Muhula v Republic (Criminal Appeal E020 of 2022)
[2022] KEHC 16051 (KLR) (Crim) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16051 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E020 OF 2022

LN MUTENDE, J

NOVEMBER 28, 2022

BETWEEN

PATRICK OUMA MUHULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. E1799 of 2015 at the Chief Magistrates' Court Makadara, by Hon. S. Jalango - (PM) on 20th November 2020)

JUDGMENT

1. Patrick Ouma Muhula, the appellant, was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act*. Particulars of the offence were that on the July 28, 2014 at [Particulars Withheld] Estate in Nairobi County, he intentionally and unlawfully caused penetration of his penis into the vagina of MKS a girl aged 17 years.

2. In the alternative, he faced the charge of an Indecent Act contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. Particulars being that on the July 28, 2014 at [Particulars Withheld] Estate in Nairobi County, he intentionally and unlawfully committed an Indecent Act with MKS by touching her breasts and private parts namely vagina.

3. Facts of the case were that on July 28, 2014, MKS the complainant was in the toilet when the appellant entered and removed her clothes as well as his, and, inserted his genetalia into hers. In the meantime, PW2 SSS, her father who had hanged his clothes inside the toilet, went back and noted it was occupied. He waited outside for a while and decided to knock the door. The door was opened and a man run out. He opened the door and found his daughter, PW1, who had mental challenges. The complainant wiped herself using her hand and he noted some discharge that he referred to as 'sperms'. He took the complainant to their house and inquired what happened and she told them that Pati had inserted his

'dudu' into her vagina. He reported the matter to Ruaraka Police Station and took the complainant to MSF Hospital on July 29, 2014. She was examined by PW6 Emmy Kosgei, a Clinical Officer, who found her hymen torn.

4. On February 23, 2015 she was examined by PW3 Dr Ian Mkisi who formed the opinion that the complainant was suffering from severe mental retardation. PW5 No 58452 Sergeant Stella Kiprotich upon receiving the report searched for the appellant but could not find him. It was alleged that he had escaped to his rural home. On June 6, 2015, PW2 went back to Ruaraka Police Station and reported that the appellant had returned. She effected an arrest on June 6, 2015 and caused him to be charged.

5. Upon being placed on his defence, the appellant stated that the case was instigated following malice as the father of the complainant had a grudge against him. That when he commenced the construction of the movie shop next to the road, having been allowed by the Member of County Assembly (MCA), PW2 raised a complaint alleging that he had blocked the road. Following the complaint the Chief attempted to evict him but the MCA intervened, hence the grudge.

6. Regarding the event of July 28, 2014, he stated that while at his video shop the DSTV signal went off. He went outside intending to re-connect it only to find PW2 holding a pliers and he threatened to close down his video shop. He connected the DSTV. Then on July 29, 2014. he heard that the complainant's father had gone to report to the police. On the June 6, 2015 while at his house he was arrested. At Ruaraka Police Station he was told that he had committed the offence of defilement, a term he did not understand until he was arraigned.

7. The trial court considered evidence adduced and concluded that the complainant was defiled and the perpetrator of the act was the appellant. It dismissed the defence put up of existence of a grudge between the appellant and the complainant's father as the evidence adduced by the Prosecution was overwhelming. The trial court convicted the appellant for the offence of defilement and sentenced him to serve ten (10) years imprisonment.

8. Aggrieved, the appellant appeals on grounds that; the case was not proved beyond reasonable doubt in accordance to section 107 of the *Evidence Act*; the penetration and medical evidence was not proved; the identification of the appellant was not positive; age of the victim was not proved; PW1 was not a credible witness, the entire evidence was marred by material inconsistences, contradiction; and discrepancies; the charge was defective; the defence put up was not given adequate consideration; points for determination were not set out to tell how the decision was reached, and time spent in custody was not considered pursuant to section 333(2) of the CPC.

9. The appeal was canvassed through written submissions. It was urged by the appellant that penetration must be conclusively supported by medical evidence and there must be nexus between the appellant and complainant. That according to evidence of the Clinical Officer, there were no tears or laceration which made the testimony of the complainant lack credibility.

10. That the incident happened at night in total darkness, therefore, evidence as to the offender was based on mere suspicion and hearsay.

11. On the question of age, it is argued that though it was indicated that the complainant was 17 years old, the age of the complainant was not established, that the birth certificate produced was doubtful which did not support oral evidence.

12. On the question of inconsistences, it is submitted that it was alleged that the complainant had mental disability but during Voire dire examination she was to be very intelligent and sworn, and, she went on to answer questions during cross examinations. The defect in the charge was alleged to be the provision

of law under which the offence was brought which according the appellant was not curable under section 382 of the *Criminal Procedure Code* (CPC).

13. Further, the appellant submitted that in event that the conviction be upheld, the court would consider time spent in custody.

14. The appeal is opposed by the State through learned Prosecution counsel, Joy Adhiambo who submitted that the testimony of the victim regarding the act of penetration was cogent, and, it was corroborated by the testimony of her father and the doctor who examined her.

15. On the issue of age of the victim, it was urged that the birth certificate indicated that she was born on November 8, 1999 and was therefore 18 years at the time of the offence, and, the age having ben indicated as 17 years was not prejudicial to the appellant.

16. On the question of identification, it was submitted that both PW1 and PW2 identified the appellant despite the darkness.

17. This being a first appellate court, this court is duty bound to re-evaluate afresh evidence adduced before the trial court and come up with its independent conclusions bearing in mind that it did not have the opportunity of seeing or hearing witnesses who testified. This was well stated by the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted afresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and the appellate court's own decision on evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala v Republic* [1957] EA 570) . It is not a 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.
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> (see *Peter v Sunday Post* [1958] EA 424)."

18. The offence of defilement is defined by Section 8(1) of the *Sexual Offences Act* (SOA) as follows:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

19. Therefore Ingredients to be proved to establish the offence of defilement are:

    (i) The age of the victim.

    (ii) The act of penetration.

    (iii) Positive identity of the perpetrator of the offence.

20. It is urged that the age of the complainant was not established. In the case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, the Court of Appeal held that:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

21. PW2 the complainant's father told the court that she was born in 1997. He also adduced in evidence a birth certificate issued to the complainant which indicate that she was born on November 8, 1999. The Birth Certificate having been issued on February 5, 2016 which was late registration, some other evidence may be considered.

22. In the case of *Mwalengo Chichoro Mwajembe v Republic*, Criminal Appeal No 24 of 2015 the Court of Appeal stated that:

> " ...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof..."

23. A parent would also be better placed to tell the age of a child. The court adopted the age as given by the father of the complainant. When PW2 testified regarding the age of the complainant, it was not disputed at trial.

24. Section 2 of the *Children Act* defines a child as:

> " Any human being under the age of eighteen years;"

25. The *Sexual Offences Act* adopts the definition of a child in the Children Act. Therefore, having been 17 years old at the time, the complainant was a child.

26. Penetration is defined by the section 2 of the Sexual Offence Act as:

> " ... the partial or complete insertion of the genital organs of a person into the genital organs of another person;"

27. The complainant stated that the assailant inserted his male genitals into her genetalia. At the outset the complainant was seen at M5F Mathare project on July 29, 2014 where a Post Rape Care Form was filed and it was noted that the hymen was torn. Subsequently the complainant was examined by PW6 Dr Kizzie Shako three (3) weeks later who found the complainant's hymen with multiple old tears.

28. In the case of *Kassim Ali v Republic* [2006] eKLR it was stated that the fact of rape can be proved by oral evidence of a victim or by circumstantial evidence.

29. The hymen of the complainant herein was found to be torn but since the genitalia was found to have no abnormalities at the time of examination, it could not be assumed that the tearing of the hymen was on the stated date. Therefore, some other evidence was necessary to prove that the act of penetration.

30. In the case of *Bassita v Uganda*, SC Criminal appeal No 35 of 1995 it was stated that:

> " 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 a 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."

31. The complainant was stated to have been retarded. She attended special schools from the age of 3 years up to 11 years. she was examined by a Consultant Psychiatrist, Dr I Kanyanya per the report adduced in evidence who found her perceptions and thinking to be normal despite retardation.

32. The complainant stated what happened to her on the fateful evening. She stated that the assailant made her bend and he stood behind her then he inserted his 'thing' inside her thing. The complainant's father saw the culprit come out of the toilet and the complainant immediately reported what had befallen her. He caused her to be checked by her mother who was however not a witness. But, the finding made him to take her to hospital and there was proof of the tear. This was proof of penetration.

33. The appellant denies having been the perpetrator of the act. The appellant was well known to the complainant and his family. The complainant identified him as the assailant. PW2 also stated that he was the person he saw run out of the toilet on the material evening. He stated that it was at 7.00 pm and there was electric light that enabled him to see the appellant. It is however the contention of the appellant that a grudge existed between him and PW2 which prompted him to come up with the allegations. During trial the appellant was represented by counsel who did not bring up such an allegation during cross examination. It is also worth noting that the victim herein had mental challenges, therefore, it was unlikely that she could conspire with her father to incriminate the appellant. This having been the case the complainant's evidence as to the assailant was corroborated by that of PW2. Therefore the identification of the perpetrator of the act in question was cogent.

34. The statement of the charge is stated to be defective, considering the stated age of the child.

35. Section 382 of the *Criminal Procedure Code*(CPC) provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

36. In the case of *John Irungu v Republic* [2016] eKLR, the Court of Appeal stated that:

> "The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice."

37. The Provision of law quoted envisages a situation where the child molested is aged eleven (11) years or less, and, the sentence provided for is life imprisonment. The sentence provided for an offender who violates sexually a child aged seventeen (17) years is not less than fifteen (15) years. The appellant herein was sentenced to ten (10) years imprisonment. It is apparent that no injustice was occasioned, therefore the defect is curable under Section 382 of the CPC.

38. On the question of time spent in custody. Section 333(2) of the CPC provides that;

> Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody

39. The appellant was arraigned on June 9, 2016 and released on bond on March 28, 2018. He was in remand custody for two (2) years. Time spent in custody should have been taken into consideration. The trial court having opted to use discretion to sentence the appellant to ten (10) years imprisonment, it should have stated whether or not the period the appellant was in remand custody had been included. In the premises, I affirm the conviction, but, set aside the sentence meted which I substitute with eight (8) years imprisonment, to be effective from the date of conviction, and sentence, the November 20, 2020.

40. It is so ordered.

WRITTEN, DATED AND SIGNED BY HON. LADY JUSTICE L. N. MUTENDE, THIS 16TH DAY OF NOVEMBER, 2022.

L. N. MUTENDE

JUDGE

JUDGMENT DELIVERED BY HON. JUSTICE J. M.

BWONWONG'A ON THIS 28TH DAY OF NOVEMBER, 2022.

J. M. BWONWONG'A

JUDGE