Munene v Republic (Criminal Appeal E020 of 2021) [2023] KEHC 19903 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19903 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E020 OF 2021

SC CHIRCHIR, J

JUNE 29, 2023

BETWEEN

ALLAN NJOROGE MUNENE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgement of Hon. E. Agade (SRM) delivered on 31st August, 2021 at the Chief Magistrate's Court in Kigumo in Sexual Offence Case No. 04 of 2018)

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).

   It was alleged that on 23rd day of January 2018 in Murang'a County within the Republic of Kenya, intentionally caused his penis to penetrate the vagina of AWW without her consent, a child with mental disabilities, aged 11 years.

2. The appellant also faced an alternative charge of Committing an Indecent Act with a child contrary to section 11 of the *Sexual Off Fences Act*.

3. The Appellant denied the charges and after trial, he was convicted and sentenced to 20 years in prison.

Petition of Appeal

4. He was aggrieved by the outcome and hence this Appeal. He has set 5 grounds of Appeal which I have paraphrased as follows:

   a). That penetration was not proved

   b). That the case was poorly investigated.

c). That the complainant was coached and influenced to implicate the Appellant

d). That the trial court erred in failing to find that there existed a disagreement between the Appellant and the 1st prosecution witness

e). That certain vital witnesses were not called to testify.

Summary of the Evidence at the Trial Court.

5. PW1 told the court that he witnessed the incident which allegedly took place inside his farm. He told the court that on the material day, he had gone to inspect his farm and as he approached, he saw someone from afar, inside his farm. He decided to move closer to him. He later realized that the Appellant was with someone and he was lying on top of that other person. He was having sexual intercourse. He waited for him to finish. The Appellant then stood up and buttoned his trouser. PW1 noticed that had no underwear; that he further noticed that the person the Appellant was having sex with, was a child. He grasped the Appellant and took him to a house neighboring the farm. The neighbour recognized both the child and the Appellant. That as he was seeking directions to the child's home, he met some people who informed him the child was a special- needs child. He stated that both the Appellant and the child were strangers to him.

6. On cross examination, he insisted that he caught the Appellant having sex with the child. That the neighbour recognized both the child and Appellant herein. He further stated that he could tell that the Appellant was having sex for the movements he was making.

7. PW2, was a teacher at [Particulars withheld] primary school, the complainant's school. She told the court that when she arrived in school, a fellow teacher informed her that she had received a call informing her that one of her special needs children had been raped at Rune; He accompanied the head - teacher to the scene. They found an angry mob who wanted to beat up the Appellant. They also found the child. PW2 accompanied the child to the chief's camp. The head teacher also went along. They were joined by the police at the camp and they all went to Makuyu police station, then later to hospital. The child was examined and subjected to some tests. That on questioning the child on what transpired, the child replied that the accused had forced himself on her. PW2 told the court that she did not know the accused.

8. On cross examination, she stated that she did not witness the defilement but found the Appellant seated and surrounded by- an angry mob. On cross- examination, she told the court that based on her acquaintance with children with special needs, the complainant was not capable of colluding with PW1 to frame the Appellant as such children suffer from a low intelligent quotient (IQ)

9. PW3, the complainant was taken through voire dire examination by the court. She responded to her name and identified the accused, but could not tell her age. The court made the determination that she could not understand the importance of an oath and directed the complainant to give unsworn testimony.

10. She testified that she was on her way to school in the morning when the Appellant took her, drew her in the ditch and penetrated her. He identified himself to her as Njoroge. She further stated that someone found them. She was taken to the hospital, then later to the police.

11. On cross examination, she stated initially that no one told her what to say. Later on, she stated that the man who found the Appellant raping her told her what to say in court.

12. PW4, was the Deputy head teacher at the complainant's school. He told the court that he knew the complainant as she was her pupil; that the complainant attends special unit class. That on the material

date, he was informed by a fellow teacher about the incident. They rushed to the scene and there they found the Appellant, an agitated mob, the complainant, and the Assistant chief. He later accompanied the complainant and the suspect to Makuyu Health Centre.

13. On cross examination, he stated that he did not know the eye-witness (PW1) and only met him at the scene for the first time.

14. The Appeal proceeded by way of written submissions.

Appellant's submissions

15. The Appellant has submitted that penetration was not proved as the Doctor told the court that she could not tell whether the child had been defiled.

16. The Appellant further submits that failure to subject the Appellant to medical examination was a fatal omission on the part of investigations; that allegation of having used a condom was not proved as it was never recovered from the scene, neither was it mentioned by the complainant, directly in her testimony.

    In short, it is his submission that the investigations were shoddy.

17. He further submits that the complainant was coached on what to tell the court.

18. Finally, it is his submission that the prosecution failed to call vital prosecution witnesses and an adverse inference should be drawn from this omission.

Respondent's submissions:

19. The Respondent' submission is that all the ingredients of the offence of defilement was proved beyond reasonable doubt. On the age of the complainant, It is submitted that a birth certificate was produced indicating that the complainant was a minor aged 11 years at the time of defilement.

20. On penetration, the respondent submits that, pursuant to the provisions of section 124 of the *Evidence Act*, corroboration is not a requirement if the court believed that a minor was speaking the truth. The Respondent relied on the case of *JWA v Republic*(2014) eKLR in this regard.

21. The prosecution further submits that, nonetheless the complainant's testimony was corroborated by PW1, who was an eye witness.

22. On identification of the Appellant, it is the Respondent's submission that it is the Appellant who identified himself to the complainant as Njoroge, and the complainant also identified him in the dock. Further, the Respondent submits, PW1 was an eye witness and he is the one who arrested the Appellant. It is further pointed out that the offence was committed at 9.00 a.m. and in totality, there was no possibility of any mistake on identification. The case of *Ogeto v Republic* (2004) KLR 19 and *Daniel Kiptegon v Republic* (2018)eKLR have been relied on in this regard.

23. On the alleged failure to call crucial witnesses, the Respondent submits that where evidence tendered is sufficient to prove a particular matter in issue or entire case, adverse inference should not arise. Reliance was placed on the case of *Buxeya & Others v Uganda* (1972) E.A. 549 and *Keter v Republic* and section 143 of the *Evidence Act*.

24. On whether the complainant was coached to implicate the Appellant, the Respondent submits that there was no evidence to support the allegation of coaching.

25. Finally, the respondent submits that the sentence of 20 years meted was lawful.

Determination

26. In my view, the following issues arise for determination;

    a). Whether all ingredients of the charge of defilement were proved.

    b). Whether the prosecution failed to call vital witnesses.

    c). Whether there existed a grudge between the eye witness and the Appellant.

Whether the ingredients of the offence of defilement was proved;

27. The offence of defilement must have the following ingredients: identification of the perpetrator, age of the victim and proof of partial or full penetration. (see section 81(1) of the *Act*.)

28. All the three (3) ingredients must be proved in order to sustain a conviction. (see the case of *George Opondo Olunga v Republic* (2016) eKLR. In the present case, the age of the complainant, as well as the identification has not been raised on this Appeal and hence I will not address myself to it.

29. The main contest is on penetration. Section 2 of the *Act* defines penetration as "The partial or complete insertion of the genital organ of one person into the genital organ of another person". The crucial question in this case is, was penetration proved?

30. Proof of penetration is based on the testimony of the complainant and corroboration of such evidence. However, under section 124 of the *Evidence Act*, corroboration is not necessary in sexual offences. The section provides as follows:

    > "Notwithstanding the provisions of section 19 of the oaths and statutory declaration Act, where the evidence of an alleged victim 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 wherein 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".

31. In this case the medical evidence did not corroborate the complainant's testimony. The relevant entry in the P3 form reads as follows; "No visible lacerations or injuries to the labia majora, labia minora, vagina not lacerated; cervix normal, hymen not visualized, whitish, foul-smelling discharge at the vagina, no blood present".

32. Further according to the Doctor (PW5) "on examination, I noted that she was dressed in her school uniform ......she was clean...." General exam of the whole body, head and neck, there were no physical injuries, no visible injuries on upper and lower limbs, there was no visible lacerations or injuries to the labia majora or labia minora. The vagina was not lacerated, the cervix appeared normal. The hymen was broken, there were no lacerations or blood, so it was not freshly broken. There was a whitish foul-smelling discharge at the vagina, with no blood present. We did a high vaginal swab and ordered urinalysis, pregnancy test and HIV test. The urinalysis were normal...,, we made a finding of alleged defilement . we could not tell whether she had been defiled. Our findings were not conclusive......we did not have proper equipment to conduct the test that would lead to conclusive findings"

33. The upshot of the foregoing is that the medical evidence availed did not prove penetration.

34. Further at the time of defilement, the complainant was in full school attire when she was confronted by and subsequently defiled by the Appellant, yet some hours later her attire still looked neat as per PW5.

35. Equally, surprising is that despite her tender age of 11 years, and the medical examination being carried out some hours after the incident, there was no bruising or any injury found in her genitalia. According to the sequence of events as described by PW1, from the crime scene, the complainant was taken to the chief's office, then the police station and finally the hospital. It means that, there was no chance to interfere with the condition of the complainant before the point of medical examination.

36. Notwithstanding the broken hymen, it was the evidence of PW5 that the hymen was not freshly broken. In the case of *PKW v Republic* (2014) eKLR the court stated

> "...........scientific and medical evidence has proved that some girls are not even born with hymen........" There are times when hymen is broken by factors other than sexual intercourse.......... The evidence of broken, raptured or torn hymen is not automatic proof of penetration through sexual intercourse. It is upon the prosecution to establish beyond reasonable doubt that it was raptured during the alleged rape or defilement.........".

PW5's evidence was that she could not conclusively say that the complainant had been defiled.

37. PW1 was an eye witness who corroborated the complainant's testimony. PW1's testimony has no indication of how far he was from where the complainant and Appellant were as he watched what was going on. In view of the medical evidence, that completely rule out penetration, one is bond to ask the question, what did PW1 see? Did he witness penetrative sex or something a kin to it. How far was he? In my view, what PW1 described as to what he saw, at an undefined distance, is not sufficient proof of partial or full penetration.

38. On the other hand, the complainant told the court that the Appellant - " took out his kasusu and put it in the middle here (points at her genital region) ". The statement in my view does not again suggest partial of full insertion of the Appellant's penis into the vagina of the complainant. The pointing in the general direction of her genitals by the child may not necessarily have meant insertion of the penis to her genitals.

39. The sum effect of the aforegoing is that it raises doubt as to whether the Appellant defiled the complainant

40. It is trite law that the benefit of doubt must and always goes to the accused. In *Pius Arap Maina v Republic* (2013) eKLR, the court held,

> "the prosecution must prove a criminal charge beyond reasonable doubt and any essential gaps in the prosecution case raising material doubts must be in favour of the accused"

41. In the circumstances of this case, I find that there are doubts as to whether there was partial of full insertion of the Appellant's penis in the child's genitals. And duly guided by case law the benefit of doubt must go to the Appellant

Whether the prosecution failed to summon crucial witness(es)

42. The Appellant has referred to the Area chief who was allegedly led to the crime scene by PW1, and the children's officer. It is his submission that failure to call these two witnesses suggest that their testimonies might have been adverse to the prosecution's case. However, I take note of the fact that the prosecution had an eye- witness. The fact that the child was taken to the children's officer was well covered by the two teachers who testified. Calling the chief or the children's officer would not have

added any value. In any event the prosecution is only required to call such number of witnesses as may be required to prove their case beyond reasonable doubt.

Alternative charge

43. Having found that defilement was not proved, the next question is to whether the evidence tendered proved the alternative charge. The trial court determined, quite correctly, that the complainant was a competent witness. I have no reason to disbelieve what the complainant told the court. While referring to the acts done by the Appellant, complainant stated: "he took off my clothes, he removed my panty……… he took out his "kasusu" and put it in the middle there."

44. Her evidence was corroborated by the PW1 who told the trial court inter alia that he saw what constitute sexual movement and that he saw the Appellant get up and zipping his trouser.

45. The *Sexual Offences Act* defines indecent Act as "any unlawful act which causes:

    a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

    b. Exposure or display of any pornographic material against his or her will".

46. I am satisfied that the acts referred to in paragraph 40 and 41 0f this judgment constitute indecent act with a child within the context of section 11(1) of the *Act*.

Whether there existed a grudge between the Appellant and PW1

47. This issue arose during the Appellant's defence. The Appellant's testimony in this regard is that he was framed by PW5 for refusing to sell to him (PW5) the land. However, the Appellant gave an unsworn statement and did not call any witness to corroborate his claims. The right to give an unsworn testimony is protected by law, but for such testimony to have any probative value, it must be corroborated. (see *May v Republic* (1979) eKLR).

48. PW1'S testimony in this regard which was subjected to cross- examination carries more weight. I therefore find that the allegation of a standing feud between PW5 and the appellant has not been proved and I dismiss this claim.

49. It is my finding that there was sufficient evidence to prove the charge of an indecent act with a child as aforesaid. I therefore find the Appellant guilty of indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

50. Section 11(1) of the *Act* imposes a sentence of 10 years upon a conviction on the offence of an indecent act with a child. The Appellant is entitled to a reduction of his sentence by the period equivalent to the one he had served while in remand pursuant to the provisions of section 333 (2) of the *criminal procedure code*.

    In conclusion, I make the following orders:

    a. The conviction on the charge of defilement is hereby quashed and sentence of 20 years set aside .

    b. The Appellant is hereby convicted of the Alternative Charge of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

    c. The Appellant is sentenced to ten (10) years imprisonment, with effect from 24th January 2018 being the date of his arraignment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JUNE DAY 2023

S. CHIRCHIR

JUDGE.

In the presence of:

The Appellant