Chepkwony v Republic (Criminal Appeal 35 of 2018)
[2024] KEHC 1993 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL 35 OF 2018

RL KORIR, J

FEBRUARY 29, 2024

BETWEEN

NELSON KIMUTAI CHEPKWONY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 9 of 2018 by Hon. Kiptoo B.K in the Magistrate's Court at Sotik)

JUDGMENT

1. The Appellant herein was convicted by Hon. B. K Kiptoo, Resident Magistrate for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 14th May 2018 in Sotik sub-county within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of EC, a child aged 13 years.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 14th May 2018 in Sotik sub-county within Bomet County, he intentionally and unlawfully touched the vagina of EC, a child aged 13 years with his penis.

3. The Appellant pleaded not guilty to the charges before the trial court, and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.

4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

5. At the conclusion of the trial, he was convicted on the charge of defilement and sentenced to serve twenty (20) years in prison.

6. Being dissatisfied with the Judgment dated 17th October 2018, Nelson Kimutai Chepkwony appealed to this court on the following grounds which I reproduce verbatim as follows:-

   i. That I pleaded not guilty at the trial.

   ii. That the learned trial Magistrate erred in law and fact by convicting and sentencing me the Appellant to 20 years imprisonment without considering that the evidence was not water tight to base the conviction and sentence.

   iii. That the learned trial Magistrate erred in law and fact by relying on weak testimonies of the Prosecution's witnesses of which all were uncorroborated at all.

   iv. That the learned trial Magistrate erred in law and fact by overlooking the differences that he had with PW3.

   v. That the learned trial Magistrate further erred in law and fact by not considering the evidence of PW1 where she stated that she was coached to state what she told.

   vi. That the learned trial Magistrate misdirected himself on a point of law and fact by rejecting my sworn defence of which exonerated my soul.

   vii. That the learned trial Magistrate erred in law and fact by rejecting my request of PW1 to be confirmed was even in court whether she is pregnant as per the evidence of the clinical officer of which the court prosecutor objected to the same.

7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by theCourt of Appeal for Eastern Africa in *Pandya v Republic* (1957) EA 336 where it stated:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled E.C (PW1) on 14th May 2018. PW1 testified that on the material day, she went to the Appellant's home at 5 p.m. and they had sex until 1 a.m. That they were later arrested.

9. Kibet Kirui (PW6) who was the clinical officer testified that he examined the victim (PW1) on 16th May 2018 and found that she had lacerations on her labia minora and further upon conducting a vaginal swab, he found spermatozoa. It was his conclusion that there was evidence of penetrative sex.

The Appellant's Case.

10. The Appellant, Nelson Kimutai Chepkwony denied committing the offence. That on the material day, he woke up in the morning and proceeded to Bomet where he did his boda boda business. He testified that he took a passenger to Tenwek Hospital where they stayed until 12.30 a.m.

11. It was the Appellant's testimony that he later dropped one of his clients in Bomet town before he proceeded home where he slept for 30 minutes. That people knocked on his door and together with PW1, they were tied together with the complainant and were arrested. It was his further testimony that he was taken to Sotik Health Centre where he was treated and later informed of the charges he faced.

12. On 7th March 2023, I directed that this appeal be dispensed off by way of written submissions.

The Appellant's Submissions.

13. It was the Appellant's submission that the Prosecution gave contradictory and inconsistent evidence. That PW1 stated that she was in his house on the material day at 5 p.m. and further stated that the Appellant was in the house all along when actually he was in Tenwek Hospital.

14. The Appellant submitted that PW2 testified that her daughter (PW1) left the house at 9 p.m. to go and study while PW1 stated that she left at 5 p.m. to go and sleep in the Appellant's house. He further submitted that PW3 stated that he went to look for people to go and rescue PW1 and that contradicted the evidence of PW1, PW2, PW3 and PW4.

15. It was the Appellant's submission that from the testimonies of PW1 and PW6, the complainant had engaged in sex before and it was not her first time. That the Prosecution failed to call PW1's neighbour and her child called Chepkemoi to demonstrate that PW1 was not at their home for studies on the material day.

16. The Appellant submitted that there was no corroborative evidence and that this court should reconsider the evidence of PW2, PW3 and PW4 whose evidence was faked. That PW3 stated that there were 75 people who proceeded to his house while PW4 stated that they were 15 people.

17. It was the Appellant's submissions that the Prosecution's witnesses were all family members and they had a grudge with him. That he testified that he worked with PW1's uncle in a school where he reported him to the head teacher for stealing paint and that was the genesis of the grudge.

18. The Appellant submitted that the P3 Form produced as an exhibit was not dated and that showed that the date of the commission of the offence was not certain or clear.

19. It was the Appellant's submission that there was variance in PW1's age in the charge sheet and the P3 form. That in the charge sheet, her age was indicated as 16 years but in the P3 Form, it was indicated as 17 years.

20. The Appellant submitted that PW3 and PW4 who were not listed as witnesses in the charge sheet recorded witness statements after the trial court had heard PW1 and PW2. That the Prosecution concealed the truth and intimidated PW1 to accept that she had been defiled.

21. It was the Appellant's submission that the arresting officer and PW1's father were not called as prosecution witnesses and that was a clear indication that PW1's uncle was bitter against him due to the allegation of the theft of paint. It was his further submission that the allegation of defilement was fabricated and the Prosecution failed to prove their case as required by the law.

The Prosecution's/Respondent's Submissions.

22. The Respondent submitted that the victim was aged 13 years of age at the time of the incident. That a Birth Certificate (P.Exh1) was produced and the evidence was not challenged by the Appellant during the trial.

23. It was the Respondent's submission that it was manifestly clear from the victim's testimony that there was penetration. It was their further submission that the clinical officer (PW6) who examined the victim produced exhibits and noted the presence of sperms and lacerations on the labia majora. That he formed the opinion that the victim's genitals had been penetrated.

24. The Respondent submitted that the issue of identification was not in doubt. That one could easily discern that the Appellant and the victim were not strangers to each other. The Respondent further submitted that they had been in a sexual relationship for some time prior to their arrest and that furthermore, the Appellant was arrested at the scene.

25. It was the Respondent's submission that the Appellant did not raise the issue of a grudge between him and PW3 when he cross examined PW1 and PW2. They urged this court to reject the Appellant's defence.

26. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on 31st October 2019, the Appellant's written submissions dated 3rd April 2023 and the Respondent's written submissions dated 15th March 2023. The following issues arise for my determination: -

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Defence places doubt on the Prosecution case.

    iii. Whether the Sentence preferred against the Accused was fair and just.

Whether the Prosecution proved its case beyond reasonable doubt.

27. The Appellant raised a pertinent issue of the evidence of RK (PW3) and BKN (PW4) who recorded statements after the trial had commenced. The trial court took exception to this conduct by the Prosecution. The trial court however allowed the witnesses (PW3 and PW4) to testify after the Appellant had been supplied with the witness statements with the caveat that the probative value of the witness testimonies had been negatively impacted and compromised.

28. The law on fair hearing is enshrined in the *Constitution* of Kenya where Article 50 (2) (j) provides that:-

> Every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

29. From the above, it is clear that the Prosecution had a duty to disclose all the evidence it intends to rely to the Accused before the trial commenced. The Court of Appeal in *Thomas Patrick Gilbert*

Cholmondeley v Republic (2008) eKLR quoted the English Court of Appeal case of *R v Ward* (1993) 2 ALL ER 557 thus:-

> " .....Glidewell, Nolan, and Steyn, LJJ who heard Ward's appeal were unanimous in allowing her appeal and they held that:-
>
> > "The prosecution's duty at common law to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses....."
> >
> > (Emphasis mine)

30. Further, in the persuasive authority of *Dennis Edmond Apaa & Others v Ethics & Anti-Corruption Commission* (2012) eKLR, Majanja J. held that:-

> " The words of Article 50(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received." (Emphasis mine)

31. The right to fair hearing is however not absolute as the Accused's rights must be equally balanced with the societal interest in pursuing justice against the Accused. The Court of Appeal in *Julius Kamau Mbugua v Republic* (2010) eKLR held that:-

> " The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions."

32. I agree with the trial court that the Prosecution violated the Accused's rights to a fair trial when they ambushed him with fresh witness statements way after the trial had commenced. I however hasten to add that the duty to disclose was a continuing one and that the court did mitigate the late disclosure by ensuring that the Accused had ample time to prepare for the witnesses by adjourning the matter on 16th July 2018 to 26th July 2018. I shall therefore proceed to consider the testimonies of PW3 and PW4 alongside the other evidence adduced by the Prosecution bearing in mind the above background.

33. I now turn to the ingredients of the offence. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender must be proved.

34. The age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. The age of the victim may be proved through the documentary evidence like a birth certificate or a parent's or victim's testimony as the case may be.

35. Rule 4 of the *Sexual Offences Rules of Court* 2014 provides that:-

> When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.

36. In the case of *Edwin Nyambaso Onsongo v Republic* (2016) eKLR, in which the court cited the case of *Mwolongo Chichoro Mwanyembe v Republic*, Mombasa Criminal Appeal No.24 of 2015 (UR) the Court of Appeal held that:-

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof....."

37. The victim (PW1) produced a Birth Certificate and the same was marked P.Exh 1. The Birth Certificate indicated that EC (PW1) was born on 3rd April 2005. The authenticity of the Birth Certificate or its production was not challenged during the trial. I find the Birth Certificate admissible and based on its contents it is my further finding that the time of the commission of the alleged offence, EC was aged 13 years. I dismiss the Appellant's submission that the witnesses gave contradictory evidence that the age of the victim as the submission is not supported by the evidence on record.

38. With regard to the issue of identification, the victim (PW1) stated that the Appellant was her boyfriend and that they had sex on the material night. She further testified that it was not their first time to take sex as she used to sneak into his room at 8 p.m. The victim further testified that they had sex on the Friday that preceded the material day. When she was cross examined, she stated that she knew the Appellant and reiterated that they had sex with him before they were arrested in his house.

39. In his defence, the Appellant stated that they were arrested together with the Appellant and they were tied and taken to Chebole AP before being taken to Sotik Police Station. This placed him at the scene of the alleged offence.

40. This evidence in my view is more of recognition than identification. In the case of *Peter Musau Mwanzia v Republic* (2008) eKLR, the Court of Appeal expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident....."

41. Guided by the above authority, there is no doubt in my mind that the Appellant was well known to PW1. It is my finding that the Appellant was positively identified as the perpetrator of the alleged offence.

42. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. In the case of *Bassita v Uganda* S. C Criminal Appeal Number 35 of 1995, the Supreme Court held that:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence....."

43. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred.

44. EC (PW1) testified that on the material day (14th May 2018), she went to the Appellant's home at 5 p.m. and they had sex at night. It was her testimony that they then slept until 1 a.m. when they were woken up and arrested. When the Appellant cross examined PW1, she confirmed that they had sex on the material night.

45. Kirui Kibet (PW6) who was the clinical officer at Sotik sub-county hospital testified that when he examined PW1, he found that she had lacerations on her labia minora and upon conducting a vaginal swab, he found presence of spermatozoa. He concluded that there was evidence of penetrative sex.

46. PW6 produced a P3 Form which was marked as P.Exh 5. The P3 Form indicated that the injuries were four hours old when she was examined. The P3 form also indicated that PW1 had lacerations on her labia minora. PW6 also produced treatment notes from Sotik Health Centre which showed that PW1 had spermatozoa.

47. The above findings upon medical examination of PW1 corroborated the evidence tendered by the clinical officer (PW6). I am satisfied based on the testimonies of PW1 and PW6 and the contents of the P3 Form and the treatment notes that E.C (PW1) was penetrated on the material day.

48. It was a ground of the Appeal that the trial court rejected the Appellant's request to find out if the victim was pregnant. It is my finding that pregnancy is not prove of penetration. The same was stated by the Court of Appeal in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR, where it held:-

> " An essential ingredient in the offence of defilement is penetration and not impregnation."

49. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

Whether the Defence places doubt on the Prosecution case.

50. I have considered the Appellant's defence in which he denied committing the offence. The Appellant's defence has already been reproduced early in this Judgment. In considering the Appellant's defence, I am conscious that the Appellant was not under any duty to prove his innocence. His defence however, if credible, could cast doubt in the Prosecution's case and consequently earn him the benefit of the doubt.

51. The Appellant testified that on the material day, he transported some clients to Tenwek Hospital where they stayed up to 12.30 a.m. before he dropped them back and went to sleep. It was his testimony that they were arrested together with the victim in his house.

52. The Appellant did not provide any witnesses or evidence to corroborate his statement that he was in Tenwek the whole day before retiring to bed at 12.30 p.m. He contradicted himself when he stated that he was arrested with the victim and upon cross examination, he testified that the complainant was not in his house.

53. I dismiss the issue of being framed up by the victim's uncle. When the issue was brought up in cross examination against the victim's uncle RKK (PW3), he stated that he had no grudges against him. JC (PW2) who was the victim's mother also testified that she had no grudge with the Appellant.

54. In totality, I find that the Appellant's defence did not raise or place a doubt on the Prosecution's case which as I had earlier found, was proved to the required legal standard.

Whether the Sentence preferred against the Accused was just and fair

55. The general principles upon which the first appellate court acts in regards to sentencing are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.(See *Francis Nkunja Tharamba v Republic* (2012) eKLR)

56. The penal section for a defilement case for a child of 13 years is provided by Section 8 (3) of the *Sexual Offences Act* which states that:-

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

57. The Appellant was sentenced to 20 years as prescribed by the law. The sentence is couched in mandatory terms and as such courts are minded to pass such sentence as set out by the law.

58. In the present case, it is clear that the Appellant and PW1 were engaged in a sexual relationship and it had been going on for a while. The age of the Appellant was not stated anywhere in the proceedings or on this appeal. This court cannot therefore tell whether the Appellant was a youngster barely out of his teens or an older person who took advantage of a minor barely into her teenage. Whichever the case, the complainant at only 13 could not be said to have engaged in consensual sex. The circumstances of the case however calls for pity.

59. The question then becomes whether I have the discretion to reduce a mandatory minimum sentence. The Court of Appeal in *Dismas Wafula Kilwake v Republic* (2019) eKLR in which it expressed itself as hereunder: -

> "Here at home in a judgment rendered on 14th December 2017 in *Francis Karioko Muruatetu & Another v Republic*, SC Pet. No. 16 of 2015, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do

with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.....

..... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing."

60. I am also persuaded by Odunga J. (as he then was) in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where he held:-

> "It may be argued that these decisions of the Court of Appeal ought not to be followed on the ground that they are per in curium in light of the clarification in *Muruatetu 2*. However, it is my view that the Supreme Court in *Muruatetu 2* did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that *Muruatetu 1* only dealt with murder. I agree with that clarification. However, the Supreme Court left it open to the High Court to hear any petition that may be brought challenging inter alia mandatory minimum sentences and make a determination one way or another. The Supreme Court did not hold that the High Court ought not to apply the reasoning in *Muruatetu 1*.
>
> In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 ofn (sic!) the *Constitution*."

61. In the end, I uphold the conviction. In view of the circumstances of this case however, I exercise discretion to reduce the Appellant's sentence. The Appellant shall serve 10 years' imprisonment from 15th May,2018 being the date of his arrest and pre-trial custody.

62. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF FEBRUARY, 2024

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of Ms. Boiyon holding brief for Mr. Njeru for the State, Appellant present in person and Siele (Court Assistant)