Republic v Muturi (Criminal Appeal E007 of 2023)
[2024] KEHC 14477 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14477 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E007 OF 2023

LM NJUGUNA, J

NOVEMBER 20, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

DENNIS MUKUNDI MUTURI ..... RESPONDENT

(Appeal arising from the decision of Hon. J. Otieno (SRM) in the Chief Magistrate's Court at Embu Sexual Offence No.13 of 2019 delivered on 27th April, 2023)

JUDGMENT

1. The respondent herein was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No.3 of 2006, the particulars being that on a date between 1st November 2018 and 30th December, 2018 within Embu County intentionally and unlawfully did cause his penis to penetrate the vagina of JWN a girl aged 13 years.

2. He is facing an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, the particulars being that on a date between 1st November, 2018 and 30th December, 2018 within Embu County intentionally and unlawfully did cause his penis to touch the thighs of JWN a girl aged 13 years.

3. The respondent pleaded not guilty to the charge and the case proceeded to full hearing with the prosecution calling four witnesses in support of it's case.

4. The complainant testified as PW1 and stated that on a date that she could not recall, she was returning home when the appellant herein greeted her while at Kivwe. He requested her to go with him to his place, and when she refused, he lured her and eventually they went to Nyakaeni where the appellant stays with his parents. They went to his house and to the bedroom where the respondent removed her

clothes and he had sex with her. The appellant warned her never to tell anybody or he would kill her and he escorted her to their gate and she went home.

5. That she was living with her mother and grandmother and that she did not tell them anything but in January, 2019 she failed to receive her monthly periods and on being taken to Nembure Hospital by her grandmother, she was told she was pregnant. That on 09/04/2019, the area chief took her to Itabua Police Station where she made a report. She also went to Embu level (5) hospital where she was examined and a P3 issued to her. She stated that she knew the appellant prior to this incident and that she is the one who took the police to the home of the appellant so that he could be arrested.

6. On cross-examination, she stated that she used to have a boyfriend called "vaite" whom she used to have sex with before this incident, and that by the time she gave her testimony, she had already delivered and the child was six months old having been delivered on the 25/01/2009.

7. PW2 was Patrick Ndwiga Njagi an assistant chief of Gatunduri who stated that, on the 08/04/2019, a man called Nyaga went to his house and reported to him that his granddaughter had been impregnated by a certain gentleman who he identified as the respondent herein. That he had a meeting with both the family of the respondent and the complainant during which, the respondent denied having had sex with the complainant. He took them to Itabua Police Station.

8. PW3 was JN the grandfather of the complainant who stated that on the 05/04/2019, he went home over the weekend and found the complainant had been sent away from school for being pregnant. That when his wife asked her, she said it was the respondent who was responsible as she used to sleep with him. He went and reported the matter to the Chief. That later on, PW1 took them to the house where they used to have sex with the respondent and the Chief referred them to Itabua Police Station where the complainant recorded her statement. She was then escorted to Embu Level (5) Hospital for examination. He stated that at the time of the incident, PW1 was 13 years old.

9. PW4 was Dr. Phylis Muhonja a forensic physician. She stated that she examined PW1 on the 10/04/2019 and found that she was pregnant about 28 weeks and she had a cuddle yellowish per vaginal discharge and between, 4 x 6 o'clock on her vagina she had multiple ragged old hymenal remnants. She further stated that PW1 was assessed by the dental department on the 16/04/2019 and the age was determined to be about 12- 13 years.

10. On cross -examination, she stated that PW1 did not report on resistance to the sexual assault and she could not tell if there was a paternal DNA that was done. That PW1 reported the incident seven month's after the incident happened and that she had participated in sexual intercourse a couple of times. That she could not state the exact day the sexual assault was done on her.

11. PW5 was corporal Georgina Syokau who booked PW1's report in the O.B at Itabua Police Station, which report was made on 07/04/2019 and the victim was then arrested. That she referred PW1 to Embu level 5 hospital where she was issued with a P3 form and she later charged the appellant. On cross-examination, she stated that she did not know whether a DNA test was done.

12. At the close of the prosecution's case, the trial magistrate in her ruling delivered on the 27th day of April, 2023 acquitted the respondent after she found that the prosecution had failed to establish a prima facie case against him.

13. Being dissatisfied with the said ruling, the prosecution has appealed to this Court vide the petition of appeal dated the 11th May, 2023 in which it has raised four (4) grounds of appeal as follows;

1. The learned magistrate erred in law and infact by finding that the prosecution needed to link the complainant's pregnancy with the alleged Sexual Act that she had with the respondent in December, 2018 yet the same is not necessary to prove the offence of defilement.

2. The trial magistrate erred in law and in fact by finding that medical evidence being a DNA test was necessary to prove that the respondent defiled the complainant yet it is not a requirement.

3. The trial magistrate erred in law and in fact by finding that the identity of the Respondent as the assailant of the complainant was a mere narration yet the complainant had properly identified the respondent.

4. The trial magistrate erred in law and in fact by finding that the prosecution failed to tender evidence to connect a penile penetration by the respondent to the complainant yet the complainant confirmed having been defiled by the respondent.

The appellant has prayed that the appeal be allowed and a re-trial be ordered.

14. From the foregoing, the issue for determination is whether the appeal has merit and if so, whether a re-trial should be ordered.

15. The appeal was disposed of by way of written submissions.

16. The respondent herein was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act*. At the close of prosecution's case, the learned magistrate acquitted him under section 210 of the Criminal Procedure Code having found that the prosecution did not establish a prima facie case against him.

17. At the point of determining whether an accused person has a case to answer, the trial court must look at the prosecution's case to ascertain whether a prima facie case has been established. The Court in the case of R. Vs Abdi Ibrahim Owi [2013] eKLR, defined a prima facie case as follows;

> " 'Prima facie' is a latin word defined by Black's Law Dictionary 8th Edition as, "sufficient to establish a fact or raise presumption unless disapproved or rebutted". 'Prima facie' is defined by the same dictionary as "the establishment of a legally required rebuttable presumption."

18. In other words, a prima facie case is a rebuttable presumption that the accused person is guilty of the offence. This is the position held in section 211 of the Criminal Procedure code. Further, in the case of Ramanlal Trambaklal Bhatt Vs. R (1957) E.A 332 at 335, the court stated as follows:

> " Remembering that the legal onus is always on the Prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution's case, the case is merely one in which on full consideration might possible be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather, hopes the defence will fill the gaps in the prosecution case. In this case, we agree that the question whether there is a case to answer depends only on whether there is some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence. A mere Scintilla of evidence can never be enough nor can any amount of worthless discredited evidence. It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable man, properly directing his mind to the law and the evidence could convict if no explanation is offered by the defence"

19. From re-examination of the evidence that was placed before the trial Court, this court standing in the shoes of a reasonable man believes that there is a basis for convicting whether or not the respondent is placed on his defence. In the case of Ramanlal (supra) the Court was faced with facts similar to this one in a corruption case. The Court found it perilous to uphold an acquittal at the point of determining whether the prosecution has established a prima facie case whether the weight of the evidence speaks of a different scenario.

20. In the case of Ronald Nyaga Kiura V. R (2018) K.EHC 5030 (KLR) the Court overturned a finding of "no case to answer "after considering the trial Courts reasons for its finding. It's held thus;

> "It is important to note that at the close of prosecution's case, what is required in law at this stage is for the trial Court to satisfy itself that a prima facie case has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of section 211 of the criminal procedure code. A prima facie case is established where the evidence tendered by the prosecution is sufficient on it's own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited court of appeal case of Ramanlal Vs. R. At that stage of the proceedings, the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence, however, must be such that it is sufficient for the trial Court to place the accused to his defence"

21. I have considered the evidence that was adduced before the trial court. In my view, the weight of the prosecution's evidence demands that the respondent be placed on his defence before the trial court after which, it can consider the evidence wholly in its final judgment.

22. Therefore, the appeal herein has merits and the same is hereby allowed with orders thus:

    a. The order of the trial Court acquitting the respondent is hereby set aside.

    b. The respondent is hereby found to have a case to answer; and

    c. Embu Chief Magistrate's Sexual Offence number 13 of 2019 be placed before the Chief Magistrate for re-allocation to another magistrate for defence hearing and final determination.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

..... for the Respondent