KENYA LAW
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Chesang v Republic (Criminal Appeal 106 of 2014) [2023] KECA 383 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 383 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 106 OF 2014

F SICHALE, LA ACHODE & WK KORIR, JJA

MARCH 31, 2023

BETWEEN

DAVID MARUKONG CHESANG .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nakuru, Emukule J), dated 8th November 2013 IN HC. CRA NO. 128 OF 2012)

JUDGMENT

1. The appeal before us is a second appeal against the judgment of Emukule J dated 8th November 2013, in which David Marukong Chesang (the appellant herein), had initially been charged at the Senior Principal Magistrate's Court at Nyahururu with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on 16th November 2011, at (particulars withheld), he willfully, unlawfully and intentionally caused his penis to penetrate the vagina of WJK, a girl aged 3 ½ years.In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 of the same *Act*. The particulars of the offence were that at the same time and place, he unlawfully and intentionally caused his genital organ namely penis, to come into contact with the genital organ namely vagina of WJK a girl aged 3 ½ years.

3. The appellant denied the charge after which a trial ensued. In a judgment delivered on 8th June 2012, Hon. L.M Wachira (the then Principal Magistrate) convicted him of the main charge and sentenced him to life imprisonment.

4. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 8th November 2013, Emukule J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Undeterred, the appellant has now filed this appeal and probably the last appeal vide a Memorandum of Appeal filed in Court on 15th November 2013 raising 4 grounds of appeal.

6. Subsequently thereafter, the appellant filed amended grounds of appeal raising the following grounds of appeal:

> " 1. That the learned high court judge erred in law in not finding that his right to fair trial was violated with abandon.
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> 2. That the learned high court judge erred in law in not finding that Sec 198 (1) of the *CPC* was grossly violated thus denying me my inherent right to fair trial.
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> 3. That the learned high court judge failed to appreciate that the medical evidence was incapable of supporting penetration.
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> 4. That, the high court judge erred in law in descending into the arena so that the judgment became warped up by the dust of conflict due to advancement of theories not advanced in the proceedings.
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> 5. That the high court judge erred in law in awarding me a sentence that was a maximum mandatory one despite my mitigation and the surrounding circumstances of the case being available for the court to ascertain and give an appropriate sentence commensurate with the matter in issue."

7. Briefly, the background to this appeal is that on 16th November 2011, WJK was at home alone when the appellant defiled her. In her own words, the appellant took her to the bush and "urinated" on her. She later went home and told her mother (PW2) what had happened.

8. PW2 was PTK and PW1's mother. It was her evidence that on 16th November 2011, she had left her home to graze the goats and when she came back at 6.00PM, PW1 told her that the appellant had defiled her (urinated on her private rights). She checked PW1 and found her private parts were sore and red. She later took PW1 to hospital and reported the matter to the police.

9. PW3 was AKK It was his evidence that on 17th November 2011, on learning what had befallen his child (PW1), he arrested the appellant and took him to the police station.

10. PW4 was PC Dan Owiti attached to Muchongoi police station. It was his evidence that on 18th November 2011, he was at the police station when PW3 came to the police station with the appellant and alleged that the appellant had defiled his daughter. He booked the appellant in the cells and interrogated PW1 who identified the appellant as the assailant.

11. PW5 was Dr. Hinga Mwaura a medical officer at Rongai. He produced a P3 Form in respect a child aged 3½ years who had a history of defilement by a person known to her. On examination the hymen membrane was torn though the tear was not fresh and a high vaginal swab that had been done previously showed pus cells and spermatozoa. He concluded that the child had been sexually assaulted.

12. The appellant in his defence gave an unsworn statement and simply denied having committed the offence.

13. When the matter came up for plenary hearing on 13th December 2022, the appellant who appeared in person while relying on his written submissions submitted that he did not know the charges he was facing and that he was not supplied with witness statements as he was asked to pay for them. Ms.

Mburu learned counsel for the respondent on the other hand sought to rely on her written submissions dated 14th November 2022.

14. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

15. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> " …This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law …"
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> In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:
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>> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213)."

16. Having considered the grounds of appeal advanced by the appellant, the same can be summarized as follows:

    1. Whether the appellant's rights to a fair trial were violated?

    2. Whether the provisions of Section 198 (1) of the *Criminal Procedure Code* were violated thus denying the appellant right to a fair trial?

    3. Whether the learned judge failed to appreciate that the medical evidence was incapable of supporting penetration?

    4. Whether the high court judge erred in law in handling the appellant a maximum mandatory sentence despite his mitigation and the surrounding circumstances?

17. Turning to the first and second grounds of appeal, which the appellant sought to argue together, the appellant submitted that when he asked for witness statements he was asked to pay for them and that as such he was forced to do without the statements and further, that he did not understand the charges.

18. We have carefully perused the record. First of all, we note that the appellant did not raise this issue before the high court. Be that as it may, and having gone through the entire record, nowhere in the proceedings did the appellant request for witness statements. The contention by the appellant therefore that he requested for witness statements and was told to pay for the same is without basis and not supported by any evidence and secondly, it cannot be raised in this Court having not been raised and determined by the first appellate court.

19. The appellant further contended that he did not understand the charges that he was facing. The record shows that when the appellant was first arraigned in court on 22nd November 2011, there was English/ Kiswahili interpretation though the record doesn't show the exact language that the charges were read to the appellant. He nevertheless denied the charge and was released on a bond of Kshs 300,000. Subsequently thereafter when the trial began before Hon L.M Wachira, the appellant cross examined all the prosecution witnesses in Kiswahili except PW1. The appellant even sought to have PW4 Yakish

Eyapani stood down so that the actual maker of the P3 Form could be availed which request was acceded to by the court. Additionally, the appellant gave his defence in Kiswahili.

20. From the circumstances of this case and contrary to the appellant's contention, it is evident that the appellant clearly understood the charges he was facing and he has not demonstrated to the satisfaction of this court that he suffered any prejudice by failure to be supplied with witness statements as alleged (if indeed this is true). Section 382 of the *Criminal Procedure Code* cap 75 of the Laws of Kenya would be instructive in this regard. It provides:

> " 382 "Finding or sentence when reversible by reason of error or omission in charge or other proceedings 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." (Emphasis ours)

21. As to whether the provisions of Section 198 (1) of the *Criminal Procedure Code* cap 75 of the Laws of Kenya were violated thus denying the appellant the right to a fair trial, the appellant seemed to suggest that the charges were read to him in a language he did not understand. Section 198 (1) of the *Criminal Procedure Code* cap 75 of the Laws of Kenya provides as follows:

> " 198. "Interpretation of evidence to accused or his advocate
>
> 1. Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

22. As we had alluded to earlier the record shows that when the appellant was first arraigned in court on 22nd November 2011, there was English/Swahili interpretation. The charges were subsequently read to the appellant in a language "he understood" and he denied the charge. It is imperative to note that at this stage the appellant did not raise the issue of language and even in the appeal that is before us the appellant has not indicated that he knows any other language other than Kiswahili. Save for PW1 who testified in Tugen, PW1, PW2 and PW3 all testified in Kiswahili. PW5 testified in English though there was interpretation to Kiswahili. Additionally, in respect of the evidence by PW1 there was interpretation by one Ruto, though it is not indicated to which language. The appellant cross examined all the witnesses in Kiswahili as stated above, save for PW1 whom he did not cross examine and this clearly shows that he understood the Kiswahili language.

23. Additionally, the appellant having not raised this issue during the trial, he cannot now be heard to raise this issue in this Court. We also note that when the matter came up for plenary hearing before us on 13th December 2022, the appellant addressed us in Kiswahili. Consequently, nothing turns on these two grounds of appeal and the same fail.

24. The learned trial judge was further faulted for failing to appreciate that the medical evidence on record could not sustain penetration and that the P3 Form before the court did not have the medical officer's reference number meaning it was not filed by a qualified medic.

25. PW1's evidence was that on 16th November 2011, she was home when her neighbour (the appellant) took her to the bush and "urinated" on her. This evidence was not challenged in cross examination. PW5 the doctor who examined PW1 corroborated her testimony that indeed she had been defiled as her hymen membrane had been torn and the laboratory tests done on 17th November 2011, which was a day after the incident confirmed presence of spermatozoa. Again the doctor's evidence towards this respect remained unconverted.

26. The appellant did not dispute the doctor's qualifications at the trial and no evidence was tendered whatsoever to show that the doctor was not qualified. The contention by the appellant that the doctor was not qualified is thus clearly an afterthought.

27. Regarding the age of the injuries, there was clear unequivocal evidence that PW1 was defiled on 16th November 2011, whereas the examination was done on 14th December 2011, which was almost a month later at Rumuruti District Hospital as doctors at the time were on strike. Be that as it may, laboratory tests that were done at Muchongoi health Centre on 17th November 2011, (a day after the incident) confirmed presence of spermatozoa and pus cells. Additionally, when PW2 examined the child (PW1) on the same day she found her private parts to be sore and red.

28. From the circumstances of this case and contrary to the appellant's submissions, there was overwhelming evidence to support the fact that indeed PW1 had been defiled and there was penetration. Consequently, this ground of appeal fails in its entirety.

29. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.

30. The evidence of PW1 that she was defiled by the appellant who was a neighbour and who was well known to her, PW2 and PW3 was not challenged even in cross examination and the same was corroborated by the evidence of PW5 who confirmed that PW1's hymen membrane had been torn. Additionally, the evidence on age which confirmed that PW1 was 3 ½ years remained uncontroverted throughout the trial.

31. We therefore find and hold that the appellants' conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

32. Turning to sentencing, the appellant faulted the court for handing him a maximum mandatory sentence despite his mitigation and surrounding circumstances. The appellant however did not state which these circumstances were.

33. The appellant was sentenced to life imprisonment as provided under Section 8 (2) of the *Sexual Offences Act*. We have considered the circumstances under which the offence was committed. The appellant defiled a 3 ½ year child who was neighbor. He did not even appear remorseful as he had nothing to offer in mitigation and in his defence he simply denied having committed the offence.

34. In our considered opinion, we consider the circumstances under which this offence was committed to be aggravated and the appellant doesn't deserve any mercy. We are therefore not inclined to disturb the sentence.

35. Accordingly, the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

36 It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF MARCH, 2023.

F. SICHALE

....

JUDGE OF APPEAL

L. ACHODE

....

JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR