Kahuro v Republic (Criminal Appeal E063 of 2021)
[2023] KEHC 3381 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E063 OF 2021

LN MUGAMBI, J

APRIL 20, 2023

BETWEEN

PETER NDEGWA KAHURO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from original conviction and sentence in the Chief Magistrate's Court at THIKA in S.O CASE No. 57 of 2020 dated 31.5.21 by Hon. E. Riany- SRM)

JUDGMENT

1. The Appellant was charged with the offence of defilement of a child contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on diverse dates between November, 2019 and April 2020, at Juja Sub-County, he intentionally and unlawfully caused his penis to penetrate into the vagina of MNN a child aged 17 years.
3. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of *Sexual Offences Act* No. 3 of 2006.
4. The particulars were that on diverse dates between November 2019 and April 2020 in Juja Sub-County within Kiambu County intentionally and unlawfully touched the vagina of MNN, a child aged 17 years.
5. After a full trial, the Appellant was found guilty of the main charge of defilement and sentenced to serve twenty years imprisonment.
6. The Appellant was dissatisfied with both the conviction and sentence thus filed this appeal.

7. In his submission dated 18.1.2023, the Appellant amended his petition of appeal and revised his grounds of appeal to four, namely:

8. The Learned Trial Magistrate erred in both law and in fact by convicting the Appellant while failing to prove the requisite element of identification as required under Section 8 (1) of *Sexual offences Act* as the Prosecution failed to prove that it was the Appellant who was the culprit.

9. The Learned Trial Magistrate erred in both law and in fact by convicting the Appellant while misapplying Section 124 of the *Evidence Act*. This is while failing to appreciate that evidence of PW1 was obtained through coercion.

10. The Learned Trial Magistrate erred in both law and in fact by convicting the Appellant while misapprehending the facts of the case, this was by relying on evidence of that was riddled with material contradictions.

11. The Learned Trial Magistrate erred in both law and in fact by convicting the Appellant while dismissing the defence while shifting the burden of proof on the Appellant.

12. This is a first appeal and the duty on of the first appellate court is to re-assess the entire evidence and reach its own independent conclusions while bearing in mind that it neither watched nor listened to witnesses as they testified [*Okeno v Republic* 1972 EA]

13. The Complainant MNN testified that she was seventeen (17) years old and in form 2 when the offence was committed. That was between November 2019 to April 2020 because sexual intercourse occurred repeatedly during the period in question.

14. She said that it all began one day when the Appellant who was well known to her and in the family went and asked her for some water to drink. Her mother was away at the time. As she entered the house to get him water, the Appellant followed her inside and shut the door. He then pulled her and laid her on the sofa. He raised her skirt, removed her panty and had sexual intercourse with her. This is how she described this sexual encounter:

> " ...I was dressed in a skirt and he raised. I resisted but he told me if I tell anyone what he will do he will kill me. I had my panty and he also removed. He opened the zip to his trouser and removed his penis and inserted in my vagina. He laid me on a sofa. He then pushed me inside. He would insert as he removed the same and he penetrated me. He didn't use any protection and mucus like substance was released..."

15. After he finished, he placed Kshs. 500 on the cupboard and told her to take it.

16. Two weeks later, the Appellant inquired if she had received her periods and when she affirmed, he returned for another episode of sexual intercourse. He then gifted her phone, 'make infinix' and told her he would facilitate to acquire sim card registration using the identity card of the complainant's sister.

17. The complainant thus gave him the sister's identity card which he used to register the line for her. She explained:

> " ...Accused went and bought me a line and told me to call him, when mum wasn't there and he would put for me credit for 50/= per week..."

18. They continued having have sex regularly without using any protection until April 2020 when she informed the Appellant that she was pregnant.

19. The Appellant suggested that she should go to hospital and confirm the age of pregnancy so that he could procure her abortion drugs.

20. On 24.6.2020, she went to the hospital but by sheer coincidence her mother saw the treatment booklet which showed she was three (3) months pregnant.

21. The following day, on 25.6.20 the Appellant went to see her. He inquired if her mother knew that she was expectant. She confirmed that the mother had discovered. The Appellant promised he was going to get her abortion pills and left but he never returned.

22. The complainant's mother took her to Munyu Health Centre where it was re-confirmed that she was indeed three months pregnant.

23. The mother took a further step of sending two people to the Appellant's father to discuss the complainant's situation but he chased them away.

24. The mother thus took the action of reporting the matter to Juja Farm Police station where they both recorded statements. The Appellant was subsequently arrested.

25. A police officer called her after filing the report and told her that the Appellant had insisted that the pregnancy was not his but was for a man by the name Johnnie.

26. She continued attending pre-natal clinic but unfortunately when she visited Kirk Medical Services on 29th August, 2020 a CT scan was done and was informed that she had lost the foetus.

27. She identified the report and scans from vision Kirk as exhibits before the court.

28. On cross examination she said she only revealed that it was the Appellant who had impregnated only after she was beaten by the mother. She stated:

> " ... when my mum beat me, and I said pregnancy was yours. Neighbours came and saved me and I slept there..."

29. The Complainant further stated on cross-examination: "... you used to come to our place using a motor bike that you ride. I would remain with my small sister and she would go to play and at times you found her and you would send her to buy mandazi from the shop...."

30. The complainant's mother said her daughter was born in 2003 and was seventeen years old at the time. In or around May, 2020 she realised that her daughter getting moody very easily and temperamental.

31. On 26.6.2020, she sent her to the posho mill only to discover that she had sneaked and visited Munyu Health Centre without her knowledge. The mother said she only discovered it when she saw a hospital booklet in the maize flour she was scooping and was shocked to learn that her daughter was already three (3) months pregnant.

32. The following day, on 27.6.2020, she sternly confronted the complainant on this issue. That is how the complainant revealed it is the Appellant who had sent her to confirm if she was pregnant and also advised that she should burn that hospital booklet. She also informed her that the visit was to confirm the age of pregnancy was so that Appellant could assist her to terminate the pregnancy.

33. PW2 decided to approach the father of the accused by sending him a lady and an old man to discuss the matter as her daughter was not going to terminate the pregnancy.

    When her entreaties were rejected, she decided to make a report to Juja Farm Police Station and the Appellant was arrested.

34. After about 1 ½ months, her daughter complained of pain in the belly and she took her to Munyu Medical Centre but they were referred to Thika Medical Centre where they found a long queue. They proceed to Vision Kirk Medical Services where examination of the daughter was done and they were informed the foetus had died.

35. She clarified that the Appellant was well known to her describing him as follows:

> " ...He used to take care of our cows and bring water for us using motor bike..."

36. Clinical Officer Ann Wanjiru (PW3) from Juja Farm Health Centre filled a P3 form (P. exhibit.3) on 6.7.2020 and her testimony was that at the time of examination the complainant had been sixteen (16) weeks pregnant.

37. The Investigating Officer, P.C. Geoffrey Mwalimu (PW4) told court that the complainant who was accompanied by her mother on 6.7.2020 went and reported that the Appellant had been defiling her between November 2019 and April 2020.

38. He then directed them to Juja Farm Health Centre for medical examination and later recorded their statements.

39. He also recovered an Infinix Phone (P. exhibit 4) which the complainant said was gifted to her by the appellant. He also produced the birth certificate (P. exhibit 5).

40. He arrested Appellant and charged him with this offence.

41. In cross examination, he stated that he did not have a receipt to prove the ownership of the phone.

42. The Appellant gave unsworn statement and called one witness. He stated that what the complainant had told the court were lies. He stated that after he lost his mother, the complainant's mother used to assist him but over time a grudge developed hence they thus conspired to fix with this offence.

43. He stated that the person who was responsible for the Complainant's pregnancy was a student who ran way in the year 2018.

44. He wondered why the matter was not even reported to the village elder.

45. He stated that his own wife and the complainant's mother belonged to one village chama (group). He also stated that if his interest had been to have sex with the Complainant, he could hired a lodging instead of doing it at their home.

46. He called one witness, Peter Ndirangu Wanjihia who testified that the Appellant had been his long-time friend. He stated that the distance between the home of the Appellant and victim's home was about 200 metres. He testified that he used to spend time together with the Appellant and it was impossible for him to go to the complainant's family home during the day without him having noticed. He also described the Appellant as a responsible married man.

Appellant's Submissions.

47. The Appellant in his submitted that penetration had not been proved by medical evidence. He argued that pregnancy was not the litmus test. To confirm penetration, he argued that it was necessary to ascertain who was responsible person for that pregnancy to rule out the possibility of any other person.

48. On credibility, he submitted that the complainant had confirmed that she had been caned so mention him. He thus contended that her evidence was as a result of coercion and should thus not be believed. He cited the case of *Paul Kanja Gitari v R* [2016] eKLR where the Court observed as follows:

> " ...What we find troubling about this case is that JMK did not on her own volition make a complaint that the Appellant had defiled her. Her testimony was that after the 'bad things', she went home whereat she met her aunt (PW 2) who beat her up to reveal what had transpired. It was the Appellant's contention that JMK's testimony was procured by threats and that it was given as instructed by P.W 2. We cannot dismiss this as an idle or insubstantial contention..."

49. Citing the case of *Ndungu Kimani v R* [1979] KLR 282. He argued that the witness in a criminal case should not create an impression in the mind of the trial court that he is not a straight forward person or raise suspicion about his trustworthiness or do something which indicates that he is a person of doubtful integrity and therefore an unreliable and inordinate witness which makes it unsafe to accept the evidence.

50. According to the Appellant, the complainant had conducted herself on a manner that shows she was not worthy of trust, like going to hospital alone and not denying if she had a relationship with one John.

51. The State response was that the offence of defilement had been established. It argued that in regard to age, the birth certificate (P. exhibit 5) was produced showing the complainant was aged 17 years at the time.

52. On penetration, it submitted this too had been established via P3 form (P. exhibit 3) which corroborated the complainant's oral evidence.

53. On identification, the State contended that the perpetrator was a familiar person who the Complaint knew well as their neighbour.

54. Determination

55. I agree with the State's submissions that to prove defilement there three key ingredients which must be established beyond reasonable doubt, namely:

    (a) Age

    (b) Penetration

    (c) The identification of the perpetrator.

56. In so far as the age of the Complainant is concerned, the evidence of the mother (PW2) plus the birth certificate – (P. exhibit 5) established the age of the complainant at the time of commission of this offence was seventeen (17) years. She was well within the age bracket of the offence charged, which was based on Section 8 (4) of the *Sexual Offences Act*, which relates to defilement of a child between 16 – 18 years of age.

57. The next issue is penetration. The Complainant gave a vivid oral account of the coitus moments she had had with the appellant in the complainant's family house as the appellant would pay her visit whenever the mother had left home for work. In exchange, the appellant would shower her gifts in cash and in kind. On first encounter, she was given Kshs. 500 and in another occasion, she was gifted a smart phone, make infinix (P. exhibit 5) and further facilitated to register a sim card using her sister's identity card by the Appellant.

58. Besides the complainant's oral testimony about sexual activity, medical evidence produced via the P3 form (P. exhibit 3) established that when the complainant was examined on 6.7.2020, she was found to have been sixteen (16) weeks pregnant. Circumstantially, this is corroborative of the fact that she had been active sexually and had been in fact penetrated sexually.

59. The next question thus becomes, did the appellant sexually penetrate the Complainant?

60. According to the Appellant, it was necessary for the prosecution to link him to the pregnancy as evidence of prove beyond reasonable doubt that he was the one who defiled the complainant.

61. Indeed, the appellant's contention was that the man responsible for the said pregnancy was one known as Johnie who had escaped. He nevertheless never disclosed how he was so sure about this piece of information.

62. Be that as may, it is important to distinguish between a sexual penetration and a pregnancy. It is possible for the complainant to have been impregnated by another man who would equally be culpable for defilement but the fact of pregnancy perse cannot exclude the possibility of penetration by another who may not have succeeded in producing the seed that made the complainant pregnant.

63. Pregnancy as rightly submitted by the Appellant is thus not litmus test for sexual penetration. And indeed, this was clarified by the Court of Appeal in *William Soira Lubwaga v R* where it held as follows:

> " ... it is patently clear to us that whilst paternity of this child may prove the father of the child defiled P.M, that is not the only evidence by which defilement of P.M. can be proved..."

64. In any case, not every sexual intercourse result in pregnancy. As has been judicially held, even slightest penetration of female sex organ by male sex organ without ejaculation is sufficient to constitute the offence, it is not even necessary for the hymen to be ruptured. (see *Ywehanange Alfred v Uganda* Criminal Appeal No. 139 of 2001)

65. The contention that pregnancy had to be linked to the appellant in order to prove that he defiled the complainant is thus without any merit.

66. The other bone of contention that the appellant raised was that the complainant implicated him because of the thorough beating she had received from her mother (PW 2) when realised she was expectant. He argued that she mentioned him out of coercion hence her evidence should have been treated with suspicion.

67. To understand the complainant's reluctant attitude, it is important to look at her conduct in context.

68. This was a young girl who from the evidence had been showered with cash and expensive gifts which included a smart phone (P. exhibit 4) in exchange of sex. After she discovered she was expectant, she was promised not to worry about the pregnancy for she would be assisted to terminate it. When at one time she expressed fear that the pregnancy will make her drop out of school, she was assured that she would be taken care of and promised good life just like the appellant's wife. She said the Appellant told her that he was rich yet he was not even educated.

69. When she went to hospital without the knowledge of the mother apparently to confirm the age of pregnancy so that abortion pills could be procured for her, she was easily convinced to destroy hospital booklet after the mother incidentally came across it.

70. In my view, this was a gullible young girl whom the defiler had mastered the art of manipulating through cash, gifts and promises of good life thereby taking advantage of her vulnerability and exploiting her sexually.

71. The manipulator had hijacked and completely brainwashed her through those gifts to the extent that she could not listen to her own mother but the defiler. The mother had little choice in ensuring that she reclaimed her parental authority and control, which unfortunately had to come through chastisement. I do not see her mother's action as particularly aimed at fixing the appellant. The mother needed to know how her daughter had gotten into that mix but the daughter was unwilling to disclose the information until the stern action by her mother.

72. Her failure to readily reveal the identity of the perpetrator is not because she was dishonest, it was simply because perpetrator had managed to successfully capture her mind which was easily swayed by multiple gifts and promises of good life.

73. The perpetrator was not a stranger to her or her family and was thus able to gain her trust easily. As revealed by the mother, this was a man who used to take care of their animals and supply them with water using his motor bike. He could thus access the home with ease and at any time. He always defiled her in their main house according to the complainant.

74. Evidence has established that the appellant was this manipulator. The detailed oral description given by the complainant of the various sexual escapades she had with him was intrinsically convincing and exposed the defence of the appellant as nothing but a mere denial. It did raise any doubt in the prosecution case and I find that it was thus properly rejected by the trial court.

75. I thus find no merit in this appeal against the conviction and I affirm.

76. The only consideration I make is on the sentence.

77. The Appellant was convicted on the Section 8 (4) of the *Sexual Offences Act*. The minimum statutory sentence applicable was 15 years imprisonment. The trial court imposed a twenty years sentence justifying the possible increase as follows:

> " ...Conduct of the accused of absconding since the time judgment was to be delivered..."

78. With due respect to the trial court, absconding was not an aggravating factor relating to the actual commission of the offence charged.

79. The absconding came much later after the trial had been concluded, that is, just before judgment was rendered. It therefore had nothing to do with the commission of the offence. It ought not to have been considered in increasing the length of the sentence, it should have been dealt with separately. What if the court would have acquitted him, would it have changed its verdict and sentenced him for the offence just because he resurfaced later? I do not agree with this reasoning by the trial court as a basis of increasing the length of the sentence.

80. I consider that the trial court considered an irrelevant factor in in meting out the sentence of 20 years imprisonment.

81. I set aside the sentence of 20 years imprisonment and substitute the same with a sentence of 15 years imprisonment to commence from the date the sentence was imposed by the trial court.

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF APRIL 2023.

L.N. MUGAMBI

JUDGE

In the presence of:

Appellant-

Advocate for Appellant-

State- Mr. Gacharia

Court Assistant- Alice

Court

This Judgement be transmitted digitally by the Deputy Registrar.