Munara v Republic (Criminal Appeal 101 of 2018)
[2022] KEHC 10666 (KLR) (Crim) (24 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10666 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 101 OF 2018

DO OGEMBO, J

MAY 24, 2022

BETWEEN

LUCAS AMULI MUNARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence eof the Hon. J. Kamau Resident Magistrate delivered on 8.6.2018 in Kibera Chief Magistrate's court in Criminal case No. SO 89 of 2014)

JUDGMENT

1. The appellant Lucas Amuli Munara, was charged in the above case on 4.9.2014. On count I, he faced a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. That on 29.8.2014 in [Particulars Withheld] within Nairobi county, he intentionally and unlawfully caused penetration by inserting his male genital organ (penis) to the genital organ of a female (vagina), FK, aged 10 years.

2. He faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. That on 29.8.2014 in [Particulars Withheld] within Nairobi County, he unlawfully and intentionally committed an indecent act by touching the vagina of FKN, a girl aged 10 years.

3. The appellant also faced another charge (Count II) of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*, No. 3 of 2006. That on 29.8.2014 in [Particulars Withheld] within Nairobi County, he intentionally and unlawfully committed an act by attempting to penetrate a male genital (penis) into the genital organ of a female (vagina), BN, aged 5 years. on this, he faced an alternative charge of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. That on 29.8.2014 in [Particulars Withheld] withinin Nairobi County

he unlawfully and intentionally committed an indecent act by touching the vagina of BN a girl aged 5 years.

4. The case of the appellant progressed to full hearing. The appellant was convicted on Count I and sentenced to a life imprisonment. He was also convicted on the alternative charge to Count II and sentenced to served 20 years imprisonment. This was on 8.6.2018.

5. Being dissatisfied with the said convictions and sentences, the appellant filed this appeal on 28.6.2019. In the petition of appeal, the appellant listed upto 3 principal grounds of appeal as follows;-

    1. That the learned trial magistrate erred in law and in facts in holding that the offence of defilement was proved beyond reasonable doubt against the appellant.

    2. That the learned trial magistrate erred in law and in fact by failing to find that enough doubt was created to secure the acquittal of the appellant for the offence of defilement.

    3. That the learned trial magistrate erred in law and in fact in basing the conviction of the appellant on scanty and unsupported evidence.

6. The appellant pleads that his appeal be allowed. On the other hand, the state Respondent has opposed this appeal and urged that this appeal be dismissed.

7. This appeal was canvassed by way of written submission which both sides duly filed, albeit that the appellant submissions came after those of the Respondent. Being the appellant, it is proper that the court first considers the submissions of the appellant first as I hereby do.

8. It is has been submitted by the appellant that the evidence of PW1, PW2 and PW3 should not be relied on, and that the medical report does not record the time and scenes where the offence was committed. He urged the court to make a complete and comprehensive appreciation on the case. He relied on the *Karisa Chengo and others Versus Republic Cr. Appeal 44, 45, and 46 of 2014 MLD* that:

> The decisions were incompetent arising from incompetent jurisdiction and for this ground, the medical evidence in this particular case was invalid and not conclusive."

9. He went on that the presence of pus cells in urine is not proof of penetration ie *PKW Versus Republic (2012)eKLR*. He also relied on *Sekitoleko Versus Uganda (1967)EA 53L* that the burden of proving an alibi is not on the appellant, but remains with the prosecution.

10. He also submitted that the prosecution's case was full of doubt and that he ought to be accorded the benefit of the doubt and cited *Elizabeth Waithengeni Gatimu Versus Republic (2015)eKLR*, that:

> " An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such plea."

11. That his case was not proved beyond any reasonable doubt as set out in *Woolmington Versus DPP (1935) AC 462*. And *Sawe Versus republic (2003)KLR* where it was held;

> " Based on the evidence on record we find that the only thing that connects the appellant to the offence is suspicious... it is trite law that suspicious alone cannot be the basis for inferring guilt."

And *James Tinega Omwenga Versus Republic* (2014)eKLR, that;

> " Suspicious however strong, cannot provide a basis for inferring guilty which must be proved by evidence."

12. The Respondent, on the other hand, it was submitted that the prosecution managed to prove the 3 ingredients of defilement asProof of penetrationAge of the victimPositive identification of the assailant.

13. The court was asked to dismiss this appeal for lack of merit.

14. This matter comes up before this court as first appeal. The jurisdiction of this court being the first appellate court are well settled in the case of *Okeno Versus Republic (1972)EA 32*, that it is to analyse and re-evaluate the evidence tendered before the trial court and to come to its own conclusions.

15. From the record, the case of the prosecution with the evidence of PW1 FKN, a minor aged 10 years and in class 5. Her evidence was that on 29.8.2014, her mother sent her to take jerrycans to the appellant to fetch water. That the appellant demanded that she takes them at night. She took them at 8:00pm. That the appellant took her into the house, gagged her mouth and inserted his penis in her vagina, before threatening her not to tell her parents. Her evidence was that the appellant had done the same to her friends Damaris and Brigid and they were all taken to hospital.

16. PW2 BN, a minor aged 5, was stood down after she could not proceed with her testimony. PW3 DW, another minor, only gave a brief testimony of how she had witnessed the appellant remove clothes from PW2 before defiling her.

17. PW4 EN is father of PW2. His evidence was that PW2 was born on 9.7.2009 (MFI -1). He recalled that on 29.8.2014 he returned from work to find 2 women at his door and they told him that PW2 and their daughters had been lured by the appellant. PW2 confirmed to him. He proceeded to take her to hospital for examination. He also reported to the police and obtained a P3 form which was filled for the child (MFI – 3). He led the police to the arrest of the appellant.

18. And MW, the mother of PW1 was PW5 . Her evidence was that PW1 was born on 5.9.2004 (MFI-4). On the material date on 29.8.2014, she came back to find when her daughter had been taken to hospital. She confirmed that the appellant used to fetch water for her and it is PW1 who would take the water jerrycans to him.

19. PW6 was PW , whose evidence was that on 29.8.2014 she was in her house, when the children, PW1, PW2 and PW3 were playing outside. That her daughter, PW3, came back at around 12:00pm while crying before taking a seat. That when she sent her she could not stand. Then she saw the child urinating on herself. That the child then told her that Anyore, the caretaker, had touched her private parts. She took the 3 children to hospital where both PW1 and PW2 were confirmed to have been defiled while PW3 also had bruises.

20. PW7 was Kinuthia Edward Mbugua , a medical officer at Nairobi Women Hospital. His evidence was that on examination, PW2 had a broken hymen, and a bad odour from her private parts. On urine test, it was found that she had gone through forced entry. He produced the post rape care form (MFI -2). For PW1, his evidence was that on examination, she had a genetic pigment discoloration, white discharge and broken hymen. That the discharge showed she had an infection in her private parts. He produced the relevant medical record (Exh.5).

21. PW8, sergeant Mary Nasimiyu is the officer who received the reports of the 3 minors and issued them with P3 forms. She recorded the witness statements. In court, she produced the immunization cards

of the minors to show their ages. The last prosecution witness was Dr. Kizi Shako who examined PW1 and PW2 and filled in their P3 forms which he produced in evidence.

22. The appellant gave a sworn defence in which he testified that on 29.8.2014, he came back from his rural home and went straight to his house. That on 30.8.2014 the police arrested him and took him to the police station and later charged. He denied the charges.

23. On cross examination, he admitted that he worked in the plot and that the children used to call him Anyore. He maintained that the mothers of the children told them what to say and that mother of PW1 had demanded a sexual relationship with him, which he had refused. He further maintained that he had been away in the rural area on 29.8.2014. He otherwise showed no receipt to confirm this. The appellant called no witness.

24. I have considered the evidence on record and the submissions of both the appellant and the state sides. This is a case of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offence Act, No. 3 of 2006. The ingredients for the offence of defilement are well settled. In the case of *George Opondo Olunga Versus Republic (2016)eKLR* , it was held;

> " The ingredients of an offence of defilement are identification, or recognition of the offenders, penetration and age of the victim."

25. And in the case of *CA Versus Republic (2018)eKLR* , the Hon. Justice Mrima J. holding the same stated;

> " The key ingredients of the offence of defilement include proof of age of the complainant, proof of penetration, and proof that the appellant was the perpetrator of the offence."

26. Of the 3 ingredients, the 2 issues of age and penetration were proved by the prosecution by the various witnesses including PW1, PW2, PW3, PW5, PW6 and PW7. The appellant has admitted as much and or raised no issues with the same.

27. The only issue that the appellant has raised is whether the prosecution proved beyond doubt that he was identified as the man who defiled the complainant. On this issue, the court notes the following salient pieces of evidence that the prosecution produced in court. PW1, a minor of 10 years, gave evidence that she knows the appellant as the man who used to draw for them water from the borehole of the landlord. She gave evidence on how the appellant, having declined to draw for her water during the day, later invited her at about 8:00pm, taking her o his house, gagging her mouth and defiling her. The cross examination of the appellant did not challenge this evidence. PW2 BNN , another minor who also stays at the same plot with PW1, also confirmed that she also knows the appellant as he stayed not far from their house. PW4 EN, father of PW1 also confirmed that he knows the appellant and is in fact the one who lead the police to arrest the appellant at the plot. PW5, MW , also testified that indeed the appellant used to fetch water for them and that he stayed at the plot. A similar confirmation was made by PW6, PW who in fact added that the appellant was the caretaker of the plot and that the children used to know the accused well, including PW1, and that she had no dispute with appellant.

28. From the evidence of these witnesses it is clear that the appellant stayed in the same plot with PW1 and the other family members and the family members of both PW2 and PW3. He used to draw for them water from the borehole dug in the plot. He would also buy the children sweets. These facts leave no doubt that the children, including PW1 knew the accused well.

29. The evidence of PW1 that it was the appellant who defiled her also got corroboration from her friends PW2 and PW3. These are small children. PW1 was aged 10 years at the time of the offences. There is no evidence at all to show that there had been any difference between the appellant and any of the

witnesses, especially PW1, PW2 and PW3, and their parents that would make them lay false claims against the appellant PW6 confirmed as much.

30. The accused in his defence, raised the defence of alibi. That on the material date, he had been away in his rural home. That he was arrested upon his return for a reason he did not know. He completely denied the charges. He otherwise admitted PW1, PW2 and PW3, who used to call him Anyore. He claimed, without naming who, that one of the witnesses had wanted a relationship with him which had led to a grudge.

31. I agree with the submissions of the appellant that the defendant would not assume the burden of proof if he raises a defence of alibi. In *Wangombe Versus Republic (1980)KLR 119* , the court held:

> " When a Defendant raises a defence of alibi, he assumes no burden of proof..... the burden of proof remains on the prosecutions."

32. Indeed the same position as those in the cases referred to by the appellant as enumerated above.

33. This court, must however stress that not all alibi would automatically displace the prosecution's case. For a defence of alibi to suffice, it must be strong as to create doubts into the prosecution's case. It is the same holding that the Hon Justice J. Ngaah reached in *Gerald Wathiu Kiragu versus Republic* (2016)eKLR, that;

> " However, I am also aware that not every alibi displaces what is otherwise a watertight prosecution case that has been proved to the required standard. To displace the prosecution's case, an alibi must create same doubt that the appellant was at the locus in quo."

34. In our case, the prosecution witness proved that the appellant was at the scene and in fact defiled the complainant, before he was arrested at the same place. I therefore do not find any merit in the defence of the appellant which I dismiss.

35. On the issue of sentence, the appellant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. He was sentenced to serve 20 years imprisonment. Section 8(2) provides for a sentence of upto life imprisonment. The court, in sentencing the appellant duly noted that it had taken into account the period that he had spent in custody. I am in the circumstances convinced that the sentence meted out on the appellant was lawful and proper.

36. The sum total is that the appeal of the appellant filed on 28.6.2018 (dated 18.6.2018) lacks any merit. The same is wholly dismissed.

HON. DO. O. OGEMBO

JUDGE

24.5.2022

Court:

Judgment read out in open court in presence of the appellant (Kamiti) and Mr. Kiragu for the state.

HON. DO. O. OGEMBO

JUDGE

24.5.2022