Michubu v Republic (Criminal Appeal E141 of 2023)
[2024] KEHC 13936 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13936 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E141 OF 2023

CJ KENDAGOR, J

NOVEMBER 4, 2024

BETWEEN

ANTONY MUTWIRI MICHUBU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Meru Chief Magistrate's Court Criminal Case no. E012 of 2022, delivered by Hon. S.K Ngetich, Senior Principal Magistrate, on the 16th November, 2023)

JUDGMENT

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JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars of the offence are that on 11th April, 2022 at an unknown time in Meru County, he unlawfully and intentionally caused his penis, to penetrate the vagina of W.K, a child aged five (5) years.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*, the particulars being that on the aforesaid date, at an unknown time, in Meru County, he intentionally caused a child to be sexually aroused by kissing W.K, a child aged five (5) years.

3. He pleaded not guilty, and the case proceeded to trial. In a judgment delivered on 16th November, 2023 the trial Court determined that the main charge had not been proven. However, the Appellant

was found guilty of the lesser charge of attempted defilement, contrary to Section 9 (1) of the *Sexual Offences Act*. He was subsequently convicted and sentenced to ten (10) years of imprisonment.

4. Dissatisfied with the conviction and sentence, he filed a petition of appeal on 21st November, 2023 listing four (4) grounds of appeal:-

    i. That, the learned trial magistrate erred in law and fact by failing to note that there was no reliable evidence to link the Appellant herein with the alleged offence.

    ii. That, the learned trial magistrate erred in law and fact by failing to note that the medical evidence was not watertight to be relied upon.

    iii. That, the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.

    iv. That, the learned trial magistrate erred in matters of law and fact by failing to consider the Appellant's defence.

5. The appeal proceeded through written submissions. In the submissions, the Appellant submitted that the charge sheet was defective in that the charge was at variance with the particulars of the offence. He argued that the documents relied on by the trial court to convict him were not authentic and that there was a lack of corroboration. The Appellant contended that the trial Court dismissed his strong defence and wrongly accepted the inadequate investigations conducted.

6. In their submissions, the Respondent asked the Court to determine that the prosecution had successfully established the elements of the case for defilement. They argued that the evidence presented was sufficient to support a conviction on the main charge and urged the court to convict the Appellant based on the evidence provided.

7. As a first appellate Court, I must reconsider and evaluate the evidence in the Court below to arrive at an independent conclusion while bearing in mind that I did not hear or see the witness. In Kiilu & Another V Republic, [2005] 1 KLR 174, the Court of Appeal set out the duties of a first appellate Court as follows:-

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. 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; 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."

8. Guided by the above principle, I have carefully considered the grounds of appeal, the evidence presented before the trial Court, and the written submissions filed by the parties. I have also read the judgment of the trial Court. Having done so, I find that the issue for my determination is whether the prosecution established the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt, whether the conviction was safe, and whether the sentence was appropriate or excessive.

9. The complainant was a child of tender years who gave unsworn evidence. The record shows that the trial Court conducted a voire dire examination and recorded it in terms. I am satisfied that the trial Court employed the correct procedure in ascertaining the child's competence to give evidence.

10. The prosecution called four witnesses. The complainant testified that on the day her mother (PW2) took her child to the clinic, the Appellant, whom she referred to as her father, took her to bed, removed her clothes, and instructed her to engage in what she referred to as "tabia mbaya." She stated that the Appellant pushed his 'kanunu' into her vagina and described the reference of 'kanunu' to mean penis.

11. PW2 was the complainant's mother. She indicated that she lived with the Appellant as a couple, although he was not the complainant's biological father. Her evidence was that she left the complainant with the Appellant on 11th April, 2022, while taking another child to the clinic. When PW2 arrived, the complainant was lying on the couch and complained of abdominal pain, so she purchased medication from the pharmacy. She mentioned that the following day, the complainant told her that the Appellant had done something inappropriate to her which she termed 'tabia mbaya'. Acting on this information, she took the complainant for a medical examination on 13th April, 2022, and later filed a report at the police station.

12. PW3 was the investigation officer. She produced the complainant's birth certificate and confirmed that the P3 form was issued upon a formal complaint being recorded at the police station.

13. PW4 was a Clinical Officer who examined the complainant on 22nd April, 2022. Her findings indicated that the hymen was broken, but there were no other notable injuries. She further produced the treatment notes filled upon presentation for medical treatment on 13th April, 2022.

14. The Appellant, in his defence, told the trial Court that on the material date, he had been left with the complainant and two other children whom he was taking care of as the parents were going to work far. He testified that he kept an eye on them while picking tea leaves. He stated that when he returned home at 3:00 p.m., PW2 had come back, and he left her at home with the children. The Appellant explained that he went back to the farm, and when he returned in the evening, both PW2 and the complainant were not at home. They did not return until the next day when PW2 explained that she had visited her sister. According to the Appellant, PW2 left with her sister that same day, and they did not see each other again until 19th April, 2022. He maintained that he only learned of the defilement accusations when he was arrested.

15. The main charge was on the offence of defilement; the ingredients that need to be proved in the offence are;

    i. Age of the victim

    ii. Penetration

    iii. Positive identification of the perpetrator

16. The Appellant was convicted on the offence of attempted defilement, contrary to Section 9 (1) of the *Sexual Offences Act*. The Section provides as follows:-

    " 9. Attempted defilement

    (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

(3) The provisions of section 8(5), (6), (7) and (8) shall apply mutatis mutandis to this section."

17. The elements of attempted defilement are identical to those of defilement, with the exception that penetration does not occur in attempted defilement. The case of John Gatheru Wanyoike v. Republic [2019] eKLR addressed the elements of an attempted defilement charge and made the following determination:

> "It is clear that the elements of the offence of attempted defilement are similar to those of defilement save that there was no penetration. The prosecution must prove that the child was a minor, that there was an act to cause penetration, which was not successful, and that there was positive identification of the accused defiler."

18. The Complainant, PW2 and the Appellant were all living in the same house. Thus, the Appellant was a person well-known to the complainant.

19. The evidence tendered was that the complainant was born on 16th June, 2016. In Hadson Ali Mwachongo v Republic [2016] eKLR, the Court of Appeal held that:

> "The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello v Republic Cr. App. No. 203 of 2009* (Kisumu). This Court stated as follows; In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)."

20. The birth certificate provided verifies the complainant's age. At the time the incident in question occurred, she was 5 years and 10 months old.

21. From the record, the minor used descriptive words to narrate what had transpired. In Muganga Chilejo Saha v Republic [2017], eKLR, the Court of Appeal, analyzed various cases where descriptive terms had been used to narrate sexual abuse.

> "Naturally, children who are victims of sexual abuse are likely to be devastated by the experience, and given their innocence, they may feel shy, embarrassed, and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya" (IE V R, Kapenguria H.C Cr. Case No. 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel *Mwangi Kinyati v R, Nanyuki HC.CR.A. NO. 48 of 2015*), "he used his thing for peeing" (David Otieno Alex v R, Homa Bay H.C Cr Ap. No. 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru H.C Cr. Case No. 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi H.C. Cr. Appeal No. 116 of 2011), as apt description of acts of defilement."

22. The descriptive term 'tabia mbaya' in this case unequivocally indicates the inappropriate conduct reported by the complainant. In her testimony, the minor clarified the reference to genital organs by associating the penis with the male gender and identifying the vagina by pointing to her private parts. The euphemism was tested in cross-examination, and the minor was consistent. The trial Court observed as follows;

> " I keenly listened to the child testify and I was satisfied that she knew what she was talking about and that she had a vivid picture of what had transpired. She narrated that:
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> "My father took me to bed and removed my clothes. He told me to do 'tabia mbaya'. He removed his trousers and underwear. He removed his 'kanunu' and pushed here (pointing at her vagina). 'Kanunu' is found in a boy (penis)."

23. I have re-evaluated the evidence, and I am persuaded that the reference was to genital organs and that there was reported inappropriate. The prosecution has presented compelling evidence showing that the Appellant was left at home with the minor child. Additionally, the Appellant has acknowledged that PW2, a key witness, took another child to the clinic on that date. PW2 took the child to the hospital on April 13th and reported to the police so soon thereafter, explaining that she did so as soon as she understood the minor's claims of having been sexually assaulted. This detail raises questions about the credibility of the defence's claim that there was any underlying animosity between PW2 and the Appellant that could have motivated PW2 to fabricate accusations against the Appellant. The available evidence indicates that the arguments presented by the defence are noticeably weak and not substantiated. The minor was categorical that the Appellant took her to the bedroom and removed his penis, which he pushed (to) her vagina. The question is whether the reported incident constituted an act causing penetration or attempted penetration.

24. The minor stated that it was the first time anything like this had happened to her. Considering her age, I reviewed the medical treatment notes to determine if there was penetration. Although treatment notes are not the final determinant of penetration, it is essential to assess the evidence in its entirety.

25. There were no objections raised nor concerns noted regarding the authenticity of the treatment notes provided by PW4. The witness explained that she was presenting these notes on behalf of the original author and that she recognized both the handwriting and the signature. The treatment notes indicated that the hymen was broken, and there were no cuts or bruises. The medical officer noted redness in the vaginal area, and there was no discharge. I agree with the trial Court that there was a delay in filling out the P3 form and that there was no conclusive proof of penetration. However, based on the overall evidence reviewed, it indicates that there was attempted penetration as the Appellant pushed his penis to her vagina.

26. Section 179 of the Criminal Procedure Code permits the Court to convict an individual for a lesser cognate offence based on the evidence presented if that lesser offence was established:-

> " 179(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitute a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence.
>
> (2) When a person is charged of an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

27. In James Maina Njogu v Republic [2006] KECA 83 (KLR), the Court held as follows regarding Section 179 of the Criminal Procedure Code:

'It is clear from this Section that the power of the Court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.'

28. This was also considered in Robert Mutungi Muumbi v Republic [2015] eKLR and the Court of Appeal held as follows:

> "An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the Court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."

29. In the end, I concur with the learned trial magistrate that the ingredients of the offence of attempted defilement contrary to Section 9 (1) of the *Sexual Offences Act* were proved beyond reasonable doubt. The offence of attempted defilement substituted is cognate and minor to the offence that the Appellant was initially charged with. The appeal against conviction is accordingly dismissed.

30. I will now turn to the sentence. Under Section 9 (2) of the *Sexual Offences Act*, a person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

31. The learned trial magistrate allowed the Appellant to offer his mitigation, and he remained silent. The choice to remain silent is distinct and should not be equated with a situation where an accused person is denied the opportunity to mitigate. He was treated as a first-time offender, and as a result, he was given the minimum sentence. The Supreme Court has now provided guidance on minimum sentences under the *Sexual Offences Act* in Republic V Joshua Gichuki Mwangi Petition No. E018 of 2023. The Supreme Court held that where a sentence is set in statute, the legislature has already determined the course unless declared unconstitutional.

32. The Appellant was afforded a fair trial, the conviction was safe, and the trial Court meted out a lawful sentence. The Appeal lacks merit and is dismissed.

IT IS SO ORDERED.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 4TH DAY OF NOVEMBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Ms. Beryl

Appellant – Antony Mutwiri Michubu

Mr. Masila - ODPP for Respondent