Mwiva v Republic (Criminal Appeal E68 of 2020)
[2023] KEHC 23994 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E68 OF 2020

TM MATHEKA, J

OCTOBER 19, 2023

BETWEEN

MASILA MWIVA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence of Hon.A. Ndung'u (SRM) in Makindu Senior Resident Magistrate's Court Criminal Case No. 50 of 2016 delivered on 12th May 2020)

JUDGMENT

1. The appellant Masila Mwiva was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that in September 2015 at an unknown date within Makueni County, he intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of KM a child aged 8 years.
2. In the alternative he was charged with Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 200 where it was alleged that in the month of September 2015 at an unknown date at [Particulars withheld] village in Kibwezi District within Makueni County, he intentionally and unlawfully touched the vagina of KM, a child aged 8 years.
3. The appellant pleaded not guilty to the charges.
4. The complainant was heard by one magistrate and the other four witnesses by another and after a full trial, the learned trial magistrate convicted him on the main charge and sentenced him to 10 years' imprisonment.
5. The appellant was aggrieved by the decision, and he lodged this appeal on the following grounds;
    a. That the learned trial magistrate erred in law and fact by convicting him on insufficient evidence.

b. That the learned trial magistrate erred in law and fact by dismissing his plausible defence without sufficient evidence.

c. That the learned trial magistrate erred in law and fact by drawing inference of guilty verdict from extraneous matters and calling extrinsic evidence not tendered.

d. That the learned trial magistrate erred in law and fact by convicting him on uncorroborated and contradictory evidence.

e. That medical analysis testimony was obtained in a manner likely to occasion detriment of the accused person contrary to article 50(4) of the new constitution of Kenya 2010.

6. To arrive at the determination, the learned trial court heard the following evidence.

7. That in September 2015, the complainant's and the appellant's families were neighbour who usually borrowed salt and fire from each another. On the material day the complainant was sent by her grandmother PW2 to the appellant's home to borrow fire charcoal (sic). According to the prosecution it was then that the appellant defiled the child and threatened her with death if she told anyone. That the child reported the alleged defilement to her mother where upon they reported to Kibwezi police station and she was taken to hospital; that the defilement was confirmed and the appellant was charged with the offences herein.

8. The prosecution called 5 witnesses to wit; the complainant (PW1), the complainant's grandmother (PW2), the investigating officer (PW3), the complainant's mother (PW4) and the doctor (PW5). They produced as evidence which included the Treatment notes (P. Ex 1), PRC form (P. Ex 2), P3 form (P. Ex 3) and a copy of the birth certificate (P. Ex 4).

9. At the close of the case for the prosecution the learned trial court found that the appellant had a case to answer. The appellant however opted to remain silent and did not give any evidence in his defence.

10. In the judgment the trial court stated that the all the five witnesses gave consistent evidence, that they were credible and trustworthy. The court relied on s. 124 of the *Evidence Act* stating that the complainant was very clear and consistent in her testimony and that it was corroborated by the other witnesses. In the same breath the court warned itself on the dangers of relying on the uncorroborated evidence of a minor of tender years and concluded that the charge of defilement was proved beyond a reasonable doubt.

11. Parties took directions and proceeded to file their respective submissions.

12. The appellant was unrepresented.

13. His plea was that the appeal be allowed and he be set at liberty but should the appeal be sustained his sentence be reduced by the period he had spent in custody before he was convicted and in the alternative he be granted a non-custodial sentence for the remainder of his sentence.

14. He submitted that the learned trial magistrate had not acted with impartiality because she seemed only to favor the prosecution. That she failed to see that the case was a frame up. He questioned the truthfulness of the complainant's allegation that she was defiled, felt a lot of pain but did not scream. More so that she alleged to have been defiled twice but never reported the same the first time. The appellant pointed out the contradictions in the evidence given by the PW1, her grandmother PW2 and her mother PW3 with regard to the circumstances of the offence. First, to whom did she report the alleged offence in the first instance? Was it her grandmother or her mother? This was important

because her mother was away from home all the while and only came home three months after the alleged defilement.

15. It is the case for the prosecution that the complainant told the court that she informed her grandmother about the alleged defilement and her grandmother took her to hospital. On the other hand the grandmother's testimony was that she noticed that the child's urine had blood. She took her to hospital and was told that the child had been defiled. She sent for the mother of the child who came home. That it is then when the mother of the child came home that the child, in the absence of the grandmother, told her mother about the alleged defilement. The grandmother testified that she was not present when the mother of the child interrogated the child and learnt about the defilement. That she the grandmother heard about the alleged defilement from the mother of the child.

16. Again on another hand the mother of the child told the court that the grandmother told her it appeared to her that the child had a boil in her private parts, and because she, the mother, was away in Nairobi, she sent money to the grandmother to take the child to hospital for treatment. Apparently she did not get any other report until she came home in December. It is then that the grandmother to the child told her that when she took the child to hospital for treatment, the doctors had told her that the child had been defiled. That it is upon receiving this information that she, the mother took the child back to hospital for treatment for the alleged defilement.

17. That appellant submitted that evidently there were serious contradictions and inconsistencies in the evidence of these three witnesses.

18. The appellant argued that it was not true that the matter of the alleged defilement was reported to the police in September 2015 or that the child was ever taken to hospital in September 2015. He pointed out that the child testified that she was taken to hospital in September 2015. However, from the evidence of the mother the child was taken to hospital in December 2015. The police officer no. 95444 PC Luchera Doreen confirmed that the report of the alleged defilement was made on 25th December 2015, and the child was examined and P3 completed on the 29th December 2015.

19. He submitted that the witnesses were not truthful that about the alleged defilement in September 2015 and that there was no explanation why the crime was reported two months after the alleged occurrence, He argued that that is the indication that he was framed. That the P3 and PRC form did not testify to fresh defilement and wondered why they were filled in this case. It was his position that penetration was not proved.

20. The State, through Prosecution Counsel Margaret Muraguri, summarized the evidence for the prosecution and identified the following as the issues for determination;

    a. Whether there was penetration

    b. Whether the appellant is the perpetrator

    c. Whether there were notable inconsistencies in the testimonies of the witnesses.

    d. Whether the ingredients of defilement have been established.

    e. Whether the sentence meted out to the appellant is safe.

21. On whether there was penetration it was submitted that PW5 examined the complainant and his evidence was that indeed there was penetration. It was submitted that there was no basis to disbelieve the evidence of PW1 and the court was urged to accept the same on face value without corroboration.

That the law in sexual offence is that no corroboration is required as long as the complainant's evidence is believable. The state relied *inter alia* on *Joseph Mwangi v R* [2015] eKLR where the court stated;

> "...The medical evidence by PW1 merely corroborated the fact that PW2 was defiled, and even if it was to be excluded under section 50 of the *Evidence Act* on account that there was no proof that PW1 was acquainted with the handwriting on the note, the proviso to section 124 of the *Evidence Act* provides that no corroboration is required in cases where the court believes that the complainant is telling the truth."

See also *GOA v Republic* [2018] eKLR to the effect that the purport of s. 124 of the *Evidence Act* is that a court can even convict on the sole evidence of the victim without corroboration if the court believes the victim and records the reasons for so doing that it was satisfied that the witness was telling the truth.

22. On whether the appellant was the perpetrator it is submitted that the complainant's evidence was that the appellant was well known to her as they were neighbors. That the evidence was corroborated by PW2 and PW 4.

23. On whether there were notable inconsistencies in the testimonies of the witnesses the court was urged to reject the assertions by the appellant because he had has selected a few sentences and construed them in isolation in a fishing expedition for inconsistencies that do not exist. That, courts have in the past held that even in instances where inconsistencies are identified in the evidence, such inconsistencies ought to be significant and sufficient to paint a picture of untruthfulness for the court to reject such evidence. The court was referred to *Erick Onyango Ondeng v Republic* [2014] eKLR where the court cited the Ugandan case of *Twehangane Alfred v Uganda*; Crim. App. No 139 of 2001 [2003] UGCA where it was held;

> "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."

24. On whether the ingredients of defilement were established it was submitted that the trial court directed itself properly and established that the complainant's genitalia was penetrated by the appellant and that the complainant was a child.

25. And on the sentence it was submitted that the same is legal, proper and safe as the offence of defiling a victim who is 11 years or less attracts a sentence of life imprisonment. The State relied *Jacob Ntoiti v –R* [2021] eKLR where the court held;

> "...The remaining question now is whether the sentence meted out to the appellant was harsh. Section 8 (2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of life imprisonment, where the victim is aged 11 years or less. Although the appellant was charged under section 8 (1), (3) of the *Sexual Offences Act* but convicted under section 8(1), (2) of the said Act, I find that since the age of the victim was established beyond any shred of doubt, the sentence was within the law. I find the appeal to be wholly unmerited and is hereby dismissed..."
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> See also *SKM v R* [2021] eKLR where the court on appeal upheld the discretion of the trial court to pass sentence. The court was urged to dismiss the appeal.

26. As a first appellate court I am bound to reevaluate the evidence on record and draw my own conclusions always alive to the fact that I never saw nor heard the witnesses when they testified. See *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*., [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*., [1957] EA 570). 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, see P*eters v Sunday Post*, [1958] EA 424." (emphasis mine)

27. Upon considering the grounds of appeal, the rival submissions and the entire record, it is my considered view that the following issues arise for determination;

    a. Whether there were inconsistencies in the prosecution case.

    b. Whether the offence of defilement was proved to the required standard

28. In this case the matter involved a minor of tender years. The record shows that after the voire dire examination, the trial court arrived at the conclusion that the complainant did not understand the importance of and the need to tell the truth. The trial court stated "the child does not know the consequences of lying on oath. I find that she is not competent to give sworn evidence. The child (complainant) to give unsworn evidence". This stands at the core of the case for the prosecution and whether or not the learned trail magistrate properly directed herself with respect to s. 124 of the *Evidence Act*.

29. On whether there were inconsistencies in the prosecution case on has to consider the record as relates to the events that transpired when PW1 went to the appellant's house, her testimony was as follows;

> " I went to borrow fire charcoal at the home of Kaveso. Masila was at home with his grandmother. Masila is the accused person on the dock. I was given fire charcoal by Masila. I took the fire charcoal home. The grandmother of Masila gave me fire to take to Masila in his house when I took the fire to Masila, Masila removed my underpants. Masila removed my underpants when I took the rice to him. The house of Masila is separate from that of his grandmother..."

30. When the grandmother (PW2) was cross examined by the appellant, she stated as follows; "I sent her fire from your mother but she was not there except you."

31. The grandmother's position is that the child found Masila at home alone. But the child's evidence was that the said Masila was home with his grandmother.

32. On her part, the Investigation Officer (PW3) stated as follows;

> " I recorded her (PW1) witness statement and that of the grandmother. She further told me she had been sent to get match box 'fire' from the accused home and it was then that he took advantage of her and defiled her since there was no one else at home."

The I. O's testimony is also that the grandmother to the child told her that the child only found the appellant home alone yet the child testified that he was at home with his grandmother.

33. The complainant's mother(PW4) testified as follows;

> " I summoned the child and wanted to know what my mother (her grandmother was saying). She seemed afraid to tell me what happened. She then told me she had been sent to Masila's home and when she got there, Masila's mother gave PW1 rice to take to Masila. When she took the rice, Masila showed her a knife then carried her on his shoulders and threatened if she tell he will kill her. She had taken the food to Masila's home."

The mother's evidence is that the child found the mother of the appellant who sent her to the appellant's home.

It is also noteworthy that the story now changed from fetching fire charcoal to matchbox, to taking food to the appellant, to the appellant being alone at home, to being with his mother and to being with his grandmother.

34. In addition, when the court sought the information in the Victim Impact Statement Report it was indicated in the 'offence circumstances' section that "The victim says that she had taken back a jerrican of water to the accused and it was then he took advantage of her."

35. From the above extracts, it is evident that the circumstances of the offence kept evolving throughout the trial. There is a contradiction as to whether it was appellant's mother or grandmother who lived with him, whether she was at home when PW1 went to borrow fire. Whether the mother of the appellant actually sent the child to take something to Masila- was it fire, matchbox, rice or a jerrican of water? Evidently the evidence of PW2, 3 and 4 as to what may have transpired is hearsay as they said what was reported to them. These contradictions raise the question of PW1's credibility considering that she was a child of tender years at the time of testifying and the fact that she gave an unsworn statement. It is also not clear from PW1's evidence as to why the appellant's grandmother gave her fire to take to the Appellant, yet the appellant had also given her (PW1) the fire charcoal.

36. In *Johnson Muiruri v Republic*, (1983) KLR 445, the Court of Appeal held that;

> " Where a child of tender years gives unsworn evidence, then corroboration of that evidence is an essential requisite. But if a child gives sworn evidence, no corroboration is required but the assessors must be directed that it would be unsafe to convict unless there was corroboration."

37. Similarly, in *Oloo v R* [2009] eKLR, the Court of Appeal held that;

> " In our view, corroboration of evidence of a child of tender years is only necessary where such a child gives unsworn evidence."

38. In the judgment, the trial magistrate expressed herself as follows;

> " It should be noted as a matter of law that an offence of this nature does not require corroboration. Section 124 of the *Evidence Act* provides that the evidence of a complainant or the victim in sexual offences can on its own stand the test of law so long as the trial court for reasons to be recorded has basis to believe that the witnesses are speaking the truth. In this present case, the complainant was very clear and consistent in her testimony. The evidence

of PW2, PW4 and PW5 gave a clear account of events that took place and corroborated the evidence of the complainant in some material particular."

39. With respect, the learned trial magistrate who finally wrote the Judgment did not see nor hear the complainant testify. It is also evident that she did not note that the complainant gave unsworn evidence. If she had done that she would have been careful to rely on s. 124 of the *Evidence Act*. It is also noteworthy that she did not notice that the evidence of the complainant was inconstant and contradictory. It was not corroborated by the other prosecution witnesses as it is not correct that the appellant picked a few sentences and construed them in a fishing expedition for inconsistencies. Those inconsistencies and contradictions are glaring as clearly pointed out in the submissions of the appellant.

40. As to whether the offence of defilement was proved to the required standard, it is settled that the ingredients of the offence are; age of the complainant, proof of penetration and positive identification of the assailant.

41. The complainant's age was sufficiently proved through production of a birth certificate which shows that the complainant was born on 17th October 2007. She was therefore 8 years old at the time of the alleged offence in September 2015.

42. With regard to penetration, the medical evidence shows that the complainant's hymen was not intact and the doctor (PW5) confirmed it. However, the same medical evidence shows that the incident was reported on 24th December 2015, about three months after occurrence. On being cross examined about the delay by the appellant, the complainant's mother (PW4) said that the complainant had been taken to hospital in September but she didn't know where the treatment notes for September were. They were therefore not produced in evidence. The fact that the hymen was not intact is not necessarily proof of penetration and in this case there was nothing to show that defilement had actually happened, It is trite that the absence of a hymen is not automatic proof of penetration through a sexual act. In the circumstance of this case, it was unsafe to look at that fact in isolation. In *Arthur Mshila Manga v Republic* [2016] eKLR, the Court of Appeal stated;

> " But did the medical evidence on record really establish that JM was defiled? We do not think so...
>
> From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined her. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM herself.
>
> It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* [2008] KLR (G&F), 1175 and *Jacob Odhiambo Omuombo v Republic* (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

43. It is on record that the initial reason for taking the child to hospital was that she had blood in her urine, it was also alleged that she was suspected to have a boil in her private parts, that it is when she was being checked for these that she was found to have been defiled. This initial treatment evidence was not availed. Neither is there evidence that in deed at that time there was evidence of, or treatment for defilement. If it was established, then there is no explanation why it was not reported then. The fact that

it is reported three months alter contradicts in material particulars the evidence of the grandmother that the child was examined by two doctors in September and found to have been defiled.

44. The fact of the minor's hymen not being intact in December 2015 was not proof that of defilement had occurred in September 2015. In those three months anything could have been the cause of the said condition. The complainant's testimony was not credible was not corroborated as required by law. That of PW2 did not support her testimony bit created further contradiction, and more importantly no investigations were conducted to establish the circumstances of the offence.

45. Considering that the evidence of the complainant was unsworn and uncorroborated, it is my considered view that it could not be safely relied upon to convict the appellant. To that effect, the trial magistrate erred by convicting the appellant on uncorroborated and contradictory evidence which was barely sufficient.

46. I note that immediately after the appellant was put on bond the PW2 came to court claiming that the appellant had threatened the child with a pangs and the child was no longer going to school, It is on record hat the prosecutor spoke to the child who told him that she had not met or seen the appellant from the last day they had been in court. In addition, the prosecution failed to produce any evidence to support the allegation that the child was not attending school even after being given several opportunities to call the principal of the school where the child was attending. The I.O denied the assertion by PW2 that the report of the alleged threat had been made at the station. These allegations led to the suspension on the appellant's bond on untrue grounds.

47. To his credit the learned trial magistrate took these allegations seriously and suspended the appellant's bond. It all turned out to be untrue and it would appear that the PW2 had some kind of grudge with the appellant. Her testimony was not true it was not supported by any evidence and she went to a great extent to have the appellant punished for something he had not done. The prosecutor conducted his investigation and found the allegations of threats to the complainant to be untrue, The I.O confirmed that no such report was made at the police station, and the mother had no idea of such an occurrence.

48. In the end I find that the evidence was insufficient, the appellant ought to have received the benefit of doubt. The conviction was not safe as the evidence placed before the trial court was insufficient, s. 124 of the *Evidence Act* was not applicable because the victim gave unsworn evidence.

49. The appeal is successful. The conviction is quashed and the sentence is set aside. The appellant be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER 2023

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Mumbua T Matheka

Judge

CA Mwiwa

Appellant: Present

For State: Kazungu