**Munungi v Republic (Criminal Appeal E60 of 2022) [2024] KEHC 16801 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 16801 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIAMBU**

**CRIMINAL APPEAL E60 OF 2022**

**NIO ADAGI, J**

**JULY 29, 2024**

**BETWEEN**

**STEPHEN WARACHI MUNUNGI ...................................................... APPELLANT**

**AND**

**REPUBLIC ............................................................................................ RESPONDENT**

***(Being an Appeal from the Judgment of Hon. G. Omodho (PM) in Kiambu in CMC S.O Case. No. 6 of 2018 delivered on 29/09/2022)***

**JUDGMENT**

1. The Appellant was charged in the magistrates' court with attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 8 of 2006. The particulars of offence were that on 6th day of January 2018 at Riabai Sub-location within Kiambu County, attempted to cause his penis to penetrate the vagina of NW (name withheld) a child aged 10 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence being that on the same date and at the same place intentionally touched the vagina of NW a child aged 10 years.
3. He denied both charges. After a full trial, he was convicted of the main count of attempted defilement contrary to section 9(1) of the *Sexual Offences Act* and sentenced to 10 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal relying on the following grounds
    1. That the sentence was manifestly excessive in the circumstances and which overlooked some material factors thereby denying the accused a fair trial as envisaged under article 25 of the *Constitution* of Kenya.

2. That the learned magistrate erred in law and in fact in convicting and harshly sentencing the Appellant which judgment is based on scanty and unconsolidated evidence as PW5 Dr. Fatuma Mohamed confirmed that the genitalia had no signs of penetration thereby arriving at unsafe conclusion under the circumstances.

3. That the learned trial magistrate erred in law and in fact in failing to take into consideration the Appellant defence which is uncontroverted and mitigation factors before sentencing the Appellant.

4. That the learned trial magistrate erred in law and in fact in considering extraneous evidence which is contrary to the *evidence act* and should be expunged from the record.

5. That the learned trial magistrate erred in law and in fact in failing to appreciate that the complainant's mother was a close neighbour of the Appellant and the issues of grudge raised in the defence case.

6. That the learned trial magistrate erred in law and in making a finding that the prosecution had proved its case beyond reasonable doubt and found the Appellant guilty of the offence of attempted defilement contrary to section 9(1), (2) a of the *sexual offences Act* in which she convicted him but did not make any finding on the alternative charge, yet she proceeded to sentence him to 10 years.

7. That the learned trial magistrate failed to hold and find that the age of the victim was not established to the required standards of the law of *evidence Act* by failure to produce a birth certificate thereby arriving at a wrong decision as the onus or duty to prove the ingredients of the offence facing the Appellant lies squarely with the prosecution.

8. That the learned trial magistrate failed to appreciate section 388 (1) of the *Penal Code* more so on issue to commit an offence thereby arriving at a wrong decision.

5. He prays that both his conviction and sentence be set aside for being unlawful, the 10 year sentence be set aside or substituted with a lesser sentence and that in the alternative he be set free unless lawfully held.

6. The appeal proceeded by way of filing written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.

7. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences. See Okeno –vs- Republic (1972) E.A 32.

8. I have re-evaluated the evidence on record.

9. In proving their case, the prosecution called six (6) witnesses. The Appellant on his part, tendered sworn defence testimony and did not call a witness.

10. The Appellant has challenged both the conviction and the sentence. He was convicted of the main count of attempted defilement; thus, the prosecution had a duty or onus to prove all the ingredients of the offence beyond any reasonable doubt.

11. The Appellant had no burden to prove his innocence. The elements of the offence were the age of the victim, which must be below 18 years. Second, the actual act or acts of attempt to defile. Thirdly the identity of the culprit.

12. With regard to the age of the victim, PW1 the victim stated that she was 10 years old, and that she was in class 5 WEST at [particulars withheld] Primary school. However, PW2, her mother stated in evidence that the victim was born on 4/9/2008 and was 11 years old. PW4, the victim's teacher testified that the victim was 12 years old at the time of the alleged incident. A clinic card was also relied upon and produced in court as PExt.6. I have looked at the clinic card, and I can say that the same looks suspicious and not genuine because of the alterations on it on the name and the lack of entry dates on when the victim attended clinic. This card could not be a basis for determining the victim's age. However, I note that the evidence on the age of the victim was not controverted and the trial magistrate saw the victim in court, and was of the view that she was very young and could not understand the nature of an oath and allowed her to tender unsworn evidence.

13. In my view, with the evidence on record, the prosecution indeed proved beyond any reasonable doubt that the victim was a child aged below 18 years at the time of the alleged incident.

14. Did the prosecution prove any act or acts that could constitute an attempt to defile the victim?

15. Under section 388(1) of the *Penal Code* (Cap.75), an attempt to commit an offence is defined as follows –

> 388(1) When a person intending to commit an offence, begins to put his intentions into execution by means adapted to its fulfillment, and manifest his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence."

16. It follows therefore, from the above statutory provisions, that it must be proved by evidence that somebody did an act or acts which would show that he or she was intending to commit the offence, but failed to commit the complete offence.

17. In the present case, the evidence of attempt to commit defilement is that of the victim PW1 who stated that she was send to buy sukuma wiki for 10/= at the Appellant's place when the Appellant took her to the house and closed the door and removed her clothes. The Appellant then led her to the bedroom pulled down his trouser and lied on her. That the Appellant then started touching her breasts and inserted his thing into hers (the place which she uses to urinate). PW1 started to scream and after finishing she stood up and dressed. The Appellant threatened to kill her if she ever told anybody, she then went home and did not tell anybody. It was her evidence also that she did not inform her mother about this. PW1 further in cross examination testified that it was not the first time the Appellant was doing that to her and that she could not count the number of times because they were many.

18. The other evidence on the same is that of PW4, GW a teacher at [particulars withheld] primary school who testified that PW1 was her pupil in Class 5. On 11/1/2018 at around 12pm she was teaching class 5 EAST when PW1 rose from her desk and came in front and told her that she wanted to tell her something. When she tried to talk, PW4 saw it was a sensitive issue and asked her to wait until the end of the lesson. After the lesson she went out with the victim and also called Madam Gachau who joined them. The victim then told them that the previous Saturday (06/1/2018) at about 12pm, she had been sent by her sister to buy vegetables when the Appellant asked her to enter his house and he locked the door, put her on the bed and did bad manners to her after tying her with a rope. She complained of stomach pains.

19. In my view, from the evidence on record before the trial court, the prosecution did not prove an act or acts amounting to an attempt to defile the victim. First, it is highly improbable that the Appellant would have attempted to do such an act and leave the victim in pains without the actual penetration.

What comes out from PW1 is that the Appellant actually defiled her and not once but many times. This rules out the offence of attempt to defile.

20. Secondly, though PW1 claimed that the Appellant had inserted his thing (penis) into hers (vagina) and had allegedly done so many times, the P3 Form PExbt.1 and testimony of PW5, Dr. Fatuma confirmed that there was no penetration on the victim. Even though the victim was taken to hospital six days after the alleged incident, the medical examination did not show any injuries, breakage of the hymen by penetration or healed scars.

21. In my view and in addition to the above, courts have to caution themselves before making adverse findings in such cases where all those involved are close family or relatives who are living together as family. In the present case, PW2 confirmed the Appellant was a distant relative. She did not observe anything strange with the victim on the day the incident took place and on the next day which was Sunday, she stayed with the victim throughout and she still did not notice if the victim had difficulties in walking or in pains something that was somehow noticed by the victim's teacher at school six days after the alleged incident.

22. PW4 testified that the victim was at the time of the incident 12 years and on the day she PW4 was testifying the victim was 13 years but she was not in school and had disappeared 3 days after the opening of the school. PW1's parents had told the school that she disappeared from home. Nothing more was said of the victim's disappearance.

23. PW4's assertion that the victim was complaining of pain in the lower abdomen and on passing urine was not supported by medical evidence, thus it cannot be ascertained.

24. With regard to the Appellant/culprit, since I have found that there was no evidence to establish an attempt to defile, I also find that the appellant was not proved to be the culprit. The Appellant was during the day on the alleged date at about midday at his home with his wife who was washing clothes. It is highly improbable that the Appellant would have attempted to do such an act when the wife was so nearby.

25. On the Appellant's defence, the learned trial magistrate found that the Appellant merely mentioned but fails to bring tangible evidence to demonstrate how the land dispute builds up to the charges before court. He further explained that his wife was at home when the offence is purported to have taken place. The wife was not brought to court to adduce evidence and no document is availed to show she cannot testify. The Appellant faced serious charges that required more tangible evidence to controvert the prosecutions case. By simply throwing statements here and there without proof in the learned magistrate's view would not amount to a defence. The learned magistrate further found the defence to be too simplistic to challenge the overwhelming evidence adduced by the prosecution. She did not find the defence substantive to challenge the ingredients of the offence as reviewed by her and proceeded to dismiss it.

26. This court's view in that regard is that the Appellant's evidence could only be taken on its face value and based thereon, fault if any could only be found based on that evidence taken as the truth. As was held in Sekitoliko vs. Uganda (1967) EA 53:

> The prosecution has a duty to prove all the elements of the offence beyond reasonable doubt and that the conviction of the accused is depended upon the strength of the prosecution case and not the weakness of the defence case."

27. In taking the approach she did, the learned trial magistrate seems to have shifted the burden of proof to the Appellant. It is trite that even where the accused decides not to adduce any evidence, the burden

is not lessened by that mere fact. This was the position of the Court of Appeal in the case of Dorcas Jemutai Sang vs. Republic [2018] eKLR where was faced with a similar case where the complaint by the Appellant was that the trial court and first appellate court had placed the burden of proof upon her to prove her innocence, the court stated as follows:

> In the present case we are satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in the light of the quotations we have reproduced above where the learned trial magistrate stated that the appellant:
>
> …did not call witness to support her defence,"
>
> and the learned Judge remarked that:
>
> …it was a significant fact that the appellant did not call …any witness at the trial."
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> By these sentiments, both the courts below appeared to say that the appellant was obliged to call witnesses to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground."

28. Thus, the prosecution did not prove beyond reasonable doubt that the Appellant attempted to defile NW (name withheld) contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* or the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

29. This court also notes two glaring errors in the Charge sheet;

    i. In the first count, the charge against the Appellant was made under *Sexual Offences Act* No. 8 of 2006 instead of *Act No. 3 of 2006*.

    ii. The second count, the alternative charge of committing an indecent act with a child contrary to section 11(1) of the Act gives particulars that the Appellant …"on the same date and at the same place intentionally touched the vagina of NW a child aged 10 years". What the Appellant could have used to touch the vagina is not stated contrary to what Section 11(1) of the Act states which has to be a "PENIS".

30. It follows therefore that both the conviction and sentence herein cannot be sustained.

31. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the Appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED & DELIVERED VIRTUALLY at MACHAKOS this 29th day of JULY 2024.**

**NOEL I. ADAGI**

**JUDGE**