Mureti v Republic (Criminal Appeal E205 of 2022)
[2024] KEHC 14820 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E205 OF 2022

LW GITARI, J

NOVEMBER 7, 2024

BETWEEN

MICHAEL MURETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant charged in the Principal Magistrate's Court at Nkubu with the offence of defilement Contrary to Section 8(1) and (3) of the *Sexual Offences Act* Sexual Offence Case No.E003/2022. The particulars wee that on diverse dated between 26th of December 2021 and 7th January 2022 in Imenti South Sub-County within Meru County intentionally caused penis to penetrate the vigina of LG a child aged 14 years.

2. In the alternative he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

3. On the 2nd count the appellant was charged with child prostitution contrary to Section 15(a) of the *Sexual Offences Act*. The particulars are hat on diverse dates between 20th December 2021 and 9th day of January 2022 in Imenti South Sub-County, knowingly permitted LG a child aged 14 years to remain in his house to be sexually abused by Michael Mureti,

4. The appellant denied the charges and after a full trial the learned magistrate found that the charge of defilement was proved against the appellant beyond any reasonable doubts. He was convicted and sentenced to serve twenty years imprisonment.

5. The appellant was acquitted on the second count.

6. The appellant was dissatisfied with both the conviction and sentence and filed this appeal based on the following grounds:

a. That the learned trial magistrate erred in law and fact by failing to note that the voir dire examination was not properly conducted since there was no finding that the complainant PW1 understood the important of giving evidence on oath.

b. That the learned trial magistrate erred in law and fact by failing to find that the complainant gave contradictory evidence.

c. That the learned trial magistrate erred in law and fact by failing to note that the clinical officer report does not prove the allegation of defilement.

d. That the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8(4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (4) of the *Constitution* of Kenya. Hence the sentence imposed on the Appellant is unlawful.

e. That the learned trial magistrate erred in law by failing to note that the key witnesses were not summoned to clear doubts.

f. That the learned trial magistrate erred in law and fact by failing to find that the whole case against the appellant was based on suspicion which the same cannot form a basis for a conviction

g. That the learned trial magistrate erred in law and fact by convicting the appellant to serve 20 years' imprisonment without supportive evidence.

h. That the learned trial magistrate erred in law and fact by dismissing the appellant defence without giving cogent reasons of dismissing it.

7. He prays that the appeal be allowed, conviction be set aside and he be set at liberty.

8. The respondent opposed the appeal and prayed that it be dismissed.

The Prosecution's case:

9. The complainant L.G (PW1) was a girl aged fourteen years. On 26/12/2021 she met the appellant at Nkubu and she went with him to his house. While in the house she sex with the appellant. She remained thee upto 9/1/2022 when she went home. She was escorted to Kanyakine Sub-County Hospital where she was examined and treated. A P3 form was filled. The complainant told the court that it is the appellant who took her to the house and told he that the house belonged to 2nd accused.

10. The assistant chief of the area Lawrence Kinyua (PW2) received a report from the area manager of Kirogine Sub-Location who informed him that the complainant had been defiled. The appellant was one f the suspects. He summoned them to his office and the complainant said the appellant is the one who had defiled her between 26/12/2021 to 9/1/2022. He referred the case to Nkubu Police Station. The complainant was later treated at the hospital. The clinical officer, Timothy Mberia (PW3) testified that the complainant was examined at Kanyakine Sub-County Hospital by her colleague S. Kaimathiri whose hardwriting and signature he was familiar with. The appellant gave a history of defilement by someone known to her. P3 form was filled twenty 20 days after the incident. On examination the hymen was broken. She had blood stains on the uterus. She had her menses. He testified the broken hymen was indicative of active Sexual intercourse – activity. He assessed the degree of injury as grievous and the age of the victim was fourteen years old. He produced the P3 form, treatment cared and Post

Rape Care Form as exhibits1-3 respectively. The area manager John Mugambi (PW4) testified that on 9/1/2022 he was tipped by the complainant's father that his child who had gone missing was at the house of the appellant. He went to the house of Mwirigi accompanied by the complainant's father and another area manager. He met Mwirigi in the house but the appellant was not there. The complainant implicated the appellant as the one who was staying with her. The Chief forwarded the matter to the Police PW5 No. 75xxx Corporal Aune attached to Nkubu Police station was the investigating office. She testified that the one Gideon Muretwa went to the Police station on 10/1/2022 together with the complainant and reported that she had gone missing since 20/12/2021. She interrogated the complainant and she told he that she met the appellant at Nkubu town and they went to the house of the 2nd accused where they engaged in sexual intercourse and she remained there upto 9/1/2022 when she went back home and asked her aunt to take her to hospital for pregnancy test. PW5 escorted her to hospital. Shen then summoned the two accused and she arrested and charged them. PW3 obtained a clinic book at Kirogine Dispensary and the immunization card of the complainant showing that she was born on 7/5/2007, exhibit 4.

Defence Case:

11. The appellant gave a sworn defence and told the court that he did not commit the offence.

12. The appeal was disposed off by way of written submissions.

13. The appellant relies on the cases of;Maina –v- Republic (1970) EACA 370.Henry & Manning –v- Republic Criminal Appeal . Rep. 150 –v- Republic (2012) eKLR Monyoki Kimatu-v- Republic (2014) eKLR.

14. The respondent submits that the prosecution proved the ingredients of the offence of defilement beyond any reasonable doubt. She relies on the case of John Mutua Munyoki –v- Republic (2017)eKLR.

15. He prays that the appeal be dismissed.

Analysis and Determination:

16. I have considered all the evidence adduced before the trial court, the grounds of Appeal and the submissions. The issue for determination is whether the charge against the appellant was proved beyond any reasonable doubts. The appellant has submitted that voire dire was not conducted. Indeed no voire dire examination was conducted before the complainant testified. The prosecution proved that the complainant was born on 7/5/2007. The offence was committed as from 26/12/2021 to 9/1/2022. This means that the complainant celebrated her 14th birthday on 7/5/2021. She gave evidence in court on 25/5/2022. At the time of giving evidence she was fifteen years old. 'Voire dire' examination is conducted by the court when it has to receive the evidence of a child so that it can determine the competency of the witness of tender of age as to whether he or she is possessed of sufficient intelligence to testify in the matter before court and understands the duty of speaking the truth.

17. Section 19(1) of the Oaths and Statutory Declaration Act provides as follows:

> Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands

the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

18. The Court of Appeal has dealt with the issue of voire dire with respect to the evidence of minor children.

19. In John Muiruri Vs. Republic (1983) KLR 445, the court held that where a child is not possessed of sufficient intelligence and understands the duty of speaking the truth, the evidence may be received. However, if the child is not possessed of such intelligence and does not understand the meaning of the oath, a person shall not be liable to be convicted unless the evidence is collaborated by material evidence in support thereof implicating him. The voire dire examination is therefore important as it determines the weight to be placed on the evidence of a child. In Maripett LoonKomok Vs. Republic (2016)eKLR, the Court of Appeal reiterated that children under the age of fourteen years ought to be taken through a voire dire examination. The court stated:

> The statutory definition of a child of tender years"

20. In Section 2 of the *Children Act* where it is deprived to mean a child under the age of ten years. The court reiterated the holding in Patrick Kathurim Vs. Republic Criminal Appeal No. 137/2014 and in Samuel Warui Karimi Vs. Republic Criminal Appeal No. 16 of 2014 where it categorically stated the definition in the *Children Act* is not of general application and that it was only intended for the protection of children from Criminal responsibility and not a test of competency to testify."

21. It follows therefore that the time honoured 14 years remains the correct threshold for voire dire examination". In Kibagendi and Korir Vs. Republic 1959 E.A 82 the Court of Appeal for Eastern Africa held that "the phrase a child of tender years" meant a child under the age of 14 years." Thus the law is well settled that voire dire examination should be conducted where the child witness is aged fourteen years and below.

22. In this case, the complainant (PW-1) was over fourteen years when the offence was committed and the time she testified in court. The court was therefore not duty bound to conduct voire dire on the complainant. The ground of appeal must fail.

23. The appellant submits that the evidence touching on penetration was insufficient to provide a conviction. It is now well settled that penetration is proved by the testimony of the complainant, that is, the victim of the offence corroborated by medical evidence. In this case the complainant testified that she was with the appellant from 26/12/2021 to 9/10/2022 and she engaged in sexual intercourse with the appellant who she said was her boyfriend.

24. Section 124 of the *Evidence Act* provides as follows:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim

and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

25. Thus the law allows the court to rely on the testimony of a victim of a sexual offence if the Court is satisfied that she is telling the truth. The learned trial magistrate in his judgment held that he observed the demeanor of the witness and was satisfied that she told the truth and that he believed in her testimony. The learned magistrate had an opportunity to see the witness and to observe her demeanor. I have no reason to doubt him as he had the opportunity to see the witness, unlike this court. The testimony of the complainant was well corroborated by medical evidence.

26. PW - 3, the Clinical Officer testified that the complainant was on allegation of defilement by someone known to her and it was revealed that her hymen was missing. He further testified that the broken hymen was indicative of active sexual activity. I find that the evidence on penetration was sufficient. The submission by the appellant is not relevant as the court did not merely rely on the broken hymen, there was oral evidence adduced by the complainant to proof penetration. The testimony of PW -3- the Clinical Officer proved the element of penetration as she clearly stated on the P3 form that "hymen being absent is suggestive of being involved in penetrative sexual intercourse." The treatment notes state that the complainant gave a history of having sex with her boyfriend. Penetration is defined as "partial or complete insertion of a person's genital organ into the genital organ of another." The testimony of the complainant clearly demonstrates that she engaged in penetrative sex with the appellant.

27. Section 8(1) and 3 of the *Sexual Offences Act* provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(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."

28. Penetration is a key ingredient of the charge and it was proved beyond any reasonable.

29. On sentence, the appellant submits that the learned magistrate erred in failing to exercise discretion in sentencing. He further submits that sentence under Section 8(4) is unconstitutional and unfair. The debate on the constitutionality of the sentences under Section -8- of the *Sexual Offences Act* has been addressed by the Supreme Court of Kenya in Pet. No. E018/2023 Republic Vs. Joshua Gichuki Mwangi where the Supreme Court affirmed the mandatory sentence provided under the *Sexual Offences Act*. The Supreme Court further held that mandatory minimum sentences do not deprive judicial officers of the power to exercise judicial discretion and further that the sentences under Section 8 of the *Sexual Offences Act* are lawful as long as the Act remains valid.

30. I find that the decision binds this court. The contention by the appellant is moot. The ground lacs merits.

31. The appellant submits that key witnesses were not called. Section 143 of the *Evidence Act* provides as follows:

No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

32. The respondent has the sole discretion to determine who to call as a witness and who not to call.

33. I find that the prosecution called sufficient witnesses in support of their case and did not have to call a multiplicity of witness to adduce the same evidence. This is a sexual offence and is proved by testimony of the complainant and corroborated by medical evidence.

34. I find that failure to call the complainant's father and Gideon Murerwa did not prejudice the appellant nor did it weaken the prosecution's case.

35. On the ground that his defence was not considered, I have perused his defence and find that it was a mere denial and was devoid of any merit and was not convincing. I find that the learned trial magistrate gave sufficient reasons for rejecting the defence.

36. On the Sentence, it is trite law that sentence is essentially an exercise of the discretion by the trial court and an appellate court will not normally interfere with the sentence unless it is shown that in passing the sentence. The court took into account relevant factor that wrong principle was applied or that short of it. The sentence is so excessive and therefore an error in prinable and must be interfered with. See Shadrack Kipkoech Kofo Vs. Republic. Eldoret Criminal Appeal No. 253/2003.

37. In this case the leaned magistrate exercised his discretion fairly and judicially as he considered the nature of offence, the provision of the law and that the appellant took advantage of the complainant's vulnerability and repeatedly defiled her over a period of time. These were relevant matters which are normally considered in sentencing. The sentence imposed was the bear minimum. The court finds no reason to interfere with the sentence.

Conclusion

38. This appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF NOVEMBER 2024.

L.W. GITARI

JUDGE

7/11/2024

Judgment is read out in open court.

L.W. GITARI

JUDGE

7/11/2024