Mutunga v Republic (Criminal Appeal E008 of 2023)
[2025] KEHC 1681 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E008 OF 2023

LW GITARI, J

FEBRUARY 20, 2025

BETWEEN

DANIEL MUCHEMI MUTUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Amended supplementary grounds

   a. That, the learned trial magistrate erred in both matters of law and facts by failing to note the key witnesses were not called.

   b. That, the trial magistrate erred in both matters of law and facts by failing to note that the clinical report was questionable.

   c. That, learned trial magistrate failed to note that the prosecution case was not properly investigated by investigating officer.

   d. That, the learned trial magistrate erred in law by failing to consider that the legal provision for mandatory life sentence under Section 8(2) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the appellant is unlawful.

   e. That, the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standards of proof as required by the law.

   f. That, learned trial magistrate failed to take into consideration the defense of the appellant.

2. The appeal arises from the judgment of the learned Magistrate in Sexual Offences Case No. E023/2021 in the Senior Resident Magistrate's Court at Nkubu where the appellant was charged with defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that on the 28/4/2019 at around 1300 hours at [Particulars Withheld] Imenti – South Sub-County within Meru County, intentionally and unlawfully cause his penis to penetrate the vagina of a girl aged seven (7) years at the time of the offence.

3. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3/2006. It was alleged that on the same date at the alleged time and place he intentionally and unlawfully touched the vagina of N.K a girl aged seven (7) years at the time of the incident with his penis.

4. The appellant denied the charges. A full trial was conducted and at the conclusion, he appellant was found guilty on the charge of defilement, was convicted and sentenced to serve life imprisonment. Aggrieved by the decision of the learned Magistrate, the appellant filed this appeal which initially raised seven grounds and was later amended. The appellant raised six (6) ground on the amended grounds and prayed that the appeal be allowed, the conviction be set aside and he be set at liberty. The state opposed the appeal and prayed that it be dismissed.

5. The Prosecution's Case

   PW1 N.K was the complainant. She told the court that on the material day she was at home when the appellant who is her uncle called her. He led her to a house which was unoccupied. He asked her to assist him look for a lost ten (10) shilling coin. The appellant then held her hand, undressed her then lay on her. He blocked her mouth using a paper bag. The appellant then removed her pant and blocked her mouth with a paper bag. The appellant removed her under wear and trouser to the knee level and defiled by inserting his penis in her vagina. The appellant blocked her mouth so that she could not scream. The complainant reported to her mother Z.N (PW2) who in turn reported to the assistant chief. She was advised to go and report to the Police. She reported at Igoji Police Station and the complainant was referred to Kanyakine Sub County Hospital for examination. She was treated and the next day she went to Meru Referral Hospital for further treatment. The appellant went underground. He resurfaced on 7/7/2021 and was arrested with assistance of members of the public.

6. PW2 told the court that the that the complainant was seven years old at the time of the incident as she was born on 26/11/2011. PW3 produced the birth certificate as exhibit. She further told the court that the appellant was an uncle to the complainant and they had no grudges.

7. PW3 Inspector John Kianga of Igoji Police Statin testified that he is the one who investigated this matter. His testimony was that on 7/7/2021 at about 4.00pm while on patrol at Kinoro area he was called by members of the public who informed him that there was a person who was being beaten by members of the public and wanted to lynch him.

8. He rushed there and found the appellant who had been injuries on the head and his clothes were soaked in blood. The mob informed him that the appellant had fled on 28/04/2019 after defiling a seven (7) year old child and had been in hiding since then. He took the appellant to the Police Station and on perusing the record in the OB of 28/4/2019 he found that the complainant in this case had reported a case of defilement against the appellant on 28/04/019. The complainant was treated at Kanyakine Sub-County Hospital and later at Meru general Hospital for further treatment. A P3 Form and Post Rape Case Form were filled. The victim told the court that the appellant had defiled her after tricking her to go and assist him look for a ten (10) shilling coin in an abandoned house. He them charged the appellant.

9. PW4 Timothy Mberia who is a Clinical Officer at Kanyakine S/C Hospital produced the P3 form and PCR form on behalf of the fellow Clinical Officer S. Kamaitheri who had worked with for two years and was conversant with her handwriting and signature. He testified that the child N.K was presented to the hospital with a complainant of defilement. On examination there was redness on the valva and the hymen was broken. Lab tests were run, that is H.V.S and revealed epithelial cells and pus cells. Urine test was normal. Based on the results the clinician found that the minor had been involved in Sexual activity. He produced the P3 form, Post Rape Care form and the lab results as exhibits 2, 4 & 3. The prosecution closed its case.

10. Defence Case

The learned Magistrate ruled that the appellant had a case to answer. The appellant gave his defence on Oath. He narrated how he was arrested on 7/7/2021 on allegation that he had a habit of teaching children bad manners. That the complainant was called but did not implicate him. He told the court that he did not commit the offence. He said he had parted with the wife and she became a friend to the complainant's mother and she is he one behind the case.

The learned Magistrate found that the evidence adduced before him had proved the case against appellant beyond any reasonable doubts. He sentenced the appellant to serve life imprisonment as provided under Section 8(2) of the *Sexual Offences Act*.

The Appeal

11. The appeal was disposed off by way of written submissions.

Appellants Submissions .

12. The appellant submits that the change was not proved beyond any reasonable doubts as the prosecutor failed to call key witnesses. He relied on the case of David Mwingirwa –vs- Republic Criminal Appeal No. 23/2015, Court of Appeal where the court stated that the failure by the prosecution to call two key witnesses who are eye witnesses one who was independent and another who witnessed who would have rendered credence to the testimony of the witness was fatal to the prosecutors case.

13. The appellant further submits that the learned Magistrate erred by failing to note that he clinical officer's report was questionable. That broken hymen was not proof of defilement. He relied on the case of P.K.W –vs- R. He further submits that redness in the vagina is not prove of defilement. The appellant submits that the prosecution had a duty to prove the change beyond any reasonable doubts. He relies on Philip Muiriri Ndaruga –vs- Republic (Cr. Appeal No. 76/2012) (2016) eKLR.

14. Finally, the appellant faults the sentence imposed by the lerned Magistrate on the basis that it is unconstitutional and unlawful as it breaches Article 27(1) (2) (4) and Article 160(1) of *the Constitution* as it deprives the Magistrate of the sentencing discretion. The appellant prays that the conviction be quashed sentence be set aside and he be set at liberty.

15. Respondent's Submissions

The submissions were filed by learned counsel, Grace Mukangu. She submits that all the ingredients of the charge have been proved beyond any reasonable doubts. He relied on the case of Charles Wamukoya Karani –vs- Republic, Criminal Appeal No. 72/2003 where the court stated that the critical ingredients in a charge of defilement are age of the complainant, proof of penetration and

positive identification of the perpetrator. The respondent submits that Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides that:

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

That in the case of Keter –vs- Republic (2007) E.A 135 the Legal principle was affirmed as follows:

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

She submits hat the respondent called sufficient witnesses to proof the charge and those who were not called, one was too young to testify and the other had an affair with the appellant.

16. On the sentence, she submits that the lerned Magistrate condidered the evidence and properly exercised his discretion. She relies on the case of Bernard Kimani Gacheru –vs- Republic (2002) eKLR where the court stated that:

> " Sentences is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the fact of each case on appeal, the court will not easily interfere will sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked same material factor, or took into account same wrong material, or acted on wrong principle. Even if; the appellate court feels that the sentence is heavy and the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless anyone of the matters already stated is shown to exist."

She prays that the appeal be dismissed.

17. Analysis And Determination

I have considered the proceedings and the judgment of the learned Magistrate, the ground of appeal and the submissions. The issues of determination are:

i. Whether the prosecution failed to avail key witness in the matter.

ii. whether the medical evidence adduced by the respondent was reliable.

iii. Sentence

18. This is a first appeal and this court has a duty to analyze and evaluate the evidence tendered before the learned Magistrate and come up with its own independent finding. The court has to leave room for the fact that it never heard or saw any of the witnesses when they testified and leave room for that. See Okeno –vs- Republic (1972) E.A 32.

19. Failure To Call Witnesses

The law on calling witnesses in a trial is anchored under Section 143 of the *Evidence Act* (Supra). There are no particular number of witnesses required to proof a fact in the absence of any provision of law to the contrary. The prosecution is supposed to call such witnesses as are sufficient to proof its case. In sexual offences the prosecution can rely on the evidence of the complainant alone and the court can

convict with that evidence if for reasons to be stated in the procedings. The court is satisfied that the witness is truthful. Section 124 of the *Evidence Act* (Cap 80 Laws of Kenya) provides:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is 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."

20. It is not in doubt that the evidence of minor requires corroboration. The court of Appeal in the case of Benard Kebiba –vs- Republic (2000) eKLR states as follows with regard to corroboration of the evidence of children in Sexual offences. The law on corroboration in sexual offences is not in dispute anymore in our courts. There is requirement for corroboration in all sexual offences. It is however, a rule of practice only. Though a strong rule of practice, it has acquired a force of law. In appropriate circumstances where the trial court is satisfied that the complainant is spealing noting but the who truth, the court may convict without corroboration.

21. In such a situation however, the court must warn itself upon basing conviction upon uncorroborated evidence of the complainant. Where the court feels that there is need for corroboration the court must say so expressly in the judgment. The court must then look for corroboration from the evidence led and accorded and if the court finds it the court must mention it expressly in its judgment. Where the court finds no corroboration after forming the opinion that corroboration is necessary the benefit of doubt must be given to the accused and acquittal must result.

22. Thus corroboration is required in sexual offences. However, under Section 124 of the *Evidence Act* (Supra) in sexual offences where a minor is the victim of the offence, the evidence of that if believed by the trial court, can without corroboration found a conviction.

23. In Mohamed –vs- Republic (2008) KLR 1175 the court held that:

> "It is now well settled that the courts shall no longer be hamstrung by requirement of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

24. The impact of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated notwithstanding the 'voice dire examination' of the child under Section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is competent to tell the truth their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto the courts are solely allowed to rely on the evidence of a child of tender years if the child is the victim of a sexual offence provided that the court first satisfies itself on reasons to be recorded that the child is being truthful...

25. It is a well-established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where the child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. See Patrick Kathurima –vs- Republic (supra), Jonsom Muuiruri -vs- Republic (1983) KLR 445 and also Johnson Otieno Oloo –vs- Republic (2009) eKLR...In addition

the proviso of the *Evidence Act* affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as Pw1 was concerned even though neither PW2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons." In this case the court addressed itself thus;

> " The complainant did not implicate anyone else. The offences were committed during the day the accused was well known to PW1, PW2, 3 & 4."

26. The appellant has not taken any issue with the reasons recorded by the trial court. This in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail. The decisions held that, where the trial court is satisfied with the evidence of the child victim that she is truthful and useable the court may convict without corroboration. The trial court has to satisfy itself that the child is telling the truth.

27. In this case the learned Magistrate stated that "From the record the accused was not a stranger to the complainant. She knows him as an uncle. The complainant's mother told the court that the accused was married to complainant's aunt and that he used to visit her home frequently. The complaint stated before court that she knew the accused. That he was married to her auntie. She pointed and identified him in the dock. The incident herein took place in broad daylight from the evidence on record. The complainant very well knew the accused. I observed her when she testified in court. She was very eloquent and specific in her narration of what transpired. She was coherent and consistent in both examination in chief and cross-examination. I believe that she told the court the truth. I trust in her testimony. I am satisfied that the accused has been sufficiently and to the satisfaction of the court identified as the perpetrator of this heinous act."

28. Page 50 – 51 of the record the court satisfied itself after looking at the demeanor of the witness. See Omuron –vs- Republic (2000) 2 E.A 508. The trial Magistrate having satisfied himself that the complainant told the court the truth, he acted properly in relying on the uncorroborated testimony of the complainant (Pw1). Indeed, considering her evidence, she was candid and firm in her testimony. The witnesses who the appellant said were crucial and were not called to testify were not eye witnesses add would not have added any weight to the testimony. Scholastica was said to be too young. Zaina according to what Pw1 told the court was a person she informed what appellant had done to her. This is not in dispute. She was a fried of the appellant with whom she had an affair. This is not in dispute. In my view the prosecution would be faulted for failing to call a witness if they had interior or some bad motive. This is not the case here. The prosecution did not have to call a superfluity of witnesses including those who were not matenat. The respondent called sufficient witnesses in support of their case and failure to call Scolastica and Zaina did not weaken the case in anyway.

29. Whether the Medical Evidence was questionable

Medical evidence was adduced by Pw4 the Clinical Officer and he told the court that on examination there was redness on the valva, hymen was broken. Lab tests revealed epithelial cells and pus cells. He concluded that the minor was involved in sexual activity. In cross-examination PW4 told the court that he did not know if the child had been sexually molested before. The minor's private parts had reddened. The law is trite that penetration is proved by the testimony of the victim corroborated by

medical evidence. On the other hand, penetration is defined under Section 2 of the *Sexual Offences Act* as follows:-

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

In this case, the complainant testified that the appellant inserted his penis in her vagina and did "tabia mbaya" to her in her private parts.

30. The testimony of Pw1 confirmed that there was penetration. This confirmed by medical evidence. There was no indication that she had engaged in sexual intercourse before nor that the redness was as a result of inflammation. The clinical officer found that the redness was a relevant factor to prove penetration. It is therefore far-fetched for the appellant to suggest there were other factors focusing redness. The testimony of Pw1 proved penetration and medical evidence corroborated that fact. The learned magistrate found that the complainant was truthful. That was a finding of fact which this court could dispute as it did not have an opportunity to see or hear the complainant. This court has to leave room for that. The appellant disappeared after the incident and on his return two years and three months later he encountered a riot mob who were still angered at what he did to the minor. The defence on the issue was a mere denial and a sham.

31. Sentence

The appellant was charged with defilement contrary to Section 8(1) & (2) of the *Sexual Offences Act*. The section provides:

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

2) A person who commits an offence of defilement with a child aged eleven years or less, shall upon conviction be sentenced to imprisonment for life."

32. The ingredients of the offence of defilement which the prosecution must prove in order to achieve a conviction are, the age of the victim, penetration partial or complete into the victim's genitalia and positive identification of the perpetrator. In Charles Wamukoya Kasani –vs- Republic Appeal No. 72/2013 the court stated that: "The critical ingredients of forming the offence of defilement are, age of the complainant, prove of penetration and positive identification of the assailant."

33. In this case the age of the complainant was proved with the production of her birth certificate showing that she was born on 26/11/2011 and at the time of the incident she was seven years. The birth certificate is credible evidence of prove of the complainants. Penetration was proved as analyzed above and the appellant was positively identified as the perpetrator. The offence of defilement was proved. The sentence under Section 8(2) of the *Sexual Offences Act* is life imprisonment. The sentence imposed by the learned Magistrate is lawful. The learned Magistrate observed the demeanor of the accused and stated that he was not remorseful. He held that the appellant deserves a deterrent sentence considering the age of the minor. The learned Magistrate considered relevant factors and passed the sentence provided under the law.

34. The long and short of the reasons stated in this appeal is that this appeal is devoid of merits.

35. Conclusion.

The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 20 TH DAY OF FEBRUARY 2025

HON. LADY JUSTICE L. GITARI

JUDGE