Ndunda v Republic (Criminal Appeal E058 of 2022) [2024] KEHC 17197 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEHC 17197 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E058 OF 2022

TM MATHEKA, J

OCTOBER 23, 2024

BETWEEN

PIUS MULUMBA NDUNDA .... APPELLANT

AND

THE REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 12th day of February 2022 at around 1700hrs at Iuani Location, Kaiti Sub-County within Makueni County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of P.M.M, a child aged 14 years.
2. In the alternative, the appellant was charged with the offence of 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 the same day, time and at the same place, the appellant intentionally and unlawfully touched the breast and vagina of P.M.M, a child aged 14 years.
3. The appellant pleaded not guilty and after a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 20 years' imprisonment.
4. Aggrieved by that decision, the appellant filed his memorandum of appeal and raised the following grounds;
    a. That the trial magistrate erred in law and fact by failing to find that the vital elements from both the victim and accused person were not brought before the trial court.
    b. That the trial magistrate erred in law and fact by not establishing the prosecution's side witness's narrations of evidence were unbelievable and illogical.

c. That the trial magistrate erred in law and fact for failing to order forensic/scientific/DNA testing of the appellant's samples in order to ascertain whether he committed the offence.

d. That the trial magistrate erred in law and fact by failing to note that the burden of proof and standard of evidence were not discharged efficiently and did not prove their case beyond reasonable doubt.

e. That the trial magistrate erred in law and fact when the conviction and sentence was done without observing that the witnesses oral evidence was full of fabricated evidences.

f. That the trial magistrate erred in law and fact by failing to act as an arbitrator as the rule of law guides but acted as supporting the prosecution side.

g. That the trial magistrate erred in law and fact by failing to note that the oral evidence by the complainant was not voluntary.

The grounds appellant filed submissions and filed the following grounds:

a. That the trial magistrate erred in both law and facts by shifting the burden of proof to him as the prosecution side relied on single uncorroborated evidence.

b. That the trial magistrate erred in law in facts without considering that the medical examination was not conducted well, same there was no evidence to prove the offence of defilement to required standard in law of reasonable doubt.

c. That the learned trial magistrate failed to make a finding that there existed some doubt in the prosecution case, and further failed to make a finding that the benefit was to be given to him and erred in the law in failing to acquit him.

5. As the first appellate court I have the duty to re- examine the evidence and draw my own conclusion.

6. The prosecution's case was that; when the complainant was in grade 2, she started living with the appellant's wife because her parents had disappeared. The appellant and his wife were like the complainant's grandparents because the appellant is a cousin to the complainant's maternal grandfather. That the appellant used to live in Mombasa and would travel home after about 2 weeks. That the complainant also lived with her brother and the appellant's son who had finished primary school.

7. That on 12/02/22, the appellant sent the complainant's brother to herd cattle and sent his child to the shop. He then sent the complainant to get him a shaving razor whereupon he followed her, locked the door and defiled her on a sofa set. He removed a knife from his pocket and threatened to kill her. He then told her to take a shower. That it was not the first incidence of defilement as her grandfather, M, had defiled her in 2018 when she was in grade 3.

8. The complainant reported the incident to her neighbor JK who reported to the sub-chief. Consequently, the appellant was arrested and taken to Kilala police post. The complainant was taken to Makueni County Referral Hospital where she was examined and placed under medication.

9. The prosecution called 4 witnesses to wit; The doctor (PW1) the complainant (PW2), the complainant's guardian (PW3) and the investigating officer (PW4).

10. The exhibits produced were; P3 form (P. Ex 1), PRC form (P. Ex 2), Age Assessment (P. Ex 3), Lab request & Results forms, a-f (P. Ex 4), pen knife (P. Ex 5a), black pouch (P. Ex 5b), black & red flowered dress (P. Ex 6a), yellow and black pant (P. Ex 6b).

11. The appellant elected to give sworn evidence and not to call any witness. He stated that he lives in Likoni, Mombasa County. That on 12/02/2022, he went about his duties and returned at around 6.30pm. He stayed outside the house until around 9.30pm and as he prepared to get inside the house, two people arrived and demanded to speak to him.

12. He requested to have the conversation at the road side near his house. Suddenly, a car arrived and PM enquired about the cost of fueling the car to Wote. He was told to get inside the car and they went to Kilala police post. P and the minor recorded a statement and he remained at the station. They went to MCRH with the officer in charge and the officer returned to the station at around 7am. On 13/02/2022, he stayed at the station the whole day and his wife visited him. He was later taken to Makueni Police Station until 14/02/2022 when he was arraigned in court but did not take plea. He took plea on 17/02/2022 and denied the charges.

13. On cross-examination, he confirmed that he has a home in Makueni and that the complainant is a daughter to his cousin: that at the time of offence, the complainant was living at his home: that the minor was taken to the hospital where tests were conducted but said that he did not know why the minor was taken to hospital; that PW3 is a neighbor but not related to her. That the complainant is currently living with PW3.

14. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

15. The appellant submits that all the evidence was a premeditated plan of certain people to victimize him. That an accused person has a constitutional right to be informed of the prosecution's evidence and to have reasonable access to it. He relied on Thomas Patrick Gilbert Cholmondeley -vs- R [2008] where the court of appeal stated;

> "The prosecution is now under a duty to provide an accused with and to do so in advance of the trial all the relevant material such as; copies of statement of witness who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

16. That the sole purpose of doing so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence.

17. He submitted that the trial court erred greatly for shifting the burden of proof to him and contended that he had no obligation of proving his innocence. He relied on Dorcas Jemutai Sang -vs- R [2018] eKLR where the Court of Appeal stated as follows;

> "In the present case one is satisfied that both the courts below appeared to or shifted the burden of proving innocence on the appellant. This we say in light of the quotations we have reproduced above where the learned trial magistrates stated that the appellant " did not call witness to support her defence and the learned judge remarked that " it was a significant fact that the appellant did not call and witness at the trial. By these sentiments, both the courts below appeared to say that the appellant was obliged to call witness to prove her innocence. As stated above, that was a wrong approach regarding the burden of proof in a criminal prosecution and therefore we allow the appeal on this ground"

18. He urged the court to find that shifting of the burden of proof is against the legal practice in our jurisdiction.

19. He submitted that the hymen was an old scar and therefore cannot be attributed to him. He contended that a broken hymen is not conclusive proof of penetration as there are many established reasons that can cause a hymen to rapture including riding a bicycle. That the bruises and abrasions around the complainant's thighs and parts of her vagina do not conclusively prove his culpability as it was not indicated if they were fresh or what had caused them. That PW1 did not say there was any struggle at the time of incident which then could be said to have caused the injuries. That PWl alleged to have had problems walking but her parents did not witness this not testify that she was having trouble walking. That the doctor has not indicated whether the medical problem was determined hence it remains single evidence which has not been corroborated in any way.

20. He submitted that young children engage in sex at very young age hence the conviction should be based on actual circumstances and proof that the complainant was indeed defiled. That the prosecution cannot be said to prove its case beyond reasonable doubt where there are doubts about the scene and mode of arrest.

21. The State, through Prosecution Counsel Vera Omollo, made reference to Okeno -vs- R (1973) EA 322 and reminded this court that its duty as a first appellate court is to evaluate the evidence afresh and to draw its own conclusions.

22. She submitted that the minor's age was proved to be approximately14 years through production of the age assessment and the minor identified the age assessment as being hers. She urged this court to consider that the trial court took cognizance of the apparent age of the complainant by conducting voire dire examination before taking down her evidence and it was noted that she was still a minor in grade 6.

23. She submitted that this court should take judicial notice of the fact that class 6 children are ordinarily aged between 13 to 14 years depending on when they started schooling. She relied on Nyasimi -vs- Republic (Criminal Appeal E026 of 2021) (2023) KEHC 20234 (KLR) (13th July 2023) that relied on Kaingu Elias Kasomo vs R. Malindi Cr. App. No. 504 of 2010 where the Court of Appeal stated: -

> "the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard..."

24. With regard to proof of defilement, she submitted that the complainant narrated what happened and her evidence was corroborated by PW3. That PW3 was able to identify the dress which the complainant was wearing and she mobilized the people who arrested the appellant and took him to Kilala police post. That at the time of arrest, PW3 noticed that the appellant called his daughter to take a pen knife with its black pouch from his pocket and she (PW3) was able to identify these items in court. That the complainant's testimony about being threatened with a pen knife was therefore corroborated by PW3.

25. Further, she submitted that the absence of bruises or spermatozoa could be explained by the fact that the complainant was instructed to take a shower and the evidence of PW1 that the complainant had a history of past defilement. That the investigating officer highlighted the steps she took in investigating the case such as taking complainant to hospital, taking the complainant's statement and taking exhibits which, she produced before court. Consequently, she submitted that the element of proof of penetration was adequately proved and the evidence tendered was not shaken during cross-examination.

26. She submitted that sentencing is the discretion of the trial court and relied on Simon Oduor Oloo -vs- Republic [2022] eKLR which cited Benard Kimani Gacheru Vs Republic (2002) eKLR where the Court of Appeal stated:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

27. She submitted that the trial court exercised its discretion correctly and judiciously and meted out a lawful sentence in relation to the evidence adduced in court. That the sentence of 20 years' imprisonment is in line with the provisions of section 8 (3) of the *Sexual Offences Act* Which Provides for a sentence of not less than 20 years. She contended that the sentence was sufficient in the circumstances because the appellant breached the duty of care which he had on the complainant.

Duty of Court

28. It is now settled that the duty of a first appellate Court is to scrutinize the evidence on record, make its own findings and draw its own conclusions giving due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses.

29. I have carefully considered the grounds of appeal, the rival submissions and the entire record, and the only issue for determination is whether the offence of defilement was proved to the required standard.

Whether the offence of defilement was proved to the required standard

30. The ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.

31. The complainant testified that she did not know her birth date but agreed that her age was assessed at a Wote hospital. DR. Stephen Musembi testified that the age assessment was done at the dental Department by Dr. Maweu. He also testified that he was familiar with the handwriting and signature of Dr. Maweu. The age assessment report produced as P. Ex 3 shows that the complainant was approximately 14 years at the time of offence. It is now well settled that age is not proved primarily by production of a birth certificate. In the Ugandan case of Francis Omuroni –vs- Uganda, Criminal Appeal No. 2 of 2000; it was held that: -

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

32. Consequently, it is my considered view that the complainant's age was sufficiently proved.

33. With regard to penetration, the medical evidence shows that the hymen was broken but the scar was old. The doctor, PW1, confirmed that the hymen was broken though not freshly. He said that the

hymen takes about a week after breakage to show no signs of having been broken freshly. The evidence of penetration was therefore adequate.

34. As to whether the appellant was responsible for the penetration, the complainant testified that on 12/02/2022 at around 5pm, she was at home with her brother and the appellant's son. The appellant sent the complainant's brother to herd cattle and sent his child to the shop. He then sent the complainant to the house to get a shaving razor. He followed the complainant to the house and locked the door. He then pushed her to the sofa set, removed her pants and put his 'kia' (penis) in her vagina. The appellant removed a knife from his pocket and threatened that he would kill her. He then told her to take a shower. After the act, she informed her neighbor, PW3, who then informed the sub-chief. Further, the complainant testified that in 2018, she had been defiled by her grandfather, M, and he was arrested.

35. From the evidence, the complainant had been living with the appellant's family after the disappearance of her parents and the appellant admitted this fact in his defence. He was therefore a person who was well known to the complainant.

36. The complainant's evidence that she had been defiled previously explains why the doctor observed an old scar in her genitalia. Further, her testimony about being threatened by the appellant was corroborated by PW3 who said that when they arrested the appellant, he called his daughter and asked her to retrieve a knife from his coat. The knife and its poach were identified and produced as exhibits.

37. The complainant testified that the incident happened at around 5.00pm after which she proceeded to PW3's house and reported. The evidence shows that the complainant and PW3 were neighbors hence it was possible for her to report shortly after the incident. PW3 testified that the sub-chief took long to send the askaris hence their decision as neighbors to arrest the appellant. This information was confirmed by the appellant who testified that he was arrested by about 8 people at around 9.30pm on 12/02/2022. The P3 report shows that the report was made at Kilala police post on 12/02/2022 at around 2210hrs. It is therefore evident that the chronology of events as explained by the complainant and PW3 was consistent and was corroborated by the appellant in certain aspects.

38. The appellant complained that the evidence was inconsistent, fabricated and illogical but he did not point out a single inconsistency in his submissions. On the contrary, my re-evaluation of the evidence shows that it was consistent and the witnesses were truthful. Their evidence was not shaken even on cross-examination. The appellant also complained that the trial magistrate erred for failing to note that the complainant's testimony was not voluntary. From the evidence however, there is no indication of coercion as the complainant's evidence was that; "After I showered, I went and told my neighbor JK who called the sub-chief."

39. The record indicates PW3's name as Judith Mueni Mutinda and she testified that the complainant went to her house and told her that the appellant had defiled her. The appellant confirmed that the complainant left his house and is currently living with PW3. The totality of the evidence therefore shows that JK and Judith Mueni Mutinda is one and the same person. She confirmed that it was the complainant who went to her home hence my view that the complaint about coercion is misplaced.

40. The appellant also complained that the trial court did not make an order for forensic/scientific/DNA testing. There is no evidence that such an application was made by the defence and was denied. In any event DNA evidence though welcome is not necessary in Geoffrey Kionji -vs- Republic Cr. Appeal No. 270 of 2010, the Court of Appeal stated:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence

is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

41. The complainant testified that there was some mucus like discharge in her vagina which had come from the appellant's penis. It was also her evidence that the appellant ordered her to shower after the act. In my view and as observed by the trial magistrate, that could very well explain why the lab tests did not reveal anything. It is common knowledge that victims of rape and defilement are usually advised not to take a shower before medical examination.

42. Having read the trial court judgment, there is no indication that the burden of proof was shifted as alleged by the appellant. The trial court identified the elements of defilement and analyzed them using relevant case law. In order to safeguard the appellants right to a fair trial, the trial court conducted voire dire examination of the complainant even though she was not a child of tender years. In my view, the defence by the appellant was a mere denial in light of the overwhelming evidence from the prosecution.

43. On sentence s. 8(3) of the *Sexual Offences Act* provides the minimum sentence as 20 years' imprisonment. The sentence is there for lawful and does not call for disturbance.

44. In the circumstances, the appeal fails, the same is dismissed, the conviction is sustained, the sentence is upheld.

45. Right of Appeal 14 days

DATED, SIGNED AND DELIVERED ON 23RD OCTOBER 2024

MUMBUA T MATHEKA

JUDGE

Ms. Nelima/Elizabeth Appellant: Present

For the state: Ms. Nyakibia for State

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA