Muriungi v Republic (Criminal Appeal E080 of 2023) [2024] KEHC 11749 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E080 OF 2023

LW GITARI, J

SEPTEMBER 26, 2024

BETWEEN

PATRICK MURIUNGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006 in the Principal Magistrate's Court at Nkubu Sexual Offences Case No.E032/2022. The particulars are that on 25/9/2022 in Imenti South Sub-County intentionally and unlawfully caused his penis to penetrate the vigina of RG a child aged eight years. He was also charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
2. The appellant denied the charges and a full trial was conducted. In the end the appellant was found guilty on the charge of defilement convicted and sentenced to serve life imprisonment.
3. The appellant was aggrieved with both the conviction and sentence and filed this appeal which was initially based on eight grounds but amended with the supplementary grounds of appeal which are as follows:-
    1. That the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution failed to call key witnesses in this case.
    2. The learned trial magistrate erred in law and fact by failing to note that the evidence of broken hymen is not prove of defilement.
    3. That the learned trial magistrate erred in law by failing to consider the legal provision for maximum/minimum sentences under Section 8 (4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose

an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the Appellant is harsh and excessive.

4. That the learned trial magistrate failed to take into consideration the defense of the appellant.

4. The respondent opposed the appeal and prayed that it be dismissed.

The Prosecution's case:

5. The complainant RG was a seven year old girl who gave evidence without being sworn. Her testimony was that sometimes in the month of September 2022 she went to the home of Murimi and while there the appellant locked her inside the house, held her hand and told her to remove her clothes. She refused but the appellant undressed her, inserted his penis in her vagina and did 'tabia mbaya' to her. The complainant cried and Murimi heard her crying and he also started crying. He met Mama K who enquired as to why she was crying. Murimi informed her that the appellant had locked the complainant inside the house. She went and ordered the appellant to open. The grant father of Murimi removed her from the house of the accused. The complainant's grandfather also went there and the appellant was arrested. The complainant was escorted to hospital where she was examined and treated by a doctor.

6. PW2 T.K is the complainant's grandmother. Her testimony was that on 25/9/2022 she went to church early in the morning leaving the complainant at home. She returned home at 11.00 a. only to find that the complainant had been defiled by the appellant and he had been arrested by the Area Manager and the Assistant Chief.

7. PW3 Frida Ntinyari is the Assistant Chief Kiamweri Sub-Location. She testified that on 25/9/2022 at 11.00 am she was called by the area manager Lawrence Kimathi who informed her that the complainant was locked inside the house of the appellant who was also inside. She went to the homestead and met the appellant and the owner of the home. She interrogated them but they did not respond. She then went to the complainant's home and she narrated how the appellant defiled her. She then arrested the appellant and took him to Kinoro Police Station.

8. PW4 Mark Gikunda testified that on 25/9/2022 he was called by Frida Kathure who informed her that the complainant was locked up in the house of the appellant. He interrogated the child called Murimi and he informed that the complainant was locked inside the house of the appellant PW4 went to that house and found that the door was locked from inside. The door was opened and the complainant and the appellant were found inside the house. The appellant was arrested by the chief and the area manager and escorted to the Police Station.

9. Timothy Mberia (PW5) was the clinical officer who testified that the complainant was treated at Kanyakine Sub-County Hospital on 25/9/2022 on allegation that she was defiled by a person who was well known to her. She alleged that she was defiled on 25/9/2022 at 11.00 am when the assailant pushed her inside his house and defiled her. On examination, she had pain and tenderness on her vagina, redness and Labia Minora and the hymen was freshly broken. Laboratory tests showed numerous pus cells and lococides (sic). No spermatozoa was seen. He concluded that based on the observations, there was penetration – sexual intercourse. He filled the P3 form and the PR.C (post Rape Care Form) and the treatment notes. The degree of injury was grievous harm.

10. PW6 No.227907 Police Constable Kiura is attached at Kinoro Police Station and was the investigating officer. He told the court that the investigating officer was P.C Nancy Achieng who was transferred from the station. He told the court that the case was reported at the station on 25/9/2022 that the

complainant had been defiled. The complainant led the police to the scene. The complainant was referred to hospital. Her birth certificate was availed to the police and showed that she was born on 3/9/2014. He produced the birth certificate as exhibit 5.

10. The appellant was put on his defence and opted to give his defence on oath. He told the court that he was rescuing the child (complainant) from where she was harvesting fruits and there were loose electricity wires. He chased the children. The aunt swore to teach him a lesson. He told the court that it was not him who defiled the complainant.

Submissions by the Appellant:

11 He submits that the prosecution failed to call key witnesses who were mentioned by the complainant. He relies on the case of David Mwingirwa v Republic [2015] eKLR and Martin Ndegwa Kabocho v Republic [2014] eKLR.

12. The appellant further submits that the charge was not proved to the required standards. He relied on P.K.W.N v Republic (citation not given). He further submits that the learned magistrate erred by failing to note that the mandatory life sentence was unconstitutional to the extent that it denies the Judicial Officers their legitimate jurisdiction to exercise discretion in sentencing.

13. He submits that the mandatory sentence under Section 8(1) (2) of the *Sexual Offences Act* violates Article 27(1) (2) & (4), Article 28 and Article 50 of *the Constitution*.

14. Finally the appellant submits that the charge was not proved beyond any reasonable doubts and relies on Woolmington v DPP 1935 AC 462, Miller v Minister of Justice and the Nigerian Case of Bakale v State [1935]2 NWLR 465.

Respondent's Submissions:

15. The respondent submits that all the ingredients of the charge were proved the required standards. He relies on Charles Wamukoya Karani v Republic, Joseph Kieti Seet v Republic 2014 eKLR.

16. The respondent relies on Section 143 of the *Evidence Act* and the case of Keter v Republic [2007] E.A 135 and submits that no particular number shall be necessary to prove a fact and submits that they adduced sufficient evidence to prove the charge against the appellant.

17. On the sentence, the respondent submits that the sentence under Section 8(1) (2) of the *Sexual Offences Act* is Constitutional. That it is not harsh and cruel as it is meant to be deterrent and a means to rid the society of those who prey on children. That he defiled a child aged eight years and that he should be kept away from the community. He cited Article 21(3) of *the Constitution*, Moatshe v The State of Matswani & Others (2003 BWCA 20 [2004] BLR 1 (CA.)

18. He has urged the court to dismiss the appeal.

Analysis & Determination:

19. I have considered the proceedings before the trial court, the submissions and the grounds of Appeal. The issues which arise for determination are:-

    1. Whether the prosecution failed to call crucial witnesses.

    2. Whether the sentence under Section 8(1) & (2) of the *Sexual Offences Act* is unconstitutional.

    3. Whether the defence of the appellant was considered.

4. Whether the charge was proved beyond any reasonable doubts.

20. This is the 1st appellate court whose duty is to re-evaluate the evidence tendered before the trial court, analyse it and come up with its own independent finding. The court is however supposed to leave room for the fact that it did not have an opportunity to see the witnesses when they testified in order to assess their demeanor. See Okeno v Republic 1972] E.A 32. In Kiilu & Another v Republic [2005] 1 KLR 174 Court of Appeal, it was stated as follows:-

> " An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustible examination and to the appellate courts own decision on the evidence. The appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In so doing, it should make allowance for the fact that the trial court has had advantage of seeing and hearing the witnesses."

21. The first appellate court has jurisdiction to consider facts and law. Section 347 of the Criminal Procedure Code (cap 75 Laws of Kenya)provides that-

> " Save as in this part provided-
>
> A person convicted on a trial held in a sub-ordinate court, of the 1st or 2nd class may appeal to the High Court and an appeal to the High Court may be on a matter of fact as well as on a matter of law."

22. The appellant has challenged his conviction on the ground that key witnesses were not called. In a criminal prosecutions the respondent has the discretion to determine who it will call as its witnesses to support the case. Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that;

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary be required to the proof of any fact."

23. In Keter v Republic [2007] E.A 135 the court held that;

> " ..... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubts."

24. Thus, not every witness who witnesses is a matter is supposed to be called as a witness. Thus, witnesses are not supposed to be called if they will come to repeat what has been stated by other witnesses, they may not be called to adduce evidence on matters that are not in dispute and have been stated by other witnesses. The prosecution will be faulted if it fails to call a witness or witnesses with ulterior motives and when the evidence is barely enough. In such situations failure to call crucial witnesses is fatal.

25. This is a sexual offence and the crucial witnesses are the victim of the crime and the medical officer whose role is to corroborate the testimony of the complainant. In Sexual offences the law allows the courts to convict on the evidence of the complainant if the court is satisfied that the witness is telling the truth. Section 124 of the *Evidence Act* (Cap 80 Laws of Kenya)provides:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section

on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

26. In Sexual Offences witnesses who are called apart from the victim, are in most case not eye witnesses. The offences are not in most cases committed in the glare of witnesses. The witnesses in Sexual Offences often give circumstantial evidence. If the prosecution calls witnesses a witness or witnesses to confirm the circumstances, it need not to call a horde of witnesses. The case of Bukenya v Uganda [1972] E.A 549 is the 'Locus classicus' on the failure to call crucial witnesses. The court held that;

> " The prosecution must avail all witnesses necessary to establish the truth even though their evidence may be inconsistent. The court has the right and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called is barely adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

27. In the case of Julius Kalewa Mutunga v Republic [2006] eKLR the Court of Appeal held that;

> " as a general principle of law whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless for example it is shown that the prosecution was influenced by some oblique motive."

28. The appellant has in his submissions mentioned witnesses who he says were not called. The prosecution called the complainant. PW2 complainant's grandmother who found that the appellant had been arrested by the area manager. PW3 was the assistant chief who arrested the appellant. PW4 when he heard that the complainant was locked inside the house. The door was opened and the complainant and the appellant were found inside. The prosecution then called the clinical officer and the investigating officer. These being the witnesses who were called, I fail to see any crucial witness who was not called.

29. On the sentence the appellant submits that the court failed to consider that the sentence under Section 8(1) (2) was unconstitutional.

30. I have considered the submission and find that the Supreme Court has affirmed that the sentence under Section 8 of the *Sexual Offences Act*is lawful. In the Supreme Court Petilian No. E018/2023 Repbulic – Joshua Gichuki Mwangi. The Supreme Court stated that the sentence under Section 8 of the *Sexual Offences Act* is lawful for as long as the Act remains valid. The court stated that the sentences under the section are not unconstitutional. On the other hand in the case of Benard Kimani Gicheru v republic [2002] eKLR the Court of Appeal stated that-

> " It is now settled law following several authorities by this court and by the High Court that sentence is a matter that rests in the discretion of the trial court. Similarly sentence must depend on the facts of each case. On appeal the appellate court will not normally not interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case or that the trial court overlooked some material factor or took into account some wrong material or acted on wrong principle. Even if the appellate court feels that the

sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with discretion of the trial court on sentence unless any one of the matters exist."

31. In this case the appellant was charged under Section 8(1) (2) of the *Sexual Offences Act* which provides for a mandatory minimum sentence of life imprisonment. The prosecution proved that the appellant picked the complainant and led her to his house where the defiled her. He was caught. The age of the complainant was proved with a birth certificate showing that she was born on 30/9/2014 and was a child of tender years, aged eight (8) years at the time the offence was committed. The appellant did not offer mitigation when he was given the opportunity. The trial magistrate considered the age of the victim, he observed that the appellant was not remorseful and deserves a deterrent sentence and that the sentence provided for was life imprisonment. I find that the trial magistrate considered relevant factors. The offence was against a minor child. The sentence imposed was lawful and appropriate in the circumstances. I find no reason to interfere with the sentence.

Whether the defence was considered

32. The learned magistrate in his Judgment stated that the defence offered by the appellant was devoid of any merit, the same does not hold any water in the face of the prosecution evidence tendered herein. I find that the defence was considered and was rejected for a good reason.

Whether the charge was proved beyond any reasonable doubts

33. The burden was on the prosecution to prove the charge beyond any reasonable doubts. See Woolmington v D.P.P [1935] A.C. The prosecution proved the ingredients of charge which include, penetration, Age of the victim and the identity of the perpetrator. Age was proved with a birth certificate of the minor. On the identity of the perpetrator, he was caught red handed in broad daylight. Penetration was proved by the evidence of the complainant and corroborated by medical evidence. The charge was proved.

Conclusion:

For the reasons stated in this Judgment, the appeal is without merits. I dismiss it.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF SEPTEMBER, 2024.

L.W. GITARI

JUDGE