



REPUBLIC OF KENYA



KENYA LAW
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**Muturi v Republic (Criminal Appeal 19 of 2019)
[2023] KEHC 3681 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3681 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 19 OF 2019
SC CHIRCHIR, J
APRIL 25, 2023**

BETWEEN

GERALD NGACHIRI MUTURI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Muranga delivered on 7th May 2019 by Hon. M. Wachira (Chief Magistrate), in Criminal case No.13 of 2017)

JUDGMENT

1. The Appellant was charged with the offence of Attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006 (The Act). It is alleged that on the 9th day of October 2017 in kahuha location within Murang'a County intentionally attempted to cause his penis to penetrate the vagina of FNG a child aged 14 years. He faced an alternative charge of Committing an Indecent Act with a child contrary to Section 11(1) of the same Act.

He was convicted of the first charge and sentenced to 10 years imprisonment. Aggrieved by the judgement, he has proffered this appeal.

Grounds of appeal

2. The Appellant filed a Petition of Appeal, however in his submissions, he seemed to have focused on slightly different grounds. I take note of the fact that the Appellant is unrepresented in this appeal and therefore I will consider the grounds as set out in the submissions and the Petition of Appeal
3. From the submissions and the Appeal, the following are what I could decipher to be the grounds of Appeal:
 - a. That the prosecution failed to call crucial witnesses.



- b. That crucial exhibits were not produced.
- c. There were contradictions and inconsistencies on the prosecution's case.
- d. That the case was not proved beyond reasonable doubt.
- e. That the court shifted the burden of proof to the Appellant.

Summary of the lower court evidence

4. PW1 was the complainant. She told the court that she was 15 years old. On 14/9/2002 she was on her way to school at 6.30 a.m. The Appellant followed her, and caught up with her when she was approaching school. He tore her dress, pushed her down, and touched her breasts, vagina and buttocks. He also tore the school bag. She screamed and her screams attracted other pupils and another person who was passing by. The Appellant took off on seeing the pupils. She bit his finger during the incident. The Appellant did not manage to pin her down or lay on her, as she was kicking and fighting him off
5. She reported the incident to her head Teacher and the teacher took her to the police station. She was taken to Murang'a Referral Hospital. She said she could clearly see the Appellant as it was early in the morning. She identified the Accused.
6. PW2 told the court that he was at Githime at a bus stop where he goes to sell milk. At about 6.15a.m the complainant, dressed in school uniform passed by. She was walking fast then she started running. Immediately thereafter the Appellant also came by, running towards the same direction. He did not suspect anything untoward. After a short while a boy came from the direction where the complainant and "the man" were headed and told him that the man who had been following the girl attempted to defile her. While they were talking, the Appellant came back and the boy told them "ni huyu" (that's him). The witness noted that it is the same man who had been following the girl. There was another man who had joint PW2 by then, and they both tried to arrest the Appellant but he managed to escape into some coffee bushes. PW2 went and reported the incident to the chief.
7. PW3 was the Head teacher of the complainant's school. She told the court that when she arrived at the school, she found the complainant in her office, crying. She narrated to the teacher about what had happened. She took the Complainant to the police and then to the hospital.
8. PW4 was the Investigation's officer. He told the court that on 9/10/2017, the complainant, in the company of her head teacher, reported the incident. On 10/10/2017 at about midnight, the Appellant was brought in by members of the public. He took him for treatment of his finger at Kerogo Health Centre. He investigated the case, then recommended the present charges.
9. PW5 was a clinical officer based at Murang'a Level 5 Hospital. He told the court that on examination, the complainant was found to have suffered bruises on the face, swelling on the right hand, elbow and tender right knee with bruises. The complainant was looking terrified. No injuries were noted on the genitals.
10. On being recalled, he produced the treatment card for the Appellant. He told the court that the Appellant had a blood stained T-shirt, he reported to have been arrested by a group of people. He had a bite wound on his left middle finger and bruises on hips. On cross-examination he told the court that the injury on the finger was a human bite mark and was not from the beatings, he received from members of the public. The Appellant was examined on 10th October 2017, a day after the attempted defilement.



11. The Appellant gave a sworn statement. He confined his statement to the events of 10/10/2017 and not 9/9/2017. He said he was at his Aunt's home when some people came looking for him. His uncle decided to take him to the police station instead.

Appellant's submissions

12. It is the Appellant's submission that some crucial witnesses including a school boy who allegedly witnessed the incident and other 3 school children, were all not called to testify; that PW2's evidence was hearsay as he was reporting what he heard from the school boy.
13. It is further submitted that crucial exhibits were not produced. The Appellant specifically named the complainant's dress and school bag which he allegedly tore. According to him, these two pieces of clothing should have been produced to prove that there were some struggle between him and the complainant.
14. On the alleged contradictions and inconsistencies, he referred to the complainant's part of her testimony where she alleged that her clothes were torn yet PW3, the head teacher's testimony was silent on it. He also points out that while the medical officer (PW4) told the court that the complainant had changed clothes, he casts doubt on where and when this could have happened, since it is apparent that the complainant moved from the scene to school, to the police station, then to the hospital. He concludes by saying that both the head teacher and the medical officer were not being truthful.

Respondent's submissions

15. It is the Respondent's Submission that there were no contradictions or inconsistencies in the prosecution's case as the witnesses' narrations of the events tallied
16. Finally, it is submitted that the Appellant did not address himself to the accusations and instead recounted the events of the following day.

Determination

17. I have perused the lower court record and considered the grounds of appeal and the submissions of the parties. The role of this court as the first appellate court is to look at the evidence afresh, re-evaluate it and come up with its own independent decision (See *Oneko v Republic* [1972] E.A 32.
18. From the grounds of appeal and the submissions, the following are issues need to be addressed:
 - a). Whether there were contradictions and inconsistencies in the prosecution's case.
 - b). Whether the prosecution failed to call crucial witnesses and to produce crucial exhibits.
 - c). Whether the case was proved beyond reasonable doubt.
 - d). Whether the court shifted the burden of proof to the Appellant.

Whether there were contradictions and inconsistencies in the prosecution's case.

19. The Appellant has cited the testimony of PW1, where she stated that she suffered injuries on knees and back and her clothes were torn yet PW3's testimony, on the other hand, was silent on this. According to the Appellant, this was a contradiction. It is my view that the above do not constitute a contradiction or inconsistency.
20. What are contradictions and inconsistencies? In *David Ojeabuo v Federal Republic of Nigeria* [2014] LPELR-22555(CA) cited with approval in the case of *MW v Republic* [2019] e KLR the court stated:



“Now contradiction means lack of agreement between two related facts. Evidence contradict another piece of Evidence when it says the opposite of what another piece of evidence has stated, and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts, while discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains” In reference the testimony of PW1 and, PW3 the Evidence did not contradict each other, it is simply that the complainant’s had “a little more”. It is a mere discrepancy.

21. The Appellant also argues that the testimony of PW4, the medical officer, is questionable as he testified that the complainant had changed clothes. He contends that this cannot be possible as there was no time to change clothes. I do find that whereas this question is valid, it does not materially affect the prosecution’s case on the act of attempted defilement.
22. On contradictions , discrepancies and gaps it has been held that such can be ignored unless they materially affect the prosecution’s case or they reveal a deliberate attempt at untruthfulness (see *Twehangane v Uganda*[2003]UGCA, cited in *Eric Onyango v Republic* [2014] eKLR)

I do not find any contradiction in the instant case , but discrepancies and gaps which in my view are too minor .They don’t go into the substance of the case neither does it reveal a deliberate attempt to mislead.

Whether there was failure to summon crucial witnesses and produce crucial documents.

23. In this regard, the Appellant cites the testimony of PW1 who stated that a neighbour to the school, and some three pupils came to her rescue. These 4, he argues, were not summoned. He also referred to a school boy who took the report to PW2 about the incident. This boy was not summoned too.

Section 43 of the *Evidence Act* obligates the prosecution to summon such number of witnesses as may be sufficient to prove their case. There is no obligation to call all the witnesses. The discretion of calling witnesses is also exclusive to the prosecution. I find that failure to call these witnesses did not materially affect the prosecution’s case.

24. On the exhibits, the Appellant contends that the complainant's school bag and school uniform, which he allegedly tore during the incident should have been produced to prove that indeed there was a struggle. In this case, the evidence of PW1 was unshakeable in cross-examination. The evidence of PW4 corroborated the fact that the complainant had been attacked. I am satisfied that failure to produce these items did not affect the prosecution’s case

Whether the prosecution’s case was proved beyond reasonable doubt.

25. The offence of attempted defilement is set out under section 9 of the *Sexual Offences Act*. It provides as follows; 9(1) "A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

Section 2 of the *sexual offences Act* defines penetration as “the partial or complete insertion of the genital organs of a person into the genital organs of another person”

Section 2 of the *children’s Act* defines a child as “an individual who has not attained the age of 18 years”

Section 388 of the *Penal Code* defines the meaning of attempt to commit an offence as follows:

1. “When a person, intending to commit an offence, begins to put his intention into execution by means adopted to its fulfilment, and manifest his intention by some overt act, but does



not fulfil his intention to such an extent as to commit the offence he is deemed to attempt to commit an offence.

2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will or whether he desists of his own motion from further prosecution of his intention.
 3. It is immaterial that by reason of circumstances not known to the offender, it is impossible in fact, to commit the offence”.
26. The complainant was 14 years old. PW4 produced her birth certificate (PEXB 1) and in any case there was no contest on the fact that the complainant was a child.
27. What about the Overt Acts? The following portion of the complainant's testimony are relevant in his regard. She told the court, “The accused caught up with me and overtook me. I stopped because I was near the school. The accused turned right to a feeder road and took some black and green papers and came back and caught up with me. He knocked me down with his foot and I fell down. He pushed the papers in my mouth and started touching my private parts. I removed the papers from the mouth and managed to bite his finger; I scream for help before he put papers in my mouth. When the accused knocked me to the ground, he tore the sides of the dress as he struggled to remove it. He was bending towards my face, but I kicked him on the face. He bent again towards my face and touched my breasts, the vagina and buttocks but because I was fighting him off and kicking him, he was unable to pin me down and lay on me. Joseph Muchoki and the pupils arrived before he managed to lay on me...”
28. There is no doubt in my mind as to what the intentions of the Appellant were: - to defile the complainant. The chain of events speak for themselves. The completion of his acts were put on hold but the arrival of a Mr. Muchoki and the 3 pupils.
29. On identification, the complainant told the court that the time was about 6.30 in the morning. She was able to clearly see the Appellant as he dashed to collect some papers from a feeder road, and dashed back to attack her. There was a struggle, resulting in the tearing of her school uniform and her school bag, and biting of the assailant's finger. In my assessment, these acts took ample time for the complainant to identify the Appellant. The complainant also told the court that she bit her assailant's finger, a fact which was corroborated by PW4, who produced a medical record showing that the Appellant suffered a human bite mark on the middle finger.
- PW2 saw the complainant running past him in uniform, and shortly thereafter saw a man equally running after her. The same man later returned, wearing the same clothes he had earlier on. Based on a report, given by a school boy who had witnessed the incident, he and his companion attempted to arrest him but the man escaped to some coffee bushes.
30. Based on the evidence of the complainant, PW2 and PW4, I have no doubt that the Appellant was fully identified as the perpetrator
31. The prosecution proved all the ingredients of the offence and I hold and find that the offence was proved beyond reasonable doubt.

Did the court shift the burden?

32. Nothing could be far from the truth. The prosecution had proved its case beyond any doubt even if the Appellant had taken the option of silence in his defence. In his response, he did not address the events of 9/10/2017. In effect, he did not make any defence in respect to the accusation raised against him.



33. I have no reason to fault the lower court's judgement on both the conviction and sentence of the Appellant.

34. The Appeal is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 25TH DAY OF APRIL 2023

S. CHIRCHIR

JUDGE

In the presence of:

Susan- Court Assistant

Appellant- present

Ms Muriu for the Respondent.

