Mwaka v Republic (Criminal Appeal E034 of 2023)
[2024] KEHC 4791 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4791 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E034 OF 2023

FROO OLEL, J

MAY 7, 2024

BETWEEN

DAVID SYAMBO MWAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal of the conviction and sentence arising in Mwingi CMCR(SO) NO 01 of 2020 delivered on 29.06.2022 by Hon I.G. RUHU, Resident Magistrate)

JUDGMENT

A. Introduction

1. The Appellant was charged with defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006.The particulars of the offence were that on diverse months of April to October 2019 at Mwamboni village, Nguutani location in Mwingi West sub county within Kitui county, intentionally and unlawfully caused his penis to penetrate the vagina of C.M.M, a child aged 11 years.

2. In the alternative he was charged with an indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No 3 of 2006.The particulars of the offence were that on diverse months of April to October 2019 at Mwamboni village, Nguutani location of Mwingi WEst sub county intentionally touched the virgina of C.M.M a child aged 11 years.

3. The Appellant took plea, and denied the charges. The prosecution called six witnesses and on being placed on his defence, the Appellant gave unsworn evidence. The trial magistrate did consider the evidence tendered/proffered, and found the Appellant culpable of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *sexual offences Act* No 3 of 2006. He proceeded to convicted him and sentenced him to serve 25 years imprisonment.

B. Evidence At Trial

4. PW1 C.M.M under went voire dire examination and gave sworn evidence. She testified that she was 13 years old, though she did not know her exact birthdate and was a pupil at class 4 Nguutani Primary school. He father had passed on a long time ago, her mother was called Katui and she lived with her grandmother one Mutua Moses and others; namely Syambo (Appellant), Kivivya (5 years old) and one Mutei (6 years old). It was her further evidence that her grandmother would leave for work and sometimes would be away for one week. During such times, she would cook for her siblings and they would sleep together in one bedroom, situated within their grandmother's house. She would sleep with the Appellant on one bed, while Kikivya and Mutei would sleep on the other bed.

5. It was during such occasions, when they were sharing a bed with the Appellant, did he take advantage and proceeded to defile her. He did so on three (3) occasions and when she threatened to go and report these incidences to her sister "Caro", the Appellant threatened her with dire consequences should she do so. She further stated that Caro was her sister but she was in boarding school. "Kivivya" and "Mutei" had also witnessed these incidences and told their grandmother. PW1 later disclosed what had transpired to her sister Caro, who informed their Aunty Kavata and they thereafter reported the incident to the police. She was taken for examination at Nguutani Hospital and later the Appellant was arrested. The appellant was person know to her and had been employed by her grandmother as a herdsman. She identified him in court.

6. In cross examination, PW1 reiterated that she knew the Appellant as he lived with them and he had forced her to have sex with him, which prompted her to tell her sister, Caro and her Aunty Kavata. He had chosen to defile her because the other girls were younger than her. In re-examination PW1 stated that she could not scream during the process as her Aunty lived far away from them. The Appellant had forced himself on her at night, so that even if she screamed nobody would hear her. She also noted that at one point during the process, she had screamed and both Kivivya and Mutei came to her rescue and told the Appellant to get off her, but there was little they could do as they were young.

7. PW2 Caroline Mumbi Moses, testified that she was a student in form one, at Iyenzuwa Secondary school and previously was at Nguutani Primary Boarding school. PW1 was her younger sister, who was born in the year 2009 and they lived with their grandmother, who worked at Wikivuvu, Where she sold alcohol for a living and at times would be away from home for a period of over a week, while carrying on with her business. During such occasions, she would be left at home to take care of PW1 and her two other sisters, namely; "Kivivya" and "Mutei". Their grandmother had also employed the Appellant as a herdsman and he also resided with them in the same home. Her grandmothers house had three bedrooms and a sitting room, the children would all sleep in one bedroom, while the Appellant would use the other bedroom.

8. In 2019, she was in class 8 and joined the primary school boarding section. During her midterm break for first term in 2019, her grandmother asked her if she had any knowledge of the Appellant sleeping with PW1, as she had found PW1 panty in the Appellants room, and the other children had also disclosed this information to her. They confronted PW1 who disclosed that indeed the Appellant used to sleep with her. Their grandmother confronted the Appellant, who left the home after cutting some chicken head. She was later surprised when she came back from school to still find the Appellant employed in the same home. She raised this issue again with her grandmother who assaulted her as she wanted to have the issued covered up. She went to her Aunty and disclosed what had happened, her Aunty reported to the authorities and this led to the eventual arrest of the Appellant.

9. Upon cross examination, PW2 confirmed that she knew the Appellant and he had initially threatened PW1 into silence and had told her not to tell anybody about the defilement. Her grandmother had lashed out at her for questioning, why she had not taken any steps as against the Appellant and this forced her to go and report this incident to her Aunty as her grandmother had refused to take any action. She further affirmed that the Appellant lived with them in the same house.

10. PW3 Christine Musee, confirmed that she was a village elder and PW1 was a neighbour known to her. In November 2019, PW2 had gone to see her and informed her that the Appellant had been defiling PW1. She reported to the area chief and advised PW2 that given the serious nature of allegations she was raising as against the Appellant it was not safe for her to go back and sleep at home, PW2 thereafter went and slept at her Aunties place. The following day, they went to the area chief after which they reported the matter to the police. She identified the Appellant and stated that he was known to her as she would she him herd cows and fetch water from the stream. In cross examination she confirmed that she had no grudge against the Appellant and was not related to the complainant's family.

11. PW4, Elizabeth Mawia, testified that in November 2019, on a date she could not remember, PW2 and PW3 came to her home accompanied together with PW1, Mutei and Kivivya. They had arrived at around 2.00am and woke her up. She welcomed them and instructed them to sleep until the following morning, when they would discuss the problem that had arisen. They disclosed that their lives had been threatened due to the defilement incident and she did later inform the children's grandmother. The children stayed with her for one month during which time PW2 disclosed that her grandmother had assaulted her, after she confronted her for not taking action, once she had discovered that the herdsman was defiling PW1. They reported the matter to the Authorities and the herdsman was arrested. He was a person she knew and was the one on the dock.

12. PW5 Dr Curtis Alice, testified that she works at Mwingi level 4 Hospital and had a bachelor degree in Medicine & Surgery from Egerton University. She had the P3 form containing the examination details of PW1, who was examined by one Dr Catherine Kago, who she worked with and was familiar with her handwriting. The patient had reported that she had been defiled three times by a person known to her. She was 11 years old, and on examination they noted that her labia was ok, the hymen was missing and she had whitish discharge. The examination confirmed that she had been defiled. she also had the PRC form and the findings contained therein were consistent with the findings as stated in the P3 form. She produced both as Exhibits. In cross examination PW5 confirmed that PW1 had stated that she was defiled by a person, known to her and she did not know if the Appellant was the perpetrator.

13. PW6 P.C Hellen Wanjiku, was the investigating officer attached to Nguutani police station. She recalled that on 26.11.2019 she was at the police station, when the village elder PW3, came to the station with PW1 and PW2. She reported that PW1 had been defiled by a person known to her, who worked for their grandmother as a herdsman. She took the complainant to Mwingi level 4 Hospital, where the doctor confirmed the defilement. She looked for the children grandmother, who confirmed she was aware of the incident. She also reported the matter to the children's office and they did compile a report (Exhibit 4). She established the age of PW1 and produced the age assessment report (Exhibit 5). The appellant was later arrested and charged with the offence before court.

14. In cross examination, PW6 confirmed that the evidence presented was not fabricated, and that the PW1 grandmother had a close relationship with the Appellant and that is why she did not report the incident to the authorities. It was the village elder who had reported the defilement and after interrogation, she believed what the minors had told her. She also confirmed that she did not take the Appellant to be examined at the hospital, as time had lapsed since the offence was committed. Further the age assement

report had been done by medical experts at Mwingi level 4 Hospital, where she had taken PW1 for age assessment.

15. The Trial Court found that the accused person had a case to answer and placed him on his defence on the main charge. The accused person gave unsworn evidence and confirmed that he lived in Nyuutani and worked as a casual labourer before his arrest. He had been arrested somewhere else and did not know the complainant, PW1. He also used to sell vegetables while moving around and was shocked when he was arrested and charged with the present offence. The charges filed were false and fabricated by PW1 Aunty (PW4) because she owned him some money. PW1 grandmother could confirm his innocence.

16. After the hearing, trial court did consider all the evidence adduced and found the Appellant was found guilty of the defilement and after mitigation, sentenced to serve twenty-five (25) years in prison.

C. The Appeal

17. Dissatisfied by the conviction and sentence, the Appellant filed the following grounds of Appeal that;

    a. Thatthe learned trial magistrate erred in both matters of laws and fact by convicting the Appellant while relying on the evidence of identification where the circumstances favouring positive identification were not existence.

    b. Thatthe learned trial magistrate still erred in both matters of law and fact by relying on insufficient evidence to convict the Appellant

    c. Thatthe learned trial Magistrate still erred in both matters of law and fact by convicting the Appellant relying on speculative and hearsay evidence.

    d. Thatthe learned trial magistrate erred in law and fact when disregarding the Appellants defence without giving cogent reasons.

18. The Appeal was canvassed by way of written submissions.

D. Analysis & Determination

19. I have considered the trial court record, the grounds of appeal and the submissions of the parties as filed and find that the following issues for determination;

    a. Whether the ingredients of the offence of defilement were proven.

    b. Whether the prosecution evidence was contradictory and/or inconsistent and therefore should not be relied upon to convict the Appellant.

    c. Whether the sentence should be interfered with.

20. This being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. See Okeno versus Republic (1072) EA 32 where the court of appeal set out the duties of the first appellant court as follows;

> " An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya versus Republic (1957) EA 336) and the appellant court own decision on the evidence made. The 1st appellant court must itself weigh conflicting evidence and draw its own conclusion (Shantital M Ruwala versus Republic (1957) EA 570). It is not the function of a first appellant court merely to scrutinize the

evidence to see if there was some evidence to support the lower court and collect finding and conclusion. It must make its own finding and draw its own conclusion. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact the trial court has had the advantages of hearing and seeing witnesses. See Peters versus Sunday Post (1958) EA 424."

(i) Whether the ingredients of the offence of defilement were proven.

21. Section 8 (1) and (2) of the sexual offence Act No 3 of 2006 provides that;

    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.

22. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator.

23. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added)

24. From the evidence on record the age of the minor in this case is 11 years old. This was stated by PW1, PW2 PW5 and PW6. Pw6 produced an age assessment report (Exhibit 5) that indicates that the minor was 11 years old. I have no doubt in my mind that this element has been proven.

25. The second element is the second ingredient is penetration which is defined under Section 2 of the *Sexual Offences Act* as follows:

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

26. The same section defines "genital organs" to include;

> " the whole or part of male or female genital organs and for purposes of this Act includes the anus."

27. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

28. The medical evidence on record was presented by PW5, a doctor who gave her evidence and stated that PW1 had been defiled and penetration had occurred. She relied on the findings arrived at in the P3 form and the PRC form which she produced as (P Exhibit 2 and 3). The medical examination had confirmed that the minor's hymen was broken and she had been defiled.

29. The minor in her evidence in chief did testify and confirmed that the Appellant defile her on several occasion. In her evidence in chief, she did state that;

> " We used to sleep in grandmothers house. It has two bedrooms and sitting room. Syambo, kiviya, Mutei and I used to sleep in the same house. I used to sleep with syambo on the same bed while Kikivya and Mutei slept on another bed. While sharing the bed "syambo alinifanyia tabia mbaya". Alinikinda"(Kamba interpreted by court assistant mueni to mean they had sexual intercourse).
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> He laid on top of me while in bed. "Aliingiza mbake kwa kitu yangu ya kukojoa" (Mbake interpretated from Kamba to mean Penis).

30. PW1 evidence was consistent and cogent. She did later tell her PW2 who raised it with their grandmother and the authorities. PW1 at 11 years is mature enough to know if she had been sexually assaulted and had no reason to fabricate evidence as against the Appellant. PW2 also confirmed that her grandmother had confided in her that she had found PW1 panty in the Appellants room and other children had disclosed to her that PW1 was sleeping with the Appellant. Further PW1 had also reported to her that she had been sexually molested by the Appellant. In short, the medical evidence and evidence of PW2 corroborate PW1 evidence that she was defiled and the evidence on record did prove the element of penetration.

31. The third and last element is identification. In this case there was recognition. This fact was confirmed by PW1, PW2, PW3, PW4 and PW6. They all confirmed that the Appellant had been employed by PW1 grandmother as a herdsman and he had been given residence within the same home. In James Murigu Karumba vs. Republic [2016] eKLR, it was held by the Court of Appeal based, on Suleiman Juma alias Tom – v- R (2003) eKLR; (2003) KLR 386 that:

> " Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."

32. The appellant did submit that, PW1 was defiled at night and had not described the light she used to identify the assailant. Secondly her guardian was said to be selling alcohol and that since she accommodated "drunkards", there was a possibility that the defilement was perpetrated by any other person. The Appellants line of submissions hold no water, as PW1's grandmother would sell alcohol at Wakivuva which was a different location and would stay away for a week or so before coming back. Secondly the Appellant defiled PW1 on three occasions and it was her evidence that they all resided in the same house and would go to bed together. The possibility of the defilement being committed by a third party are none existent. I do therefore, find that the offence of defilement was therefore adequately proved in this case.

(ii) Whether the prosecution evidence was contradictory and/or inconsistent and therefore should not be relied upon to convict the Appellant.

33. The appellant further submitted that the prosecution evidence had inconsistencies and that the trial magistrate erred in relying on the said evidence to convict him. Justice G.V Odunga J (as he was then) in the case of Charles Ratemo vs Republic, Machakos HCCR E035 of 2021 (unreported stated as follows when considering a similar issue:

> In the case of John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13, the court stated that: "Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."
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> 57. This was the position in Willis Ochieng Odero vs. Republic [2006] eKLR, where the Court of Appeal held: "As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But HCCrA 17 of 2018 Page 26 that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the Criminal Procedure Code."
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> 58. As was noted in Twehangane Alfred vs. Uganda, Crim App. No. 139 of 2001, [2003] UGCA, 6: "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."
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> 59. In Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: - "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

34. In this case, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were minor inconsistencies in the evidence of the said witnesses, which is common, I am unable to find that the same were material enough to warrant interference with the decision.

(iii) Sentencing

35. As regards the sentence, the Appellant was charge with defilement contrary to section 8(1) and 8(2) of the *sexual offences Act* No 3 of 2006. Further, the said Section 8(2) of the said *sexual offences Act*

expressly provides that a person found guilty of defilement of a child ages eleven year or less shall upon conviction be sentenced to imprisonment for life.

36. The appellant upon conviction did mitigate and the trial Magistrate sentenced him to serve a period of twenty (25) years, which sentence was to consider the time already spent in custody. The Court of Appeal in the case of Benard Kimani Gacheru Vs Republic (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a 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 decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

37. It has not been shown that the trial magistrate made any error while sentencing the appellant. The sentence melted out too, without prejudice is not manifestly high/excessive in the circumstances of the case nor has it been shown that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. If anything, the Appellant needs to be consoled that the trial magistrate applied the current jurisprudence regarding mandatory sentence and at his discretion opted not to hand down a life sentence as provided for under the said sexual offence Act.

G. Disposition

38. The upshot, having considered the evidence adduced at trial and submissions made, I do find that this Appeal is not merited and proceed to dismiss the same.

39. Right of Appeal 14 days.

40. It is so ordered.

JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 7TH DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 7th day of May, 2024.

In the presence of:-

Appellant present from Embu prison

Mr Mwaniki for O.D.P.P

Mr. Muluki Court Assistant