Muriera v Republic (Criminal Appeal E095 of 2023) [2025] KEHC 2407 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2407 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E095 OF 2023

CJ KENDAGOR, J

FEBRUARY 20, 2025

BETWEEN

ROBERT MURIERA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment delivered by Hon. J.Machari on 5th July, 2023 in Tigania Magistrates Court S. O. No. E005 of 2021, Republic v Robert Muriera)

JUDGMENT

1. Robert Muriera was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars are that Robert Muriera on the 24th day of January, 2019 within Meru County intentionally caused his penis to penetrate the vagina of VM, a child aged 14 years.
2. In the alternative count, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
3. At the end of the trial, the trial magistrate convicted the Appellant, who was sentenced to 20 years' imprisonment.
4. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal here on the following amended grounds:
   1. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction
   2. That the learned trial magistrate erred in matters of law and fact by failing to note that there was a grudge between the appellant and the relatives of the complainant

iii. That the learned trial magistrate erred in fact by failing not observing that the evidence adduced by the prosecution witness was not corroborated and there was a lot of inconsistencies

iv That the learned trial magistrate erred in fact by failing not observing that the testimony of the complainant contradicts the evidence of the expert (doctor)

v. That the learned trial magistrate erred in matters of law by and fact by failing to note that no independent witness in this matter to clear doubts

vi. That the trial magistrate erred in both matters of law and also facts by rejecting the appellant defense without giving cogent reason

vii. The appellant prayed to be present during hearing of this appeal.

5. The appeal was canvassed by written submissions. The Appellant's submission contended that the trial magistrate erred by failing to recognize the total contradiction regarding the names provided for the Appellant. Further, that the prosecution failed to adduce sufficient evidence by not calling essential witnesses, such as the investigating officer and the arresting officer.

6. The trial magistrate erred in matters of law and facts by failing to note that the age of the minor was too contradictive

7. The Appellant submitted that the trial magistrate erred in rejecting the Appellant's defence for insufficient reasons. The Appellant urges this Court to allow the appeal, to set aside the sentence on the grounds that the prosecution failed to prove their case beyond reasonable doubt.

8. The Respondent submitted that the specific elements of the offence of defilement were proved beyond reasonable doubt.

9. Concerning sentencing, the Respondent asserts that the Appellant was sentenced in accordance with the law and that there are no justiciable grounds for interference. The Respondent submitted that this Court dismisses the appeal in its entirety.

10. PW1, VM, the Complainant, stated that the Appellant went to their home because he wanted to see their father. She mentioned standing at the door where the appellant asked her to accompany him. She stated that the Appellant took her hand and led her towards the church. The Complainant mentioned that their home borders the church, and they passed through the bush. She further indicated that the Appellant did 'tabia mbaya' to her, and as they left, they passed through the chief's plantation. Additionally, she stated that the Appellant used a condom. The Complainant noted that they did not stay there long, and she left for home while the Appellant went to Gituma's place, their neighbour who subsequently arrested him. She stated that she went home, where G and her mother asked her where she had been, and she told them what had happened. She mentioned that they visited Ken, the sub-chief, who took them to Kathanguma police station. They later went to the hospital, where she was given treatment notes, a PRC form, and a laboratory test request. She stated that she doesn't know her age and that the Appellant was known as Robert Munene.

11. During cross-examination, she mentioned that there is a road near the church. She indicated that she did not scream and noted that the Appellant had visited their home to take beer, adding that her father was not home as he had gone to the tea purchasing centre.

12. PW2, MN stated that the Complainant is her daughter. She mentioned that it was night when the Appellant arrived at her home, greeted her, and sat outside. While she was in the kitchen, she offered him something to eat, but he refused since he was consuming khat. She stated that the Appellant

left shortly thereafter and thereafter the Complainant informed her that she was on her way to her aunt's house (Gituma's place) and left with her sister, M.. She stated that it was night when she heard commotion from the banana plantation. She went outside and saw her daughter M. who told her that the Complainant had asked her to wait while she went to church with Bahati (the Appellant). She testified that she went to church and found no service taking place and the Complainant was not there.

13. PW2 testified that G came inquiring about VM's whereabouts, and while they were talking, VM arrived. PW2 asked her where she had been at night, noting that she was wearing only one shoe. She testified that they proceeded to Gituma's home, where the Complainant stated she had been with Bahati. Shortly thereafter, Bahati came to Gituma's house, and when G asked him where he had taken the Complainant, he claimed that the Complainant had been sent by her mother. She testified that G then arrested Bahati, and they went to the chief's office. There, the chief took them to Kathangumi police station, where the accused was detained and later taken to hospital. PW2 stated that she knows Bahati, the Appellant, as he used to work at the chief's office and attends the same church as her. On cross examination, she confirmed that the church was very close to the road. She further stated that G is a neighbor.

14. PW3 MNM works in Miathane Sub County Hospital. She stated that she was testifying on behalf of her colleague, Mr. Wambua. She mentioned that the Complainant, VM, was examined on 24th January 2021; during the examination, her vaginal walls were hyperendemic, indicating penetration. The hymen was torn but not fresh. The Complainant underwent laboratory tests and was put on post-exposure prophylaxis and medication to prevent pregnancy.

Defence Case

15. DW1, the accused, gave a sworn statement on 27th July, 2023. He denied knowing VM. He stated that he was building a cow shed for the Complainant's father, who did not pay him. He further stated that they fought over the non-payment and that the father went ahead and reported the case as defilement. During cross-examination, he stated that he is 44 years old and was arrested in 2021. He mentioned that he used to stay at Gathekia, who is the sister of the father. He stated that he began working on the 23rd and 24th and had no opportunity to meet VM.

Analysis and Determination

12. This being the first appellate Court, this Court is guided by the principles in David Njuguna Wairimu v RepuClic [2010] eKLR where the Court of Appeal held:

> "The duty of the first appellate Court is to analyze and re-evaluate the evidence which was before the trial Court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial Court. There are instances where the first appellant Court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower Court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the Court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

15. After considering the grounds of appeal, records of trial Court and submissions, issues for determination are: -

    i. Whether the prosecution proved its case beyond reasonable doubt;

    ii. Whether the sentence was appropriate.

16. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under Section 8 (1) of the *Sexual Offences Act* and must each be proven for a conviction to issue. (See George Opondo Olunga vs. Republic [2016] eKLR.)

17. Section 8 (1) of the *Sexual Offences Act* provides as follows:

> " 8.
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

18. The Complainant's mother provided her age. She stated that the Complainant was 14 years old and also mentioned the ages of two other younger children, who are 12 and 10, as well as a 3-year-old. The Complainant testified that she did not know her exact age but stated that she was school-going. The same age is what was captured in the medical notes that were produced.

19. The case of Francis Omuroni v Uganda Court of Appeal; Criminal Appeal No. 2 of 2000, is explicit on proof of age of the sexual victim 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..."

20. I am confident that the evidence showed certainty regarding the Complainant's age as provided by her mother. The information presented consistently supports her age. Furthermore, the insights offered by the Complainant's mother about her other children provide strong confirmation of her daughter's age, indicating that she was certain about it. This consistency across reinforces the reliability of the information and eliminates any doubts. I accept the age as stated at 14 years old.

21. The Complainant used descriptive words in her testimony that the assailant; raised her dress, removed her underwear, put on a condom on 'his thing' and did 'tabia mbaya' to her.

22. In Muganga Chilejo Saha v Republic [2017], eKLR the Court of Appeal analyzed various cases where descriptive terms had been used to narrate sexual abuse;

> " Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in courtrooms. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya" (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015), "he used his thing for peeing" (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement."

23. According to the charge sheet, the Complainant was defiled on 24th January, 2021 and from the Medical Examination Report, she was examined on 26th January, 2021. The medical evidence showed that a diagnosis of defilement was made from the examination showed sexual activity; hymen was torn

(though not fresh) and the vaginal walls were found to be hyperendemic which the medical officer said was a sign of penetration.

24. From the Complainant's testimony and the findings, I am persuaded that by the words 'tabia mbaya' she referred to sexual activity and that the assailant used his penis, after putting on a condom, and penetrated her vagina. The medical evidence supports that there was penetration.

25. Concerning identity, the Complainant stated that the Appellant led her away after visiting her home. This claim is supported by PW2, who confirmed that the Appellant indeed visited their home and that the Complainant left immediately after the Appellant excused himself to leave. The Complainant referred to the Appellant as the assailant, with a high degree of certainty. She mentioned that there was moonlight and described both their interaction at her home and the location nearby where she reported the incident occurred. This location was not far from her home, and she confirmed that she had no further interactions with anyone else. Therefore, I am convinced that the identification was clear, and the Appellant was the assailant. The defence presented was not cogent, and I have reviewed it as the trial court did examine in its judgment.

26. Section 143 of the *Evidence Act* provides that-

> "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."

In Keter –v- Republic (2007) E.A the Court stated that

> "The prosecution is not supposed to call a super fruity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubts."

27. The prosecution has the discretion to determine the number of witnesses they wish to call. The question is whether the failure to call Gatuma, the area chief, the investigating officer, or an independent witness is fatal to the prosecution's case. I do not see any gaps in the prosecution's case that would render the absence of the other witnesses mentioned in the testimony detrimental to the prosecution's case.

28. This being a sexual offence case, the first crucial witnesses in the prosecution case are the complainant and the doctor. A sexual offence case is proved by the testimony of the Complainant, and or supported by medical evidence. The law allows the court to rely on the sole evidence of the victim of a sexual offence if it is satisfied that the witness is truthful. Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya provides that-

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> 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."

29. The record before me, shows clearly that complainant was properly subjected to voire dire examination at the end of which, the trial Court concluded that she was intelligent and understood the duty of

speaking the truth and directed her to give sworn statement. The trial Court noted in the judgment that she was convinced that the complainant was telling the truth.

30. In Woolmington -v- D.P (1935) AC 422, the issue of the standard of proof was examined, and it was stated:

> "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility but not in the lease probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

31. Lord Oputa of the Supreme Court of Nigeria in the case of Bakare versus state 1985 2NWLR adopted the statement as follows at page 465.

> "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 charge. 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."

32. The ingredients of the offence of defilement were proven beyond reasonable doubt. The alternative charge fails.

33. The Appellant was sentenced to 20 years' imprisonment. It is trite that although sentencing is at the discretion of the trial Court, that discretion must be exercised judiciously in accordance with the law taking into account the facts and circumstances of each case.

34. In my view, the trial Court duly exercised its discretion and proceeded to sentence the appellant to a period of twenty (20) years, cognisant of Section 8 (1) (3) of the *Sexual Offences Act*, which stipulates that a person who commits the offence of defilement with a child between the ages of twelve and fifteen years is liable, upon conviction, to imprisonment for a term of not less than twenty years. I find that the sentence is inherently sound in itself and guided by statute, thereby representing the minimum sentence available for the offence.

35. Accordingly, I uphold the conviction and sentence and the appeal is hereby dismissed in its entirety. The trial was conducted when the Appellant was in custody and as such the sentence shall, pursuant to Section 333 (2) of the *Criminal Procedure Code*, commence on the date of the Appellant's arrest on 25th January, 2021.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 20TH DAY OF FEBRUARY, 2025.

....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Omondi ODPP

Appellant present