Murimi v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 27512 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 27512 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E013 OF 2022

RPV WENDOH, J

MAY 31, 2023

BETWEEN

MURIMI MUSIMO MURIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon M. Obiero – Senior Principal Magistrate in Migori Chief Magistrate's Criminal Case No. E 059 OF 2021 delivered on 28/2/2022)

JUDGMENT

1. Murimi Musimo Murimi, the appellant, is aggrieved by the judgment delivered on 28/2/2022 by Senior Principal Magistrate Migori Law Courts.

2. The applicant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. 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*.

3. The particulars of the charge are that on diverse dates between 1/8/2021 and 6/9/2021 in [particulars withheld] of Migori County intentionally and unlawfully caused his penis to penetrate the vagina of BEN; a girl aged sixteen (16) years or that he touched the vagina of BEN a child aged sixteen years with his penis.

4. The case proceeded to full trial with the prosecution calling a total of three witnesses. The applicant, gave unsworn defence and did not call any other witness. The court convicted the appellant and sentenced him to fifteen (15) years imprisonment. The said judgment provoked this appeal.

5. The appellant relies on the following Amended grounds of appeal:-

    1. The trial court failed to comply with Article 50 (2)9g) and (h) of the Constitution;

2. That the offence of defilement was not proved;

3. That the court violated his right by declining to allow him to recall the complainant;

4. That the court violated his right under Article 49 (1) (c) and (d)of the Constitution;

5. That essential witnesses were not called.

6. He therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith. The appellant also filed submissions in which he contends that the complainant clearly stated that the parents gave her to Murimi for marriage and hence they knew her age to be above eighteen (18) years and he should have been given the benefit of doubt because the complainant 's parents were never called as witnesses. He argued that the complainants parents and uncle were crucial witnesses who should have been called as witnesses; that the Chief who rescued the complainant should also have been called as a witness. He relied on *Bukenya v. Uganda* (1972) E.A. 549.

7. It was also submitted that the complainant's testimony was contradictory in that she claimed to be sixteen (16) years and she did not go to school, then changed to State that she is fourteen (14) years and goes to school and that it was not believable. The appellant also urge d that no evidence was adduced to prove penetration.

8. The appeal was opposed and the prosecution counsel filed submissions on 12/9/2023. It was submitted that the complainant (PW1) knew the appellant as Murimi, a neighbour, the age was assessed at sixteen (16) years and that PW1 narrated how the appellant took her to the brothers house and inserted his penis in her vagina; that PW3, the clinical officer examined the complainant and found her to have injuries to her genitalia, hymen was broken and there was proof of penetration.

9. As to violation of the appellants rights under Article 50 (2) (g) and (h, it was counsel's submission that the court informed the appellant of his right to be represented by counsel before plea was taken and the appellant indicated that he was ready to proceed without counsel.

10. Counsel relied on the decision of *Joseph Kiema v. Republic* (2019) eKLR. As regards the right under Article 50 (2) (h) counsel relied on *Awiti v. Republic* (2023) where the court observed that the right is not automatic and the appellant needed to demonstrate some injustice will result to him if counsel was not assigned to him at State expense.

11. On failure to recall some witnesses, it was submitted that the witnesses were not key witness and as to recalling PW1, the appellant did not give reasons for recalling PW1. Counsel urged that the trial court arrived at the correct finding and that the court exercised its discretion judiciously in sentencing the appellant.

12. This being a first appeal, it behoves this court to re-examine all the evidence tendered before the trial court, analyse it and come to its own conclusions but bear in mind that it neither saw nor heard the witnesses testify. The court is guided by the decisions of *Okeno v. Republic* (1972) EA 32.

13. The prosecution case was as follows:-

> The complainant BEN testified that on 4/9/2021 her parents gave her to Murimi (the appellant) to be married to him. She went with Murimi to his home and that he took her to the brother's home where the appellant removed her clothes, removed his too and put his penis in her vagina. He forced her to have sex with him and threatened her with dire consequences if she refused. On 5/9/2021 he took her to Migori where he rented a house

and the Chief found her there, enquired why she was there and she said she was staying with Murimi; that the Chief talked to Murimi and then called police and Murimi was arrested.

14. PW2 PC(W) Jemima Amoit of Oruba Police Station recalled the 6/9/2021 when the OCS informed her of a girl who was cohabiting with a man at Ragana. They went to the scene, met the Chief, suspect and complainant. They took them to the police. On 7/9/2021 both the complainant and suspect were taken for examination. PW2 also took the complainant for age assessment and she was found to be 16 years old.

15. PW3 Stella Oiro a clinical Officer at Migori County Hospital examined the complainant on 7/9/202. PW3 found bruises to the complainant's vagina; hymen was broken and she had urinary tract infection. PW3 estimated PW1's age to be sixteen (16) years old.

16. In his defence, the accused made an unsworn statement generally denying the offence.

17. I have now considered the grounds of appeal, the rival submissions and the evidence tendered in the trial court.

18. Alleged violation of Article 49 (1) (c) and (d). Article provides for rights of an arrested person.

19. Article 49 (1) An arrested person has the right-

    (a) to be informed promptly, in language that the person understands, of –

        (i) the reason for the arrest;

        (ii) the right to remain silent; and

        (iii) the consequences of not remaining silent;

    (b) to remain silent;

    (c) to communicate with an advocate, and other persons whose assistance is necessary;

    (d) not to be compelled to make any confession or admission that could be used in evidence against the person.

20. The appellant did not substantiate how the above rights were violated. If at all the right were violated, it cannot be by the court but at the hands of the police. A conviction and sentence cannot be vitiated for such violation, he should seek for damages against the arresting officers or police. In any event, there is no proof of violation of the said rights.

21. As regards violation of the appellants rights under Article 50 (2) (g) and (h);

    Article 50 generally provides guarantees to an accused person's right to fair hearing. Under Sub Article 2 (g), it is required of the court to promptly inform an accused of his right to choose counsel to represent him. I have looked at the court record and I find that the appellant was informed of his right to choose counsel on 8/9/2021 once he was arraigned before the court and before plea was taken. He responded that he was ready and therefore the charge was read to him. In *Joseph Kiema v. Republic* (2019) eKLR the court said:-

    > It is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expenses of the state. It [the court

record] must show that the court did take the profile of the accused person before the trial commenced."

22. The right under Article (2) (g) was not violated.

23. Under Article 50 (2) (h) the court is required to inform an accused that he is entitled to counsel provided by the State at State expense if substantial injuries is likely to result. However, there is an order that the counsel will only be provided if 'substantial injustice would otherwise result.'

24. The court considered the said right in *Awiti v. Republic* (2023) eKLR where the court observed that the said right is not automatic because it has to be demonstrated that substantial injustice will result if the counsel is not assigned counsel. In Karisa Chengo v. Republic Criminal Appeal No. 44, 45 and 76 of 2014, the court held:-

> ...a person would be entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation.... Substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death..."

25. In *Sheria Mtaani Na Shadrack Wambui v. Office of the Chief Justice & Another; Office of the Director of Public Prosecutions & Another (Interested Parties)* (2021) eKLR J. Mrima held that legal representation is a qualified constitutional right under Article 50 (2) (h) because today in Kenya, only an accused charged with murder and a child in conflict with the law is automatically, entitled to counsel at State expense. For others, it has to be demonstrated that they will suffer substantial injustice if counsel is not provided because of the complexity of the case, the inability by accused to defend themselves, or lack of understanding of the issues, amongst others. So far, the appellant has not demonstrated that substantial injustice resulted to him as a result of failure to be provided with Counsel at State expense.

Whether the offence of defilement was proved:

26. To prove a charge of defilement under Section 8 (1) of the *Sexual Offences Act*, the prosecution has to prove beyond reasonable doubt that:-

    1. The Complainant is a minor;
    2. That there was penetration;
    3. Proof of identity of the perpetrator.

Of Age

27. During voire dire examination, the complainant stated that she was sixteen (16) years old. However, later on in cross examination, she said that she was fourteen (14) years old. She was examined by the clinical officer who was of the view that she was sixteen (16) years old. In the case of *Mwalango Chichoro Mwanjembe v. Republic* (2016) eKLR the court laid down guidelines on how age of a victim of defilement may be proved when it said :-

> The question of proof of age has finally been settled by 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."

28. Again *Flappyton Mutuku Ngui v. Republic* (2014) eKLR

> that the conclusive proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

29. In *Francis Omuroni v Uganda* Criminal Appeal 2 of 2020 the Court of Appeal of Uganda added that age can also be proved through common sense. In this case, when the magistrate saw the complainant, he decided to take her through voire dire examination meaning that the court noticed that she was a minor. At first, the complainant said she was sixteen (16) years old and not going to school later, she changed and said that she was fourteen (14) years and in class 3. She may have been referring to the finding of the clinical officer who found that she was sixteen (16) years. In my view, the complainant's age was established by the clinical officer PW3 and even common sense from observation by the court.

Whether penetration was proved:

30. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

31. PW1 narrated how the appellant took her from home, slept with the PW1 at his brother's house on 4/9/2021 where he inserted his penis in he r vagina. PW1's testimony was corroborated by PW3's findings, that PW1 had bruises to her vagina and the hymen was broken which confirmed that there was penetration. She was examined on 7/9/2023, three days after the ordeal The court has no doubt that penetration was proved beyond reasonable doubt.

Whether the appellant was the culprit:

32. The complainant identified the appellant as Murimi her neighbour at home. That fact was not controverted. The defence was a bare denial. There was no reason why PW1 would come up with such a lie against the appellant.

33. In his submissions, the appellant alleged that PW1 must have been over eighteen years and that is why her parents gave her off for marriage. However, the court has found that the complainant must be a child from the observation by the court which took her through voire dire and confirmed by the clinical officer. Besides, the appellant never raised a defence under Section 8 (5) *Sexual Offences act* that the complainant represented herself as an adult over eighteen (18) years old. The said defence cannot be raised on appeal. The identity of the appellant did not come into question. PW1 stayed with the appellant for some days before arrest. There is no doubt that the appellant was properly identified.

34. The appellant also complained that his right to fair hearing was violated when the court declined to allow him to recall the complainant. The request was made on 12/1/2022 just before he gave his defence. The appellant did not give reasons for wanting to recall PW1. The court could not allow the recall of a witness for the sake of it. The appellant should have demonstrated why he needed to recall PW1. The request was properly declined.

35. The appellant alleged that key witnesses were not called i.e. PW1's mother and uncle and the Chief; Calling of witnesses is the discretion of the prosecution to determine how many witnesses to call and who are relevant to their use. Section 143 of *Evidence Act* provides that a fact may be proved by the testimony of one witness except in cases where the law provides otherwise. In Bukenya v. Uganda

(supra) the court held that the prosecution should avail all witnesses whose evidence is essential to the just decision of the case. It is unnecessary to call and superfluity of witnesses. Where however, the evidence of a witness is left out for an oblique motive, the court would hold that the evidence may have been adverse to the prosecution case. In *Mwangi v. Republic* (1984) KLR 595; the court of Appeal said:-

> Whether a witness should be called by the prosecution is a matter within the discretion of the prosecution and the court will not interfere with that discretion unless it may be shown that the prosecution was influenced by some oblique motive."

36. PW1 testified that the parents married her away to the appellant. The complainant's parents were not called as witnesses to deny or confirm. Whatever the case, the complainant being a minor was not qualified to be married. If the parents did that, then they are also guilty of abetting the offence . No reason was given why they were not called. Whatever their case, failure to call them did not weaken or vitiate the prosecution case. It is because the witnesses did not witness the commission of the offence.

37. The same goes for the Chief. Though PW1 said he is the one who first arrested the appellant and PW2 confirmed that the Chief is the one who called police to report that the appellant was living with a minor, he was not a primary witness and failure to call the Chief, though it may have added some weight to the prosecution case, did not vitiate or weaken the prosecution case. The trial court in its judgment also considered the omission to call the three witnesses and held that they were not key witnesses to the core of the offence. The trial court believed the testimony of the complainant as regards the defilement. I am in agreement with the findings of the trial court that the prosecution proved beyond reasonable doubt that the appellant committed the offence of defilement and he was properly convicted. I affirm the conviction. The appellant was sentenced to fifteen (15) years. The sentence is lawful and legal and there is no reason for the court to interfere with it.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 31ST DAY OF MAY, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Owuor for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant