Mwangi v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 18686 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18686 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E005 OF 2022

SC CHIRCHIR, J

MAY 31, 2023

BETWEEN

JOSEPH MUTHANJI MWANGI ..... 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. (The Act)

   The particulars of the charge were that on 9th October 2021 within Muranga County, he intentionally caused his penis to penetrate the vagina of JWP, a child aged 11 years.

2. He faced an alternative charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The Appellant pleaded not guilty, and after a full trial, he was convicted of the main charge and sentenced to life imprisonment.

4. The Appellant was aggrieved by both the conviction and sentence, and proffered this Appeal. He has set out ten (10) grounds of Appeal are hereby paraphrased as follows:

   a. That the trial magistrate violated his rights under Article 50(2)(c) of *the constitution* and Section 169 of the criminal procedure code.

   b. That the prosecution testimonies were full of material contradictions and inconsistencies, were dubious and was a conspiracy by the mother of the complainant so that the complainant's mother could escape paying debts due to the Appellant.

c. That the trial court used "single-based" evidence which conflicted and which was manipulated by the complainant's mother and her three children.

d. That the prosecution testimonies were sham, flimsy and shaky.

e. That the court failed to call crucial witnesses.

f. That the trial court relied on hearsay and incoherent evidence.

g. That the trial court erred by ignoring and dismissing his evidence.

h. That the conviction was against the weight of evidence.

i. That the sentence was harsh and excessive.

j. That the case was not proved beyond reasonable doubt.

Summary of the Evidence

5. PW1, was the mother of the complainant. She told the court that she had 3 children, the complainant and a set of twins. On 17.10.2021, she found her twins without clothes. On questioning them, they told the mother that they were doing what the complainant and "Wamasaa" normally do together. She questioned the complainant, who admitted that she would engage in sex with the Appellant and the Appellant could then give her Kshs.100. The complainant further told PW1 that the Appellant would remove his clothes and lie on top of her. PW1 took the complainant to Murang'a Level 5 hospital then to Murang'a police station. The doctor told her that the child had been defiled.

6. She went to Kigetoini police station and the accused was arrested. She further told the court that the Appellant was arrested at PW1's home as she had summoned him to question him regarding the complaint's allegations.

7. Pw1 further told the court that the complainant and her twin siblings would occasionally take firewood to their grandmother who lives about 5 minutes' walk from their home. It was further her testimony that the Appellant was her farm-hand.

8. On cross examination, she stated that both her twins and the complainant informed her about the defilement; that the Appellant used to give money to the complainant as to buy her silence.

9. On re-examination, she told the court that the complainant had told her that the Appellant had warned her that she would be punished if she reported about the defilement.

10. PW2 was the 5 years old sister to the complainant. After voire dire examination the court formed the opinion that she was not capable of understanding the oath. She gave unsworn testimony in Kikuyu language. She told the court that "Wamasaa" was present in court. That Wamasaa does "tabia mbaya" on JWP (the complainant). That she saw the Appellant and the complainant naked. That the complainant was lying down, while the Appellant was lying on top of her. She further stated that she was with her twin brother M.

11. PW3 was the complainant in this case. Voire dire was conducted in Kiswahili. After the voire dire examination, she proceeded to give sworn testimony. She told the court that on 9.10.2021, she had gone to collect firewood for her grandmother. She met the complainant who urged her to go to the bushes with him. That when she refused, he held her hand; that PW2 followed them. The Appellant then did bad things to her. That he pulled her dress up and removed her underwear; that the accused removed his trouser and inner wear; that the Appellant put his penis on her vagina and that after he was done he gave her money; That she bled after the act and that she later burnt the clothes that had

blood. She had sex three times with the Appellant. The Appellant told her not to tell anybody. On cross-examination, she told the court that PW2 was on the scene during the incident.

12. PW4 was the Clinical officer who examined and treated the complainant. His findings were that the complainant's vagina was normal. She had no physical bruises, her hymen was broken due to recent penetration, there was no spermatozoa and urinalysis was normal. Pregnancy test was negative. He filled the P3 form. He also produced treatment notes in respect of the complainant.

13. PW5 was the investigating officer. She told the court that she received a report of the incident from the complainant and her mother. She escorted them to Murang'a level 5 hospital. That the complainant knew the Appellant as Wamasaa. She recorded statements. She produced the complainant's birth certificate showing that the complainant was 11 years.

14. On being put on his defence, the Appellant opted to give unsworn statement. He told the court that PW1, the complainant's mother was his employer. That between 11.10.2021 and 18.10.2021 he had gone to PW1's house to ask for his pay of Kshs.1,750; that he was given Kshs.1000 and told to wait for the balance. That when he went for the balance he was arrested by the police. That the charges against him were untrue and that they were instigated because he demanded for his wages.

Appellant's Submissions.

15. It is the Appellant's submission that the voire dire examination on PW2 was as good as not being done due to the trial court's failure to strictly comply with section 19 of the *Oaths and Statutory Declarations Act*; that the questions that are on record from PW2 and PW3 were insufficient to establish the intelligence of the two minors. That as regards PW2 and PW3, the court did not indicate whether it had satisfied itself that the two minors appreciated the importance of telling the truth. Reliance was placed over: Gabriel s/o/ Maholi vs Republic (1960) EA 159; Kibageny Arap Kolil (1959) EA 92 , Maniget Loonkomok vs Republic (2016) KLR, Johnson Muinini vs Republic (1982) KLR 447, and Republic Vs Lal Khan (1981) 73.

16. The Appellant also submits that there was no corroboration of the two minor's testimonies as the medical evidence did not corroborate the said testimonies.

17. The Appellant, while admitting his identification was not an issue at the trial court, submits that there was doubts as to whether he was identified as the perpetrator as none of the witnesses, save the investigating officer, identified him.

18. On penetration, the Appellant submitted that absence of the hymen is not necessarily proof of defilement.

19. That in totality, the prosecution case was not proved beyond reasonable doubt.

20. The Appellant also takes issue with the manner in which the judgment was delivered and submits that the same failed to comply with section 169 of the criminal procedure code.

21. On sentencing, it is the Appellant's submission that he ought to benefit from the recent decisions by the High Court declaring the Mandatory minimum sentences unconstitutional. He relies on the case of Philip Maingi & 5 others vs Republic – Machakos Petition No.17 of 2021.

Respondent's submissions:

22. The Respondent's submission is that all the ingredients of defilement were present. That the age of the victim was proved to have been 11 years at the time of defilement, that the complainant's birth certificate and the testimony of her mother (PW1) proved the fact of age.

23. On penetration, it is submitted that the complainant gave a detailed account of how the defilement took place and that the medical officer (PW4) indeed testified that his examination of the complainant's vagina shows that there had been a recent breakage of her hymen.

24. On identification, the Respondent submits that the Appellant was duly identified by PW1, PW2 and PW3.

25. On compliance with Section 19 of the *Oaths and Statutory Declarations Act*, the Respondent's submit that voir dire examination was properly conducted, and that in any event the Appellant did not raise any objection at the time of voire dire examination. The state has relied on the Johnson Muiruri vs Republic (1983) KLR 445 as cited in the case of Japheth Mwambine Mbitha vs Republic (2019) eKLR and M.W VS Republic (2019) eKLR to buttress their submissions in this regard.

26. On compliance with Section 169 of the criminal procedure code, the Respondent has pointed that indeed the trial court delivered judgment. Determination.

27. I have considered the evidence tendered at the trial court, parties' submissions and the Authorities cited. This is the first Appeal and the duty of this court is to look at the evidence afresh, re-examine it and draw its own conclusion, while making allowance of the fact that the trial court had the benefit of hearing and seeing the witnesses first-hand. (see Okeno vs Republic (1972) E.A.132

28. A perusal of the Apellant's submission shows that Appellant has raised some additional issues that he had not raised in his Petition of Appeal. However, taking into consideration the fact that the accused was not represented, I will take the same into consideration.

29. In my view, the following issues are discernable for determination:

    a). Whether voire dire examination was properly carried out

    b). Whether defilement was proved

    c). Whether there is a proper judgment on record

    d). Whether the sentence was excessive

Whether the conduct of voir dire Examination was proper

30. The Appellant has taken issues with the manner in which the voire dire examination of PW2 and PW3 were taken and hence their competence as witnesses.

31. The extract of court proceedings in respect of PW2 went as follows:

> " Court: Voire dire to be conducted in Kikuyu.
>
> PW2 MW- I study at [Particulars Withheld] – I go to church
>
> Prosecutor : PW2 is 5 years old.
>
> Court :Voire dire has been conducted and MW is shy and to swear her will not be adequate at this time. She is not able to expressly proceed with swearing of PW2 due to her age and expressions
>
> PW2 – MW – 5 years girl, unsworn in Kikuyu"

Then she starts her testimony

32. For PW3, the proceedings Went as follows:

> " Court – Voire dire to be conducted in Kiswahili:
>
> PW3 – JW – I go to [Particulars Withheld] Primary School – Class 5. Mr. Muriri is my class teacher. I go to Full Gospel Church. We are taught to say the truth. I will speak the truth.
>
> Court – PW3 (JW, 11 years girl – Christian, sworn and states in Kiswahili."
>
> Then she proceeds to give her testimony".

33. The above is a summary of the voire dire examination. Was the above examination satisfactory? The above narration shows that the court did carry out the voire dire examination and was satisfied that PW2 could not understand the significance of the oath and hence was directed to give unsworn evidence. Equally, I am of the view that there was nothing short on the voire dire examination of PW3.

34. The Appellant contends that the examination should have taken a Question and Answer session, but there was no prejudice that has been demonstrated to have occurred due to the court's failure to record the proceedings in a Question and Answer format.

35. Further, the session achieved the purpose of Voire dire examination, that is, determining the competence of a witness. When it comes to children, another essential purpose is for voir dire examination is for the court to satisfy itself that the child appreciates the importance of telling the truth, (see Japheth Mwambire Mbitha vs Republic (2019) eKLR). The record shows that the voire dire examination achieved that purpose.

I see no reason to fault the voir dire examination carried by the trial court.

Whether penetration was proved:

36. The Appellant contends penetration that was never proved. Section 2 of the *Sexual Offences Act*, defines "Penetration" as "Partial or complete insertion of the genital organ of one person into the genital organs of another person".

37. The following extract of PW3 evidence are relevant in this regard. She told the court: "alinifanyia tabia .....", he removed my inner wear, he penetrated his penis into the vagina, "mahali nina susu, na susu yake akanifanyia tabia kwa susu yangu". She went on: "His hands were on my shoulders. I told him to stop. I felt pain and he said no and I wait a bit he finishes. He did not stop.....Blood came from my vagina .....We had sex with Wamasaa when I was fetching firewood".

38. The above is a detailed account of what transpired. What the complainant described is clearly a case of penetrative sex. This narrative was not shaken at cross examination.

39. Further PW3's testimony was corroborated by the testimony of PW4, the Clinical Officer. He told the court that though the other part of the complainant's genitalia appeared normal, the hymen shows evidence of recent penetration. The complainant was examined on 17th October 2021 while the offence was committed on 9th October 2021. PW4'sreference to "recent penetration" cannot be said to have no basis therefore.

40. The Appellant has contended, while supporting his contention on the court's finding in the case of P.KW. vs Republic (2012)e KLR, that the evidence of broken hymen was not the only evidence. However in the case of P.K.N(supra), the Appellate Court was faulting the Lower Court for having placed undue reliance on a broken hymen as proof of defilement in complete disregard of the other

available evidence. In the present case the broken hymen was corroborative of the complainant's detailed account of what the Appellant did to her.

41. I am satisfied that the evidence of PW3 and PW4 proved the act of penetration beyond reasonable doubt.

Identification:

42. The issue of identification was never taken up in the trial court and indeed is one of the issues that only came up in the submissions of the Appellant. It was never listed as one of the grounds of Appeal. The totality of PW1, PW2 and PW 3 evidence point to the fact that the Appellant was well known to the complainant and her family. It was the evidence of PW1 that the Appellant had worked for her as a farm-hand "even before the complainant was born". Both children witness PW2 and PW3 talked of "Wamasaa" as the one who had been having sex with PW3. The Appellant did admit that he had gone to collect his wages from PW1's home when he was arrested and thus corroborated PW1's testimony on the fact that the Appellant used to work for him. He did not contest the fact that he was otherwise known as "wamasaa". There is no doubt therefore that the Appellant herein was the perpetrator. Identification was by recognition

The age of the complainant:

43. The issue that has been raised on this aspect of age, is whether a child of 11 years and some months should be placed under the bracket of 11 years and less, within the context of Section 8 (2) of the Act or 12 years within the context of Section 8 (3) of the Act. It is submitted that the complainant should be treated as belonging to the bracket of 12 years as she had already passed her 11th birthday.

44. In Hudson Ali Mwahogo vs Republic (2016) e KLR the court of Appeal had this to say about the determination of the correct age bracket under section 8 of the *sexual offences Act*; " Section 2 of the *Interpretation and General Provisions Act* defines "year" to mean a year reckoned according to the British Calendar. Under the British Calendar Act, 1751, a year means a period of 365 or 366 days. Thus, a person who is, for example, 10 years and 6 months is deemed to be10 years old and not 11 years old. That approach entails not considering the period above the prescribed age so long as it does not amount to a year. Back to the *Sexual Offences Act*, a victim who is days or months above 11 years will be treated as 11 years old so long as he or she has not attained 12 years of age. On the same reasoning, the victim in this case who was 15 years, 6 months and 13 days old must be treated to be 15 rather than 16 years old."

45. I align myself to the above decision of the court of Appeal. The complainant herein had not reached her 12th birthday and as such she was 11 and not 12 years at the time of defilement . The Appellant 's submission in this regard is misplaced and I dismiss it.

Whether the sentence was excessive:

46. The Appellant was sentenced to Life imprisonment pursuant to the provisions of Section 8(2) of *Sexual Offences Act*. The Appellant has relied on the two High Court decisions of Philip Maingi Mueke & 5 Others, Machakos Petition No.017/2021 and Edwin Wachira & Others vs R. Mombasa , High Court Petition No.97/2021, to argue against the constitutionality of minimum mandatory sentence that was meted to him. However the supreme court in Francis Muruatetu & Ano vs Republic (2017) e KLR case clarified that the declaration of the unconstitutionality of minimum mandatory sentences was only in respect to section 204 of the penal code. Am bound by the decision of the Supreme Court. The sentence meted out therefore was founded in law, and I have no reason to interfere with it.

Whether section 169 of the Criminal procedure code was complied with.

47. I have perused the record of the trial court and indeed there is a judgment dated, signed and delivered at Murang'a on 24th February 2022. The same was delivered by S.K. Nyaga, Resident Magistrate, in the presence of the prosecution represented by Ms Muriu, the Appellant herein and Court Assistant by the name Margaret. This court therefore finds that Section 169 of CPC was complied with.

48. In conclusion, the Appeal herein has no merit and it is hereby Dismissed.

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

S. CHIRCHIR,

JUDGE.

In the presence of:

Susan- Court Assitant

Appellant- present

Ms Muriu for the Respondent.