Murunga v Republic (Criminal Appeal E033 of 2022)
[2023] KEHC 23069 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23069 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E033 OF 2022

PM MULWA, J

OCTOBER 5, 2023

BETWEEN

LYDIA MURUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Lydia Murunga, was tried and convicted of the offence of sexual assault contrary to Section 5 (1) (ii) of the *Sexual Offences Act* No. 3 of 2006 (the Act).

2. The particulars supporting the charge were that on 18th March 2019 in Thika West division, Kiambu County, unlawfully used her fingers to penetrate the vagina of JW, a minor aged 4 years 4 months.

3. Upon conviction, the appellant was sentenced to serve 10 years' imprisonment. She was aggrieved by the conviction and sentence hence this appeal. She filed her appeal on 19th April 2022. The appellant relied on the following grounds of appeal which are reproduced below;

    i. The learned Magistrate erred in fact an in law by relying on the testimonies of the witnesses which were contradictory and inconsistent the minor having said she was assaulted in school and later changed the testimony that she was assaulted by the appellant herein who was a house girl without the investigating officer conducting proper investigations into the matter.

    ii. The learned magistrate erred in fact and in law by shifting the burden of proof to the appellant and convicted her on the basis that she had failed to take action to assist the minor immediately the child reported to her to have been assaulted in school.

    iii. The learned magistrate erred in fact and in law in relying on the testimony of the minor who had clearly been coached to change her testimony and to accuse the appellant herein when the first report of the minor was that she had been assaulted at school.

iv. The learned magistrate erred in fact and in law when she convicted the appellant without sufficient evidence that proved beyond reasonable doubt that the appellant is the one who had assaulted the minor in view of contradictory evidence and admissions by the minor that she had been assaulted in school.

v. The learned magistrate erred in fact and in law by relying on the P3 form selectively and made a finding that the document proved that the minor had been assaulted and ignored the relevant part which stated that the alleged assault had taken place in school and by persons known to the minor, yet the appellant did not work in the said school.

vi. The learned magistrate misdirected herself and gave the wrong interpretation to the testimony of the minor during the hearing and arrived at the wrong conclusion by making a finding that the Kiswahili word "digi digi" means sexual assault when indeed the word means to tickle.

vii. The learned magistrate erred in fact and in law when she ignored all the glaring evidence of the minor that she had been assaulted in school by the use of a stick and misdirected herself and made a finding that the appellant herein had assaulted the child by use of her fingers a fact that is not true.

viii. The learned magistrate erred in fact and in law by failing to give the appellant the benefit of doubt as is required by law since the first complaint was that the child was assaulted in [Particulars Withheld] Primary School with the use of a stick by her classmates and later the testimony was changed that it is the appellant who had assaulted the child hence there was uncertainty as to where the child was assaulted and who assaulted the child.

ix. The learned trail magistrate erred in fact and in law by failing to recognize that the charges could be out of malice and an afterthought and vendetta to pin the injuries of the child on someone the complainant's mother having failed to pin the complaint on the school where the child had indicated she had been assaulted.

4. The appeal was disposed of by written submissions which both parties duly filed.

5. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent. I have also read the judgment of the learned trial magistrate.

6. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind, that it did not see the witnesses as they testified and give due allowance to that (see Okeno v Republic (1972) EA 32).

7. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the evidence adduced by the prosecution was sufficient to prove the charge of sexual assault preferred against the appellant beyond any reasonable doubt.

8. Section 5 of the Sexual Offences provides that:

> "(1) Any person who unlawfully:
>
> (a) penetrates the genital organs of another person with—
>
> (i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

9. The Court of Appeal in the case of John Irungu v Republic, [2016] eKLR pronounced itself on the essential ingredients of the offence of sexual assault as follows:

> "…. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

10. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose. The essential elements of the offence therefore are, proof of penetration and positive identification of the assailant.

11. In regard to the age of the complainant herein, the age of the child was established according to the birth certificate PMF1 4, she was born on 28th September 2014. At the time of the incident, she was therefore 4 years and 7 months.

12. Turning now to the issue of penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

13. PW1 testified that the appellant used her fingers to penetrate her vagina. She said she felt pain and started bleeding. She testified that she disclosed the matter to her mother, (PW2). Upon cross examination, PW1 stated that she told her mother and the doctor that she was hurt using a stick in school.

14. PW2 testified that on the material day she went back home at around 10 p.m. and found PW1 awake which was unusual. PW1 told her she wasn't feeling well upon which she checked her and only saw some rashes on her back. She then asked PW1 to go use the toilet before she went to bed. She heard PW1 screaming while she urinated. PW2 checked PW1's vagina and found it bloody. She also noted her underpants had blood stains too. PW1 told her she was hurt at school. She then took PW1 to the hospital where she was examined. The next day she went and reported the matter at school where investigations were done and it was confirmed that the incident did not happen in school. The following day it's when PW1 informed her that it was the appellant who hurt her and threatened to beat her if she reported her.

15. According to the clinical officer, Gorge Maingi - PW5, the hymen was freshly torn, blood noted on external genitalia, redness on the labia majora and minora.

16. When I juxtapose the evidence of the complainant against the medical evidence, I am satisfied that penetration was proved. I have no reason to doubt the complainant.

17. On identification, the complainant evidence is that of recognition. The appellant was a house help at the victim's house.

18. On inconsistency in the testimony of PW1, I partly agree with the learned counsel for the appellant that there were some inconsistencies between her examination in chief and cross examination. But in my view, they were immaterial. In the case of Joseph Maina Mwangi v R, Criminal Appeal No. 73 of 1992, the Court of Appeal held that in any trial there are bound to be such discrepancies.

19. I will now deal with the issue of sentence. The appellant was sentenced to 10 years' imprisonment as prescribed under section 5 (2) of the *Sexual Offences Act*. The trial court considered the appellant's mitigation and sentenced her to 10 years. I thus find that the appellant was properly sentenced.

20. In conclusion, the appeal is without merit and is dismissed.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 5TH DAY OF OCTOBER 2023.

P. MULWA

JUDGE

In the presence of:

Kinua/Duale – court assistants

Ms. Ashioya – for the Appellant

Mr. Gacharia – for the Respondent

Appellant – *present virtually from Lagata W/P*