Miriti v Republic (Criminal Appeal E140 of 2022)
[2023] KEHC 21177 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21177 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E140 OF 2022

LW GITARI, J

JULY 27, 2023

BETWEEN

PAUL MUGAMBI MIRITI ..... 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.

2. The particulars of the charge were that on 17th January, 2021 in Imenti South Sub-County within Meru County, the Appellant intentionally caused his penis to penetrate the vagina of L.K., a child aged 13 years.

3. The Appellant faced the alternative charge of committing an indecent act with a child.

4. The Appellant denied the charge and the matter proceeded to trial with the prosecution calling a total of seven (7) witnesses in support of its case and the Appellant testified as the sole witness in his defence. After a full trial, the Appellant was convicted and sentenced to serve imprisonment for a period of twenty (20) years.

5. Being dissatisfied with the said decision, the Appellant filed this appeal which was canvassed by way of written submissions. In his submissions, the Appellant relies on the following amended grounds of appeal:

    a. That the learned trial erred in law and facts by convicting the Appellant herein based on evidence which was marred with material contradictions and conflicting testimonies from the key prosecution witnesses.

b. That the learned trial erred in law and facts by failing to note that the prosecution case was in the first instant grounded on suspicion and not actual facts which led to the arrest of the Appellant by the area manager and that they did not prove their case to the required standard in law.

c. That the learned trial erred in law and facts by convicting the Appellant in total disregard of his plausible defence testimony without giving cogent reasons.

d. That the learned trial erred in law and facts by failing to note that the provisions of the law which prescribes a mandatory minimum sentences in the Sexual Offences Avt were declared to be unconstitutional by the High Court sitting at Machakos as they deprive the court the power to exercise judicial discretion and award appropriate sentences.

e. That this Hon. Court finds that the mandatory minimum sentence of 20 years imposed on the Appellant to have infringed on his inherent rights under Articles 25(c) and 28of *the Constitution* as read with Sections 216 and 329of the Criminal Procedure Code.

6. Based on the above grounds, the Appellant prayed that his appeal succeeds in its entirety.

The Appellant's Submissions

7. It is the Appellant's submission that the credibility of the evidence tendered by the prosecution was doubtful as the evidence of PW1, PW2, PW3, and PW4 contradicted with regards to the exact time that the offence is alleged to have been committed by the Appellant. It is further his submission that his arrest was based on suspicion and that no one saw the Appellant defile the complainant.

8. On sentence, it is the Appellant's submission that the mandatory minimum sentence of 20 years as provided under Section 8(3) of the *Sexual Offences Act* deprived him of his right to a fair trial as it allegedly robbed him of an opportunity for an individualized sentence that took into consideration factors relating to the Appellant's personal information and the circumstances surrounding the offence committed. That such a sentence should only be imposed in exceptional and appropriate circumstances which may require a severe deterrent punishment. He contends that the mandatory minimum sentence deprived him his right to fair trial under Article 25(c) of *the Constitution* and to be treated with dignity in violation of Article 25(a) thereof. The appellant has relied on the case of Phillip Mueke Maingi & 5 Others, Petition No. E017/2021

9. The Appellant thus urged this Court to find that the prosecution's case was not proved to the required standard in law and acquit him and that in the alternative, to reduce his sentence after taking into consideration his mitigating factors.

The Respondent's Submissions

10. On its part, it is the Respondent's submission that it proved the case against the Appellant beyond reasonable doubt. That the age of the complainant was established as 13 years and that penetration was proved through the evidence of the victim as corroborated through the medical evidence. Further, that PW1 positively identified that the Appellant as the perpetrator. He relies on Court of Appeal decision in George Opondo Olunga –v- Repulic (2016) eKLR where the court held that the three elements which ought to be satisfied before conviction for the offence of defilement which are age of victim, penetration, identification of perpetrator.

11. On the issues of independent witnesses not being called, it is the Respondent's submission that the prosecution witnesses who testified proved their case beyond reasonable doubt. Further, that Section

124 of the *Evidence Act* provides that in sexual offences, a court can convict an accused based on the evidence of the victim alone.

12. On the issue that the charges were a frame up, it was the Respondent's submission that the Appellant did not raise the same as issue when the witnesses were testifying to enable the Respondent to respond. Further, that the Appellant was given an ample chance to cross examine the witnesses and never raised the issue. According to the Respondent, the allegation by the Appellant that there was a grudge between him and PW1 or his family is an afterthought.

13. On the issue of the trial court not considering the period that the Appellant had spent in custody, the Respondent submitted that the trial court did comply with Section 333(2) of the Criminal Procedure Code by ordering that the Appellant's sentence should commence from the date that the Appellant was first placed in custody.

14. The Respondent denied that the trial court rejected the defence of the Appellant without giving cogent reasons. It was the Respondent's submission that the trial magistrate did consider the defence and found that the same was an afterthought and a mere denial.

15. Finally, on the issue of the sentence meted against the Appellant, the Respondent submitted that the same was proper and lawful and that the trial court took into consideration the aggravating factors to wit the nature of the offence, the age of the victim and the manner in which the offence was committed. The Respondent thus prayed for the Appellant's conviction and sentence to be upheld.

Issues for determination

16. I have considered the grounds of appeal as well as the submissions of the parties. The following issues arise for determination by this Court:

    a. Whether the prosecution proved its case beyond any reasonable doubt;

    b. Whether the sentence meted against the Appellant was appropriate in the circumstances of this case.

Analysis

17. This is a first appeal. The duty of this Court as a first appellate court is 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 vs. Republic [1972] EA 32].

18. The Court of Appeal also held in the case of Kiilu & Another vs. Republic [2005]1 KLR 174 as follows:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

19. Guided by the above authorities, I shall now re-analyse the respective cases of the parties.

The Prosecution's Case

20. The complainant herein, L.K. testified as PW1. She stated that she was 13 years old and lives with her mother (PW2). That on 17th January, 2021 at around 10 p.m., she was watching television at Mama Judy. That the Appellant went there, held her hand, and took her to his house. That the Appellant undressed her and he also undressed and then did "tabia mbaya" to her by inserting his penis into her vagina. It was PW1 testimony that the Appellant used a condom and that after he was done, he opened the door and told her to go home threatening to beat her if she revealed the incident to anyone. That she went home and the area manager Gitari came. Further that the area manager took her and the Appellant to the chief's office at Kiandene before referring them to hospital at Nkubu.

21. PW2 was the complainant's mother. She stated that she was preparing supper at home on the material day when the complainant returned home late at about 9.30 p.m. That shortly afterwards, PW2 had the area manager calling her name. The area manager asked her the time that the complainant had jotted home and they then went to the Appellant's home where, according to PW2, they found many people who wanted to beat up the Appellant. It was PW2's testimony that the complainant then told them that the Appellant had defiled her and that is when they went to the office of the area assistant chief who referred them to Igoji Police Station and then to Consolata Hospital Nkubu where the complainant was attended to.

22. PW3 was Julius Gitari. He stated that he stays at Mworoga and is the area manager. That on the material day at around 10 p.m., one Eric Kirimi went to PW3's home and told him that the Appellant had been seen with a child in his house. That they then went to the Appellant's house and found the complainant with the Appellant standing at the door. That PW3 asked them what they were doing and then arrested him. According to PW3, the complainant then sneaked and fled. That PW3 then went for the complainant at their home before returning to the Appellant's house, where PW1 allegedly narrated that the Appellant had defiled her.

23. PW4 was Morris Mutembei, a neighbour to the Appellant. According to him, he was in his rented home on the material day when he heard a girl talking in the Appellant's house. That he went to the house of Eric Kirimi, an area elder, and informed him what he had heard. PW4 stated that the said Eric Kirimi then went and called the area manager, PW3, who found the Appellant and the Complainant outside the Appellant's house. That as they were questioning the Appellant, the complainant fled to her mother's house but the area manager went and got her back. That the Appellant was then arrested and escorted to the area chief's office and later to Igoji Police Station.

24. PW5 was Charles Mutura, the assistant area chief of Mworoga sub-location. He stated that on the material day at about 1.30 a.m., PW3 went to his office with the complainant, the Appellant and other members of the public. He was notified of the incident and Appellant was arrested.

25. PW6 was PC Wycliffe Kiplangat stationed at Igoji Police Station. He was the investigating officer in this case. According to him, he was informed of a report of defilement case by one OCS Madam Hellen on 18th January, 2021. That the case was reported by the complainant and her mother and that the Appellant was the suspected perpetrator and was escorted by member of the public. That the complainant was referred to hospital at St. Anne Mission Hospital where she was later referred to Consolata Hospital on the same day. PW6 then investigated the matters and recorded the witness statements.

26. PW7 was Seberina Kaimatheri, a clinical officer at Kanyakine Sub-County Hospital. She produced the complainant's lab request form, p3 form and PRC form as P. Exhibits 2, 3, and 4 respectively. She stated that the complainant was examined by her colleague Moses Baiyenia who was on transfer but

that she was conversant with his handwriting and signature. It was her testimony that the complainant was treated at Consolata Hospital and the degree of injury was assessed as grievous harm. She testified that on the genitalia, the hymen was broken and she concluded that the complainant had been sexually penetrated.

The Defence Case

27. When put on his defence, it was the Appellant's contention that the area manager had a grudge with him. That in August 2016, the area manager had employed him to work on his farm. That the area manager was involved in a criminal offence and fled only to return in 2020. That the Appellant left his employment after the wife to the area manager failed to pay him in full and that in 2021, the area manager confronted the Appellant as he was not happy. The Appellant thus contends that his case was a frame up by the area manager.

28. From the above facts, I shall now move to analyzing the issues arising for determination by this Court.

    a. Whether the Prosecution proved its case beyond any reasonable doubt

29. The ingredients for the offence of defilement were highlighted in the case of Charles Wamukoya Karani Vs. Republic, Criminal Appeal No. 72 of 2013 as follows:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

30. The Appellant in this case was positively identified by the complainant, PW3 and PW4 as the perpetrator. The age of the complainant was also proved by the production of her baptismal card (P. Exhibit 1) which confirmed that the complainant's date of birth was 23rd July, 2008.

    The particulars of the charge stated that the victim was aged 13 years. She was therefore 12 years and six months. The trial magistrate found that the complainant was twelve years old as she had not celebrated her thirteenth birthday. Section 8(3) of the *Sexual Offences Act* provides:

> " (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."

    In Edwin Nyambogo Onsongo –v- Republic (2016) KLR it was held that the age can be proved by documentary evidence such as birth certificate, birth notification or baptism card or by oral evidence. Prove of age of the victim is crucial in sexual offence as it determines not only the section under which the culprit is charged but also the sentence to be meted out. The younger the victim the severe the sentence. In this case the age of victim was proved. She was over twelve years and therefor the charge preferred was proper.

31. "Penetration" under Section 2 of the Sexual Offence Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

32. It was PW1's testimony that on the material day, the Appellant took her to his home where he defiled her. According to the clinical officer (PW7), an examination of the complainant revealed that her hymen was broken which made the clinician draw the conclusion that the complainant had been sexually penetrated.

33. The issue of a broken hymen as proof of penetration in the offence of defilement has been interrogated in many cases. In the case of John Mutua Muyoki v R [2017] eKLR, the Court of Appeal held as follows in this regard:

> " Therefore, in order for the offence of defilement to be committed, the prosecution must approach each ingredient beyond reasonable doubt. The clinical officer was categorical that he was not in a position to ascertain the act of defilement after examining the complainant. He testified that he conducted vaginal examination and found no tears, no bruises, no hymen and no discharge. In addition, there were no spermatozoa and yeast cells or fungal cells. The complainant had also confirmed to him that she had previously engaged in sexual intercourse and was therefore not a virgin. Accordingly, the lack of hymen could not be attributed to the alleged incident involving the appellant. In a nutshell, there was no evidence of penetration."

34. In this case, no lacerations or bruises, and no discharge were noted upon examination of the complainant. As per the P3 Form, the approximate age of the injuries was a few days. The additional remarks noted in the P3 form are to the effect despite the complainant's hymen being broken, the lack of other physical injury could be attributed to healing as the complainant took around four (4) days before seeking medication. It was however the complainant's testimony on cross examination that she sought medical attention on the same day. PW6 testified that the complainant was referred to Consolata Hospital the same day. They did not have money so they went back to the police station. The P3 was filed at Kanyakine Sub-County Hospital. It was file on 21/1/2021. Part B (2) states that she was treated at Consolata Hospital. There was no material contradiction in the testimony of the complainant and that of PW7 because two confirmed that then complainant was referred to the hospital he same day.

35. The PW1 however did not need corroboration. As per the proviso to Section 124 of the *Evidence Act*, no corroboration is required in sexual offences where the court believes that the complainant is telling the truth. In Geoffrey Kioji v Republic, NYR Crim. App. No. 270 of 2010 (Nyeri) the Court stated as follows in this regard;

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

36. The complainant herein was a child aged 13 years. She is therefore considered to be a child of tender years. This is as per the many court decisions which have maintained the higher threshold of 14 years regarding the competency of evidence by children of tender years [See: Samuel Warui Karimi v Republic [2016] eKLR]. It was therefore essential for the trial court in this case to subject the complainant to a voire dire examination prior to taking her evidence in order to ascertain whether she understood the duty telling the truth. This was however not done.

    Be thus as it may, the trial magistrate held as follows with regard to the testimony of the complainant. She was eloquent and consistent; she was very specific in her narration of what transpired. " I am convinced she told the court the truth."

The learned trial magistrate did not conduct a voire dire examination which is conducted to determine the admissibility of the evidence, competency or disqualification of a witness. The Court of Appeal in Johnson Muiruri-v-Republic (1983) KLR 445 which it quoted in its decision in Japheth Mwambire Mbitha –v- Repbulic (2019) eKLR where it was stated-

> " 1. Where in any proceedings before any court a child of tender years is called as a witness, the court is required to form an opinion on voire dire examination, whether the child understands the nature of the oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
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> 2. It is important to set out questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
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> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded; so that the cause the court took is clearly understood.
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> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth.
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> 5. The court is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to a conviction."

The purpose of conducting a voire dire examination is to ensure that the minor understands the solemnity of oath and if not, at the very least the importance of telling the truth.

In sexual offences where minors are called to testify voire dire examination is critical in order to determine the veracity of their testimony.

In Manpett Loon Komok-v- Republic 2016 eKLR, Court of Appeal, the court stated:

> "It is firmly settled that not in all cases that voire dire is not administered or is not administered properly the entire trial would be vitiated. This court sitting at Nyeri has recently reiterated what has been said many times before that, that question will depend on peculiar circumstances and particular facts of each case. See James mwangi Murithi –v- Republic, Criminal Appeal No. 10/2014"

The court also considered the meaning of a child of tender years and stated, "However back in 1959 in the celebrated case of Kibageny Arap Kolil –v- Republic (1959) E.A 82 the Court of Appeal for Eastern Africa held that the phrase, 'a child of tender years meant a child under the age of fourteen (14) years." It further stated- "It follows therefore that the time honoured fourteen (14) years remains the correct threshold for voire dire examination on children of tender years. It follows from a long line of decisions voire dire examination on children of tender years must be conducted and that failure to do so does not 'per se' vitiate the entire prosecution case."....."But evidence taken without examination of a

child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person."

In Athumani Ali Mwinyi-v- Republic Criminal Appeal No.11/2015, the Court of Appeal stated that in appropriate cases where 'voire dire' is not conducted but there is sufficient independent evidence to support the charge, the court may still be able to uphold the conviction.

In this case the trial magistrate did not conduct voire dire examination. The complainant was hardly thirteen years old was sworn and was cross-examined. The trial magistrate found that she was eloquent and he was convinced that she was telling the truth. The trial magistrate had the chance to see the complainant and assess her demeanor. The complainant was cross-examined. The medical evidence tendered by the clinical officer confirmed that there was penetration. Furthermore the evidence of PW3 confirmed that the complainant (PW1) was in the house of the accused on that material night. Though the appellant alleged grudge with (PW3) he admitted that the PW3 is not the parent of the complainant. He also admitted during cross-examination that he had no problem or grudge with the parents of the complainant. The alleged grudge with PW3 cannot possibly be true and was rejected by the trial magistrate as it was not put to PW3 when he testified. I find that in line with the holding in Marripett Loonkomok- v-Republic (supra), the totality of the evidence tendered by the prosecution proved that the complainant was defiled on the material night by the appellant and in particular the medical evidence which proved there was penetration and corroborated the fact of defilement.

I find that failure by the trial magistrate to conduct a voire dire examination cannot vitiate the conviction in the circumstances of this case.

On the sentence, Section 8(3) of the *Sexual Offences Act* (supra) provides that a person convicted under the section is liable upon conviction to imprisonment for a term not less than twenty years.

The trial magistrate held that "I find the accused deserving of a deterrent sentence." The accused was then sentenced to serve twenty (20) years imprisonment. The trial magistrate exercised discretion in passing the sentence. The sentence passed was lawful and proper. I find that the trial magistrate cannot be faulted for passing that sentence. I also note that the learned trial magistrate fully complied with the mandatory provisions of Section 333 of the Criminal Procedure Code as he ordered that the sentence to commence from the date the accused was first placed in remand custody. The appellant was given an opportunity to mitigate before the sentence was passed. There was no violation of his right to fair trial.

Conclusion:

37. For the reasons stated above, I find that the appeal lacks merits.

Order:

38. This appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF JULY, 2023.

L.W. GITARI

JUDGE