Mugambi v Republic (Criminal Appeal E016 of 2022)
[2023] KEHC 21116 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21116 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E016 OF 2022

LW GITARI, J

JULY 31, 2023

BETWEEN

CHRISPHINE KINOTI MUGAMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 7th May, 2020, the Appellant caused his penis to penetrate the vagina of I.N.K. a child aged 14 years old.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

3. After a full trial, the Appellant was found guilty on the main count of defilement and sentenced to serve fifteen (15) years imprisonment. Dissatisfied by the said decision, the Appellant preferred the instant appeal based on the following grounds, inter alia:

    a. That the learned trial magistrate erred in both matters of law and facts by convicting the Appellant without considering the adduced prosecution evidence was inadequate to stand conviction.

    b. That the learned trial magistrate still erred in both matters of law and facts by relying on shoddy investigations carried out by the prosecution to convict the Appellant.

    c. That the learned trial magistrate misdirected itself on facts by failing to consider both evidence of the prosecution and defence in their entirety and for the totality hence arriving at an erroneous finding.

d. That the learned trial magistrate still erred in both matters law and facts by rejecting the Appellant's defense without giving cogent reasons.

e. That the learned trial magistrate still erred in both matters of law and facts by imposing a harsh and excessive sentence upon the Appellant without considering that Appellant as a first offender was qualified for benefit of the least severe punishment under Article 50(2)(q) of the *Constitution*.

4. The appeal was canvassed by way of written submissions.

The Submissions

5. It is the Appellant's submission that the prosecution failed to prove all the ingredients of the offence of defilement. The Appellant (conceded that the victim was fourteen (14) years old at the time of the commission of the alleged offence. He however denied that there was proof of penetration and that he had a sexual relationship with the child in question. It was thus the Appellant's submission that the prosecution's evidence was not sufficient to warrant the Appellant's conviction and that the same was circumstantial at best. That the victim's testimony that she was defiled at the house of her uncle, Mr. SKN contradicted the testimony of the said Mr. Samuel that on the material day, he left his house locked and was not in Tharaka Nithi County. The Appellant thus maintains that the alleged victim was couched and coerced by her parents to give a false testimony. Further, that the trial court declined the Appellant an opportunity to call his alibi witness that could testify about the Appellant's whereabouts during the date and time of the alleged defilement.

6. On the issue of the sentence meted out by the trial court, it was the Appellant's submission that the same was not only unfair and harsh but also unwarranted. The Appellant thus urged this court to vacate the sentence meted out against him.

Respondent's submissions:

7. On its part, the Respondent submitted that the prosecution's evidence was sufficient and enough to secure a conviction as the same proved all the ingredients of the offence of defilement, that is: identification or recognition of the offender, penetration, and the age of the victim. That the Appellant's alibi defence did not challenge the evidence of the prosecution's witness as the same was not corroborated. Further, that the learned magistrate noted that there was no evidence of a grudge between the Appellant and the complainant that was established to support the possibility that the complainant and her family had conspired to falsely implicate the Appellant as having committed the offence.

8. As regards the sentence, it was the Respondent's submission that the Appellant was not remorseful for his actions as he did not offer any mitigation. The Respondent thus prayed that the Appellant's conviction and sentence be upheld.

Issues for Determination and Analysis

9. I have considered the pleadings, and the submissions by the parties. The main issues that arise for determination by this Court are:

a. Whether the prosecution proved its case against the Appellant to required standard of beyond any reasonable doubt;

b. Whether the trial magistrate considered the Appellant's defence; and

c. Whether the sentence meted out against the Appellant was harsh in the circumstances.

Analysis

a. Whether the prosecution proved its case against the Appellant to the required standard of beyond any reasonable doubt

10. Being a first appeal, the duty of this Court as a first appellate court is now well settled in law. For avoidance of doubt, it is the duty of this Court to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses to assess their demeanour. [See: *Okeno v. Republic* [1972] E.A. 32]

The 1st appellate court is therefore supposed to analyse the evidence and come up with its own independent finding and this duty is owed to the appellant who has a legitimate expectation that the evidence shall be subjected to an evaluation and the appellate court's independent decision. The Court of Appeal in *David Njuguna Wairimu –v- Republic* 2010 eKLR had this to say on the duty of the 1st appellate court.

> " The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on the evidence without overlooking the conclusions of the trial court. There are instances where the 1st appellate court may, depending on the facts and circumstances of the case, come to the same conclusions. We do not think there is anything objectionable in doing so provided that the court has considered the evidence to satisfy itself on the corrections of the decision."
>
> Analysis of the evidence tendered:-
>
> PW1 J.K.M was the complainant's father. He testified that his daughter was born on 2/2/2006 and was therefore 14 years old at the time the offence was committed. He produced in evidence the Birth Certificate of the complainant showing that she was born on 2/2/2006 and was therefore slightly over fourteen years. He told the court that on 9/5/2020 at 10.00 am he received a phone call from his wife LN informing him that the complainant had a relationship with the appellant. He went and asked the appellant whether it was true that he had a relationship with his daughter. The appellant denied. PW1 then went and confronted his daughter with the information and she confirmed that she had sexual intercourse with the appellant on 7/5/2020. PW1 and his wife book the complainant to Muthambi Health centre and thereafter reported the matter at Muthambi Police Station. They were issued with a P3 form which was filed at Chuka District Hospital according to PW1 the complainant stated that the offence occurred at the appellant's cousin's house and not at the appellant's house. The cousin is SK.

11. PW2 I.N.K. is the complainant. Her testimony was that she was fourteen (14) years old having been born on 2/2/2006. On 7/5/2020 she went to the house of her uncle, one S for a visit. She the appellant, her uncle S and her aunt called M. She told the court that it was about 5.00 pm. Her uncle talked to the appellant and he left. She was left with appellant and her aunt. He went to the bedroom and stayed for some time. She then came out. The appellant then told her go with him into the bedroom. The appellant held her shoulder and led her into the bedroom where he stripped her naked and made her to lie on the bed. The appellant removed all his clothes and remained naked. He then climbed on top of her. He covered her mouth with his hand. He then inserted his penis inside her vigina and had sexual intercourse with her for nearly one hour. She managed to escape from the house and went home. She

did not disclose to her parents as to what happened. On 9/5/2020 her father went to talk to her and that is when she told him that the appellant had sexual intercourse with her. The parents took her to Muthambi Health Centre and they reported at Muthambi Police Station.

12. In cross-examination, the complainant told the court that the appellant had sexual intercourse with her on 7/5/2020 and she told her father on 9/5/2020. She further told the court that her parents did not beat her up so that she could implicate the appellant.

13. PW3 Joseph Mwenda Mirebu testified that he is a registered clinical officer working at Chuka District Hospital. He told the court that he filled the P3 form for the complainant who was aged 14 years old at the time of examination. She had a history of sexual assault on 7/5/2020 by someone well known to her at 5.00 pm He told the court that on the examination of her genitalia the hymen was absent and she had bruises on the right side of the labia minora. Routine tests were carried out. High viginal swab showed presence of few red blood cells and epithelial cells. H.I.V test was negative. Pregnancy test was negative. Venereal disease was negative. He produced treatment notes from Muthambi Health Centre as exhibits 2, P3 form as exhibit 3 and Post Rape Case Form as exhibit 4.

14. The last witness was PW4 P.C Belinda Etyang who testified that she is stationed at Marima Police Patrol Base. She testified that the victim was taken there by on 9/5/2020 at 5.00pm. She reported that the appellant defiled her in the house of her uncle, one S. She escorted the complainant to hospital. Shen then arrested and charged the appellant with this offence.

15. The appellant, Chrispine Kinoti Mugambi in his sworn statement told the court that he was arrested on 9/6/2020, after one month. It was said he had defiled someone. He was brought to court and charged. The incident occurred on 7/5/2020. He was taken to hospital. He was not taken to hospital. That day he was at work.

16. The appellant called DW1 SKN who stated that the accused is his neighbour and that on 7/5/2020 he was in Nairobi at work. The appellant did not use his house to commit the offence.

17. The learned trial magistrate held that she had no reason o doubt PW2's credibility as a witness in view of her consistent evidence. The learned magistrate found that the prosecution had proved all the three ingredients of defilement against the appellant. That the conduct of the appellant. The minor was 14 years old. She proceeded and convicted the appellant and sentence him to serve fifteen (15) years imprisonment.

18. To secure a safe conviction for the offence of defilement, it was upon the prosecution to prove three main ingredients, that is, the age of the victim (must be a minor), penetration and the proper identification of the Appellant as the perpetrator of the offence. [See: *George Opondo Olunga vs. Republic* [2016] eKLR]. It was held that the key ingredients of defilement are,Proof of age of the complainant.Proof of penetrationProof that the appellant was the perpetrator of the offence.

Age of the Complainant

19. PW1, the father of the complainant, produced the complainant's birth certificate (P. Exhibit 1) as proof of the age of the complainant. The same indicates that the complainant was 14 years old at the time the alleged offence was committed. The complainant's birth certificate is conclusive proof of her age. As such, I find that the age of the complainant was proven to the required standard. Her age was not in dispute. She was born on 2/2/2006 which proves that she was fourteen years old at the time of the offence.

Penetration

20. "Penetration" is a term of art and is defined under Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

> Penetration is an essential ingredients of the offence and taking into account the severity of the sentence if the offence is proved, it calls on the prosecution to proof to the required standard, that of beyond any reasonable doubt.

21. The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case it is the testimony of the complainant, PW2, that it is the Appellant who defiled her. That the Appellant undressed her and inserted his penis inside her vagina. On the other hand, it is the Appellant's contention that penetration was not proved. The complainant narrated how she had gone to visit her uncle and aunt on the material day and found the Appellant at her uncle's house. The complainant gave clear details of the time that the offence took place and how it took place.

(1) The medical evidence is essentially adduced to corroborate the testimony of a single witness and therefor its importance can never be understated.

In *Mark Oiruri –v- Republic* Criminal Appeal No. 295/2012 2013 eKLR, Court of Appeal, the issue of penetration was addressed as follows:

> "and the effect that medical examination was carried out on her on her on 16/11/2008 five days after the event and that during that time she must have taken birth and the spermatozoa could be found. In any event, the offence is against the penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and need not be deep inside the girl's organ."

22. There is no doubt that medical evidence is important to corroborate the testimony of a single witness. The law however allows the reliance of the evidence of a single witness where the magistrates satisfied herself for reasons that she has to record, that the witness was telling the truth. This is provided at Section 124 of the *Evidence Act*, the proviso thereto. The prosecution adduced medical evidence to prove penetration.

23. PW3, the clinical officer who examined the complainant noted injuries on her genital, her hymen was absent and there were bruises on the right side labia minora. The treatment notes from Muthambi Health Centre, the P3 form, and the PRC Forms produced by PW3 as P. Exhibits 2, 3, and 4 respectively corroborate the evidence of PW2 that there was penetration. The absence of semen does not negate that there was penetration. The complainant was examined two days after the defilement. She must have taken a bath in that intervening period. Her evidence proved that there was penetration and medical evidence sufficiently corroborated her testimony.

Identification of the Perpetrator

24. PW2 testified that it was the Appellant who defiled her. The Appellant was well known to the complainant as they are neighbours. The offence took place at 5.00 p.m., meaning that the lighting

was adequate to make a positive identification. I therefore I find no ground upon which to differ with the trial court's finding of fact that the complainant was firm in her identification of the Appellant as the perpetrator. There is no place for the appellant's contention that there was personal vendetta, and extortion by the minor's parents as submitted by the appellant. This did not come up in the evidence before the trial court when the witnesses testified. I find that the submission has no basis. I reject the contention.

b.Appellant's Defence

25. On the defence of alibi raised by the Appellant, it was the testimony of DW2 that the Appellant is his neighbour and friend and that on the material day, DW2 was at work in Nairobi and that the Appellant did not use his house to commit the offence. A perusal of the trial court's record of proceedings and judgement reveals that the trial magistrate considered the Appellant's defence and found the same to be an afterthought. I have equally considered the said defence. The said DW2 merely stated that he was at work in Nairobi on the material day. He did not indicate whether or not he was with the Appellant on that day.

A successful defence of alibi is raised to rule out the accused person as the perpetrator of the crime. An accused person who wishes to rely on the defence of alibi must raise it at the earliest opportunity to give the prosecution an opportunity to evaluate as the appellant bears no burden to proof his alibi defence. The Court of Appeal in *Kiarie –v- Republic* (1984) KLR stated:-

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable...."

See also *Victor Mwendwa Mulinge –v- Republic* (2014) eKLR Court of Appeal. It stated

> " It is trite law that the burden of proving the falsity if at all of an accused's defence of alibi lies on the prosecution."

The Court of Appeal in *Erick Otieno Meda- v- Republic* (2019) eKLR while quoting two South African Decision with approval which has set out five principles with respect to assessment of alibi evidence, stated that though persuasive, 8it is good law. I quote the two decisions below:-

In *S.v- Malefo en andere* 1998)1) SACR 127 (W) at 158 a-e

> " a) There is no burden of proof on the accused to prove his alibi.
>
> b) If he is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of doubt.
>
> c) An alibi "moet aan die hand van die totaliteit ran getnienis en die hoff se indrukke van die getuies beoordeel word."
>
> d) If there are identifying witnesses, the court should be satisfied not only that they are honest but also that the identification of the accused is reliable ("betroubaar")
>
> e) The ultimate test is whether the prosecution has furnished proof beyond a reasonable doubt- and for this purpose a court may take into account the accused has raised a false alibi."

The other case cited is *Republic –v- Buya* (1952) (4) SA 514(A) at 521 C

> "If there is evidence of an accused person's presence at a place and at time which makes it impossible for him to have committed the crime charged, then if on all the evidence there is a reasonable possibility that this alibi evidence is true it means he has not committed the crime...."

The Court of Appeal then observed at follows:-

> "a) An alibi needs to be corroborated by other witnesses and not just a mere regurgitation of the events from the accused's point of view.
>
> b) The alibi defence needs to be introduced at an early stage so as to allow it be tested, especially during cross-examination of the trial.
>
> c) The alibi defence or evidence may often rest on the credibility of the accused and reliability of the evidence that he or she has presented in court.
>
> d) The accused does not need to prove the alibi but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

See *Mhhungu –v- S* (AR 300/13 2024 ZAKZPHC 27 (16May 2014)

The law today is that it is up to the prosecution to displace the any defence of an alibi and show that the accused was present at the place and at the time the offence was committed by the accused or his accomplices. See *R v John Kimiti Mwaniki* (2011) eKLR

26. The question that begs an answer in this appeal is whether the defence of alibi tendered aby the appellant can stand. The appellant stated that on that day he was at work. This defence of alibi was given too late in the day. He never put it to any of the witnesses that he was not at the scene. Not a single witness or witnesses were called to corroborate his testimony that he was at his place of work. The only witness called was PW2 who testified that he had locked his house and was away in Nairobi. So no defilement could have been committed by the appellant in his house. The witness (DW2) never stated that he was with the appellant in Nairobi. He had no idea as to where the appellant was. He did not say who he lived with or that he is the only person who lives in his home.

I find that the testimony of DW2 is insufficient and is incapable of corroborating the defence of the appellant. In view in a defence of alibi which seeks to prove that the appellant was not at the scene of crime at the alleged time and place corroboration expected is one that proves that the witness was with the appellant at a totally different place. Evidence which is appellant by the defence witness who merely assumes that the defilement could not have occurred for some reason is worthless and is a sham.

The complainant gave credible evidence that the appellant was at the home of his uncle (DW2), his wife and the appellant. The trial magistrate found no reason to doubt her credibility. Based on her testimony, the appellant was placed at the scene of the crime. The defence of the appellant is a sham. The defence does not meet any of the criteria laid out in the case of *Erick Otieno Meda –v- Republic* (supra). The trial magistrate, contrary to the submission by the defence considered the defence and for good reasons properly rejected it.

c. On the Sentence

27. Sentencing is in the discretion of the trial court. In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

28. Section 8(3) of the *Sexual Offences Act* provides as follows:

> " (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

29. In this case, the complainant was aged fourteen (14) years at the time of the commission of the subject offence. It thus follows that the offence the Appellant was charged with carries not less than twenty years imprisonment upon conviction. The Appellant did not submit anything in his mitigation. Accordingly, the proper sentence that should have been meted out against the Appellant is twenty years. The sentence fell short of the lawful sentence provided under the section and the appellant was lucky that he was not sentenced to the mandatory minimum sentence of twenty years. I note that the current trend in sentencing is moving away from minimum mandatory sentence and leave the court with discretion to pass the appropriate sentence based on the circumstances of each case. I will therefore not interfere with the sentence as it was neither excessive nor harsh.

Conclusion

30. Having considered the Grounds of Appeal that were enumerated and/or canvassed before the court, it is appropriate to state that grounds against the Appellant's conviction are bereft of merits. The evidence on record was sufficient to support the conviction of the offence of defilement. I find that the appeal is without merits. I order as follows:-

    1. This appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY OF JULY 2023.

L.W. GITARI

JUDGE