Munene v Republic (Criminal Appeal E034 of 2022)
[2022] KEHC 15503 (KLR) (21 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E034 OF 2022

TW CHERERE, J

NOVEMBER 21, 2022

BETWEEN

ANTHONY MUNENE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original judgment and conviction in Principal Magistrate's court at Nkubu Criminal Case No.29 of 2019 by Hon.Irura(PM) on 09th June, 2020)

JUDGMENT

1. Anthony Munene (appellant) was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006 (the Act). Appellant 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. The offences were allegedly committed on September 16, 2019 against RP a child aged 14 years.

2. Complainant stated that on the September 16, 2019 at 06.00pm, she was going to buy potatoes when she found appellant whom he identified as Munene seated by the road side. It was her evidence that when she refused to respond to his greetings, he held her hand and dragged her to his house in his employer's home where he defiled her after which he threatened her not to tell anyone. Complainant's mother stated that complainant was born on May 12, 2004 as shown on her certificate of birth PEXH. 2. It was her evidence that appellant was arrested on September 20, 2019 after reported that he had found him near her house and it was after his arrest that complainant informed her that appellant had defiled her. Complainant was examined on September 22, 2019 and a P3 tendered in evidence revealed that her hymen was broken but she had no lacerations nor bruises.

3. Appellant in his sworn defence denied the offence. He stated that he was found with complainant's mother by her husband and was subsequently framed with this offence.

4. After considering both the prosecution and defence cases, the learned trial magistrate found the prosecution case proved and on June 9, 2020 convicted and sentenced appellant to serve 10 years' imprisonment

5. Dissatisfied with both the conviction and sentence, appellant lodged the instant appeal on grounds that:

   i. *voire dire* examination was not properly conducted

   ii. crucial witnesses did not testify

   iii. medical evidence did not link appellant to the offence

6. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] eKLR that:

> " It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

7. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (see *CWK v Republic* [2015] eKLR) which I will consider later in this judgment.

8. Concerning *voire dire* examination, the purpose of voir dire was explained by the court in *Johnson Muiruri v Republic* [1983] KLR 445 as follows:

> " 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 a *voire dire* examination, whether the child understands the nature of an 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."

9. Section 19 of the *Oaths and Statutory Declarations Act* cap 15 of the Laws of Kenya provides that:

> 19(1) Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (cap 75), shall be deemed to be a deposition within the meaning of that section.

10. "A child of tender years" is described under section 2 of the *Children's Act* as "a child under the age of 10 years. Complainant was 14 years when she testified and was therefore not a child of tender years and it was not necessary to subject her to voire dire examination.

11. It is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See *Kaingu Kasomo v Republic* Criminal Appeal No 504 of 2010).

12. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See *Hadson Ali Mwachongo v Republic* Criminal Appeal No 65 of 2015 [2016] eKLR & *Alfayo Gombe Okello v Republic* Cr App No 203 of 2009[2010] eKLR.

13. Complainant's certificate of birth tendered in evidence reveals she was born on May 12, 2004 and was therefore 15 years when she was allegedly defiled.

14. Concerning penetration, section 2 of the Act defines penetration to entail: -

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

15. The P3 form reveals that complainant had torn hymen and I find that the trial magistrate correctly found that penetration was proved.

16. Concerning appellant's culpability, I have considered the case of *Stephen Nguli Mulili v Republic* [2014] eKLR the Court of Appeal had this to say regarding reliance on section 124 of the *Evidence Act* to convict:

> " as a general rule of evidence embodied in section 124 of the *Evidence Act*, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:
>
> "Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." (emphasis added).

17. Appellant conceded that she was not a stranger to the complainant. As rightly observed by the trial court, the offence was committed just before dusk and the trial magistrate's finding that there was no possibility that complainant was mistaken as to who the assailant was was in my considered view well founded.

18. Concerning the appellant's contention that prosecution failed to call crucial witnesses, section 143 of *Evidence Act* (cap 80) Laws of Kenya provides:

> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

19. In *Donald Majiwa Achilwa and 2 other v R* [2009] eKLR the court stated:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be

adverse to the prosecution case. (See Bukenya & others v Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

20. In *Keter v Republic* [2007] 1 EA 135 the court held *inter alia*:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

21. In the instant case. the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. Baba Kanana and the area manager who appellant complains were not called as a witnesses did not witness the incident and were therefore not necessary witnesses in this case.

22. Appellant complains that he was not subjected to medical examination to confirm whether he is the one who defiled the complainant. It is trite law that such examination was not necessary. (See *Dennis Osoro Obiri v Republic* [2014] eKLR and *Fappyton Mutuku Ngui v Republic* [2014] eKLR).

23. Concerning whether the prosecution case was proved, I have considered the English case of Woolmington v DPP [1935] AC 462 in *Miller v Minister of Pensions* [1947] 2 ALL ER 372 where the court held at page 373:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability".

24. I have considered the appellant's defence implicating complainant's mother that he only raised during his defence and I find as did the trial magistrate that it was an afterthought and did not create a doubt in the prosecution case.

25. Although appellant did not challenge sentence, I have noted that he was arrested on September 21, 2019 and remained in custody throughout the trial until the date of his conviction and sentence on June 9, 2020. The record reveals that the learned trial magistrate did not apply the provisions of section 333(2) of the *Criminal Procedure Code* at the point of sentencing the appellant.

26. From the foregoing analysis, I make the following orders:

    (1) the appeal only succeeds on sentence

    (2) the 10-year sentence shall commence from June 9, 2020 when appellant was arrested.

DELIVERED AT MERU THIS 21ST DAY OF NOVEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti

Appellant - Present in person

For the State - Ms. Mwaniki (PPC)