



**Charo v Republic (Criminal Appeal 12 of 2023)
[2024] KEHC 2164 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2164 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
CRIMINAL APPEAL 12 OF 2023
DKN MAGARE, J
FEBRUARY 22, 2024**

BETWEEN

MATANO MDZOMBA CHARO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. Joy Mutimba, Resident Magistrate in Msambweni SRMCSO No. E055 of 2021 dated July 6, 2022.
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.
3. The particulars of the offence were that on September 14, 2020 at around 0900hrs, in [particulars withheld] of Kwale County intentionally and unlawfully causes your penis to penetrate the vagina of MCT, a child aged 12 years.
4. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded.

Evidence

5. At trial, PW1, the minor testified that she was 14 years old. That she took ripe bananas to the Appellant for him to buy. It was her father that instructed her to do so.
6. That the appellant dragged her into his bedroom.
7. It was her case that the appellant wore a condom which was on his table



8. On cross examination, she testified that the appellant forced her into his bedroom and defiled her. That it was painful.
9. PW2, the complainant's father also testified that the appellant had asked to buy bananas for Kshs. 40.
10. That the appellant did not pick his call after the complainant had taken the bananas to him to buy. Upon his follow up, the appellant was in the house and denied seeing the complainant.
11. On cross examination, he testified that he saw the complainant in the appellant's house.
12. PW3 was the Clinical Officer. It was his case that the hymen was not intact on examination.
13. He produced the P3 Form, PRC Form, Treatment notes and Lab Request Form.
14. PW4 testified that he was the Investigating Officer. He testified that the results of the investigations pointed to the appellant as offender and they arrested him.
15. The appellant also testified. It was his case that he told the complainant's father to bring 5 bananas for Kshs. 50. After 30 minutes, the complainant came carrying the bananas. Later, that her father arrived panting and sweating and locked him inside the house. The complainant was still in the house.
16. The Trial Court, Hon. J. Mutimba, RM considered the case and rendered the Judgement on July 6, 2022. The Court found the appellant guilty and convicted him of the offence. The appellant was also sentenced to 20 years imprisonment.
17. The appellant, aggrieved, lodged this Appeal.
18. The grounds were that the Trial Court erred in law and fact:
 - i. In finding that the prosecution had proved its case beyond reasonable doubt.
 - ii. For not considering the contradictions in the prosecution evidence
 - iii. Failing to consider the Appellant's mitigation and meting out excessive sentence.

The Appellants' Submissions

19. Directions were given for parties to file submissions. I have not seen the submissions of the appellant.
20. The Respondent filed submissions on November 27, 2023.
21. It was the Prosecution's case that the Trial Court correctly found the Appellant guilty and convicted him as charged.
22. The respondent submitted that all the ingredients of the offence thus age, penetration and identity were proved beyond reasonable doubt. Reliance was placed on the case of *George Opondo v Republic* (2016) KLR.
23. It was submitted that the Trial Court correctly considered mitigation and meted out appropriate punishment in accordance with law. Reliance was placed on the case of *Muruatetu & Another v Republic* (2021) eKLR to support that submission that mandatory sentences were constitutional.
24. I was urged to dismiss the Appeal.



Analysis

25. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.
26. The duty of the first appellate court remains as set out in the Court of Appeal for *Eastern Africa in Pandya -vs- Republic* [1957] EA 336 is as follows: -
- “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 different.”
27. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:
- “...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
28. I note that the complainant testified that she was a minor aged 14 on 23/2/2022 since she was born in 2008. The Appellant allegedly told the complainant’s father that he had 40/= to buy the bananas. The Complainant’s father as a result sent the Complainant to take the bananas to be bought by the Appellant. The evidence adduced in court overwhelmingly proved that the Appellant took advantage of the minor as sent by her father and defiled her.
29. On my reevaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence. The evidence of PW3, the clinical officer confirmed the unlawful act.
30. I consequently have no reason to interfere with the finding of the Trial Court on conviction.
31. On sentence, the Trial Court gave the maximum available sentence. The Appellant breached trust and defiled a minor sent to him to deliver bananas for sale. The Appellant was arrested on 10/8/2021.
32. In any case the sentence should be proportional. The Court of Appeal in the case of *Thomas Mwambu Wenyi – vs- Republic* (2017) eKLR stated as follows: -
- “A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and that the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence”.
33. I have perused the pre-sentence report. I do not think the Trial Court was wrong in imposing a custodial sentence. However, the maximum sentence of 20 years was in my view not justifiable. I will interfere



with the sentence of 20 years which I set aside and replace with 15 years to run from the date of arrest on 10/03/2021.

Orders

- i. The Appeal on conviction is dismissed.
- ii. The sentence of 20 years is set aside and replaced with 15 years to run from the date of arrest on 10/03/2021.
- iii. Right of Appeal 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 22ND DAY OF FEBRUARY, 2024.

KIZITO MAGARE

JUDGE

Judgment delivered through Microsoft Teams Online Platform

In the presence of: -

Appellant present

Miss Nyawinda for the state

Court Assistant - Brian

