Miriti v Republic (Criminal Appeal E110 of 2021)
[2022] KEHC 14107 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14107 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E110 OF 2021

EM MURIITHI, J

OCTOBER 21, 2022

BETWEEN

STEPHEN MIRITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S.Ndegwa SPM in Githongo S.O No. 24 of 2020 delivered on 1/4/2021)

JUDGMENT

1. The appellant herein, Stephen Miriti, was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on July 28, 2020 at around 1600 hours at Kiija location, Imenti Central sub county within Meru county, he intentionally caused his penis to penetrate the vagina of RK a girl aged 17 years old.

2. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. It was alleged that on the same date and place, he intentionally touched the vagina of RK a child aged 17 years old. He denied the charges but upon full trial, he was convicted on the main charge of defilement and sentenced to imprisonment for 20 years.

The Appeal

3. On appeal, the appellant raised 2 grounds of appeal that the evidence was contradictory and inconclusive, and that the sentence was discriminatory and harsh.

Duty of First Appellate Court

4. The duty of this court as the first appellate court was set out in *Okeno v R* (1972) EA 32 as follows:-

i.

> " "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 Republic* [1957] EA 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 Rulwala v Republic* [1957] EA 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."

Evidence

5. PW1, RK and the complainant herein, gave unsworn statement that, "on July 28, 2020 I was at my uncle's place when he (points at accused on the dock) did 'tabia mbaya' to me. He removed my clothes. We were in my uncle's kitchen. He touched my vagina with his thing for urinating. He put his thing for urinating into mine. I informed my grandmother CJ i.e accused, told me not to tell anyone." On cross examination, she stated that, "my clothes were not blood stained. I did scream. I wouldn't know if you were examined. I did scream." On re-examination, she stated that, "I screamed."

6. PW2 CJ, testified that, "On July 28, 2020 I was in the market at Mitunguu. I went back home to the evening and found complainant seated there. She was very quiet and looked disturbed. I took her to my house and asked her what was wrong. She said an old man M held her by the hand took her to the kitchen and lay her on the floor and removed her pants and put his thing for urinating into hers and that she felt a lot of pain. I went to the sub area [manager] one Mbaya and informed him. He called the assistant chief and they came and arrested accused i.e M. We all went to Mujwa police post. I didn't know him before but he had been employed as a farmhand at farm."

7. On cross examination, she stated that, "complainant told me she had screamed. Her pants had slight blood stains. She told me Miriti is the one who had defiled her. She pointed you to me. Its not true that I vowed to have you leave the farm as your employment had made [me] lose odd jobs there." On re-examination, she stated that, "Its not true that I framed accused so that he would lose his job and get back the odd job. I used to perform in that farm."

8. PW3 Bernard Mbaya, the area manager testified that, "On July 30, 2020 at around 10.00 am. I received a phone call from one Coletta informing me that Stephen i.e accused on the dock had defiled R. The area chief and I went and arrested him. We took him to Mujwa police post. He is before court-accused identified. I didn't know him before." On cross examination, he stated that, "I didn't see you commit the offence. I only acted on a report by complainant's grandmother."

9. PW4 Severina Kaimatheri, a clinical officer at Kanyakine sub county hospital testified that the complainant, albeit being mentally challenged, was able to express herself. On examination, the complainant's hymen was broken and there was a whitish discharge which showed pus and yeast cells for infection. The P3 was filled after 6 days and the injuries were 3 days old. She produced the complainant's P3 form, PRC form together with treatment notes as exhibits in court. On cross examination, she stated that she did not see any blood-stained clothes and the appellant was not examined alongside the complainant.

10. PW5 Irene Kagendo, the assistant chief Ng'onga sub location testified that, "on July 30, 2020 at around 8.00 am I received a phone call from Bernard Mbae-area manager Mpunga sub unit. He reported that a girl had been defiled by someone known to him. I went there met him and went to the home of the old man who had allegedly defiled the girl. We found the old man, arrested him and took him to Mujwa police post. He is before court - accused identified. I didn't know him before." On cross examination, she stated that her role was only to arrest the appellant.

11. PW6 PC Kawira Kithi of Mujwa police post, stated that, on July 30, 2020, she was in the office when the complainant, who was in the company of her mother, came to report that she had been defiled by someone known to her. She identified the appellant, who she did not know prior to the offence, in court and produced the complainant's birth certificate as exhibit. On cross examination, she stated that the appellant was positively identified as the assailant by the complainant, and that he was not examined alongside the complainant.

12. In his sworn defence, the appellant stated that on the material day, he went to his home in Nkubu and came back to Kiija at around 6.00 pm. He stated that PW2 did not want him in the farm because his employment led to the termination of her odd jobs there. On cross examination, he stated when he came back from Nkubu at around 6.00 pm, he found his son FM, who was not a witness in this case, waiting there.

Submissions

13. The appellant submitted that the evidence on record was overly contradictory and therefore inconclusive to prove the offence. He urged that the 20 year sentence imposed on him was harsh, disproportionate and severe.

14. The respondent submitted that it had proved all the ingredients of the offence beyond reasonable doubt, and relied on *George Opondo Olunga v R*[2016]eKLR. It urged that the complainant knew the appellant well thereby leaving no room for mistaken identity, and relied on *Anjononi and others v R* [1989] eKLR. It termed the appellant's alibi defence as an after thought, as the same was not put to any of the prosecution witnesses in cross examination. It urged the court to dismiss the appeal in its entirety and uphold the conviction and sentence.

Analysis and Determination

15. The issues for determination are whether the evidence adduced to proof the offence was sufficient to prove the offence and whether the sentence was excessive.

16. The ingredients of this offence which the prosecution was required to prove beyond reasonable doubt are age, penetration and identity of the perpetrator. PW6 produced the complainant's birth certificate which proved she was 17 years old having been born on December 13, 2003.

17. On penetration, PW4 stated that when she examined the complainant, her hymen was broken and she had a whitish discharge as well as pus and yeast cells. This evidence is corroborative of the evidence of the complainant who detailed the assault by the accused when "he put his thing for urinating into mine." It is therefore this court's finding that penetration was proved beyond reasonable doubt.

18. On whether the appellant was the perpetrator of the offence, PW1 testified that, "On July 28, 2020 I was at my uncle's place when he (points at accused on the dock) did 'tabia mbaya' to me. He removed my clothes. We were in my uncle's kitchen. He touched my vagina with his thing for urinating. He put his thing for urinating into mine." Her evidence was fortified by that of PW2, PW3, PW5 and PW6. Although PW2 stated that she did not know the appellant prior to the offence, he had been employed

as a farmhand at a neighbour's farm. The appellant was unknown to PW3, PW5 and PW6 prior to the incident but they all identified him in court.

19. Even though the complainant was mentally challenged and was unable to appreciate the solemnity of testifying under oath, she narrated with detailed specificity as to the place and how the appellant had undressed her and thereafter defiled her. She narrated to PW2 later that day what the appellant had subjected her to while she was at her uncle's kitchen.

20. This court finds that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt. The accused's evidence of grudge of the complainant's mother who was allegedly aggrieved with the accused's employment denying her the opportunity for odd jobs could not explain why the complainant, a 17-year old, could have concocted the evidence of sexual assault.

Sentence

21. Section 8(1) as read with 8(4) of the *Sexual Offences Act* provides that:

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

22. The appellant was sentenced to 20 years imprisonment, yet the section under which he was charged provides for a sentence of not less than 15 years. Although there is no indication whether the trial court considered the minimum sentence and decided to impose, as it could have, a higher sentence, this court gives the accused the benefit of doubt that the court sought to impose the minimum sentence applicable to the offence.

Order

Order accordingly.

DATED AND DELIVERED THIS 2ST DAY OF OCTOBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the DPP.