



**Muli v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 4963 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E036 OF 2023**

RK LIMO, J

MAY 13, 2024

BETWEEN

KAVUKU MULI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Kavuku Muli, the appellant herein was charged with the offence of defilement contrary to Section 8(1) (4) of *Sexual Offences Act* No 3 of 2006. The particulars of the offence of the charge sheet are that on 14th June 2020 at about 7.30pm at [particulars withheld] in Kitui County, he intentionally caused his penis to penetrate the vagina of EMG a child aged 16 years.
2. The appellant was also charged with an alternative charge of indecent act with a child but that alternative charge is not relevant to this appeal since he was found guilty of the main charge after trial and convicted.
3. The prosecution called 6 witnesses whose evidence is summarized here below.
4. EMG (PW1), the victim or the complainant in testified that on 14.6.2020 at [particulars withheld] market, she was in the company of her mother AW (PW3) and that she went to a butchery to take a meal. She stated that she met their home maid named Kambua and that the said Kambua had two bottles of beer and told her that she was heading to Jacaranda bar and restaurant.
5. She stated that she greeted one Mutiso who was the owner of the bar and that the said Mutiso gave her a drink which she took before going to the butchery and failed to see her mum. She stated that she went back to Jacaranda where Mutiso gave her another drink. She stated that she then went to the Kitchen to get some water and met the appellant. She stated that the appellant offered her another drink and she took and she was given a soda which she took and found herself unable to walk because her legs were weak. She testified that the appellant carried her about 20 meters and defiled her.



6. She stated that the following day she found herself in her bed-room with pain in her private parts and bleeding. She stated that she was taken to Endau Police Station and got treated. She insisted that she was carried by the appellant between 4-5pm.
7. Jamlek Mutua (PW2) testified that he was at jacaranda hotel on the material day at around 6.30pm when he saw two people he referred to as Mutiso and Kiveti Kulu. That he then heard some noise coming from a house, he went to investigate and met an individual he referred to as Martin. He testified that he then left and went to the shopping centre where he heard a lot of noise which sounded like someone who was in a lot of pain. He testified that it was the complainant who had vomited and laid on something. He then asked the individual he had met earlier Martin what had happened to the complainant and Martin asked him not to tell anyone i.e. '*cheza chini*'. That he called the complainant's mother and informed her that he had found the complainant unconscious. That he was also informed by one of the bar attendants that the complainant had been carried away by a thin man. On cross examination the witness stated that the appellant was in the bar with other customers and not where the complainant was found and gave the time of the incident as around 7 pm.
8. AW (PW3) the complainant's mother testified that she had accompanied the complainant to town to have lunch but the two parted ways when she stopped to talk to her niece. She testified that she went looking for the complainant at Jacaranda butchery but did not find her and she was informed that the complainant had left. she proceeded that she went back to town to look for the complainant and she met PW3 who informed her that the complainant was in town but was not in a good condition. She stated that she went on a search for the complainant and eventually found her very drunk and naked. That she took the complainant to hospital and also made a report at the police station. On cross examination, the witness testified that she was informed by an individual called Mulatia that the appellant was the one who was with the complainant.
9. Charles Kyalo Muli (PW4) testified that PW3 requested for his assistance in the search for the complainant. That while they were searching for her, they heard some noise coming from a cow shed and when they went to investigate, they saw two people and one of them ran away saying 'we have been found'. That they found the complainant naked and she was taken to hospital. He testified that an individual called Mulati Musyimi was arrested and he mentioned other people.
10. Steven Kyalo (PW5) a Clinician from Endau Dispensary testified on behalf of his colleague Peter Kamanga who had examined the complainant on 15th June 2020 but was away on study leave. The examining doctor's findings were as follows; no abnormalities were found on the neck, head, thorax and abdomen. The complainant had an abrasion on the right knee. On examination of her genitalia, the labia majora and minora were intact, she had a laceration on her vaginal canal with mild bleeding, she had blood stains on her inner pants. A pregnancy test turned negative and the HIV test was non-reactive, urinalysis revealed leucocytes plus pus showing white blood cells in the urine which signified a bacterial infection and ketones plus pus which are by products of muscle respiration showing dehydration. The complainant also exhibited epithelia cells which indicated an infection upon a high vaginal swab and vaginalis which caused vaginal infections. The medical officer observed that there was forceful penetrative intercourse. The complainant was bound with a venereal infection and was put on medication. The doctor also recorded that the complainant could not recall vividly what had transpired before the ordeal. The witness produced a P3 form dated 16th June 2020 as Pex. 1, a lab request form dated 15th June 2020 as Pex. 2, a PRC Form as Pex. 4 and treatment note as Pex. 5.
11. PC Joseph Ndambuki PW5 a Police Officer from Endau Police station testified that he was at the said station on 15.6.2020 when a report was made by the complainant's mother about defilement. He stated that the report was made at 10.20pm and that the report indicated that the girl was defiled at 7.30pm at



- Ekesaya market. He stated that the complainant was aged 16 years old and tendered her birth certificate as Pex.3. He stated that he booked the report and issued a P3 form.
12. When placed on his defence, the appellant denied committing the offence and stated that he was framed. He defended himself saying that at the material time, he was at his home with his wife.
 13. MK (DW2) testified that she was the appellant's wife and that the two of them were together the whole day on 14th June 2020 working in the *shamba*. That the two returned home and the appellant showered and slept and that he did not leave their home. On cross examination, she maintained that she was with the appellant the whole day on the material day and further denied knowing the complainant
 14. The trial court evaluated the evidence tendered and found that the evidence of the complainant was reliable as she appeared truthful. The trial court relied on the provision of section 124 and convicted the appellant sentencing him to serve 30 years in jail.
 15. The appellant was aggrieved and preferred this appeal raising the following grounds;
 - i. That the learned Magistrate erred in both law and fact by convicting the appellant on evidence that did not meet the minimum threshold to uphold a conviction.
 - ii. That the learned Magistrate erred in both law and fact by not considering the appellant's defense.
 16. The appellant in his written submissions dated 28.11.2023 advanced four grounds summarized as hereunder;
 17. That penetration was not proven. He submits that although medical evidence indicated that the hymen was missing, it has been held that absence of the hymen is not conclusive proof of penetration. He submits that there was no evidence of recent sexual activity, that after medical examination, the complainant was found to have been infected with a venereal disease but the appellant did not have it.
 18. That the evidence tendered was contradictory. The appellant submits that testimonies from prosecution witnesses were contradictory.
 19. He submits that the prosecution's case was based on circumstantial evidence which was insufficient to sustain a conviction as the appellant was found in front of the bar and not at the scene, that the person who was seen by PW4 running from the scene was identified as Mulati Musyimi and not the appellant.
 20. The appellant further contends that the complainant's credibility was questionable because she defied her mum by failing to go to the butchery for lunch as instructed but instead proceeded to a bar with their house help. He points out that her own mum also found her drunk and naked before she dressed her and took her to Endau Police Station.
 21. The appellant further faults the trial court in the sentence meted out stating that the sentence was not legal.
 22. The State has conceded to this appeal on grounds that the appellant was not linked to the offence, that mistakes were made during trial, that PW4 indicated that he saw an individual called Mulatia fleeing from the scene but the individual was not mentioned by the complainant in her testimony. That the complainant testified that she was intoxicated at the time of offence and gained consciousness the following day in her bedroom hence it is difficult to ascertain whether her testimony was from memory or being coached. That the trial court also made an indication that the complainant was gang raped which does not reflect the particulars in the charge sheet.



23. This Court has considered this appeal and the grounds advanced. The State/Respondent for good measure has conceded this appeal for the reasons aforesaid but this court shall determine the same on merit.
24. This Court as a first appellate court is mandated by law to re-evaluate or re-assess the evidence with a view of coming to its own conclusions.
25. The main issue for determination is whether the prosecution proved its case to the required standard in law. The main ingredients necessary to be established and proved for a charge of defilement to be established are;
 - a. Age
 - b. Penetration
 - c. Identification of perpetrator.

Age

26. The importance of proving the age of the complainant in sexual offences was emphasized in *Alfayo Gombe Okello vs. Republic* (2010) eKLR where the Court stated that;

In its wisdom, Parliament chose to categorise 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)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars

In this instance, the prosecution tendered a birth certificate (Pex.3) which indicated that the complainant was born on 8.6.2008 which therefore demonstrated that she was 16 years of age at the material time. The production of the birth certificate tendered proved the age of the complainant. This element is not disputed in this appeal and was also not disputed at the trial.

Penetration

27. The issue of penetration hinged on the evidence of the complainant (PW1) and the medical evidence of the medical officer (PW4). The testimony of the complainant however was a bit inconsistent and lacked clarity. She stated that she was at a bar known as Jacaranda and after a few drinks, she felt her legs were too weak perhaps to support her and all she could recall was the appellant carrying her to a deserted place 20 meters from the gate (it is not certain if the gate she referred to was a gate to the bar) and defiling her. She stated that she woke up to find herself in her bedroom but that narrative was discounted by PW2 and her mother (PW3) who stated that the complainant was found in a cowshed lying naked and very drunk. The state at which the complainant was found could have perhaps mistaken the cowshed with her bedroom. But in the state of mind the complainant was, it was erroneous to find that she was a reliable witness.
28. The medical evidence (P3) tendered by PW4 on the other hand established that she was defiled. The element of penetration was therefore established.
29. However, on the question of the identity of the perpetrator, the evidence tendered was inconsistent and unreliable.



30. Evidence from PW1 was that the appellant carried her on his back to a deserted house and defiled her. Her testimony indicates that she became unconscious possibly because she was intoxicated as she testified that she took some alcohol from the bar and only woke up the following day and found herself in her bedroom.
31. PW2's testimony was that he was at the shopping centre when he heard a lot of noise which sounded like someone who was in pain. He stated that he went to investigate and found the complainant who had vomited. That he asked an individual he referred to Martin about what had happened to her and he asked him not to tell anyone. His testimony was that she was unconscious. That he asked one employee at the bar about what had transpired and he was informed that she had been carried away by a "thin man" and followed by others. He also testified that the appellant was at the front with other customers.
32. PW3, the complainant's mother was that she sought assistance from PW4 in the search for the complainant. Her testimony was that she saw someone at the cow shed who implicated the appellant when he was taken to the police station. She testified that the complainant was very drunk. On his part, PW4 testified that he saw someone who uttered the words 'we have been found' and identified the person as Mulati Musyimi. The witness indicated that it was Mulati who implicated the others. The prosecution however failed to avail the said Mulati Musyimi to testify and shed light on the implication of the appellant herein. The mother of the complainant was categorical that the said Mulati reported to her that it was the appellant. This information could only be admissible if the said Mulati was availed to give direct evidence. The prosecution's failure to avail the said Mulati rendered the said evidence implicating the appellant as hearsay and could not be relied to render a conviction.
33. The trial court relied on the testimony of PW1 on identification. The court also created an impression in its judgment that the appellant was in the company of others and they all defiled the complainant. This is contrary to the testimony tendered by the complainant who only referred to the appellant. Another individual referred to as Mulati Musyimi was the one who was found at the scene by PW4 and PW3 and he indicated that they had been found and he attempted to run away but was arrested. From the evidence tendered, it is true that the complainant was too intoxicated, to give clear or reliable identity of the person who carried the complainant from the bar. The prosecution in my view ought to have called the bar attendant who informed PW2 that the complainant had been carried by a "thin man" and others as well as Mulati Musyimi who implicated the appellant. The trial court relied on the strength of the complainant testimony which is allowed in sexual offences cases under Section 124 of the *Evidence Act* but the section provides a caveat that;
- "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."
34. There is no record that the court was satisfied that the complainant was telling the truth. Besides that, the magistrate who made the determination was not the one who took her testimony as such, the court did not get a chance to get a first-hand account from complainant to enable it to solely rely on her testimony for a conviction. The complainant was highly intoxicated, at the time and given that state of affairs, the complainant's evidence required corroboration. It was not safe to purely rely on her testimony for a conviction.
35. The trial court was conducted by three different Magistrates and the Court that took the evidence of the complainant was Hon. Kaseru. The said Magistrate was the one who was in a position to see the complainant directly and be in a position to determine if Section 124 of the *Evidence Act* could



be applied. Hon. Asiago who determined the matter was ill placed to rely on Section 124 to render a conviction because Hon. Kasera did not record in the proceedings that the complainant struck her as a person who was truthful and reliable. Hon. Asiago therefore having not taken her evidence fell into error to rely on Section 124 of the *Evidence Act* to render a conviction. It is also important to mention here that before a new magistrate takes over a case, partly heard before another magistrate, it is imperative to comply with the law.

36. The legal requirements to be complied with in the taking over of proceedings from a previous trial magistrate by a succeeding magistrate are contained in Section 200 of the *Criminal Procedure Code* (Cap 75), the relevant part of which provides:-

200 (3)

“Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding Magistrate shall inform the accused person of that right”.

37. The above provisions of the law are couched in mandatory terms and the trial court had a duty to explain to the appellant of his right under the provision of Section 200 (3) of the Criminal Procedure Code. This was not done by any of the magistrates and Section 200 (3) of the *CPC* was not complied with. Court of Appeal decision in the case of *Miruga v Republic* (Criminal Appeal 149 of 2014) [2022] KECA 1369 (KLR) (8 December 2022) (Judgment) held as follows;

“This court has pronounced itself on numerous occasions concerning the duty of the court under section 200 (3) of the *Criminal Procedure Code*. The provisions of section 200 (3) are mandatory and a succeeding judge or magistrate, must inform the accused person of his right to recall witnesses if he or she so desires. The magistrate or judge complies with it as a statutory duty and it does not require that there first be an application by the accused person. Failure of the court to invoke the section when required will render the trial a nullity”.

38. This Court finds that Section 200 of the *Criminal Procedure Code* was not strictly complied with but his finding is in obiter. The significant finding by this court is that the prosecution failed to establish the identity of the perpetrator of the crime to the required standard. It was unsafe to rely solely on the evidence of the complainant given her state of mind at the time and given the inconsistent evidence tendered by the witnesses and in particular, PW2, PW3 & PW4. These inconsistencies should have created doubts about the real identity of the perpetrator. The concession by the Respondent on this aspect is viewed from this context. In the premises, this court finds merit in this appeal. The prosecution’s case was not proved beyond reasonable doubt and it was erroneous by the trial court to find otherwise. The conviction of the appellant is therefore quashed and the sentence is set aside. The appellant shall be set free forthwith unless he is lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 13TH DAY OF MAY, 2024.

HON. JUSTICE R. K. LIMO

JUDGE

