**Mulwa v Republic (Criminal Appeal E051 of 2021)**
**[2024] KEHC 93 (KLR) (17 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 93 (KLR)

***FORMERLY CRIMINAL APPEAL NO. 42 OF 2021***

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E051 OF 2021**

**AC MRIMA, J**

**JANUARY 17, 2024**

**BETWEEN**

**LEVY MULWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising out of the conviction and sentence of Hon. C.M. Kesse (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 210 of 2018 delivered on 25 th August, 2019))***

**JUDGMENT**

**Introduction:**

1. The Appellant herein, Levy Mulwa, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* before the Chief Magistrates Court at Kitale in Sexual Offence No. 210 of 2018 (hereinafter referred to as 'the criminal case'). The particulars of the offence were as follows:

> On the 31st day of July, 2017 at [Particulars Withheld] village, within Trans-Nzoia County, the Appellant unlawfully and intentionally caused his penis to penetrate into the vagina of SC, a child aged 9 years old.

2. 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*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally torched the vagina of SC, a child aged 9 years old with his pennis.

3. The Appellant denied all the charges and he was tried. After a full trial, the Appellant was found guilty of defilement and was convicted accordingly. He was then sentenced to 15 years' imprisonment.

**The Appeal:**

4. The Appellant was utterly aggrieved by the conviction and sentence. He subsequently lodged an appeal after having been granted leave to appeal out of time on May 19, 2021.

5. In his Petition of Appeal, the Appellant challenged the conviction as without basis since the prosecution did not discharge its burden of proof to the required standard. In his view, the age, penetration and identification aspects were not properly handled. He also contended that the charge sheet was defective and that the defence was not adequately considered.

6. In the premises, he prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.

7. During the hearing of the appeal, the Appellant relied on his written submissions which he filed on May 24, 2023. He expounded on his grounds of appeal.

8. On the part of the prosecution, through its extensive written submissions filed on June 20, 2023, it contended that the conviction was safe and that all the ingredients of the offence had been proved as required in law. It urged that the appeal be dismissed.

9. The prosecution relied on various decisions in support of its case.

**Analysis:**

10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

11. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

12. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.

13. Before dealing with the said aspects of the offence, this Court highly appreciates the detailed manner in which the trial Court summarized the evidence in the judgment. This Court adopts that summary herein by reference.

14. Having said so, suffice to state that the prosecution availed 7 witnesses. PW1 was the complainant. She testified on oath on the events that befell her on July 31, 2017 in the hands of a sexual assailant while she had gone into the forest to collect firewood with her two sisters. One of her sisters testified as PW2. PW1's mother testified as PW3.

15. PW4 was a Clinical Officer at the Kitale County Referral Hospital. He produced medical documents on the victim. He confirmed penetration of the victim's vagina. PW5 was the arresting officer one No. 2008xxxxxx APC Apollo Mbito, then attached at the Kaka AP Post. PW6 was Dr. Sammy Osore, a Dentist at the Kitale County Referral Hospital. He produced PW1's Age Assessment Report and PW7 was the investigating officer.

16. When the Appellant was subsequently placed on his defence, he gave a sworn defence and denied committing the offence. He did not call any witness.

17. It is on the basis of the above evidence that this Court is to establish if the charges of defilement were committed. The Court will now look at the elements of the offence of defilement.

**Age of the complainant:**

18. The Appellant challenged the age of PW1. In this case, the age was proved by an Age Assessment Report which was produced by PW6. The technical basis of the examination was explained and the report eventually received as an exhibit. It was estimated that PW1 was aged 13 years old on December 10, 2018 when she was examined.

19. The offence was allegedly committed on July 31, 2017. Therefore, as at that date, PW1 was around 12 years old.

20. Accordingly, the complainant was a child within the meaning ascribed to the term under Section 2 of the *Children's Act*.

**Penetration:**

21. Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

22. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

> ... Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

23. Later, the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

24. The Appellant herein vehemently argued that the prosecution failed to establish penetration.

25. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim. However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.

26. This Court has, with care and caution, reviewed the evidence on record. The victim was taken to hospital where she was examined. The Clinical Officer, PW4, examined PW1. He found that PW1's

vaginal hymen was broken and the vaginal opening was open with bruises along the labia walls. PW4 concluded that PW1's vagina had been penetrated by a male sexual organ.

27. PW2 and PW3 also examined PW1's vagina. They found blood oozing therefrom as PW1 was yelling in pain. They were satisfied of a penile penetration more so since PW2 had caught the assailant in the act with PW1.

28. Therefore, by considering the evidence of the victim, PW2, PW3 and PW4 the trial Court seems to have correctly settled the issue of penetration.

29. This Court, thus, finds no difficulty in affirming the position that penetration into PW1's vagina was proved to the required standard.

**Identity of the perpetrator:**

30. The prosecution had to lastly positively identify the perpetrator of the offence. The prosecution relied on the testimonies of PW1 and PW2.

31. PW1 and PW2 testified that they had met the assailant on their way to the forest to collect firewood. The assailant carried a panga and a rungu. As PW1 had briefly stepped back, the assailant appeared and chased her. PW1 attempted to run away, but was tripped and fell. She was held and dragged into the bushes by the panga and rungu wielding man. She was threatened with death and her mouth was held. As the man had undressed her and was in the sexual act, PW1 managed to raise alarm and her sister, PW2 came to her rescue.

32. PW2 found the assailant on top of PW1. She confronted him. The man jumped off and while holding his trousers, picked two stones as he ran away. He left a panga behind. PW2 had the opportunity of seeing the man and recalled him to be the one she had earlier on seen on the way.

33. Both PW1 and PW2 were emphatic that the man they met on the way was the assailant since they met him during the day and the overt act was committed soon thereafter. Further, as the two raised alarm, people gathered and they explained what had befell them. They gave a description of the man with squinted eyes and the villagers readily knew him to the Appellant also known as 'Champion'. A search was organized, but the man was not found. It was learnt later that he had even disappeared from the village.

34. It was the prosecution's evidence that the Appellant relocated to another village and was traced and arrested thereat a year later.

35. In his defence, the Appellant stated that on the material date he remained at his home while smearing his home. That, over a year later, he went to his home village in December 2018 and that he was arrested thereat on December 7, 2018.

36. It is a fact that PW1 and PW2 had not met the Appellant before the material day. They, however, saw him immediately before and it was during the day. PW2 again confronted the Appellant while on top of PW1 and raised alarm. He hurriedly jumped off and ran away in PW2's full glare. Both PW1 and PW2 described the physical appearance of the Appellant. They also stated that he had squinted eyes. According to the villagers, the description squarely fitted the Appellant.

37. The Appellant's defence that he did not leave his home until a year later does not, therefore, augur well with the efforts made by the villagers and the police in tracing and arresting him. According to PW7, the police issued an Arrest Warrant after they failed to severally find the Appellant in his home.

38. On the re-evaluation of the record, this Court finds and hold that the Appellant was never at his home after the ordeal. He must have left immediately thereafter otherwise he would have been found and arrested. The defence, to that end, could not hold. It was an afterthought and was rightly rejected by the trial Court.

39. In re-affirming that the Appellant's identification in this case was without any error, the words of the Court in *R v Turnbull & Others* (1973) 3 ALL ER 549, remain alive to this Court. The Court partly stated as follows: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

40. The caution in the above case, R -vs- Turnbull & Others case (supra), seems to have been well taken care of in the present case.

41. This Court now returns the verdict that the Appellant was rightly identified as the one who sexually assaulted PW1.

**The other ground of appeal:**

42. Having dealt with the main ingredients of the offence of defilement, there was one more ground which was raised by the Appellant. It was the alleged defectivity of the charge.

43. The Appellant contended that the way the charge was drafted was such that he was not able to understand its contents and could not defend himself properly.

44. This Court will briefly render on this issue. Article 50(2)(b) and (n) of *the Constitution* provides as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right-
>
> (b) to be presumed innocent until the contrary is proved;
>
> (n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –
>
> i) an offence in Kenya; or
>
> ii) a crime under international law

45. Section 134 of the *Criminal Procedure Code* (hereinafter referred to as 'the CPC') provides as follows: -

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

46. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.

47. The then East Africa Court of Appeal in *Yosefu and Another -vs- Uganda* (1960) E.A. 236 held as follows: -

> The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

48. In *Nyamai Musyoka v. Republic* (2014) eKLR, the Court of Appeal expressed itself as follows: -

> The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

49. And, in *Sigilani -vs- R* (2004) 2 KLR 480, it was held that: -

> The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

50. The *Black's Law Dictionary* defines 'defective' as follows: -

> Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

51. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.

52. Therefore, if on examination of a charge, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.

53. Applying the above to this case, the Appellant was charged with the offence of defilement. The particulars were given. The Appellant took part in the examination of all witnesses. He even defended himself in stating that he was not the one who defiled PW1. The contention on the defectivity of the charge cannot, therefore, hold. The same is hereby dismissed.

54. Therefore, having positively ascertained the three ingredients of the offence of defilement and that the trial was not vitiated in any way, this Court finds that the Appellant was properly convicted. The appeal on conviction, therefore, fails.

**Sentence:**

55. The Appellant was sentenced to 15 years' imprisonment. The trial Court considered the mitigations.

56. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

57. I have considered this matter with caution and care. The trial Court was careful in the manner it conducted the sentencing proceedings.

58. The Court considered the nature of the offence, the mitigations, the Appellant's previous and relevant conviction on manslaughter, among other relevant actors.

59. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 *vide* Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

60. This Court does not see how the sentencing proceedings are to be impugned. The sentence is proper and appropriate in the circumstances of this case.

**Disposition:**

61. In the end, the following final orders of this Court do hereby issue: -

    a. The Appeal is wholly dismissed.

    b. This file is hereby marked as closed.

    Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered virtually and in the presence of: -**

**Levy Mulwa,** the Appellant in person.

**Miss Kiptoo,** Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Chemosop/Duke** – Court Assistants.