Njeru & another v Republic (Criminal Appeal E096 of 2022)
[2023] KEHC 21407 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21407 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E096 OF 2022

MS SHARIFF, J

AUGUST 10, 2023

BETWEEN

PAUL MURIITHI NJERU ..... 1ST APPELLANT

NICHOLAS MWIRIGI MITHIKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence delivered by Hon. L.K Mutai CM in Isiolo Sexual Offence Case No. 15 of 2016 on 6/07/2022)

JUDGMENT

1. The appellants Paul Muriithi Njeru and Nicholas Mwirigi Mithika were arraigned before the subordinate court to answer joint charges of gang defilement contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006 and a second count of administering substance with intent to stupefy contrary to Section 27(1)(a) as read together with Section 27(3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars in relation to count 1 were that on diverse dates between 2/07/2016 and 21/07/2016, in Isiolo County within Eastern region while in the company of each other intentionally and unlawfully penetrated with their penises one after the other, into the vagina of MA a child aged nine years.

3. The particulars of the offence in relation to count 2 were that on diverse dates between 2/07/2026 and 21/07/2026, in Isiolo County intentionally caused concoction to be inhaled by MA with intentions of stupefying so as to enable them to engage in sexual activities with her.

4. Upon arraignment, each of the appellants pleaded not guilty. The matter then proceeded to hearing.

5. PW-1 SM, the minor's mother testified that the minor herein on 21/07/2016, the minor did not get home as usual and she decided to go looking for her at school, she didn't find her. She went back home and found the minor looking exhausted. The minor explained having gotten lost and she had used a Samaritan's phone to call her father.

6. PW1 stated that the next day, the minor arrived home on the first trip. The next day, that is, Saturday, she delayed and when she was asked to explain why she was late, she repeated the same story of being left by the van while going back to pick her book from class. On Sunday, she stripped the minor naked and noted the minor appeared to have had sexual intercourse and she thus deduced that the minor had been defiled.

7. This witness testified that the minor then disclosed that on 2/06/2016, the appellants herein defiled her when she had gone to pick her Kiswahili book after class; teacher Paul and Nicholas covered her mouth with a palm and she did not know what transpired thereafter, when she regained consciousness, the said two teachers were still present and she did not have her underpants and saw blood stains on herself. PW1 stated that the daughter told her that the teachers had threatened her and forced her to hide her school uniforms.

8. PW1 further stated that when the minor's father returned home, she informed him of the incident and the minor was then taken to Isiolo General Hospital and later Nairobi Women Hospital. The appellants were arrested after the minor identified them.

9. PW2- the minor herein testified that on 2/06/2016, her Kiswahili teacher (Nicholas) had requested her to get her book from him in the evening before going home. As she was picking the book, she found teacher Paul (1st appellant) in the classroom checking books. Someone who was behind the door suddenly grabbed her from behind and placed a white handkerchief with had a reddish substance on her nose and she then fainted. She stated that she woke up about twenty minutes later and found the appellants on the sides of a table.

10. She testified that she was lying on the table and bleeding from her private parts. She then put on her skirt, picked her bag and went home. When she went to board the school van, she found out that the van had left for the first trip and she had to wait for the second trip but when she got home, she did not reveal the incident to her parents. PW2 stated that she continued taking the books to her teacher of Kiswahili and the appellants herein would alternate on drugging her with the red substance on a handkerchief from Monday to Friday yet she did not disclose these happenings to anyone.

11. She stated that on July 21, 2016, she took the book at 11 am as usual and later went to collect the same after school and Paul put the white handkerchief on her nose and she fainted. On regaining consciousness, she went out and found the school van had left and she decided to walk home but got lost along the way. She then met some good Samaritans who assisted her with a cellular phone and she was able to call the father who then went and picked her. The following day she repeated the same routine and went home in the first trip. On Sunday her mother called to enquire as to what had happened and she narrated the ordeal.

12. PW3, AA. the victim's father testified that on July 21, 2016, he was called from a number that was not in his contacts register save that it was PW2 who spoke to him. PW2 told him that she had gotten lost she was using a phone of one of the good Samaritans were assisting her in tracing her home. The good Samaritans then dropped her by the road and he was able to trace and pick her. On July 24, 2016, PW1 told him that the day he had taken PW2 home, she had been defiled by her teachers. The following day, PW1 and PW3 took the complainant to Isiolo Police station, Isiolo General Hospital and later to Nairobi Women Hospital.

13. PW4, ZK PW-1's house help testified that in July 2016, as she was washing doing laundry, she found the child's underpants, maroon trouser which were part of the uniform. She showed the same to PW1 and who instructed her to wash them. She later learned that the complainant had been defiled by her teachers.

14. PW-5, OG, testified that he was the driver and that he used to drive PW2 and her siblings to and from school. That on 27/07/2016, he did not see PW2 and he dropped the other children but he did not ask where she was.

15. PW-6, MM, the security guard at [Particulars Withheld] school testified that he knew the appellants as they taught in the said school and that DW-5 was the driver ferrying students. He stated that on 21.07.2016, he did not allow any student to leave the school alone and that the appellants left the school in the 2nd trip bus. He denied receiving report of any student missing.

16. PW-7, PC Said Kassim testified as having received report from Ali Abdullahi and his wife on 25/07/2016 and that he issued them with a P3 form which was filled at Isiolo Hospital and returned the following day. On a later date, he went to the school which the complainant was attending while accompanied by his colleagues and the OCS and they arrested the appellants.

17. PW-8 Adan Daudi Dabasso, a Clinical Officer testified as having examined the victim on 25/7/2016. On examination, he found noted tenderness on the abdomen, difficulties in urinating and difficulty in walking. On specific examination, there was fractured hymen with no physical injuries. He concluded that the minor had been defiled.

18. PW-9, SP Abed Kavoo testified that he was allocated the matter to investigate by the CCIO and that he started investigations wherein he recorded statements from witnesses as to the incident in issue and later arrested the appellants. According to him, the incident was already being investigated by PW-7. He interrogated and recorded witnesses statements.

19. PW-10, Edwin Nyangena Omwenga testified that he examined the minor at the Nairobi Women Hospital on 31/7/2016 and from his examination, he noted a foul-smelling discharge from the vagina, broken hymen and his conclusion that the hymen could have been broken by penetration. He produced into evidence the Post Rape Care Form.

20. The appellants were placed to their defense and they elected to give a sworn statement.

21. The 1st appellant (Paul Murithi), testified that he joined (XXX) School on 3/05/2016 teaching Kiswahili and Social Studies and also involved in Music. He said that he was not the complainant's teacher as he taught class 4 East while the minor was in class 4 North. It was his testimony that in June to July, he was involved in Music activities. He denied having committed the offence in issue both in cross examination and re-examination.

22. The 2nd appellant (Nicholas Mwirigi) testified that he knew the complainant as he taught her Kiswahili in Class 4 West. He however testified that he never defiled the minor or asked her to avail her book for marking after class.

23. DW3, Lilian Kaari K testified that she used to teach at (XXXX) School and that between 5/07/2016 and 26/7/2016 she was the teacher on duty. This witness stated that her duties included ensuring that classes were empty after classes. She did not remember any incident of a student having been left being left behind as classes used to be closed at 4:30PM.

24. DW4, Harriet M, testified that she knew the two appellants herein and that 1st appellant never used to teach class 4 West but only the appellant did and that on the date of arrest she showed some two men the 2nd appellant's desk but when they searched the same, nothing was recovered therefrom.

25. The trial court considered the evidence tender by the prosecution and the defence and found the appellants guilty and consequently sentenced the appellants to serve fifteen (15) years imprisonment on count 1 and 2 ½ years on count 2.

26. The appellants being aggrieved filed this appeal raising the following grounds; -

    a. The trial magistrate erred in law and in fact by convicting the appellants on a non-existing offence.

    b. The trial magistrate erred in law and in fact by convicting the appellants based on a defective charge sheet.

    c. The learned trial magistrate erred in law and in fact by convicting the appellants without regards to the fact that the prosecution's evidence was uncorroborated and doubtful.

    d. The learned trial magistrate erred in law and in fact in basing her judgment and conviction on fabricated evidence remote, irrelevant assumptions and considerations

    e. The learned trial magistrate erred in law and in fact in finding a conviction in medical evidence that was doubtful and contradictory

    f. The learned trial magistrate erred in law and in fact in trivializing the appellant's defense, evidence and submissions

    g. The learned trial magistrate erred in law and in fact in convicting the appellants against the weight of the evidence

    h. The learned trial magistrate erred in law and in sentencing the appellants without due regards to their mitigation and that of the appellants'; counsel and in particular that they were first offenders.

27. The appeal proceeded by way of written submissions. Both parties including the victim/complainant filed their respective submissions which have been taken into account.

Analysis and determination.

28. My duty as first appellate court was stated in *Okeno v Republic* [1972] EA 32 at 36 where it was stated;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

29. The appellants herein were charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act, 2006*. The said section provides thus; -

> "Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

30. Considering the grounds of appeal raised by the appellants in the instant case and the duty of this court on first appeal, I find that the issues arising for determination are; whether the prosecution proved its case beyond reasonable doubt, and secondly, whether the sentence was excessive.

31. I appreciate and need not over emphasize that the duty of the prosecution is to proof its case beyond any reasonable doubts by establishing the necessary ingredients of the offence.

32. The elements of the offence were discussed by Gikonyo J in *Daniel Kaberu v Republic* [2021] eLKR where the learned judge held;

> Under Section 10 of the *Act*, for the Prosecution to obtain a guilty verdict in the offence of gang rape, it needs to prove the following four elements:
>
> a. Commission of rape; Penetration as defined by section 2 of the *Sexual offences act* without consent thereof;
>
> b. In association with another or others, or any other with common intention, is in the company of another or others who commit the offence of rape
>
> c. Positive identification of the perpetrator.

33. The question therefore is whether the prosecution was able to prove the elements of the offence of gang rape as stated above. The facts of the case need not be reproduced at this stage as the preceding summary suffices.

34. As to prove of the age of the victim, the prosecution produced a birth certificate as pexh-1 and which indicates that the victim was born on 26/04/2007. The offence was said to have occurred between June and July 2016 and which is clear evidence that the victim was under the age of eighteen years and thus a child within the meaning of the law. Age of the victim was thus sufficiently proved.

35. As relates to penetration, Section 2 of the Act defines the term to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person"

36. In *EE v Republic* [2015] eKLR, the court held as follows;

> "An important ingredient of the offence of defilement is that there must have been penetration. Penetration is defined in section 2 of the *sexual offences act* as
>
> > "'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No 35 of 1995, the court stated,

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

37. In *Mohamud Omar Mohamed v Republic* [2020] eKLR, it was held:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt.
>
> For evidence to be capable of being corroborated it must:
>
> (a) Be relevant and admissible *Scafriot* {1978} QB 1016.
>
> (b) Be credible *DPP v Kilbourne* {1973} AC 729
>
> (c) Be independent, that is emanating from a source other than the witness requiring to be corroborated *Whitehead* J IKB 99
>
> (d) Implicate the accused."

38. The charge sheet indicates that the offence occurred between 2/06/2016 and 21/07/2016. The victim (PW2) gave sworn evidence to the effect that on 2nd June, 2016, the 2nd appellant had asked her to take her book to him and pick it in the evening before leaving school. That she was drugged in that classroom and when she regained consciousness, she was bleeding. Her skirt and pantie were on the floor and the appellants were fully dressed. She testified that this continued from Monday to Friday.

39. She stated that on July 21, 2016 she again took the book to the teacher and when she went to collect the same the 1st appellant (Paul) put the white handkerchief on her nose which made her faint and when she dressed up and went to catch the school bus, she found school van had already left on it's second trip and she thus decided to walk home but got lost along the way and met some Samaritans who gave her a phone. She called her father.

40. PW1 testified that when PW2 went home, she looked tired. She did her homework and the next day, she went home as usual with her siblings and that it was not until Sunday when she was able to interrogate the victim and examine her genitals.

41. It is trite as provided for in Section 124 of the *Evidence Act* that in sexual offences, an accused can be convicted on the basis of the victim's lone evidence but the said evidence can only be relied upon for reasons to be recorded if the court is satisfied that the victim is telling the truth.

42. The victim (PW2) testified that the appellants herein started defiling her on June 2, 2016 and that they could do it every day until the 21/7/2016. However, the greater part of the evidence tendered before the trial court is in relation to 21/7/2016.

43. The complainant PW2, had never informed her parents of the ordeal earlier than the date her mother examined her. It is unfathomable bearing in mind the victim's age, how was it not possible for PW1 and PW3 to notice something amiss for the entire period that their daughter was allegedly defiled. In my view, the evidence by the prosecution weighed as against the appellants indeed raises doubts as to the victim having been defiled daily from 2.06.2016 to 20/07/2016.

44. Further the evidence by PW1 was that the victim went home on July 21, 2016 and she said she was just late in school and the following day she went home early. That on Saturday, she repeated the same story as to the reasons she had gone home late. That it was only on Sunday when she was able to threaten her and she disclosed as to what had happened. She testified that she examined her and formed an opinion that she had been defiled.

45. The evidence presented shows that throughout the period of one month from June 2, 2016, PW1 had never noticed anything wrong with PW2. Then the question that arises is what prompted her to interrogate and examine her daughter on July 21, 2016, said to have been a Sunday and not on a school day.

46. In my view and considering the evidence by the victim, the same was not sufficient to be relied on its own so as to support a safe conviction.

47. Another issue to be considered is whether the evidence by the doctor was corroborative. The doctor from Isiolo Hospital (PW-8) produced a copy of the P3 form and testified upon examination, he found that there was fractured hymen but she had no physical injuries. The history, physical examination and lab findings confirmed that defilement had taken place although the victim was brought five days later. PW-10 testified that upon examination, his conclusion from the missing hymen was that there was penetration.

48. In *Arthur Mshila Manga v Republic* [2016] eKLR was held;

> '..... No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the PW3 form as PEXI.
>
> > 'From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed v Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo v Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief.'
>
> As we shall endeavour to demonstrate later in this judgment, much as the trial court believed the testimony of the complainant, there was no strict compliance with the requirements of the proviso to section 124 of the *Evidence Act* aforesaid. It is quite clear that there was

doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant. It is trite that those doubts should have been resolved in favour of the appellant."

49. In *PKW versus Republic* [2012] eKLR, the Court of Appeal held that;.....

> " Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. 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 ruptured or torn hymen is not automatic proof of penetration through a sexual intercourse. It is upon the prosecution to establish, beyond reasonable doubt that it was ruptured during the alleged rape or defilement. It is noticeable that in this case the complainant never said her hymen was ruptured during the sexual intercourse she claimed she had with the appellant."

50. In this instant case, the doctor in cross examination gave evidence as to the rapture of the hymen being about four days and which evidence contradicted the evidence by PW1 and PW2 as to the date that PW2 was allegedly defiled. The evidence of PW2 was that she had a whole one month's history of defilement. There is indeed doubt from this evidence as a whole as to whether there was penetration. This evidence by the doctor indeed raises doubts as to whether the victim herein was indeed defiled by the appellants herein.

51. The P3 produced by PW-8 made reference to the incident having taken place on 21/7/2016 and he examined her on 25/7/2016. He noted that the minor had difficulty in urinating and walking. He approximated the age of the injuries to be 5 days. It is curious how the minor's parents failed to note the difficulty noted by the doctor because according to the evidence tendered by the minor's mother, her suspicion was prompted by the minor being late from school and the minor disclosed the defilement after the mother beat her up. PW1 and PW3 never noticed any difficulties in PW2's walking style for one whole month that she is said to have been defiled continuously.

52. Going by this, I note contradictions for instance, PW-1 stated after failing to meet the child at school, she went back home and found her with her siblings. The day, she inquired from the minor what had happened to her, she narrated an incident relating to 2/6/2016. More than a month earlier. It is clear that the incident talked about by the minor was not in relation to the incident of 21/7/2016.

53. I have also considered the defence evidence tendered. For instance, the 1st appellant states that he was employed on 9th May, 2016 and the 2nd appellant states that he was employed on 2nd June, 2016 as Dexh 1 and 5 respectively. If this be the case, the date the offence allegedly took place was the 2nd appellant's first day at work. It is highly doubtful whether by the end of the first day, the 2nd appellant could have known the minor.

54. The other defence witnesses including DW-3, the teacher on duty from 5/7/2016 to 26/7/2016. Her testimony was that her duties included ensuring that classes were locked after 3.20 pm. She did not find the minor with the teachers in the classroom at the scene of crime. She did not receive any complaint from the minor over the week. She noted nothing unusual during the week.

55. I have carefully reviewed the trial court's record, the submissions filed in this appeal and the legal position on the subject and I do find that the evidence tendered before the trial court by the

prosecution/respondent herein, did not suffice to form the basis of a conviction for the offence of defilement as there was no prove of penetration. The evidence before the trial court was marred by material inconsistencies which should have been resolved in the favour of the appellants. The learned trial magistrate's finding on the same was erroneous and not supported by the evidence.

56. The fact that there were no injuries noted on the victim's genitals casts doubt on whether the appellants defiled her. There is no clarity on when the offence is said to have been committed whether it was between June 2, 2016 and July 20, 2016 or on July 21, 2016. The evidence in that respect was contradictory and not clear. I thus acquit the two appellants in relation to count 1.

57. In relation to the second count, Section 27 provides thus;-

> " 27.
>
> (1) Any person commits an offence if he intentionally administers a substance to, or causes a substance to be administered to or taken by, another person with the intention of –
>
> (a) stupefying; or
>
> (b) overpowering that person, so as to enable any person to engage in a sexual activity with that person."

58. Section 27(2) provides further that;-

> " In proceedings for an offence under this section it is for the complainant to prove that the accused person administered or caused the alleged victim to take any substance with a view to engaging in a sexual activity with the alleged victim."

59. In my view, the prosecution did not tender any evidence that the appellants herein administered any substance. Despite PW-1 testifying that she could always be made to inhale some substance, there was no evidence tendered in that respect. It is not clear as to why as part of the medical examination, PW2 was never tested for any substance yet she had presented a history of forceful administration of a reddish substance that was causing her to lose her consciousness during the alleged defilement.

60. The P3 produced by the clinical officer does not indicate that the minor was under influence of any drug or alcohol.

61. As the appellants rightfully submitted the said substance which was used was never produced in court and neither was any medical evidence tendered as to the effect of the said substance to the victim. In my view I find that the trial court erred in finding the appellants herein guilty in absence of any evidence in that respect. There is indeed doubt in that respect. These doubts ought to go to the appellants' benefit.

62. Considering the above, I find that the evidence by the prosecution was insufficient to prove the elements of the offence facing the appellants herein in both counts. The trial court indeed erred in convicting the appellants.

63. On the balance I do hereby allow the appeal herein and I hereby quash the conviction as against the appellants herein in both counts and I further set aside sentence meted out to them. I order that the appellants be released forthwith unless otherwise lawfully held.

64. Orders accordingly.

DELIVERED,DATED AND SIGNED AT MERU THIS 10TH DAY OF AUGUST 2023.

MWANAISHA. S. SHARIFF

JUDGE

In presence of:

Appellants

Ms Njeru for the respondent