Macharia v Republic (Criminal Appeal E039 of 2022)
[2023] KEHC 18425 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E039 OF 2022

HK CHEMITEI, J

JUNE 14, 2023

BETWEEN

MOSES MUNGAI MACHARIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgement of Hon. J B Kalo (CM) in Nakuru CMCRC No. 64 of 2017 Dated 13th May 2022.)

JUDGMENT

1. The appellant was charged with the offence Defilement contrary to Section 8(1) & (2)of the *Sexual Offences Act* no 3 of 2006. The particulars of the charge were that on the 7th day of April 2016 in Nakuru north district within Nakuru county, the accused unlawfully and intentionally committed an act by inserting his male genitals namely penis into the female genital namely vagina of RW a girl aged 6 years.

2. The alternative charge was Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* no 3 of 2006. The particulars of the charge were that on the 7th day of April 2016 in Nakuru north district of Nakuru county the accused unlawfully and intentionally indecency assaulted RW a girl aged 6 years by touching her private parts namely vagina.

3. The accused was convicted and sentenced to life imprisonment hence this appeal. The appellant has raised 11 grounds in his appeal which dwelt on the fact that the case was not proved beyond the shadow of doubt; there was contradictions in the evidence so presented; and the doubt ought to have been exercised in favour of the appellant.

4. When the matter came up for directions the court ordered the same to be disposed by way of written submissions which the parties complied.

5. The evidence as presented at the trial indicates that the minor who was 6 years old in her unsworn testimony stated that she decided to visit her friends, S and D who were the appellant's children. The appellant came and told her children to go and sleep. He proceeded to undress her in the sitting room and defiled her. She told the court that the appellant did to her" tabia mbaya".

6. She said that she felt a lot of pain and the appellant told her not to tell anyone. She then put on her clothes and went home. She met her mother and when she informed her where she had been she beat her using a stick.

7. She said that she was feeling pain while urinating and her aunt took her to the hospital. She told her mother that it was the appellant who had caused her the pain. She said that she was present when the appellant was arrested.

8. When cross examined by the appellant she said that they found him alone at home when she went with S and that she was able to walk home alone after the incident.

9. PW2 MW testified that the complainant did not come home at 1 pm after school and she started looking for her and she came at around 4 pm. She said that she wore her uniform wrongly as the front side was facing behind and not the way she had dressed her that morning. She beat her and her clothes fell off and she realised that she did not have her panty.

10. She went on to state that neighbours came and they discovered that she had injuries in the private parts. She did not disclose to her or N her sister in law but she disclosed to her father. He then took her to Kabatini hospital where it was confirmed that she had been defiled. They were referred to Bahati district hospital.

11. Later the police issued them with a p3 form and the appellant was arrested. She said that she had known the appellant for three months.

12. On cross examination she denied that she had injured the child's private parts when she beat her.

13. PW3 Dr. Karanja Kamau examined the complainant and filled the p3 form. He concluded that there was inflammation of the labia and minora and there were obvious signs of penetration. He found the hymen not intact. He also relied on the PRC form from Bahati district hospital.

14. PW4 JNM the complainant's father testified that he was from work around 5pm when he found people in his home. He was told by his wife that the child had been defiled by the appellant. He then went to Kabatini police station where he was advised to take her to the hospital where she was treated and given medicine. The p3 form was later filled by the police.

15. PW5 PC Juma Kisera was the investigating officer in the matter. He recorded witness statements and preferred charges against the appellant.

16. When placed on his defence the appellant gave sworn evidence denying the charges. He accused the parents of beating up the minor and caused her injuries. He said that the sister to the complainant's father was present when the child was beaten and she should have been called to testify.

17. When cross examined he said that he knew the minor who was a friend to her children for the last two years.

18. DW2 Teresa Waithera the appellant's wife testified on his behalf but she said that she was not present during the incident as she had gone to work. She said that the complainant went to the same school with her children and she used to go to her house. She accused the complainants mother of a habit of framing men for raping her daughter.

19. On cross examination she confirmed that the complainant went to her house that day and that she had left the appellant at home that day.

20. As indicated above the parties did file their written submissions.

Appellants submissions.

21. Counsel for the appellant admitted that the age of the complainant, which in this case was six years was well proved by the respondent.

22. On penetration the appellant submitted that the same was not proved by virtue of the fact that the child had been beaten by her mother and that there was material variance between the p3 form and the PRC form. That this element was not proved at all. He said that the maker of the PRC form ought to have been called.

23. He further argued that there were myriad of contradictions by the prosecution witnesses especially PW 1 and 2 as to how the incident occurred.

24. He accused the respondent of not calling key witnesses especially those who interrogated the child and saw pw2 beating her. He submitted that the appellant ought to have been granted a benefit of doubt and be released.

25. The court has also perused several authorities relied on by the appellant.

Respondents submissions.

26. The learned state counsel on his part supported the trial courts finding. He submitted that all the ingredients of the offence were satisfied and that there were no contradictions in the respondent's case.

Analysis and determination.

27. The court is expected to analyse the evidence afresh and come up with an independent finding. See *Okeno v. Republic* 1972 EA 32.

28. The three grounds that are needed to establish the offence at hand include the age of the victim, evidence of penetration and the identity of the perpetrator.

29. The age of the minor herein was proved and it is not in contention as clearly admitted by both sides. At the date of the incident, she was six years old and a class one pupil.

30. The next critical issue is whether she was defiled. The minor explained in details in her unsworn evidence how she went to the appellant's home to visit her two friends, S and D who were the appellant's children. It appears from the parties that the visit by the appellant was almost a routine matter as they are neighbours and school mates. It was not therefore a surprise that she was found there on that occasion.

31. She told the court that the appellant directed his children to go and sleep and she remained with him. He was sitted on the opposite chair and he then went to where she was and removed her dress and her inner wear or panty. She said that he removed his "pipe" and inserted in her place where she uses to pee. She said that he did "tabia mbaya" to her and she felt a lot of pain.

32. When she went home she was beaten by her mother for going to Sn's home. It was her evidence that she felt pain especially when urinating.

33. Her evidence, for the reason that it was unsworn ought to be corroborated unless the court chooses to believe in line with Section 124 of the *Evidence Act*.

34. Her mother noted that she did not wear her panty and the clothe had been worn opposite. She was examined by one N and other women who concluded that she had been defiled.

35. The key evidence therefore shifts to the medical examination and conclusion. Pw3 concluded that there was evidence of penetration as the hymen was not intact and there was inflammation on the labia and minora.

36. The PRC form which was relied upon by pw3 on its part indicated that;

> " there was signs of inflammation on the right labia minora and hymen was not intact. No obvious sign of vaginal penetration".

37. The PRC form was filled on the same day while the p3 form was filled the following day. Taking the totality of the two findings it appears in my view that the PRC form filled by one Bernadine Nduni was more immediate than the p3 form. In any case pw3 relied among others on the said PRC form.

38. I do not respectfully agree with the submission by the appellant that the cause of the injury to the minor was the beating she received from her mother, pw2. If there was such then the PRC form would have indicated so as the person who filled it clearly stated that she had no physical injury other than on the private parts.

39. Pw3 on the other hand would have concluded that there were other injuries upon the complainant's body. The sections which requires such information are empty or in other words no comments.

40. In view of the two medical documents produced which are contradictory, that is the p3 form indicating that there was "obvious signs of penetration "and the PRC form indicating "no obvious signs of vaginal penetration "I hold that the alternative charge would have been the efficacious charge in the circumstances. To hold that there was penetration especially where the only available evidence is that of the minor and which is unsworn possess greater injustice to the appellant.

41. The nature of the charge that faced the appellant and the consequences were so dire that it needed no room for a scintilla of doubt. The respondent in proving the counts against the appellant ought to have been careful enough to leave no room for doubt. Although there was some element of penetration the same was not conclusive enough in the circumstances.

42. The perpetrator in this case was the appellant. All the evidence leads to one conclusion that he was at home on the said day. This was not denied by the appellant or his wife. The minor obviously knew him as she frequents his home to visit her friends who are the appellant's children.

43. The other grounds raised by the appellant concerning the failure by the respondent to call key eye witnesses does not in my view lessen the offence by the appellant. The witnesses called by the respondent were able to establish the case facing the appellant especially on all the three grounds.

44. At any rate it is established now that there is no amount of witnesses required to prove an offence.

45. Consequently, the appeal is dismissed, the main charge, that is defilement is set aside and substituted with the alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No, 2006.

46. The sentence of life imprisonment is hereby set aside and substituted with an imprisonment of 10 years from 13th May 2022.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14TH DAY OF JUNE 2023.

H. K. CHEMITEI.

JUDGE