Muthoni v Republic (Criminal Appeal 197 of 2017)
[2023] KEHC 17771 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17771 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 197 OF 2017

CM KARIUKI, J

MAY 25, 2023

BETWEEN

EFRAM GITHAE MUTHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Sentence of Hon . S N Mwangi-Senior Resident Magistrate delivered on 3/11/2017 in Nyahururu Chief Magistrate's Criminal Case No. 1677 of 2013)

JUDGMENT

1. The Appellant was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child Contrary to Section II (1) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the charge are that on the diverse dates of December 2012 and September 2013 at [Particulars Withheld] Village in Nyandarua County of Central Province, intentionally and unlawfully caused his penis to penetrate into the vagina of MWW, aged 14 years old.

3. The Appellant pleaded not guilty after the substance of the charge and every element thereof was read out to him in the language he understood. After trial, he was found guilty and convicted of the main count of defilement and was, on November 3, 2017, sentenced to serve 20 years imprisonment.

4. In his appeal, he set out homemade ground amounting to twelve (12) of them, which essentially raised three (3) issues.

    a Whether the prosecution proved its case beyond any reasonable doubt?

    b The trial court did not consider the glaring contradictions and discrepancies that would affect the outcome of the verdict.

c Whether the sentence was too harsh in the circumstances.

5. The parties were directed to canvass the appeal via submissions.

Appellant Submissions

6. That there needed to be a clear document to ascertain the exact age of the complainant, and neither a birth certificate nor age assessment findings from the doctor were produced before the court; instead, PCR was used for this purpose which is not procedural.

7. That another mechanism would have been used to come up with the truth of the matter for the purpose of justice since both the complainant and the accused person live in one village hence factor of identification due to framing was not necessary because the complainant is used to seeing accused as a village mate. DNA results would have been availed in court to clear everything, and the fact that the court demanded DNA results many times, but all went in vain, prompting the accused person to be sentenced without the results.

8. The argument that the complainant was in class five and under age is invalid since people go to school at different ages, for example, the famous mzee muruge, who went to school in his old age.

9. That the honourable court would have taken into account the statement by DW2 that estimated the age of complainant's age as between 20-21 years refer to Hon. Magistrate judgment page 4 last paragraph.

He begs this court to allow this submission conviction to be quashed, set aside the sentence, and grant me freedom.

Respondent Submissions

It is submitted that the ingredients of offence to be proved are;

a Age of the victim.

b Penetration of genital organ.

c Identity of the perpetrator of the offence.

(a) Age

10. The charge sheet indicated that the complainant was aged 14 years.PW2, the mother to the complainant, testified and marked/identified her baptism card MF1 2, P3 form, MF1- 1 and PRC form — MFI 3, and treatment notes MFI-4, Which indicated the complainant to have been 14 years old and the other 15 years old for having been born on July 19, 1998.

11. PW4 eventually testified as a clinical officer and produced the P3 form as P. Exhibit 1 and the PRC form as P Exhibit 2.

12. The appellant never dislodged this evidence on proof of the complainant's age.

13. In *Mwalango Chichoro v Republic* Msac Appeal No 24 OF 2015 [UR], the Court of Appeal stated that:

> " The question of proof of age has fondly been settled by a recent decision of this Court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence among other credible forms of proof."

14. Guided by the above evidence and authorities, submitted that they are of the firm view that the complainant's age was sufficiently proved beyond a reasonable doubt, that the complainant was a minor and below 18 years at the material time for she was then aged 15 years and two months old. Moreover, the trial court had the opportunity to observe the minor and believed that she was a minor.

(b) Penetration

15. Penetration of the female genitalia in defilement cases is a core element. The Law does not envisage absolute penetration into the genitalia nor the release of spermatozoa or semen of the male organ for the act of penetration to be complete, see Daniel Wambugu Maina v Republic (*supra*).

16. PW 1 testified that in December 2012, she had been sent to the shop by her mother, and when she went, she found the Appellant, who told her to go with him to Karagoini. When her mother started looking for her, he took her to Mburu and later to Kawangware in Nairobi. He later brought her back to Kwa Kung'u, where they lived together as husband and wife. She used to sleep with him.

17. She further stated that they first had intercourse at Karangoni. She then got pregnant and gave birth on January 30, 2013. During cross-examination, she stated that she knew the Appellant while in class 5, and that is when they started having sex. She only had sex with the Appellant.

18. PW4, a clinical officer attached to Nyahururu District Hospital, stated that she examined the complainant, who had a complaint of being defiled, and the assailant had eloped with her in December 2012. He found her to be 20 weeks pregnant. The outer genitalia was normal, the hymen was broken, and no discharge, blood, or venereal infection was noted. She also produced the PRC forms, which ideally indicated that the pregnancy test was positive.

19. The complainant was consistent during cross-examination as well as PW4 that the complainant was a minor under the age of 18 years, and the fact that she was pregnant was proof enough that she had been defiled.

(c) Identity

20. Regarding this question, the complainant testified that she knew the Appellant while in class five and that he used to wait for her at the gate of the school where she was schooling at Karagoini Primary

    School in Standard Six (6). She further stated that they were living together as husband and wife at Kawangware in Nairobi and again at Karagoini and later brought her back to Kwa Kung'u.

21. The events above point to the fact that the complainant knew the Appellant, and therefore chances of mistaken identity were remote as the Appellant was sufficiently recognized and identified. The Appellant never challenged this fact during his cross-examination. The Court is invited to look at the victim from the right position in *Roria v Republic* 1967 EA 583 (Unreported) that the circumstances were tenable to enable the complainant identify and recognize the Appellant.

22. It is evident that the victim recognized the Appellant as they had met prior to the act and even lived together as husband and wife for ten months.

23. On the ground that the prosecution's evidence was full of glaring contradictions and discrepancies, it was submitted that there were no material contradictions in this case and those that were minor that would not tilt the outcome of the case in the Appellant's favour. Reference was made to the case of Twehangare Alfred v uganda Criminal Appeal No 139 of 2001, where the Court ruled that it is not every contradiction that warrants rejection of evidence and that the Court will ignore minor

contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

24. It is thus submitted that despite minor and inconsequential contradictions, the testimonies of prosecution witnesses were forthright, cogent, reliable, and corroborative and did not have a deliberate design to tell a falsehood. This ground accordingly fails.

25. On the grounds that the Appellant was not medically connected to the offence and the fact that the trial Magistrate did not wait for the DNA results to link the Appellant to the offence, it is submitted that even without DNA results, there was sufficient evidence advanced in Court which proved that the accused person was the assailant.

26. Moreover, this being a sexual offence, there was no need for corroboration of the complainant's evidence in line with Section 124 of the *Evidence Act* (Cap 80) Laws of Kenya, as the Court can convict on the basis of evidence by the complainant alone if satisfied that she is telling the truth.

27. When placed on his defence, the Appellant gave sworn evidence which was merely one of denial and a sham. He did not prove that he was being framed, for there was not even bad blood exhibited to warrant the framing of the charges.

28. The Prosecution was able to prove all the main elements of this case beyond reasonable doubt and that the appellant's appeal be dismissed as it is unmerited.

29. The trial court judgment set out facts in summary, thus,

30. After voire dire was conducted, the complainant was affirmed and stated that she had been sent by her mother to the shop sometime in December 2012 when she met with the accused, who asked her to go with him. She did so, and her mother started looking for her though they had already gone to his uncle's place at Kawangware in Nairobi, they later returned home, for he used to torture and beat her. They used to live together as husband and wife until he brought her back to a friend's house in the Gwa Kungu area, where they stayed for one month. During that time, they were together, they used to sleep together, and the first time they had intercourse was at Kawagware. She eventually gave birth to her daughter on January 30, 2013, and the accused wanted to marry her. In cross-examination, she stated that the accused used to tell her he would marry him, and she couldn't recall the exact date they met though her mother had been hospitalized. The accused used to wait for her at the school gate, and she used to live with him as his wife. In re-examination, she said she met the accused while she was in class five, and she only had sex with the accused.

31. It was then that the court ordered the DNA samples to be collected. PW2 was the complainant's mother, who stated that on December 1, 2012, her daughter disappeared, having sent her to the shop, but she never returned home. She was told she had been seen in a hotel at the Equator, but when she went there, she didn't find her though she had boarded a vehicle. She reported it to the police. On December 20, 2013, they were traced at Leshau, but she did not find them till January, when her daughter went back home, she told her she was at her aunt's place. She took her back to school, but in January 2013, she disappeared again, and she looked for her in vain. She reappeared in September 2013 while sick, and when she took her to the hospital, she was told that she was pregnant the following month; her other daughter informed her that she had been with the complainant and that he wanted to marry her. She reported to the police as she recorded her statement, and he was arrested as he went to meet her daughter. The complainant further told her that they used to live together at Kawangware. In cross-examination, she reiterated what she had stated in her examination-in-chief. It was then that the court still ordered the DNA to be conducted.

32. I took over this matter on July 1, 2016 and conducted voire dire on PW3, who was later sworn and stated that she was the complainant's sister and on December 24, 2012, the complainant was at the accused's home and she knew this for the accused used to go for her at the school gate and she returned home at 9 pm on that day after the accused had chased her away. On Christmas day, she went back to the accused's home and returned thereafter, for the accused had beaten and chased her away. Later on, the complainant was taken back to school by her father, but the accused went for her, and since she was pregnant, she couldn't continue schooling, and she later gave birth to a girl. That the accused told her to go with him for her sister was stupid as he wanted to take her to his mother's house in Nakuru, and she told her mother about it; they reported it to the police, and the accused was arrested. She came to know the accused when they became friends with his sister. In cross-examination, the accused opted not to ask her any questions.

33. I thereafter gave another order for the DNA to be conducted, which was mentioned several times in vain. Thereafter the accused engaged the services of a counsel who came on record. PW4 was the clinical officer who testified that he examined the complainant on September 27, 2013 and had a history of having been defiled by an assailant who had eloped with her in December 2012. At the time of examination, she was 20 weeks pregnant, and her outer genitalia looked normal; her hymen had been broken, had no discharge or blood, and had no venereal infection. The further information in the PRC form, which he also filled, was that the complainant used to live with the assailant until the time he chased her away. He then produced both

34. the P3 and PRC forms as exhibits. In cross-examination, he stated that the complainant's date of birth was given to him as July 15, 1998 though he could not explain the anomaly by the police, who stated she was 14 years old. He, however, never examined the assailant and could not tell who the assailant was, but he couldn't tell her mental status, for he never recorded anything to that effect.

35. Thereafter, the state counsel applied for an adjournment, an application which was objected to by the defense counsel. The court also denied the application for this was a 2013 case with the DNA having been ordered in 2014, and two years later, after this court took over the matter, no DNA samples had been taken, or the results had been availed to the court which was clear laxity on the part of the prosecution which had been given several adjournments which were stated in this court's ruling. Eventually, the state counsel closed the prosecution case.

36. In his sworn defense. the accused person stated that the charges facing him were a lie, for he had known the complainant for one month in 2013, for she used to be his milk customer and was in her mother's business. He also denied having married her and never took her to either his home or Kawangware. The last time he was in Nairobi was in 2010. He estimated her age to be between 20 and 21 years old, and he had never seen her in uniform. He also attacked her character by stating that she used to be with many boys, and he only saw her pregnant, and the prosecution never proved the baby was his. That he had been framed for his business was successful, and her parents demanded Kshs.200,000/- from him so they didn't sue him. That he understood that the complainant was already married and he was never taken to the hospital to be examined. Interestingly, the state counsel had no questions to ask him in cross-examination.

37. DW2 was the accused's friend who also knew the complainant, as he used to see her around but not with the accused. The complainant was mentally unstable and estimated her age to be 20-21 years old. He never saw her at the accused's home and would see her on the road with boys and of the existing grudge against them due to their business. In cross-examination, he stated that the complainant's mother's business was different from theirs and they had no grudge against each other then, he changed and said the grudge was only directed against the accused and not him. He couldn't tell what the

complainant used to do with the boys though she wasn't a good girl, for she would walk in darkness. He never used to live in the same house with the accused and couldn't tell what he used to do at night once they parted ways.

38. In the defense submissions, the counsel submitted that the prosecution didn't challenge the accused's defense, and her age wasn't proved as required by law. That the prosecution failed to prove its case against the accused beyond reasonable doubt for the DNA report was crucial, but it wasn't produced. The investigating officer was a crucial witness who was never called to testify, and no explanation was advanced for his failure to testify so. She relied on several cases, and since the prosecution did not prove its case beyond a reasonable doubt, she urged the court to acquit the accused person.

39. Trial evaluation and analysis of the evidence, in this case, showed that the evidence provided was adequate. PWI gave clear evidence as to how and who penetrated her. She said it was the accused person, whom she knew and used to live with as the wife though he was very cruel to her. She went to live with him sometime in December 2012, returned home in January 2013 but left again to live with him in Kawangware in Nairobi till September 2013, when she was beaten up and chased away. She arrived at the home hospital. She was said to be 20 and found to be weeks pregnant upon being taken to the hospital. A combination of that evidence and there being no doubts cast as to her credibility leads to an irresistible conclusion of guilt on the part of the accused person.

40. Thus, the trial court found no glaring gaps in the evidence of PWI, PW2, PW3, and PW4 that cast doubt on the prosecution's case. The defense tendered was held to be feeble and a sham. Recognizing, the burden of proof fell squarely on the shoulders of the prosecution. It did not shift to the accused person. Reliance was placed on the case of *Kiarie v Republic* [1984] KLR 739, *Woolmington v DPP* [19351 AC 462, *Bhatt vs Republic* [1957] EA 332, *Abdallah Bon Wendo Another v Republic* [1953] EACA 166 and *Kaingu Kasomo v Republic* Malindi Court of Appeal No 504 of 2010 (unreported). Also Section 111 of the *Evidence Act*. On the totality of the evidence, the court was satisfied that the principal count was proved well beyond reasonable doubt against the accused person, who was thus convicted under Section Two hundred fifteen (215) of the Criminal Procedure Code for the principal count of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

Issues, Analysis, and Determination

41. After going through the evidence and submissions on record, I find the issues are; Whether the prosecution proved its case beyond any reasonable doubt? The trial court did not consider the glaring contradictions and discrepancies that would affect the outcome of the verdict. And whether the sentence was too harsh in the circumstances.

42. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence before the trial court to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123, where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

43. The law places the burden of proof on the prosecution, and that proof must be beyond any reasonable doubt. In a charge of rape, the prosecution must prove penetration, lack of consent, and identity of the perpetrator.

44. In the case of *Stephen Nguli Mulili v Republic* [2014] eKLR: the court held;

> " [I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of *DPP v Woolmington*, [1935] UKHL 1, where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See *Festus Mukati Murwa v R*, [2013] eKLR."

45. In the famous case of *Miller v Ministry of Pensions*, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond any reasonable doubt:

> " That degree is well settled. It need not reach certainty but must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, of course, it is possible, but not in the least probable, the case is proved beyond a reasonable doubt, but nothing short of that will suffice."

46. And in *Bakare v State* [1987] 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized the phrase proof beyond a reasonable doubt, stating:

> " Proof beyond reasonable doubt stems from the compelling presumption of innocence inherent in our adversary criminal justice system. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offense charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability." (emphasis)

47. It was incumbent upon the prosecution to prove the ingredients of the offence: the AGE of the victim, the penetration of the genital organ of the victim, and the identity of the perpetrator of the offence.

48. On the element of age, the charge sheet indicated that the complainant was aged 14 years.PW2, the mother to the complainant, testified and marked/identified her baptism card MF1 2, P3 form, MF1- 1 and PRC form — MFI 3, and treatment notes MFI-4, Which indicated the complainant to have been 14 years old and the other 15 years old for having been born on 19 July 1998.

49. PW4 eventually testified as a clinical officer and produced the P3 form as P. Exhibit 1 and the PRC form as P Exhibit 2. The appellant never dislodged this evidence on proof of the complainant's age.

50. The question of proof of age has fondly been settled by a recent decision of this Court to the effect that it can be proved by documentary evidence such as birth certificate, baptism card, or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence among other credible forms of proof. See the case of *Mwalango Chichoro v Republic* Msac Appeal No. 24 of 2015 [UR].

51. Thus, the complainant's age was sufficiently proved, beyond a reasonable doubt, that the complainant was a minor and below 18 years at the material time, for she was then aged 15 years and two months old. Moreover, the trial court had the opportunity to observe the minor and believed that she was a minor.

52. On penetration of the female genitalia in defilement cases the same element is a core element. The Law does not envisage absolute penetration into the genitalia nor the release of spermatozoa or semen of the male organ for the act of penetration to be complete, see Daniel Wambugu Maina v Republic (*supra*).

53. PW 1 testified that in December 2012, she had been sent to the shop by her mother, and when she went, she found the Appellant, who told her to go with him to Karagoini. When her mother started looking for her, he took her to Mburu and later to Kawangware in Nairobi. He later brought her back to Kwa Kung'u, where they lived together as husband and wife. She used to sleep with him.

54. She further stated that they first had intercourse at Karangoni. She then got pregnant and gave birth on January 30, 2013. During cross-examination, she stated that she knew the Appellant while in class 5, and that is when they started having sex. She only had sex with the Appellant.

55. PW4, a clinical officer attached to Nyahururu District Hospital, stated that she examined the complainant, who had a complaint of being defiled, and the assailant had eloped with her in December 2012. He found her to be 20 weeks pregnant. The outer genitalia was normal, the hymen was broken, and no discharge, blood, or venereal infection was noted. She also produced the PRC forms, which ideally indicated that the pregnancy test was positive.

56. The complainant was consistent during cross-examination as well as PW4 that the complainant was a minor under the age of 18 years, and the fact that she was pregnant was proof enough that she had been defiled.

(c) Identity

57. Regarding this question, the complainant testified that she knew the Appellant while in class five and that he used to wait for her at the gate of the school where she was schooling at Karagoini Primary School in Standard Six (6). She further stated that they were living together as husband and wife at Kawangware in Nairobi and again at Karagoini and later brought her back to Kwa Kung'u.

58. The events above point to the fact that the complainant knew the Appellant, and therefore chances of mistaken identity were remote as the Appellant was sufficiently recognized and identified.

59. It is evident that the victim recognized the Appellant as they had met prior to the act and even lived together as husband and wife for ten months.

60. On the ground that the prosecution's evidence was full of glaring contradictions and discrepancies, there were no material contradictions save minor inconsistencies that would not tilt the outcome of the case in the Appellant's favour. see the case of *Twehangare Alfred v uganda* Criminal Appeal No 139 of 2001, where the Court ruled that it is not every contradiction that warrants rejection of evidence and that the Court will ignore minor contradictions unless the Court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case.

61. The testimonies of prosecution witnesses were forthright, cogent, reliable, and corroborative and did not have a deliberate design to tell a falsehood. This ground accordingly fails.

62. On the grounds that the Appellant was not medically connected to the offense and the fact that the trial Magistrate did not wait for the DNA results to link the Appellant to the offense, it is clear from the material before the trial court that even without DNA results, there was sufficient evidence advanced in Court which proved that the accused person was the assailant.

63. Moreover, this being a sexual offense, there was no need for corroboration of the complainant's evidence in line with Section 124 of the *Evidence Act* (Cap 80) Laws of Kenya, as the Court can convict on the basis of evidence by the complainant alone if satisfied that she was telling the truth.

64. When placed on his defence, the Appellant gave sworn evidence which was merely one of denial and a sham. He did not prove that he was being framed, for there was not even bad blood exhibited to warrant the framing of the charges.

65. Thus, it is evident that the Prosecution was able to prove all the main elements of this case beyond reasonable doubt and that the appellant's appeal lacked merit on conviction.

66. On sentence, the appellant was a first offender, and there were no aggravating circumstances to warrant the imprisonment of the sentence of twenty years. The victim was also the facilitator of the commission of the offence as she would accept to live with the appellant as a wife though not an imprimatur for adults to lure minors into marriages. Thus, the court will reduce the sentence accordingly and make the orders;

    i. The appeal on conviction is dismissed and the conviction upheld.

    ii. The appeal on sentence allowed and is reduced to ten (10) years imprisonment from the date of sentence by the trial court on November 3, 2017.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 25TH DAY OF MAY 2023

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CHARLES KARIUKI

JUDGE