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Muchiri v Republic (Criminal Appeal 59 of 2016) [2023] KEHC 17777 (KLR) (22 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17777 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 59 OF 2016

DK KEMEI, J

MAY 22, 2023

BETWEEN

EVANS KAMAU MUCHIRI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the conviction and sentence of Hon. CL Yalwala (SRM) in Bungoma CMCR No. 71 of 2013 delivered on 3rd March 2016)

JUDGMENT

1. This appeal is against the conviction and sentence of 15 years' imprisonment for defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006.The Appellant herein, Evans Kamau Muchiri, was charged in the main count with defilement of a child contrary to section 8(1) as read with section (4) of the *Sexual Offences Act*, 2006. It was alleged that on diverse dates between 19th December 2012 and 10th January 2013 at [particulars withheld] within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of JWN a child aged sixteen (16) years old.

2. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on diverse dates between 19th December 2012 and 10th January 2013 at [particulars withheld] within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of JWN a child aged sixteen (16) years old.

3. The Appellant denied the charges and the matter proceeded to trial. The prosecution called six witnesses whilst the defence called one witness; the Appellant.

4. During the prosecution's case, the complainant herein testified as PW1. She told the Court that she resides with her father and step mother and that she is a student at [particulars withheld], in form two. According to her, at the material time of the incident, she was 16 years old as she was born on 15th May 1997 and she produced her birth certificate No. D50xxxx in Court marked as Pexhibit. 1. She recalled on 17th December 2012 while on school holidays, she decided to leave her parents house due to mistreatment by her step-mother. She left her parents house for that of the appellant herein and informed him of her predicament. She told the Court that the appellant never wanted her to stay at his house but she insisted as she did not want to go back to her home. They had sexual intercourse and she remained there up to sometime in January 2013 when the police officers came to the appellant's house and arrested them. She told the Court that she consented to having sexual intercourse with the appellant during her stay with him. She identified the appellant in Court. It was her testimony that the Appellant was a friend and that it was only during her stay at his house that they had sexual intercourse.

5. On cross-examination, she told the Court that her father was the complainant in the matter and that her father and step-mother were mistreating her. She told the Court that at the time of the arrest, she was inside the house and that the appellant was outside, and that she knew the appellant very well.

6. On re-examination, she told the Court that at the time of their arrest, she was inside the appellant's house while he was outside and that was on 10th January 2013. It was her evidence that she did attend disco but she did not have any friends with whom she had sexual intercourse with.

7. PW2 was ETB who testified that she knew the complainant herein as she is her step daughter. She recalled that on 19th December 2012 at 8.00am she got home from her place of business to discover PW1 was missing from home and on inquiry from her siblings she was informed that PW1 left the house in the morning. They searched for her but to no success only for her sisters to inform her that she had been seen with the appellant and that she had once disappeared and they found her at the appellant's place where they rescued her. She proceeded to the house of the appellant but found that he had moved house and on 10th January 2013, PW1's father informed her that the complainant had been arrested in the company of the appellant at [particulars withheld] area and that they were taken to Bungoma Police Station. She proceeded to the police station where they were referred to the Hospital after they were issued with a P3 form. She told the Court that at the time of the incident PW1 was a student at[particulars withheld] Girls Secondary. She testified that when PW1's grandmother interrogated PW1, she told her that the appellant was her boyfriend and that prior to his arrest, she knew the appellant though not very well and that he held no grudge against him.

8. On cross-examination, she told the Court that she was not present when PW1 left home and that nobody knew where she was until her arrest in the company of the appellant.

9. On re-examination, she told the Court that she held no grudge against PW1 and that she was only focused on disciplining her.

10. PW3 was DNM, who testified that PW1 is his daughter and that she was born on 31st July 1997 as per the birth certificate. He recalled on 19th December 2021 he came back home from work in the evening only to learn that PW1 was not at home and that he waited for her but she never came back. They searched for her in vain and proceeded to report the incident at Bungoma Police Station, area chief and children department. He told the Court that on 10th January 2013 he received a phone call from his son-in-law telling him that the police had arrested PW1 in the company of the Appellant. He proceeded to the Appellant's homestead at Sio area. He told the Court that he knew the Appellant as earlier in the month of December 2012 PW1 had disappeared and was also found in the company of

the Appellant who at that time resided at Ranje. He identified him as the Appellant in the dock. It was his testimony that the Appellant was arrested but later set free.

11. On cross-examination, he told the Court that he was not present when PW1 disappeared from home and that he was the complainant herein.

12. PW4 was No. 83678 Corporal Susan Mogire who testified that she is a gender officer stationed at Bungoma Police Station and the investigation officer herein. She recalled on 19th December 2012 while at the office, she found a report of a missing child aged 16 years old and on 10th January 2013 at about 4.00 pm an officer, PC Bolton Oyunga, walked into the station with the Appellant informing her that he was the man keeping the missing child as his wife. He was also in the company of PW1 and informed her that he had got both of them in the Appellant's house in Sio area. She took necessary action and took PW1 to Bungoma District Hospital where she was examined and treated and a P3 form filled. She produced in Court a letter from [particulars withheld] Girls School dated 11th January 2013 as Pexhibit. 4. She proceeded to record witnesses' statements and that PW1 informed her that she had been kept by the appellant as her friend. She proceeded to re-arrest and charge the appellant.

13. On cross-examination, she testified that she recalled on 19th December 2012 she found a report of a missing girl on the OB and not on 20th December 2012. She did not visit the scene and that the Appellant was arrested by her colleague PC Bolton Oyunga.

14. On re-examination, she told the Court that PW1 had been with the appellant from 19th December 2012 up to 9th January 2013.

15. PW5 was Quinto Maloba who testified that she is a clinical officer at Bungoma County Hospital and that she filled the P3 form for PW1 herein. She recalled on 13th January 2013 PW1 was brought to the hospital with a history of having been defiled by a person known to her on diverse dates between 19th December 2012 and 9th January 2013. On examination of PW1's private parts, she observed that there were no bruises but the hymen was broken/torn open suggesting PW1 had been involved in sexual activity for some time. On further examination, she established that there were epithelial cells, puss cells and slight blood cells with the presence of blood cells suggesting some kind of trauma. The Pregnancy test conducted was negative and no HIV test was done. She told the Court that she filled the P3 form on 13th January 2013 where she opined that PW1 had been defiled. She produced PW1's P3 form in Court as Pexhibit 2 and the treatment notes/card as Pexhibit 3.

16. On cross-examination, she told the Court that PW1was approximately 16 years old as that was what she told her and she noticed when she came to the hospital that she was not walking well and that she knew the person who had defiled her. She told the Court that she saw no visible injuries to the patient's vagina but observed presence of pus cells which could only be detected with microscopy.

17. PW6 was No. 81001 PC Bolton Oyunga who testified that he is currently station at Nyeri Traffic Base. He recalled on 10th November 2013 while in Bungoma Town on police duties he received information that the girl (PW1) who had gone missing on 19th December 2012 was staying at Sio area with a young man. He was led to the house where he found the girl (PW1) and the appellant herein resting on a mattress. He proceeded to confirm with the girl her details where she established that she was the one reported missing and on confirmation, he arrested both of them. She handed over the matter to corporal Susan to carry out further investigations. He identified the Appellant in Court as the person he apprehended together with PW1 and further noted that he used to see him around at the bus stage.

18. On cross-examination, he told the Court that he received a report from an informant who was assisting him and he went ahead to [particulars withheld] area. He told the Court that there were neighbours

around but not every neighbour volunteers to record a statement. He told the Court that he found the Appellant together with the complainant resting.

19. When he was placed on his defence, the Appellant gave a sworn statement where he denied the offence insisting that on 10th January 2013 at about 10,00 am he left his house for his carwash business and while there he was approached by three people he did not know who ordered him to accompany them to give him a job. He proceeded to follow them and they informed him to enter a vehicle and they drove off to Bungoma Police Station where he was locked up for three days and later arraigned before the Court to face charges which he does not know.

20. On cross-examination, he told the Court that he only saw PW1 for the first time in Court and that on 19th December 2012 he used to stay alone in the house and that he was not married.

21. The trial Court evaluated the evidence and found that the ingredients of the offence of defilement had been established and that though the victim consented to sex, she had no legal capacity to do so. The Appellant's defence was found not convincing and hence the conviction by the learned trial Magistrate in his Judgment dated and delivered on 3rd March 2016. He was found guilty of the offence of defilement as laid in the main count, was convicted thereof under section 215 of the *Criminal Procedure Code* and was subsequently sentenced to fifteen (15) years' imprisonment.

22. In performance of its duty as a fist appellate Court (see *Okeno v R* (1972) EA 32), this Court has considered the evidence presented by the Prosecution and the defence as a whole in compliance with the said duty. See Okethi Okale & others v R (1965) EA 555, citing *Ndege Maragwa v R* (1965) EACA, Criminal Appeal No. 156 of 1964 (unreported). See also *Ouma v R* (1986) KLR 619.

23. Being aggrieved by his conviction and sentence, the appellant preferred this appeal setting out the following grounds of appeal:

    i. That he pleaded not guilty to the charge.

    ii. That the sentence meted by the subordinate Court was harsh and excessive given the circumstances of the case.

    iii. That he is the sole bread winner of his family.

    iv. That the trial Magistrate erred in law by not considering the age of the complainant.

    v. That the trial Magistrate erred in law by entirely relying on the Prosecution evidence without considering that there was no test or DNA carried out to determine the truth in this case.

    vi. That the trial Magistrate erred in law by ignoring his defence and his mitigation

24. Consequently, it was the appellant's prayer that his appeal be allowed, the conviction quashed, and the sentence set aside.

25. Vide Court directions, this appeal was canvassed by way of written submissions. It is only the Respondent which filled its submissions.

26. It was submitted that the age of the complainant was proved beyond reasonable doubt by production of a birth certificate marked as Pexhibit 1 confirming that she was 16 years old.

27. It was submitted that the key ingredients in a defilement case is proof of penetration, age of the victim/ complainant and the identification of perpetrator. DNA testing is not mandatory in defilement cases and the instant appeal was not a requirement as the complainant was not pregnant and there was no need for proving paternity. It was submitted that the conviction and sentence of the appellant was

proper and in accordance with the law. Counsel urged that this Court upholds the conviction and sentence of the trial Court and dismiss this appeal.

28. I have given due consideration to the evidence that was presented before the lower court in the light of section 8 of the *Sexual Offences Act* pursuant to which the charges were laid, which provides as follows:

    (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.

    (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

    (4) 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.

29. Accordingly, the Prosecution needed to prove the following essential ingredients:

    i. That the complainant was, at the material time, a child aged 16 years;

    ii. That there was penetration of the Complainant's vagina;

    iii. That the penetration was perpetrated by the Appellant.

30. As regards the age of the complainant, the evidence adduced before the lower Court by the Complainant is that as at 7th March 2014 when she testified, she was then aged 17 years; and therefore she was aged 16 years old at the time of the incident. She produced her birth certificate in Court as Pexhibit 1 which indicated that she was born on 15th May 1997.

31. Accordingly, credible evidence was adduced before the lower Court to prove beyond reasonable doubt that the Complainant was a child for purposes of sections 2 of the *Sexual Offences Act*, as read with section 2 of the *Children Act*, No. 8 of 2001.

32. As regards the issue of penetration, the evidence adduced before the lower Court was principally that of the complainant. She testified at how she left her home as her step mother used to mistreat her and that on 17th december 2012 she left home and went to stay with the appellant. She remained there up until sometime in January 2013 when the police officers arrested both of them. She told the Court that they had sexual intercourse. Her evidence was corroborated by the medical evidence of PW5 who testified that on examination of PW1's private parts, she observed that there were no bruises but the hymen was broken/torn open suggesting PW1 had been involved in sexual activity for some time. On further examination, she established that there were epithelial cells, puss cells and slight blood cells with the presence of blood cells suggesting some kind of trauma. The pregnancy test conducted was negative and no HIV test was done. She told the Court that she filled the P3 form on 13th January 2013 where she opined that PW1 had been defiled. She produced PW1's P3 form in Court as Pexhibit 2 and the treatment notes/card as Pexhibit 3. PW6 testified that when he got to the area where he had been alerted, the Appellant was residing with PW1 he found them resting on a mattress and he proceeded to confirm whether PW1 was the girl who was missing and on confirming her details, he apprehended both of them.

33. Again, the prosecution's evidence in this regard was entirely uncontroverted, and was therefore cogent and credible. Accordingly, the lower Court correctly came to the conclusion that penetration had been proved.

34. As to whether the penetration of the complainant was committed by the Appellant, the evidence of the complainant was straightforward enough; and she stated, in her evidence in chief that she knew the Appellant before their meeting on 17th December 2012 as he had been her friend. It was also her testimony that she consented to having sexual intercourse with the appellant during her stay with him. She identified the Appellant in Court and that it was only during her stay at his house that they had sexual intercourse. PW3 also testified that he knew the Appellant as earlier in the month of December 2012 PW1 had disappeared and was also found in the company of the appellant who at that time resided at Ranje. He identified him as the appellant in the dock. It was his testimony that the Appellant was arrested but later set free.

35. It is manifest therefore that the complainant had known the appellant before, hence her readiness to seek shelter at his place. The learned trial magistrate also took into consideration the evidence of the complainant that she had sexual intercourse with the Appellant. Accordingly, the possibility of mistaken identity was non-existent. Iam satisfied that the identity of the appellant was not in doubt and that it was by way of recognition. Indeed, the appellant and complainant were found together relaxing on a mattress at the house of the appellant and were both promptly arrested.

36. On the ground that no DNA testing had been conducted to determine the truth of the matter, I am persuaded by the prosecution's submissions that a sexual offence such as defilement is not proved only by forensic (DNA) evidence. The Court held in *Musa Kipsiele Chepkonga v Republic* [2021] eKLR that the absence of DNA test does not mean that rape never took place and that the same can be established through other evidence which necessarily may not just be forensic analysis. Section 124 of the *Evidence Act* indeed provide that the evidence of the victim on its own will suffice if the court is satisfied that the victim is telling the truth. Though the trial court could have prompted the prosecution to do the needful by subjecting the child born, as a result of defilement to DNA test, pursuant to section 36 of *Sexual Offence Act* it was quite in order to evaluate the evidence presented before it and determine if the threshold had been established. This is because the provisions of section 36 of *Sexual Offence Act* give the trial Court a discretion to order for DNA test where it finds it appropriate. It is not a mandatory requirement.

37. Turning to the appellant's defence, I find the same did not shake that of the prosecution. Even though the appellant denied ever knowing the complainant, the complainant's testimony completely destroyed his defence evidence in that she claimed that the appellant had been her boyfriend and that she had gone to his place where they stayed together for some time and had sexual intercourse together. The evidence of the doctor corroborated the act of the defilement. There was thus no reason at all for the complainant to frame the appellant who had been her friend. The complainant in a bid to shield her boyfriend stated that it was her father who had lodged the complaint and not herself. Whereas that might have been so, the father to the complainant was acting as a caring parent to his young daughter. In any case, even if the complainant consented to the sexual intercourse, the same was of no consequence since she had no capacity to consent to the same as she was a minor. Hence, the appellant's defence was rightly rejected by the trial magistrate.

38. Thus, having re-evaluated the evidence adduced before the lower court, I am satisfied that the essential ingredients of the principal charge of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* were proved against the appellant beyond reasonable doubt as laid in the main count that the appellant was charged with before the lower Court.

39. In the result therefore, I am satisfied that the conviction of the appellant for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* was based on sound evidence.

40. As regards the issue of sentence, under the *Sexual Offences Act*, sentence for defilement is prescribed based on the age of the victim of the sexual assault. Although the Act does not expressly state, the manner the penalty is prescribed show that the younger the victim, the more severe the sentence. Therefore, it appears to me that age of the victim of sexual offence is an aggravating factor which the Court should always consider amongst others in sentencing.

41. In this case, the complainant was of the age of 16 years at the time of the offence. Thus, the appropriate penalty clause is section 8(4) of the *Act* which provides:

> " 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."

42. Sentencing is an exercise of discretion by the trial Court which should never be interfered with unless the trial Court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo v R*., and *Wilson Waitegei v Republic* [2021] eKLR)

43. This Court having found that the appellant had been properly convicted, it will not interfere with the sentence as the same was the minimum possible, lawful and legal. This Court also directs that any time he had spent in custody while his trial was being conducted be taken into account in the computation of his sentence as provided in section 333(2) of the *Criminal Procedure Code*. The record of the lower court indicates that the appellant was arrested on the 13/1/2013 and did not manage to post bail during the period of the trial. Hence, the sentence imposed should commence from the said. date of arrest.

44. For the foregoing reasons, and save only that the sentence imposed is to commence from the date of arrest namely 13/1/2013, the appellant's appeal lacks merit. The same is dismissed.

    It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF MAY 2023

D. KEMEI

JUDGE

In the presence of :

Evans Kamau Muchiri For Appellant

Mukangu For Respondent

Kizito Court Assistant