Mukundi v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 2592 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E011 OF 2022

LW GITARI, J

MARCH 16, 2023

BETWEEN

DUNCAN MUKUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 17th September, 2017 at Matakiri location within Tharaka South District in Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of A.G., a child aged 17 years.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that; on the nigh of 17th September, 2017 at Matakiri location within Tharaka South District in Tharaka Nithi County, the Appellant intentionally touched the vagina of A.G., a child aged 17 years, with his penis.

3. After a full trial, he was found guilty, convicted, and sentenced to serve fifteen (15) years' imprisonment for the said offence.

4. Aggrieved by the said decision, the Appellant lodged this appeal vide a Petition of Appeal that was filed on 21st March, 2022. He listed the following grounds in support of his appeal:

    a. That the learned magistrate erred in law and fact by imposing a harsh and excessive sentence upon the Appellant without considering that both the complainant and the Appellant were not strangers but amicable friends of the same age.

    b. That the learned trial magistrate erred in law and fact by failing to note that the complainant was not opposed to the relationship with the Appellant and willingly consented to the union.

c. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence without taking into account that the Appellant committed the offence at the age of 17 years hence ignorance could have led him to crime.

d. That the learned magistrate erred in law and fact by failing to note that the Appellant was not guilty as he did not know if his act was a crime no mens rea whatsoever on his part, so the honourable court ought to have treated the Appellant with leniency as per the law called for where a mistake of fact is explicit.

5. The appeal was canvassed by way of written submissions.

6. Notably, the Appellant filed his written submissions on 9th February, 2023. Together with his submissions, he files a list of amended grounds of appeal indicating that he has abandoned the grounds of appeal listed above. The Appellant thus substituted his initial grounds of appeal with following grounds:

a. That the trial court erred in law when it relied on contradictory and inconclusive evidence.

b. That the trial court erred in law when it failed to note that the prosecution witnesses were not sure of the time of the alleged offence.

c. That the trial court erred in law when it failed to record the reasons of believing one witness.

d. That the trial court erred in law when it imposed a harsh sentence upon the appellant without considering that he was a minor.

The Submissions

7. It was the Appellant's submission that the trial court erred in relying on contradictory evidence. Specifically, the Appellant stated that the evidence adduced by the prosecution was inconsistent and did not support the particulars of the charge sheet with regards to the exact date that the complainant was alleged to have been defiled.

8. The Appellant further submitted that he was denied his right to a fair trial when the learned magistrate dismissed his application on 17th September 2017 for PW1 to be recalled for purposes of cross-examination.

9. In addition, it was the Appellant's submission that he reasonably believed that the complainant was of full age and that she had granted him consent.

10. Finally, the Appellant submitted that the sentence imposed upon him was manifestly and extremely excessive since the alleged victim suffered no harm sexually. He relied on the case of Eliud Waweru Wambui v. Republic Criminal Appeal No. 102 of 2016 to buttress this position.

11. Citing the case of Korir v. Republic Criminal Appeal No. 100 of 2019 [2021] KECA 305 KLR, the Appellant thus prayed for mercy from this honourable court indicating that he has already served over 6 years in prison and considering that he was arrested at a very youthful age of 17 years.

12. On its part, the Respondent filed its written submissions earlier on 28th November, 2022. It was the Respondent's submissions that the prosecution proved all the ingredients of the offence of defilement as stated in the case of George Opondo Olunga v. Republic [2016] eKLR. To be more specific, the Respondent submitted that the prosecution proved that the complainant was a minor aged 17 years; that there was proof of penetration and that the Appellant was positively identified as the perpetrator.

It was thus the Respondent's submission that the prosecution proved the charge against the Appellant beyond all reasonable doubt.

13. On the issue of the sentence meted out against the Appellant, the Respondent submitted that the sentence imposed by the trial court was legal to the extent that is provided for in law. Further, the Appellant pointed out that the Appellant's allegation that he was a minor at the time the offence was committed was not true as the medical examination report produced before the trial court showed that he was 18 years at the time of the material incident.

14. Relying on the case of DS v. Republic [2022] eKLR, the Respondent thus urged this Court to dismiss this appeal in its entirety for want of merit and for the conviction and sentence of the trial court to be upheld.

Issues for determination

15. I have considered the appeal, the grounds in support thereof, and the submissions by the parties. The main issues for determination in this appeal are:

    a. Whether the Appellant was accorded a fair hearing.

    b. Whether the prosecution proved its case against the Appellant to the required standard of beyond any reasonable doubt.

    c. Whether the sentence imposed on the Appellant was harsh and excessive in the circumstances.

Analysis

16. This being the first appellate court, this Court is duty bound to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of Okeno V. Republic [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala -V- R. (1975) EA 57). 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; it must make its own findings and draw its own 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."

17. Guided by the above authority, below is an analysis of the evidence tendered by the parties.

The Prosecution's case

18. PW1 was the complainant. She stated that she was 17 years old and that she knew the Appellant as he was her boyfriend since 2015. That on a particular Friday, which date she did not indicate, she went to the Appellant's house and they slept together and had sex. It was her evidence that the Appellant inserted his penis into her vagina without protection. They then slept until the following day when the Appellant left first and the complaint was left behind. According to PW1, she left the Appellant's house at around 10.00 a.m. and on her way, she met her mother to whom she disclosed what had happened. PW1 was then examined at Gatunga and Marimanti hospitals.

19. PW2 was DKK, the complainant's father. He confirmed that PW1 was 17 years old and stated that he knew the Appellant as he was their neighbour. PW2 stated that on a Friday, which date he did not give, PW1 did not return home. They tried to look for her in vain. PWS2's wife, who is the PW1's mother, found PW1 at her friend's home on Sunday but she disappeared again as they were on their way home. On Monday, PW2 went to PW1's school to look for her. She was absent. PW2 got a tip off from one G and the Appellant's sister that PW1 was at the Appellant's house. PW2 proceeded to the Appellant's house in the company of Allan Mutegi (PW4) and David Njeru (PW5). There, they found the Appellant's mother who denied that PW1 was at her son's home. She later caved in to the threats of the police being called and revealed that PW1 was hiding at the home of the Appellant's uncle. PW2, PW4, and PW5 proceeded to the Appellant's uncle's home and found PW1. PW2 then took her to school and later reported the matter to the police and the Appellant was arrested. PW4 and PW5 corroborated PW2's testimony.

20. PW3 was Emilio Mwenda Gaicho, a clinical officer at Tharaka District Hospital. He gave evidence on behalf of his colleague, one Maurice Mugao, who attended to PW1 but was unavailable to testify. PW3 stated that he was conversant with Mugao's handwriting and signature. He produced the complainant's P3 form and testified that the examination done on her revealed that her labia minora and majora were normal. She did not have a hymen and there wear no tears. Her vaginal walls were also normal. It was noted that the PW1 was wearing a pant with blood stains which were from her menstrual period.

21. PW6, PC Josphine Thuo, is attached at Marimanti Police Station and was the investigating officer in this case. She stated that on 20th September, 2017, PW1 and PW2 went to the station and reported that PW1 had gone missing from 15th September, 2017 and was later found exiting the Appellant's home. That she investigated the matter and found that PW1 and the Appellant had eloped from 17th September, 2017 and during that time, the two had sexual intercourse.

The Defence Case

22. The Appellant was put on his defence. He gave an unsworn statement stating that he is a casual labourer and that on the material day, he was not his home as he was working at [Particulars Withheld] Primary School. According to him, the sub-chief came and claimed that he had eloped with PW1. The Appellant claims that he was framed as PW1 was not found in his home and the sub-chief allegedly had a grudge with the Appellant's father over land issues.

23. Having considered the evidence adduced by both sides, I now turn to analyse the issues pending determination in this appeal.

i. Whether the Appellant was accorded a fair hearing

24. The Appellant submitted that the trial court denied him his constitutional right to a fair trial as guaranteed under Article 50 of *the Constitution* by failing to give him a chance to cross-examine PW1 by recalling her to the stand.

25. The record shows that on 1st February, 2018 when the trial was to proceed by hearing the evidence of PW6, the Appellant indicated that he was not ready to proceed as he had not been supplied with the statements of the PW4 and PW6. The court noted that the Appellant seemed to be applying delaying tactics as he was not keen to pursue the statements since he was out on bond. The learned magistrate thus ordered for the Appellant to remain in custody so that he could get the statements. The following court date was on 14th February, 2018 for a routine mention and the Appellant confirmed that he had

received the statements. The Appellant prayed for PW1, 2 and 3 to be recalled for purposes of cross-examination, which prayer was granted by the court.

26. PW2 was subsequently recalled on 12th March, 2018. On the same day, summons issued to PW1 and PW3. The two witnesses however never appeared before court. The prosecution continued with its other witnesses and closed its case on 25th September, 2018. The defence hearing was then scheduled for 8th November, 2018. After hearing of the defence case was adjourned several times on account of the Appellant's illness and request for the proceedings. The defence hearing was eventually fixed on 1st July, 2019 on which day the day the Appellant prayed for PW1 to be recalled. The trial dismissed this application stating that the Appellant was trying to raise some delay tactics as he had been present during the trial and the many subsequent mentions but never raised the issue.

27. From the record, it is true that the Appellant was present throughout the trial and at some point even acquired a legal counsel to represent him. I agree with the trial court finding that the Appellant's prayer to have PW1 recalled on 1st July, 2019 was a mere delaying tactic considering the circumstances of the case. As such, the allegation that he was not accorded a fair trial has no basis.

ii. Whether the prosecution proved its case beyond any reasonable doubt

28. By virtue of Section 107 (1) of the *Evidence Act*, the burden of proof rests on the prosecution to establish every element in a criminal charge beyond any reasonable doubt.

29. The appellant herein was charged with the offence of defilement. The same is provided for under Section 8(1) of the Sexual Offence Act as follows:

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

30. The three elements that the prosecution must establish to prove a charge of defilement were set out in the case of George Opondo Olunga Vs. Republic [2016] eKLR as follows:

    i. Penetration

    ii. Identification of the offender

    iii. The age of the complainant/victim

31. On the issue of penetration, the complainant gave clear evidence how she met the Appellant on the road on the material day and they agreed to go the Appellant's house. They arrived at the Appellant's home at about 7.00 p..m. The Appellant offered PW1 some boiled maize but she refused. They then slept together and had sex. According to PW1, the Appellant inserted his penis into her vagina. He did not have protection. The medical evidence adduced by PW3 showed that PW1 did not have a hymen.

32. On this issue, the Appellant first noted that the PRC form was missing among the list of prosecution exhibits. The Appellant went on to submit that although the clinical officer pointed out that PW1's hymen was broken, the same could not suffice as proof of penetration in the absence of any other findings. According to him, the same should have been supported by tears and laceration as a result of forceful penetration. He further pointed out that there were no findings to indicate whether PW1's hymen had been recently broken or not.

33. In the persuasive case of Julius Pushen v Republic [2016] eKLR, the court held that:

> " The point that the doctor noted of no tears and lacerations on the victim does not by itself contradict the victim's evidence. Hymen was open which made him opine that there was penetration. The slightest penetration would suffice. Tears and lacerations to a female genitalia can be signs of penetration but their absence is not necessarily evidence to the contrary."

34. I am persuaded by the above finding. The testimony of PW1 as corroborated by the evidence of PW3 was sufficient proof of penetration. Further the complainant gave candid evidence that she had sexual intercourse with the Appellant. Her evidence was not challenged in cross-examination. She gave her evidence on oath. Section 124 of the *Evidence Act* provides that:

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

The learned trial magistrate found that the testimony of PW1 was believable. Being a sexual offence, the trial magistrate could rely on the testimony of the complainant as he had reason to believe her. The evidence of the complainant was therefore reliable to prove penetration. It is trite that medical evidence is not the only evidence that can prove sexual intercourse. The Court of Appeal in AML v. Republic [2012] eKLR stated that: "The position in law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence." In this case, the direct oral evidence tendered proved penetration.

35. On the issue of the identity of the perpetrator, the complainant testified that she knew the Appellant as he was her boyfriend since 2015. Further, according to PW2, the Appellant was their neighbour. This the Appellant did not deny. Based on these testimonies, it follows that the Appellant was therefore properly and positively identified as a person that was well known to the complainant and as the one who defiled PW1.

36. As a ground in support of his appeal, the Appellant faulted the trial court for not recording reasons for believing a single witness. To this end, it is worth noting that the law does not require the prosecution to call a given number of witnesses so as to establish their case. Section 124 of the *Evidence Act* indicates that in a criminal case involving a sexual offence where 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. It thus follows that the trial court can therefore not be faulted for relying on the evidence of the complainant on the occurrence of the offence.

37. On the issue of the age of the complainant, the same was proved by the production of her original birth certificate serial number 2146873 which confirmed that the complainant was born on 2nd July, 2000 and was therefore 17 years 2 months on the material day. It is the law that a child under the age of eighteen years cannot consent to sex. Section 8(5) of the *Sexual Offences Act* qualifies Section 8(1)

of the Act which penalizes defilement. Consent is defined under Section 42 of the *Sexual Offences Act*. Having proved that the complainant was below eighteen (18) years old, the law provides that she could not consent to sexual intercourse.

Alleged contradictions in evidence

38. The Appellant raised an issue of there being contradictions in the evidence adduced by the prosecution witnesses in respect of the date that the alleged offence was said to have occurred. It is trite that where contradictions are found in evidence, the court should determine whether the same are substantial to the extent of affecting a conviction. In Twehangane Alfred v Uganda Crim. App. No 139 of 2001, [2003] UGCA, 6, it was held that it is not every contradiction that warrants rejection of evidence. The court subtly stated as follows:

> "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."

39. It is clear from the above authority that inconsistencies, unless satisfactorily explained, would usually but not necessarily result in the evidence of a witness being rejected.

40. In the instant case, the Appellant alleges that there were contradictions brought out by the prosecution evidence in respect to when the alleged offence occurred. He stated that the Occurrence Book (OB) number captured on the charge sheet is different from the one referenced on the medical examination report adduced as P. Exhibit 3. That the OB No. captured in the charge sheet reads as OB No. 6/20/11/2017 while medical report refers to OB No. 8/20/11/2017. That that notwithstanding, the P3 is dated 4th October 2017 which is an indication of the date that the same was filled. The charge sheet shows that the Appellant was arrested on 20th November, 2017. It means that OB No. 6/20/11/2017 relates to his arrest while OB No. 8/20/9/2017 relates to the date and time the offence was reported to the police. These are minor defects which have not caused any prejudice on the Appellant and are curable under Section 382 of the Criminal Procedure Code.

41. The Appellant further pointed out that according to the evidence of PW6, the police report of the alleged offence was made on 20th September, 2017 and yet OB No. on the charge sheet refers to an incident that was reported on 6th November, 2017.

42. I have looked at the charge sheet and the P3 form on record. It is true that the P3 form is dated 4th October, 2017. It was filled in reference to OB No. 8/20/9/2017 and not OB No. 8/20/11/2017 as submitted by the Appellant. It is also true that the OB number captured in charge sheet reads as OB No. 6/20/11/2017. The subject offence was alleged to have occurred on 17th September, 2017. According to PW6, a report of the occurrence of the offence was reported on 20th September, 2017. This explains the reference to OB No. 8/20/9/2017 in the P3 Form. As per the charge sheet, the Appellant was arrested on 20th November, 2017. This date explains the OB No. 6/20/11/2017 captured in the sheet. On this issue, therefore, it is not true, as alleged by the Appellant, that there were contradictions in respect to the date when the alleged offence occurred.

Defence under Section 8(5)(6) of the *Sexual Offences Act*

43. The Appellant submitted that he reasonably believed that the complainant had granted her consent and that she had a capacity to grant the said consent and that he believed she was of full age and capacity to consent.

44. Section 8(5) and (6) of the *Sexual Offences Act* gives potential defences that an accused can raise when facing the offence of defilement. The said sub-sections provide that:

> "(5) It is a defence to a charge under this section if –
>
> (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
>
> (b) the accused reasonably believed that the child was over the age of eighteen years.
>
> (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant."

45. It is clear from the above provisions that a defence under Section 8(5) and (6) of the Act should be raised at the trial stage. Once raised, it is upon the trial court to consider the defence having regard to circumstances of the case, including the steps whish the accused took to find out the age of the complainant.

46. When an accused opts to rely on the defence under Section 5 & 6 of *Sexual Offences Act* the evidential burden shifts to him to satisfy the court that it is the child complainant who deceived him to believe that she was eighteen years old or above. Further, that the accused believed that the child was over eighteen years and that when all the circumstances are considered, it will lead to the conclusion that the belief on the part of the accused was reasonable. An accused who therefore wishes to rely on this defence must raise it during the trial so as to give the prosecution an opportunity to interrogate the defence and to respond to the same.

47. In this case, the Appellant did not raise this defence during the trial. He has only raised the defence at this appeal stage. His defence at trial was that he was framed. Alleging that he was deceived by the complainant is but an afterthought which cannot be considered at this stage. This ground must thus fail.

48. In view of the above analysis and considering the three ingredients of the offence of defilement, it follows that the prosecution did prove its case to the required standard in criminal cases. The Appellant's conviction was therefore safe.

ii. Whether the sentence meted out against the Appellant was harsh or excessive in the circumstances

49. Section 8(4) of the Sexual Offence Act provides that:

> "A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

50. Parliament, in its wisdom, chose to categorize the gravity of the offence of defilement on the basis of the age of the victim. The victim herein was 17 years old and as such, the provisions of Section 8(4) of the Sexual Offence Act apply to this case. In my view, the mandatory nature of the penalty as set out in the said Section takes away the power of the court to exercise its judicial discretion in sentencing. As such, the sentence meted was therefore lawful.

Conclusion

51. For the reasons stated, I find that this appeal is without merits. I order that:

    1. The appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE

16/3/2023

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

16/3/2023