Mwangangi v Republic (Criminal Appeal E280 of 2023)
[2024] KEHC 13305 (KLR) (Crim) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E280 OF 2023

LN MUTENDE, J

OCTOBER 30, 2024

BETWEEN

GEORGE MWANGANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in S.O. No. 33 of 2018 at the Chief Magistrate's Court Makadara)

JUDGMENT

1. George Mwangangi, the Appellant, was arraigned following allegations of having committed the offence of defilement in contravention of Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. Particulars of the offence were that on the 11th November, 2017 at Nairobi within Nairobi County, he intentionally caused his penis to penetrate the vagina of N.N. a child aged 8 years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Particulars being that on diverse dates or 11th November, 2017 at Nairobi within Nairobi County he intentionally touched the vagina of N.N. a child aged 8 years with his penis.

3. He was taken through full trial, convicted for defilement and sentenced to serve life imprisonment.

4. Aggrieved, the appellant proffered this appeal against both the conviction and sentence on grounds that;There was no proper identification.Circumstantial evidence adduced did not place the appellant at the scene of the alleged crimeThe age of the complainant was not established.The defence which reasonably exonerated theappellant from any wrongful doing was rejected.The complainant was an

incredible witness whose evidence could not be a basis for conviction.Convicting on single witness evidence without giving reasons for believing the complaint's testimony was erroneous.

5. Briefly, facts of the case were that the complainant was at a salon when the appellant a person known to her told her that he had been sent by her mother to pick her from the salon. Along the way he bought her chips then he also bought miraa/muguka and they walked in the market centre. Thereafter he took her to some place with long grass where he removed her underpants, then her two teeth and sexually violated her. Upon finishing he escorted her up to Muthurwa market and told her to run home.

6. She complied and along the way encountered her mother to whom she reported the incident. They reported to the Muthurwa Police Sation, the occurrence and her mother took her to hospital for examination and treatment. Three months later, on 20th February, 2018, the appellant was arrested and charged.

7. Upon being placed on his defence the appellant stated that he resided at Grogan Road being homeless, and, a water vendor. That on 11th November, 2017 he sold water using a trolley at Muthurwa then went to relax at Grogan at about 1.00 pm. That on 20th February, 2018 as he walked back to Grogan from Country Bus Terminus he was arrested and taken to Muthurwa Police Station then Kamukunji Police Station where he recorded a statement. He argued that he was not taken to the hospital for DNA extractions. That he saw the complainant's mother and the complainant for the first time at the Muthurwa Police Post.

8. The court considered evidence adduced, found the fact of the victim being a child and penetration having been proved. The court further believed that the child was telling the truth hence the conviction.

9. The appeal was canvassed through written submissions. The appellant introduced issues that were not in the Petition of Appeal, namely the argument that voire dire examination was poorly conducted, and, that evidence was inconsistent and uncorroborated. These must be disregarded by the court as no leave was obtained.

10. It is further argued that the minor started off by denying that she knew the appellant but changed during cross examination hence could not have been truthful so as to be believed; and, that the sentence was excessive.

11. The respondent opposed the appeal. It is urged that the appellant was known to the complainant having gone to drink alcohol at a neighbour's house and was regular in the Muthurwa neighbourhood. Relying on the case of Mohamed Boru Guyo Vs. Republic (2020) eKLR it was argued that pursuant to Section 124 of the *Evidence Act*, evidence of the victim did not require corroboration.

12. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in Okeno Vs Republic [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the

trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424".

13. The elements of the offence of defilement are stipulated in Section 8(1) of the *Sexual Offences Act* (SOA) that provide thus:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

14. This was restated in GOA Vs. Republic (2018) eKLR thus:

> " The Key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the appellant was the perpetrator of the offence"

15. On the question of proof of age of the victim which is disputed herein, in Francis Omuroni Vs Uganda, Crim. Appeal No. 2 of 2000 the court of Appeal of Uganda stated thus:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

16. In Mwalengo Chichoro Mwajembe Vs Republic (2016) it was held that:

> " The question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary 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""

17. The particulars of the offence state that the victim was eight (8) years old. She was taken through voire dire examination and found to be intelligent and was affirmed. At the time of testifying which was one year after the alleged incident she told the court that she was nine (9) years old and in standard 3. PW3 Sophia Rukia Wangare the mother of the complainant stated that she was ten (10) years old. A certificate of Birth Serial No. (Withheld) for N. N. had a date of birth as the 27th October, 2009. The incident having occurred on 11th November, 2017 or thereabout the victim was eight (8) years old at the time hence a child of tender years.

18. The victim gave a detailed account of what befell her, how the assailant lay on top of her and having removed her undergarments inserted his private part that he uses to urinate into her private part that she used to urinate. Considering human anatomy, the thing used to urinate by a man would be the 'penis' while that of a woman would be the 'vagina' which are genital organs.

19. Section 2 of the *Sexual Offences Act* defines penetration as follows:

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person;"

20. The victim was subjected to medical examination thereafter. PW5 Penina Agwenyi, a Clinical Officer at Medecins Sans Frontieres (MSF) Mathare Project, who adduced in evidence the Post Rape Care (PRC) form that was filed following the examination. It was established that the victim was missing two (2) teeth. The vagina had reddened walls with blood stripes. The hymen had fresh tears at 6 and

12 o'clock positions. At her age since she had not started menstruating, it was opined that it must have been a case of sexual assault.

21. Subsequently, a P3 was filled. The Doctor who examined the victim found her hymen torn. PW5 Dr. Kamau Mariga who adduced it in evidence stated that there was no indication of missing teeth.

22. Also adduced in evidence by the same Doctor was a P3 issued to George Mwangangi stated to be 18 years old as at 21st February, 2018. He had a lacerated cut wound on the lower lip that was swollen and tender, injuries that were a day old and profiled as harm.

23. The appellant was identified as the assailant by the victim. It is recorded that the victim stated 'I do not know the accused' Then she proceeded to state as follows:

> " He is called George Mwangangi. I have seen him at our home. He come to our home. I have seen him once..."

24. On cross examination she stated that:

> " I would see you at our neighbours drinking alcohol"

25. Thereafter, she was recalled for further cross examination by counsel retained for the accused. She recounted the whole episode and said her teeth were removed by the appellant who threatened to kill her if she divulged what happened.

26. Evidence adduced was of a single witness as appreciated by the appellant. The law is clear, such evidence may be adequate depending on whether the court finds it believable. Section 124 of the *Evidence Act* Provides thus:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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.

27. The court opined that the evidence was believable. That although had Baba Angel testified his evidence would have corroborated that of PW3, while testifying the child avoided eye contact with the appellant hence he was the assailant.

28. This is a case where at the outset the victim stated that she knew the appellant as she had previously seen him at a neighbor's place drinking alcohol.

29. PW3, her mother testified to have been told by Mama Gaceri and her husband that they had seen the appellant with the complainant, but these were not eye witnesses to the act and their evidence was hearsay hence must be disregarded.

30. The complainant said she knew the appellant previously having seen him at their neighbour's place drinking alcohol. It was also a case where the perpetrator took the child from where she had gone to the salon, went with her to a video place where they watched a movie prior to taking her to the locus in quo. For an intelligent child aged eight (8) years she was not mistaken about the identity of the appellant.

31. On the issue of sentence, Section 8(2) of the *Sexual Offences Act* provides that:

> "(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

32. The trial court considered the mandatory sentence provided for in law. From the foregoing, it is apparent that the court adhered to the law. In the premises, I find the appeal lacking merit. Therefore, it is dismissed in its entirety.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 30TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE