Kariuki v Republic (Criminal Appeal 6 of 2014)
[2022] KECA 657 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 657 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 6 OF 2014

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JULY 8, 2022

BETWEEN

STEPHEN MWANGI KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from a conviction and judgment of the High Court of Kenya at Nakuru (Wendoh, J.) dated 18th December, 2013 in H.C.CR Appeal No. 324 of 2010)

JUDGMENT

1. On October 25, 2010, Stephen Mwangi Kariuki, who is now the appellant before us, was convicted by the Principal Magistrate's Court at Nyahururu with the offence of defilement contrary to section 8(1) of the *Sexual Offences Act*, and sentenced to life imprisonment under section 8(2) of the same Act.

2. Being dissatisfied with his conviction and sentence, the appellant lodged an appeal, which was heard by the High Court (Wendoh, J.), and judgment delivered on December 18, 2013 in which the appeal against conviction was dismissed, and the appeal against the sentence partially allowed. The learned Judge found that the trial magistrate erred in sentencing the appellant under section 8(2) of the *Sexual Offences Act* as the appellant ought to have been sentenced under section 8(4) of the *Sexual Offences Act*. The learned Judge thereby quashed the sentence of life imprisonment and sentenced the appellant to 30 years' imprisonment.

3. The appellant is now before us on this second appeal in which he has raised five grounds challenging the judgment of the High Court on conviction and sentence. The appellant, who is in person, filed written submissions that he fully relied upon in support of his appeal.

4. In the submissions, the appellant argues that the charge sheet was fatally and incurably defective because it cites section 8(1) as read with section 8(4) of the *Sexual Offences Act*, while the evidence adduced by the prosecution was that of section 8(1) as read with section 8(2) of the *Sexual Offences Act*;

that section 8(2) and 8(4) carry different sentences, and that this prejudiced the appellant. He faulted the learned Judge for sentencing him under section 8(4) of the *Sexual Offences Act* when the charge sheet did not support that section in the particulars of the charge.

5. The appellant further argued that the sentence imposed upon him was harsh and did not take into account the principles of fair trial. The appellant noted that the two courts below were inconsistent as to whether the evidence proves section 8(2) or 8(4) of the *Sexual Offences Act*. He also faulted the learned Judge for imposing a sentence of 30 years without assigning any reason when the minimum sentence under section 8(4) of the *Sexual Offences Act* is 15 years.

6. Further, the appellant submitted that age, which is a major ingredient in sexual offences, was not proved by the prosecution as there was contradictory evidence. The charge sheet showed that the complainant was 12 years old while the P3 form showed that she was 9 years old. In addition, the evidence of the complainant was that she was 10 years old, while that of the clinical officer who examined her showed that she was 9 years old, and the complainant's mother who was also a witness did not produce any document or tell the court when the complainant was born.

7. The appellant also submitted that penetration was not proved in evidence as there was contradictory evidence regarding the penetration and whether the hymen was broken, which evidence was overlooked by both the trial court and the appellate court. He dismissed the P3 form, claiming that it was filled on December 15, 2009when the offence is alleged to have been committed on December 3, 2007. He therefore urged the Court to allow the appeal.

8. The Director of Public Prosecutions was duly served with the hearing notice for the hearing of the appeal, but did not file any written submissions, nor did any counsel attend Court. Notwithstanding this, we are under a duty to consider the appeal and determine it on merit.

9. We have carefully perused the record of appeal, and considered this appeal in light of the appellant's submissions and the authorities cited. This being a second appeal, it is limited under section 361 of the *Criminal Procedure Code* to issues of law only. In our view, the issues that emerge for determination are: whether the charge sheet was defective; whether the elements of the charge against the appellant, specifically the age of the complainant and penetration, were proved to the required standard; and whether the learned Judge erred in dismissing the appeal against the conviction, and in reviewing the sentence of the appellant to 30 years' imprisonment.

10. We shall address the ground relating to the defective charge together with the appeal against the sentence. The charge against the appellant as stated in the charge sheet was as follows:

> " Charge
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> Defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006.
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> Particulars:
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> Stephen Mwangi Kariuki: On December 3, 2007at Kahiga village in Kipipiri district within central province intentionally and unlawfully did cause his genital organ namely penis to penetrate the vagina of RWK a child aged 12 years."

11. Although the charge sheet stated the complainant's age as 12 years, the evidence that was before the trial court was not consistent with this. Before the complainant gave her evidence, she was examined by the trial magistrate and stated her age as 10 years old. Peter Nginyo (Nginyo), the Clinical Officer who examined her and filled the P3 form, stated that the complainant was 9 years old. He indicated on the

P3 form that her estimated age was 9 years old. The complainant's mother also stated the complainant's age as 9 years old. Therefore, it is apparent that the evidence and the charge sheet was not consistent. The trial magistrate who was alive to this fact, addressed it as follows:

> " The charge sheet says the subject was defiled on December 3, 2007 when she was 12 years old. The P3 indicates the subject was 9 years old when she was examined for defilement. The penalties from sexual offences in particular defilement are very age specific. When the prosecution read the charge sheet as it is – and fail to amend the same, - and when no effort is made to prove the age of the subject, it creates a situation where the accused person may be prejudiced. If in 2007 the subject was 9years old, in 2009 when the charge sheet was drawn, she ought to have been 11 years old. However, the charge says she was 12 years old....
>
> Finally, the charge sheet is defective. Section 8(4) refers to children as between 16 and 18 years old.
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> ....
>
> However, there is no doubt that the subject herein was defiled."

12. The trial magistrate then proceeded to sentence the appellant under section 8(2) of the *Sexual Offences Act* that provides for the age of the victim being 11 years or less, and a mandatory sentence of life imprisonment.

13. In the impugned judgment, the learned Judge addressed this issue as follows:

> " Although the charge sheet states that the complainant was aged 12 years, it was her evidence that she was 10 years. Her mother and the Clinical Officer who examined her indicated that she was 9 years old at the time the offence was committed. The complainant being under 11 years, the appellant should have been charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act* but not section 8(4) of the *Sexual Offences Act*. The trial court noted that anomaly and attributed it to the delay in charging the appellant following his disappearance after the commission of the offence. The prosecution should have been alert enough to amend the charge sheet to read section 8(2) of the *Sexual Offences Act*, once PW1 once (sic) PW2 testified. This is because under *Sexual Offences Act*, the age of the minor in a defilement case determines what sentence will be meted upon conviction of an accused....."

14. It is evident that both the trial court and the learned Judge properly addressed the issue of the defective charge. However, the trial magistrate proceeded to sentence the appellant under section 8(2) of the *Sexual Offences Act* under which section the appellant was not charged, and this was prejudicial to the appellant. The learned Judge properly dealt with the prejudice meted out to the appellant as follows:

> " Coming to the sentence, the appellant was charged under section 8(1) as read with section 8(4) of the *Sexual Offences Act*. Section 8(4) provides for sentence where one is convicted of defiling a child aged between 16 and 18 years. The complainant was only 9 years. It is unfortunate that the prosecution and the court did not note this anomaly and amend the charge sheet to read section 8(2) of the *Sexual Offences Act*. The sentence under section 8(2 of the *Sexual Offences Act* is more severe i.e. life imprisonment and the magistrate could not sentence the appellant under that section without due notice to him before the hearing of the case. Sentencing the appellant under section 8(2) of the *Sexual Offences Act* was prejudicial to the appellant because the sentence under that section is more severe. For that

reason, I quash the sentence meted under section 8(2) of the *Sexual Offences Act*. Instead, I sentence the appellant under section 8(4) Sexual Offenses Act as charged."

15. We cannot fault the learned Judge as she had powers under Section 382 of the Criminal Procedure Code to alter the sentence on account of the error on the charge to avoid the prejudice that the appellant was exposed to by being sentenced under Section 8(2) of the *Sexual Offences Act*. This removed the prejudice that the appellant had suffered by being sentenced to a more severe sentence under section 8(2) of the *Sexual Offences Act*. We find no substance on the ground of appeal regarding the defective charge and the reviewed sentence.

16. As regards the grounds of appeal relating to the failure to prove the elements of the charge of defilement relating to age and penetration, under section 8(1) of the *Sexual Offences Act*, defilement arises where a person commits an act of penetration with a child.

    Under section 2 of the *Sexual Offences Act*, a child has the meaning assigned in the *Children's Act*, 2001. Section 2 of the Children's Act 2001 provides that "child" means any human being under the age of 18 years. There was overwhelming evidence adduced before the trial court that the complainant was under the age of 18 years. Therefore, the evidence regarding her age was sufficient to prove the offence of defilement under section 8(1) of the *Sexual Offences Act*. The specific age of the complainant was only relevant in regard to the penalty that was to be imposed for the offence of defilement, which we have already addressed.

17. As regards penetration, the complainant testified that the appellant raped her. Rape is a technical term that the young complainant could not have used. But the complainant proceeded to give a clear explanation of how the appellant did it by laying her down, removing her pant, lowering his trouser and putting his thing inside her place which she urinates. That evidence was consistent with the evidence of the complainant's mother who examined the complainant, and the evidence of the Clinical officer who also examined the complainant and filled the P3 form indicating that her genitalia had lacerations on the labia majora, and that there was a small tear on the area of the perennial. The date on the P3 form raises concern, but it is apparent that the appellant disappeared for about 2 years and, although the complainant was examined a day after the incident, the P3 could have been filled two years later after the appellant was arrested. We are satisfied that penetration was established, and that the appellant was identified as the person who had caused the penetration.

18. We come to the conclusion that the charge against the appellant was properly proved and that his conviction was safe, and the sentence imposed by the learned Judge, proper. We therefore dismiss the appeal in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR