Mukoyani v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 20586 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20586 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E012 OF 2022

WM MUSYOKA, J

JULY 21, 2023

BETWEEN

VICTOR WAWIRE MUKOYANI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment by Hon. CN Njalale, Senior Resident Magistrate, in Butali SPMCCRC No. 009 of 2021, of 25th January 2022)

JUDGMENT

1. The appellant, Victor Wawire Mukoyani, had been charged before the trial court of the offence of defilement, contrary to section 8(1), as read with section 8(3), of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The particulars were that on 8th March 2021 within Matete Sub-County of Kakamega County, he caused his penis to penetrate the vagina of SNJ, a child of 15 years. He pleaded not guilty, a trial was conducted, and 7 witnesses testified.

2. PW1, SJN, was the complainant. She testified that she was on her way form a posho mill, where her mother had sent her, when she met the appellant. He grabbed the flour she was carrying, and took it to a nearby sugarcane farm, and then grabbed her by hand and took her to where he had placed the flour. He brought her down, lay on top of her, removed his and her clothes, and had sexual intercourse with her. Although she screamed, no one came to her rescue. When he was done, he slapped her. She took the flour, and went home, where she reported the incident to her mother, who went ahead to report to the relevant authorities. She was taken to hospital and to the police.

3. PW2, RK, was the mother of PW1. She testified that PW1 reported her ordeal to her, and she immediately took steps to report to the authorities, and to have her taken to the police and the hospital. PW3, JJW, was the father of PW1. He also got the report of the incident shortly after PW1 got home, and he was also involved in the follow-up steps that were taken by PW2. PW4, Richard Shikuku

Abraham, was the village elder, to whom the report was made by PW2. He advised PW2 to take PW1 to hospital, then he informed the local assistant chief of the incident. PW5, Dennis Ekisa, was the clinician who attended to PW1, and filled the P3 Form. She had a muddy dry dress, but her inner wear was clean, for she had had a change of clothes. She was not a virgin, for she had an old torn hymen. There was a whitening vaginal discharge, but no bleeding. Urinalysis revealed red blood cells, which he interpreted to mean that sexual intercourse had recently happened, for the red blood cells suggested either injury or menstruation, but since her menses had not started yet, the only conclusion could be penetration.

4. PW6, Luke Chikamai, was a friend of the appellant. He testified that he was with the appellant that day. They saw PW1 as she came to the posho mill, and on the way back. When the appellant and PW1 met as she was going home, he left them together, and he walked some distance away from them. He could not tell where they disappeared to after that, but when the appellant later emerged, he looked suspicious for he was shaking. When he enquired, the appellant told him of his unsuccessful effort to defile PW1. PW7, Lydia Chemtai, was a police constable, number 105594, the investigating officer. She detailed the steps that she took in the investigation of the matter.

5. The appellant was placed on his defence. He gave a sworn statement, as DW1. He stated that on the material day, he had just come from school, and had gone to meet PW6, so that they could go visit a mutual friend. They saw PW1 as she was going to the posho mill. While leaving the home of their mutual friend, they again saw PW1, as she was going home from the posho mill. He and PW1 did not talk nor share greeting, and each of them went their way. He later got information that it was being claimed that he had defiled her.

6. After taking evidence from both sides, the trial court found that the offence of defilement had been established against the appellant. The appellant was aggrieved, hence the instant appeal. The grounds are that the medical evidence did not prove that there was any violence and penetration, contradictions in the evidence were not considered, the evidence was not adequately analysed, there was no corroboration, the sentence was harsh and excessive for a young person, and the mitigation of the appellant was ignored.

7. The appeal was canvassed by way of written submissions. Only the appellant filed written submissions, dated 21st October 2022. He collapsed the various grounds of appeal to 2, whether there was concrete and cogent evidence to prove violence and penetration, and whether the sentence was harsh and excessive. The first general ground, as submitted on, raises the issue of contradictions.

8. Was there penetration of PW1? PW1 was the victim of the crime. She testified that she was penetrated. Her allegation was supported by the medical evidence. The clinician testified that he did an urinalysis, which revealed red blood cells, which he said meant that there was penetration. The court does not have to rely on the medical evidence, for the testimony of the victim is adequate. In this case, the same was corroborated by the medical evidence. Corroboration is not required for defilement cases, so long as the victim gives evidence which appears, to the trial court, to be reliable and consistent, or, to say it simply, that the victim appears to be truthful and honest.

9. Did the appellant penetrate PW1? PW1 said that the appellant penetrated her. The issue of identification should not arise. The 2 knew each other, they were neighbours or came from the same locality. These events happened during daytime. I find that there was more than enough corroboration of the allegations by PW1. These events happened at about 6.00 PM, when there was still some light. PW1 reported her ordeal immediately to her parents, PW2 and PW3, who, in turn, reported to the authorities. The appellant was with PW6, when they met PW1, and PW6 left the 2 together, after which he noted that the appellant was suspicious, and when he enquired, the appellant, by his own mouth, told him that he had attempted to defile PW1.

10. Other than penetration, the appellant argues that there was no proof of violence. There is no requirement that a sexual offence must be accompanied by violence or force. In other words, use of force and violence are not critical elements of sexual offences. Sexual offences are often committed in environments of violence, where either force or violence is used to subdue the victim, or the sexual act itself is committed roughly, exposing the victim to injury to the genital areas. A majority of sexual acts, amounting to offences, are not committed in environments of violence, where force is used. Rape connotes absence of consent, but often there could be consent, obtained fraudulently or through false pretences, or through intimidation, where no actual force or violence is involved. In some defilement cases, the victims consent or acquiesce to the act, and, therefore, no force or violence would feature. Sexual offences, whether rape or defilement, need not be violent offences, and, therefore, proof that the act was committed in an atmosphere of violence is not a requirement. Then there is the issue of an old torn hymen. A woman loses virginity only once, when the hymen is torn. Defilement cannot be proved only through a torn hymen, for in some cases the minor victims might not have been virgins at the time of the defilement the subject of the trial, like in the instant case.

11. On contradictions, the general principle is that if there are any, they would only affect the case by the prosecution where they are significant, and go to the core of the matter. I have not seen any significant cases of inconsistencies or contradictions, serious enough to damage the case by the prosecution. The prosecution's case was fairly straightforward. The appellant defiled PW1 at about 6.00 PM, he was seen by PW6 together with PW1, and he said something about PW1 and defilement. PW1 made reports of the incident to her parents immediately she got home, and reports of it were quickly circulated amongst the security operatives at the local level.

12. On the sentence being harsh or excessive. Of course, the offence charged fell under section 8(3) of the *Sexual Offences Act*, under which the minimum penalty is 20 years in jail. The trial court gave the appellant the minimum available. Being a mandatory minimum, the trial court had no discretion. The trial court was accused of not considering the mitigation by the appellant, that he was a young person in Form Four in secondary school, and also that the Republic had asked that he be treated as a first offender. It is not true or correct to say that the trial court did not consider that mitigation. This is what the court said:

> "Mitigation considered and the fact that the accused person is a first offender. I have also considered the nature of the offence and the sentencing policy. As indicated that the charges facing the accused attracts a sentence of not less than 20 years. The court's hands are tied."

13. The sentencing was done on 26th January 2022, long after *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was decided, which appeared to give a sort of discretion to trial courts with respect to mandatory sentences. Of course, after that came *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ), which stated that Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) was meant to apply only to murder cases. The effect of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ) was to push the trial courts back to the position before *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), tying the hands of the court to the mandatory sentences stipulated in the *Sexual Offences Act*. The hands of the trial court were tied to the minimum sentences, and the sentence it imposed on 26th January 2022 was the only one that the trial court could impose.

14. Since then there have been developments in the jurisprudence around minimum sentences, with respect to sexual offences. In *Philip Mueke Maingi & others v Director of Public Prosecutions & another* Machakos HC Petition No. E017 of 2021 (Odunga, J) and *Edwin Wachira & 9 others v Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), the High Court restated the Francis Karioko Muruatetu & another v Republic [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) principles with respect to sexual offences, and extended discretion to the trial courts, and thereby freeing their hands, so that they can consider sentences other than those that the statute provide. The trial and appellate courts now have discretion to consider sentences other than the mandatory sentences imposed by the *Sexual Offences Act*.

15. The final orders are that the appeal fails, with respect to the conviction, for the reasons given above. However, it succeeds, with respect to sentence, for the reasons given above. The sentence imposed by the trial court, on 26th January 2022, is hereby set aside. The appellant was a young person, in high school, at the time of the commission of the offence. His age was indicated as 20 years, in the material on record, while PW1 was 15, an age gap of 5 years. The appellant should be treated as a young person, for all practical purposes, straddling that space between childhood and adulthood, having only recently emerged from childhood. A custodial sentence would not serve him well. I shall, accordingly, substitute his sentence with a probation order for 3 years. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21ST DAY OF JULY 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for the appellant.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.