Marigu v Republic (Criminal Appeal E089 of 2024)
[2025] KEHC 4215 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E089 OF 2024

RM MWONGO, J

APRIL 2, 2025

BETWEEN

EMMANUEL KARIUKI MARIGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J.W. Gichimu CM in the Runyenjes MCSO No. E005 of 2023 delivered on 24th April 2024)

JUDGMENT

(Appeal arising from the decision of Hon. J.W. Gichimu CM in the Runyenjes MCSO No. E005 of 2023 delivered on 24th April 2024)

The Charge

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* No. CAP 63A. Particulars are that on 08th April 2023 at Kiringa area in Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of FKN, a child aged 12 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 08th April 2023 in Embu County, the appellant intentionally touched the vagina of FKN, a child aged 12 years with his penis.

2. The appellant pleaded 'not guilty' to the charge and after the full hearing, he was convicted and sentenced to 20 years imprisonment.

The Petition of Appeal

3. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 06th November 2024 seeking that the appeal be allowed, the conviction be quashed, and the sentence be set aside.

4. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:

    1. By convicting the appellant on a defective charge sheet;

    2. By convicting the appellant without considering the complainant's evidence which was highly influenced by adults;

    3. By relying on contradictory and uncorroborated evidence;

    4. By showing bias in convicting the appellant based on the complainant's narrative whereas the medical evidence did not support the offence; and

    5. By disallowing the appellant's defense without giving cogent reasons.

Summary of the Evidence at the Trial

5. At the trial, the prosecution called 6 witnesses. PW1 was the victim who stated that she had gone to sell mangoes to a neighbor when the appellant took her by the hand and led her to his home which was nearby. He locked her in the house before he stripped her naked, told her to lie on his bed, he removed his trouser and underwear and he inserted his penis into her vagina. After the appellant was done, he told her to dress up and leave. She went home but did not tell her mother what had happened. Her teacher got concerned about her poor academic performance and that is when she told her that she had been defiled by the appellant.

6. The school headteacher intervened and took her to Runyenjes Level 4 Hospital after the matter was reported at Runyenjes Police Station. She identified the appellant in court as her assailant. The trial court noted the child's demeanor as she was testifying. The child broke down and, at some point, the file was placed aside to allow her to recover before resuming her testimony. In cross-examination, she stated that during the incident, she did not scream because there were no people around. That after the incident she did not inform her mother because she was afraid.

7. During re-examination, PW1 stated that the appellant did not defile her. she was recalled at a later date to clarify her statement on re-examination. She then stated that when she first testified, she was afraid to say that the appellant defiled her. She said that even then, she was still afraid of the appellant because he threatened to kill her. Upon further cross-examination, she stated that the appellant defiled her using his thumb in his house and he threatened to kill her.

8. PW2 was the victim's mother. She stated that she called her daughter's teachers who were concerned about PW1's academic performance. When she went to the school, one of the teachers told her that PW1 told them that she had been defiled by the appellant during Easter holidays. She took the child to Runyenjes Police Station and then to Runyenjes Level 4 Hospital. She produced PW1's birth certificate showing that she was 12 years old at the time of the incident. She denied that there were any differences between her and the appellant and stated that the appellant used to be a casual laborer at her step-son's farm. In cross-examination, she stated that the complainant told her that the appellant threated to kill her if she revealed what had happened.

9. Diana Wawira Mugendi, PW1's teacher testified as PW3. She stated that around the time of the incident, she noticed that there was an immediate decline in PW1's academic performance. She reached out to the student to find out why she was not performing well and discovered that during school examinations, PW1 was suffering from urine incontinence. PW1 told her that she had been defiled by the appellant. Kariuki wa Kiringa during the Easter break. The matter was escalated to the headteacher and then reported to the police. The complainant was taken to hospital for treatment

10. PW4 was Daniel Ndwiga the area chief who stated that PW1's father reported to him that his daughter had been defiled. He assisted with arresting the appellant whom he also identified in court.

11. PW5 was PC Patricia Kimwele who testified that when the incident was reported at Runyenjes Police Station, she escorted the complainant to the hospital for examination, where a P3 form was filled. The appellant was arrested the day after the incident. She confirmed the age of PW1 through her birth certificate before charging the appellant with the offence.

12. Dr. Geoffrey Njiru of Embu Level 5 Hospital testified as PW6. He said he examined PW1 and found that her hymen had been perforated but not recently. PW1 had thus had sexual encounters before the incident in question had occurred one week prior to the examination. Given the time that had lapsed after the incident, no samples were collected for further examination. He observed that there were no bruises around the genitalia, an indication that there was no recent penetration.

13. At the close of the prosecution's case, the trial court placed the appellant on his defense. He gave a sworn statement saying that on 09th September 2023, he was at home when he was arrested by the area Chief who was accompanied by members of the public on allegation that he had defiled the complainant. He stated that he had been framed and that the complainant's family was interested int eh land which he had bought in the year 2020. That the complainant was mistaken and she was not clear in her testimony. On cross examination, he stated that on the day of the incident, he was away in Embu town with Mugendi, a client who wanted to purchase property.

Submissions on Appeal

14. The parties filed written submissions as directed by the Court.

15. The appellant submitted that the prosecution's case was shaky and inconsistent, and the complainant even said that he did not defile her. He relied of the cases of Gerald Ndoho Munjuga v Republic [2016] KEHC 6508 (KLR), Argut v Republic [2023] KEHC 3175 (KLR), Peter Nyamu Mutithi v Republic [2021] KEHC 8852 (KLR) and John Mutua Munyoki v Republic [2017] KECA 376 (KLR).

16. On his part, the respondent submitted that the charge sheet was properly drawn and in accordance with section 134 of the *Criminal Procedure Code*. It relied on the cases of Isaac Omambia v Republic [1995] KECA 156 (KLR) and Peter Ngure Mwangi v Republic [2014] KECA 405 (KLR) in support of that argument. It was its argument that the testimony of PW1 was not coached, neither was it contradictory, rather, it was corroborated by the testimonies of PW2 and PW3. That the trial court considered the defense offered before reaching its findings. The respondent stated that the offence was proved beyond reasonable doubt and that the conviction was safe. It urged the court to dismiss the appeal and uphold the conviction and sentence.

Issues for Determination

17. The issues for determination are as follows:

    1. Was the charge sheet defective?;

2. Whether or not the offence was proved beyond reasonable doubt; and

3. Whether or not the sentence should be set aside.

Analysis and Determination

18. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of Kiilu & Another v. Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the 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; 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."

19. The appellant has decried the validity of the charge sheet, terming it as defective. The test of a defective charge sheet is when it fails to clarify the charges or the law under which the appellant was charged. A defective charge sheet hinders the accused person from understanding the proceedings against him such that he cannot participate in the trial. In the case of MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR), the court stated:

> " The Court of Appeal in Benard Ombuna v Republic (2019) eKLR addressed the issue of a defective charge sheet in the following terms:-
>
> "In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.""

20. The appellant understood the charge he was facing and he actively participated in the trial by cross-examining the witnesses. In light of this, the charge sheet as drawn cannot be held to be defective in any way.

21. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the *Sexual Offences Act* provide:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) 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."

22. Therefore, the elements of the offence are as follows:

1. The age of the complainant - it must be proved that the complainant was a child;

2. Penetration as defined under section 2(1) of the *Sexual Offences Act* occurred to the child;

3. The perpetrator was positively identified.

23. The age of the victim herein was determined through her birth certificate produced as PExh. 1. It shows that she was born in October 2011. At the time of the incident, she was aged 11 years, 5 months, 30 days, a minor within the meaning of the Children's Act. This is sufficient proof of the complainant's age. In the case of Alfayo Gombe Okello v Republic [2010] KECA 319 (KLR), the court stated as follows;

> "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

24. The prosecution was tasked to prove that penetration occurred and that the appellant caused it. PW1 testified that she was out selling mangoes to a neighbor when the appellant pulled her and took her to his house which was nearby. He locked her inside the house, told her to remove her clothes and then he also undressed and inserted his penis into her vagina. When she was recalled to testify and clarify her re-examination on a different date, she said that when the appellant defiled her, he used his thumb.

25. PW6 testified that he examined PW1 one week after the incident. In the P3 form which was produced as PExh.2, he reported that the minor had told him that she had had many sexual encounters with other men before the incident in question. The report shows that there were no spermatozoa cells present. In his evidence, he observed that the hymen was perforated but not recently. According to him, there was prior penetration before the incident.

26. According to Section 2(1) of the *Sexual Offences Act*, "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person. The evidence adduced leaves doubt as to whether the was penetration at the time it is alleged to have happened. However, PW1 testified that the appellant used his thumb at the time of defiling her.

27. When asked why she initially said that the appellant did not defile her, she said that she was feeling apprehensive since he had threatened her if she disclosed the incident. In as much as there is no evidence beyond reasonable doubt that penetration happened, there is evidence that PW1's genitals were unlawfully touched.

28. Regarding identification of the appellant as the assailant, PW1 and PW2 testified that he is their neighbor. They both identified him in court as a person they were familiar with. In his defense, the appellant denied having anything to do with that incident. He attempted to raise an alibi, that on the day of the incident he was away in town with a cline of his called Mugendi. It is trite that for a defense of alibi to hold, it must be raise early in the case, preferably before the close of the prosecution's case. this was the sentiment of the Court in the case of Mercy Chelangat v Republic [2022] KEHC 1827 (KLR). This alibi defense did not hold because it was not interrogated and proved. The appellant's defense can be categorized as a mere denial.

29. PW1 testified that it was the appellant who defiled her. Eventually, she told PW3 about this when she was found to have urine incontinence during her exam period at school. In turn, PW3 told PW2 who reported it to the police and they escorted the child to be examined by PW6. PW1 identified the appellant as her assailant. It is the only evidence available to that effect.

30. Given the nature of the offence, the law deems the testimony of the victim of a sexual offence to be sufficient to identify his/her assailant, without the need for corroboration. Section 124 of the *Evidence Act* provides:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory
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> 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
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> 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."

31. From a look at the trial court's judgment found at page 36 lines, 12 and 13 of the record of appeal, the trial Magistrate stated that from his observation of the child during testimony, he was satisfied that she spoke the truth. He disregarded the defense given by the appellant, finding it to be an afterthought.

32. From the foregoing, there is doubt as to whether the appellant defiled the victim. However, there is consistent evidence to the effect that he did touch her genitals, therefore committing an indecent act with the child. Section 2(1) of the *Sexual Offences Act* defines "indecent act" as any unlawful intentional act which causes-

> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> (b) exposure or display of any pornographic material to any person against his or her will;

Conclusions and Disposition

33. In my view, the offence of defilement has not been proved beyond reasonable doubt. However, the same evidence adduced sufficiently proves the alternative charge which is that of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* which provides:

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

34. Accordingly, the court hereby orders as follows:

1. The conviction and sentence reached by the trial court is hereby set side;
2. The appellant is found guilty of the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*;
3. The appellant is sentenced to serve 10 years imprisonment in accordance with the Supreme Court findings in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).

4. The sentence shall commence on the date of the appellant's arrest on 19/04/2023.

35. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 2ND DAY OF APRIL, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Appellant present in Court

2. Ms. Nyika for the Respondent

3. Francis Munyao - Court Assistant