Muriuki v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 4278 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL E025 OF 2024

EM MURIITHI, J

APRIL 3, 2025

BETWEEN

JUSTIN MUGENDI MURIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was dissatisfied with the decision of the trial court in SO/Case No. E020/2022 of CMC Court at Kerugoya. Consequently, he lodged this appeal which is pegged on the following grounds:
    a. That the learned Magistrate made the judgment against the weight of the evidence.
    b. That the learned Magistrate erred in Law and in fact in failing to find that that the particulars of the charges were not proved beyond any reasonable doubt.
    c. That the learned Magistrate erred in law and in fact by not considering the credibility of the witness, i.e. she relied on the testimony of the complainant despite her recanting her statement and being declared a hostile witness.
    d. That the learned Magistrate erred in Law and in fact in disregarding the contradictions and inconsistencies in the evidence adduced by the prosecution witness.
    e. That the trial Magistrate erred in law and fact by not considering that the complainant was coerced in giving false statement to the police (She was placed in custody for one day, tortured to obtain her statement which she later recanted in court).
    f. That the trial magistrate erred in law and facts in failing to properly and fairly analyse the evidence adduced by both the prosecution and the defence.
    g. That trial Magistrate erred in law and in fact in failing to consider the appellant's defence.

Brief facts

2. The accused person, Justin Mugendi Muriuki, had been charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*.

3. It is alleged that on diverse dates between 23rd and 25th December 2022 at Mutira location in Kirinyaga Central sub county within Kirinyaga county, he intentionally and unlawfully caused his penis to penetrate the vagina of GNG a child aged 15 years.

4. He also faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars being that on the same dates at the same place, he intentionally caused his penis to penetrate the vagina of GNG a child aged 15 years.

5. He was tried and convicted for the offence of defilement on 14th March, 2024. On 26th March, 2024 he was sentenced to 5 years' imprisonment.

Witness testimony

6. PW1 GNG testified that on 23rd December 2022, after a disagreement with her mother, she went to the accused's home and spent the evening there. She spent 2 days in the accused's house and went back home on 25th December 2022. PW1 denied having sex with the accused.

7. The minor was declared a hostile witness and her statement was produced as evidence in court. She conceded that she had signed the statement but added that she had signed it because she was — examined at the hospital and found to have engaged in sex. She told the court that the person she had sex with was her boyfriend, Alex. She also claimed that she had been beaten up by one Macharia before she wrote the statement and added that she had slept in a cell for a day.

8. PW2- Hezron Macharia Maina gave the medical evidence in support of the prosecution's case. He told the court that at the time of her examination, the estimated age of the minor was 15 years - and 9 months. PW2 stated that on physical examination of the minor, it was noted that she had lacerations on the lower parts of the genitalia, the perineum. It was noted that the hymen had an old breakage. A laboratory examination of high Vaginal Swab showed an increase in epithelial cells. No spermatozoa or pus cells were noted. Tests for Syphilis and pregnancy turned negative and the HIV test was non-reactive.

9. PW2 stated that he had filled in the P3 form having relied on outpatient treatment notes and PRC forms authored by Peter Kunga, his colleague of four years. He also referenced laboratory test results originating from Kerugoya County Hospital.

10. PW 3 – Sergeant Mary Wambui the investigating officer testified that when a report was made that the minor was missing, she circulated a message to other stations. On 25th December, they were informed that the minor had been found. The fact that PW1 had been with the accused from 23rd to 25th raised eyebrows. The officer decided to take the minor to hospital for examination. At first, the minor denied having sex with the accused but admitted she had, after examination.

11. DW1 – Accused in his defence, the accused told the court that on 23rd December, 2022, PW1 went to his home crying. She told him that her mother had broken her phone and threatened to kill herself or her mother if he insisted that she goes back home. The accused took PW1 to his house where she spent the night. The following morning, the accused went about his business early in in the morning and returned at 10:00 p.m. He was surprised to find PW1 still in his house because he had told her to go back home. The following morning, he demanded that she go back home and she went. He vehemently

denied the claim that he had had sex with the minor on the nights she was in his house. The accused also informed the court that he got to know PW1 from his counselling sessions with young people. He stated that the minor's father had tried to extort money from him after his arrest.

Appellant submissions

Identity of the perpetrator

12. The appellant submits that the complainant (PW1) informed the court clearly that the appellant herein was not the perpetrator and she went ahead and named the perpetrator (Alex), a vital fact that the honorable Magistrate failed to put into consideration.

13. In trying to prove the Identity of the appellant as the perpetrator; The prosecution did not disprove nor question the assertion that the complainant (PW1) accused another person (her boyfriend Alex) during the trials, even after she gave a detailed timeline ("I had sex with Alex before KCSE. I was not a virgin") as to when she started having sex with her boyfriend (a fact that can be collaborated by the medical report on the issue of an old broken hymen). During the trials, the complainant identified the appellant as the person whose house she spent at between the night of 23rd Dec 2022 and the morning of 25th December 2022 but not the person she had sex with. "I did not have sex with the accused. I have never had sex with him. I had sex with my boyfriend. He is called Alex"

Penetration

14. In her judgement, the trial Magistrate used these ambiguity results from the medical tests to determine her judgement and unfairly tied the appellant with the act of defilement.

15. He (PW2) also stated that a blunt object could have caused lacerations but he was not specific on the exclusivity of the said object. This left room for speculation on the nature of the said 'blunt' object as it can be an object of self-sexual pleasure or any blunt object of imagination other than a male penis. This evidence alone did not satisfactorily prove penial penetration on the material time.

16. PW2 leaned on the assumption that because the complainant identified the appellant as a friend, it was a possibility they had sex and yet he acknowledged at the same time that he (PW2) could not identify the appellant as the perpetrator from the medical examination specimens of PW1. These observations by PW2 were inconsistent, assumptions and contradicting hence unreliable as evidence.

17. In her cross examination by the defense counsel, PW3 stated that she did not have any statement(s) by PW1's guardians. PW3 further stated that PW1's father was uncooperative and unresponsive during the trial process to a point that warranted a summon by the Investigating Officer.

18. When the trial Magistrate enquired the whereabouts of PW1's mother, PW3 told the court that the mother had a 2-3weeks old baby and that is the reason she could not be placed as a witness. The appellant herein disagrees with this because the baby in question was one and a half years old, not an infant, and could not have hindered the mother from being actively present as a prosecution witness. Notably, the trial court failed to ascertain I. O's report concerning the whereabouts of the mother and proceeded with the case without PW1 mother's testimony which could have been vital in shedding more light if cross-examined by the appellant.

19. PW3 also admitted in court that as the investigating officer she acted against procedure and unlawfully placed the alleged victim in police cells. At this point, the appellant wishes to point out that there is no specific cell for children at Kagumo Police Station as insinuated by PW3 and the minor was placed in the cells for one day and one night to intimidate her and not for her protection as purported by PW3.

20. The appellant also testified that PW1's father tried to extort money (ksh200,000) from him and when the appellant declined, he (PW1's father) showed no further interest in the case and neglected the entire trial process. These facts ought to have raised doubts on whether the alleged victim's guardians sought justice or they had their own monetary interests in accusing the defendant of defiling their daughter.

Respondent submissions

21. The respondent submits that it proved all the essential ingredients of the offence of defilement beyond any reasonable doubt.

22. On the question of age, we submit that GNG, the victim and PW in the case was a minor. At the hearing of the case, PW1 testified that she was 16 years old, child. This was corroborated by the testimony of PW2.

23. On whether there was penetration, the respondent submits in the affirmative. PW2, the clinical officer, testified that the victim's hymen had been broken and she had lacerations on the lower parts of the genitalia. This was confirmed by the P3 form produced as P. Exh. 1, treatment note, P. Exh. 2, the PRC Form, P. Exh. 3 and the Laboratory Test Reports — P. Exh 4(a) to (d). They submit that there was penetration.

24. On whether the appellant was the perpetrator, they submit that the appellant was identified by PW1 as the perpetrator. PW1, the victim, made a statement at Kagumo Police Station stating that she had lived with the appellant from 23rd to 25th of December 2022. In that period, PW1 noted that they had unprotected sex.

25. PW1 turned hostile and gave a very different account of events from what she had stated at Kagumo Police Station. However, despite her being a hostile witness, the incontrovertible medical evidence produced by PW2, corroborated and highlighted the commission of the offence of defilement as her vagina had been penetrated and hymen broken. He did not date the breakage of the hymen. This aligns with PW1's statement, Exhibit 6, that they had unprotected sex with the appellant. We thus submit that the appellant was identified as the perpetrator of the offence.

Issue

26. The issue for determination is whether the ingredients of defilement were proved by the trial court.

Analysis

27. On the first appeal to this Court by virtue of the principles in Okeno v R {1972} EA 32 the appellant's appeal is one on matters of law and fact.

> " [T]he appellate Court is mandated to analyze and re-evaluate the evidence adduced before the trial Court, independently, to draw its own conclusions of course without overlooking or disregarding the findings made by the trial Court and bear in mind that unlike the trial Court it does not have the advantage and opportunity of hearing and seeing witness testify."

28. Sections 8(1) and 8(3) of the *Sexual Offences Act* provide for the offence of defilement and the punishment as follows.

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

    b. ...

c. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

From the above provision on the offence of defilement, the Prosecution must prove the minor age of the victim, penetration and perpetration by the accused.

Age

29. The complainant testified that she was 16 years old. She is a Form 2 student at St. Rita Kiaragana Girls.

30. In Francis Omuroni v. Uganda Court of Appeal CR Case No. 2 of 2000 the Court held inter alia that:

> " Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

31. The age of the minor was sufficiently proved through the production of a copy of her birth certificate by PW3 which showed that the minor was born on 8th March 2007. She was 15 years and 9 months old at the time the offence is alleged to have occurred.

Penetration

32. The prosecution was also required to prove the element of penetration. For this, it also relied on the medical evidence of PW3 who stated that the physical examination of the minor and laboratory tests of specimen taken from her had established that there was penetration.

33. PW2, the clinical officer, testified that the victim's hymen had been broken and she had lacerations on the lower parts of the genitalia. This was confirmed by the P3 form produced as P. Exh. 1, treatment note P. Exh. 2, the PRC form P. Exh. 3 and the Laboratory Test Reports — P. Exh 4(a) to (d).

34. The prosecution submits that there was penetration of the complainant's vagina.

Whether the appellant was the perpetrator

35. PW1 testified that she went to the house of the appellant on the night of 23rd December, they prepared supper and ate. He slept on the couch and she slept on the bed. They did not have sex. She slept there again on 24th December, 2022 and they did not have sex.

36. She testified that she had sex with Alex before. She was not a virgin. She stated that she was assaulted by Kagumo Police Station to implicate the appellant.

37. Section 124 of the *Evidence Act* states: -

> " Provided 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 if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim was talking the truth."

38. The respondent submit that the appellant was identified by PW1 as the perpetrator. PW1, the victim, made a statement at Kagumo Police Station stating that she had lived with the appellant from 23rd to 25th of December 2022. In that period, PW1 noted that they had unprotected sex.

39. The appellant has raised two grounds contending the evidence by the PW1. First, he argues that PW1 was not a credible witness as she had retracted the statement she made at Kagumo Police Station and gave a different testimony in Court. This led to her being declared as a hostile witness.

40. The effect of being declared a hostile witness was stated by the Court of Appeal in Abel Monari Nyanamba & 4 others v Republic [1996] eKLR where the Court held:

> " The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt."

41. However, if the statement of the hostile witness is corroborated by other independent evidence, then the evidence can found a conviction.

42. The appellant submits that the complainant(PW1) informed the court clearly that the appellant herein was not the perpetrator and she went ahead and named the perpetrator(Alex), a vital fact that the honorable Magistrate failed to put into consideration.

43. On penetration, PW2 stated on cross-examination that there were lacerations on the perineum. The hymen was broken and there was no other injuries on the external and internal genitalia. The breakage of the hymen was old as there were blood clots. It could have been months old.

44. The appellant submitted that PW2 leaned on the assumption that because the complainant identified the appellant as a friend, it was a possibility they had sex and yet he acknowledged at the same time that he (PW2) could not identify the appellant as the perpetrator from the medical examination specimens of PW1. These observations by PW2 were inconsistent, assumptions and contradicting hence unreliable as evidence.

45. Pw3 – testified on cross-examination that the complaint had at first denied having sex with the accused. She accepted having sex with him after medical examination. Further, she had been placed in a police cell. The officer denied slapping her.

46. PW3 stated that she did not have any statement(s) by PW1's guardians. PW3 further stated that PW1's father was uncooperative and unresponsive during the trial process to a point that warranted a summon by the Investigating Officer.

47. When the trial Magistrate enquired the whereabouts of PW1's mother, PW3 told the court that the mother had a 2-3weeks old baby and that is the reason she could not be placed as a witness. The appellant herein disagrees with this because the baby in question was one and a half years old, not an infant, and could not have hindered the mother from being actively present as a prosecution witness.

48. In the case of Juma Ngondia vs Republic (1982-1988) 1 KAR 454 the Court of Appeal held:

> " The prosecutor has in general, a discretion whether to call or not call someone as a witness. If he does not call a vital witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced, would, if produced have been unfavorable to the prosecution."

49. See also Bukenya v. Uganda (1972) EA 549.

Orders

50. Accordingly, for the reasons set out above, the Court finds that the appellant was not prop erly identified as the perpetrator of the defilement, and the conviction was unsafe.

51. Consequently, the Appellant's conviction is quashed and the sentence of imprisonment for five (5) years is set aside.

52. The appellant is acquitted of the offence of defilement contrary to section 8(1) as read with 8 (3) of the *Sexual Offences Act*, and there shall be an order for his release from custody forthwith unless he is otherwise lawfully held, and for deregistration on the register of sexual offenders.

53. File Closed.

Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF APRIL 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Mamba for DPP.

Applicant in person.