by threats and insults from the appellant.
6. PW3, **Richard Zakayo Munyao**, was the village elder. According to him, on 8th November, 2015, he was called by PW1's sister, **N** who informed him that PW1 had administered an oath against her after the sister inquired about PW1's stay with the appellant. Upon being informed that PW1 was staying with the appellant but would go to Musyoki's home at night he went to Musyoki's home at 6.00am where he found PW1 and took her to the police station where PW1 informed the police that the appellant was procuring them to engage in prostitution.
7. PW4, the area assistant chief testified that on 9th November, 2015 at around 19.37 hours she received a call from PW3 who informed her that someone would be taken to her with allegations of having sworn a traditional oath. The following day when PW3 called, W4 informed him to take the person concerned to the Chief's camp where she would be received by officers there. Accordingly she instructed the said officer to detain the person pending her arrival. According to her PW3 was in the company of PW1 and upon PW4's arrival she interrogated PW1 about the oath who informed her that her sister had denied her, her sweater. PW4 ordered them to settle the matter in accordance with the Kamba culture.
8. However PW1's mother went and raised concerns regarding PW1's stay with the appellant. Upon interrogation, PW1 disclosed that the appellant had procured them to engage in sex with other men. At that time it was PW4's evidence that PW1 was about 20 years and had been living with the appellant for three years. PW1 disclosed that the appellant had assisted her in aborting her pregnancy.
9. According to **M N T**, PW5, on 10th November, 2015 her mother sent her to the police but she was unaware of the reason. Apart from knowing the appellant as a hairdresser she did not reveal anything else. Due to her behaviour, PW5 was declared a refractory witness pursuant to section 152(1)(b) of the **Criminal Procedure Code**. She was accordingly detained in custody for three days.
10. Upon the resumption of the hearing the witness testified that in May 2015 the appellant called her at her home whereby PW5 found two men one of whom the appellant requested PW5 to take but PW5 declined. The following day the appellant again called her and told her to sleep with the men and though she initially declined, after being scolded by the appellant she accepted to do so. She disclosed that on both occasions she was with PW1. According to her the said men gave the appellant Kshs 200 for each of them. This transaction continued for three months. It was her evidence that they were never paid and that the appellant only used to give them food. She confirmed that PW1 got pregnant during that period and at the time of her testimony, PW1 had a child. She reiterated that the appellant forced them to sleep with the men the first day and that different people used to come on different days.
11. PW6, Cpl **Susan Kwach**, was the investigating officer. According to her on 10th November, 2015 at around 1400 hours she was at the police station when PW1 and her mother and informed her that they had been sent to her by the Chief. The mother informed her that PW1 had stopped going to school and had been introduced into prostitution by the appellant. At the time of the said engagement, PW1 was 15 years though at the time of the report she was 18 years. According to the witness, PW1 narrated her version in the manner in which her testimony was made in Court. She then got hold of PW5 who also narrated substantially what she told the trial Court. According to her PW1 and PW5 were apprehensive of their lives and as a result PW5 became evasive and went into hiding for fear of the appellant.
12. At the close of the prosecution case, the appellant was placed on her defence. She however opted not to call any evidence and was contented to keep quiet and to await the decision of the Court.
13. In her judgement, the learned trial magistrate found that apart from what was disclosed in the charge sheet there was no evidence of PW5's age. In this case the Court relied on **Dominic Kibet vs. Republic Criminal Appeal No. 155 of 2011** and found that the age was not conclusively proved. The Court however found that the appellant forcefully nudged PW5 to sleep with the men and got paid as a result thereof.
14. The Court having found that the age of PW5 was not proved proceeded to find that as the other elements were proved, the appellant was guilty of the offence under section 17 of the **Sexual Offences Act** and convicted the appellant accordingly.
15. It was submitted by the appellant that there was no medical evidence adduced by any of the said minors that they had been examined by a doctor or that there was any evidence of sexual activity found. As rightly held by the learned trial magistrate, the ingredients of an offence under section 15(a) of the **Sexual Offence Act** are whether the complainant is a child; whether the complainants were forced to remain in any premises; and whether the purpose of remaining therein has caused the child to be sexually abused or to participate in any form of sexual

activity or in any obscene or indecent exhibition or show. As opposed to cases of defilement where proof of actual penetration is an ingredient, in offences under section 15(a) there is no such a requirement. Similarly, the provisions of section 17 of the Act, under which the appellant was convicted does not require as a condition precedent that there be evidence of sexual intercourse before the accused can be convicted. In this case, in any event, there was testimony from PW5 that she was engaged in sex as a result of the appellant's actions which evidence was not rebutted by the appellant. Accordingly, no issue turns on this ground.

16. As regards the power of the Court to convict the appellant of the cognate offence without affording the appellant an opportunity to address the issue, the Court of Appeal in **Robert Mutungi Muumbi vs. Republic [2015] eKLR** expressed itself as hereunder:

“The third issue in this appeal relates to appellant’s alleged lack of opportunity to plead before he was convicted of the offence of indecent act with a child. If we understood the appellant right, his contention is that he should not have been convicted of the offence of indecent act with a child, which he was not charged with, before he was afforded an opportunity to plead to that offence. Mr. Monda’s response was that the appellant could be properly convicted under section 179 of the Criminal Procedure Code without having to plead to the offence, so long as it was a minor and cognate offence to that charged. Section 179 of the Criminal Procedure Code provides as follows:

“179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

As is apparently clear, section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged. An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See **ROBERT NDECHO & ANOTHER V. REX (1950-51) EA 171** and **WACHIRA S/O NJENGA V. REGINA (1954) EA 398**). *Spry, J.* explained the essence of the first consideration as follows in **ALI MOHAMMED HASSANI MPANDA V. REPUBLIC [1963] EA 294**, while construing the provision of the Tanzania Criminal Procedure Code equivalent to section 179 of the Kenya Criminal Procedure Code:

“Subsection (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate, offence (proved) and may then, in its discretion, convict of that offence.”

That conclusion is reached at the stage of judgment when it is not practical to require the accused person to plead afresh to the minor offence. It is a decision premised on the discretion of the court based on the evidence adduced at the end of the trial. [Underlining mine].

17. The Court proceeded:

“The second consideration arises, of necessity, precisely because the accused person is not charged with, and has not pleaded to, the minor cognate offence. The purpose of delving into this consideration is to satisfy the court that the accused person was not prejudiced, and that by being charged with the major offence, he had sufficient notice of all the elements that constitute the minor offence. (See **REPUBLIC V. CHEYA & ANOTHER [1973] EA 500). In this case we are satisfied that committing an indecent act with a child is a minor and cognate offence of defilement with which the appellant was charged. The elements of the offence of committing an indecent act with a child are ingrained or subsumed in the elements of the offence of defilement. The former attracts a comparatively lesser sentence than the latter. Accordingly, we find that the appellant was properly convicted of indecent act with a child under section 179 of the Criminal Procedure Code even though he was not charged with that offence and had not pleaded to it. The requirements of section 179 were satisfied.”**

18. It is therefore clear that the learned trial magistrate was under no obligation to give either the appellant or the prosecution an opportunity of being heard before convicting the appellant of the cognate offence.

19. However the issue arises as to whether the offence with which the appellant was convicted was a cognate offence.

20. Section 179 of the **Criminal Procedure Code** provides that:

179. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

21. Section 191 of the *Criminal Procedure Code* provides that:-

The provisions of Sections 179 to 190, both inclusive, shall be construed as in addition to, and not in derogation of, the provisions of any other Act and the other provisions of this Code, and the provisions of Sections 180 to 190, both inclusive, shall be construed as being without prejudice to the generality of the provisions of Section 179.

22. Section 179 aforesaid was dealt with by the Court of Appeal in the case of Rashid Mwinji Nguisa & Another vs. Republic [1997] eKLR in which it was held:-

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial...Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”

23. The same Court in Kalu –vs- Republic (2010) 1 KLR observed as follows:-

“With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the Criminal Procedure Code which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the Penal Code for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the Penal Code with manslaughter under Section 202 as read with Section 205 of the Penal Code. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder”.

24. The *Black’s Law Dictionary* 9th Edition page 1186 defines a cognate offence as:-

A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.

25. I agree with Ngenye-Macharia, J in David Mwangi Njoroge vs. Republic [2015] eKLR that:

“...the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.”

26. Section 15(a) of the *Sexual Offences Act* provides as hereunder:

A person who knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show...commits the offence of benefiting from child prostitution and is liable upon conviction to imprisonment for a term of not less than ten years.

27. Section 17 on the other hand provides that:

Any person who -

(a) intentionally causes or incites another person to become a prostitute; and

(b) intentionally controls any of the activities of another person relating to that persons prostitution; and does so for or in expectation of gain for him or herself or a third person, is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

28. The elements of the offence under section 15(a) are that complainant must be a child; must be made to remain in the premises; and the purpose must be for causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show. As regards the offence under section 17(a), it is not restricted to a child though in my view nothing prevents the Court from convicting where the person concerned is a child. Secondly, the person must be incited to be a prostitute or her activities must be controlled in a manner relating to prostitution. In my view the only substantial departure between the two offences is the age of the complainant otherwise the other elements do not show any serious departure. The objective of making an offence under section 15(a) punishable by a higher sentence, in my view is for the protection of children. That being the case, it is my view that an offence under section 17 is cognate to one under section 15(a). Accordingly, nothing turns on grounds 2 and 3 as well.

29. As regards ground 5, whereas it is true that the learned trial magistrate seems to have concentrated only on the evidence of PW5, this Court, as the first appellate court, is enjoined to analyse and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno vs. Republic [1972] EA 32 where the Court

of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”

30. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus;

1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. 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; 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.

31. In this case part from the evidence of PW5, there was the evidence of PW1 which was similarly not controverted in which PW1 detailed the circumstances under which she found herself under the control of the appellant. In her evidence she identified one of the girls as N. PW5 is called **M N T**. It is not contended that there was any other N involved in the affair apart from PW5. In my view the evidence of PW1 clearly corroborated that of PW5 in material aspects and the mere fact that PW5 was declared a refractory witness did not render her evidence worthless.

32. While I agree with the decisions in **Abel Monari Nyanamba & 4 Others vs Republic [1996] eKLR** and **Batala vs. Uganda [1974] EA 402**, that the evidence of a hostile witness whether given before or after he was treated as hostile can be given little, if any, value in this case PW5 was not declared a hostile witness. She was refractory and after being treated in accordance with the law, gave evidence which, rightly in my view, was relied upon by the learned trial magistrate to convict the appellant. Accordingly, ground 5 must similarly fail.

33. As regards the standard of proof, I have considered the evidence adduced by the prosecution which evidence was not controverted by the appellant and it is my view that the testimony of the prosecution witnesses was not shaken in cross-examination by the accused. In the premises taken in totality, the case for the prosecution met the standards required to convict an accused person.

34. In the premises, this appeal fails and is dismissed.

35. Right of appeal within 14 days.

36. Orders accordingly.

Judgement read, signed and delivered in open Court at Machakos this 9th day of July, 2018.

G V ODUNGA

JUDGE

In the presence of:

Mr Omondi for Mr Mulei for the Appellant

Miss Mogoi for the Respondent

CA Geoffrey