Muasya v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 15681 (KLR) (9 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15681 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E017 OF 2023

FR OLEL, J

DECEMBER 9, 2024

BETWEEN

ELVIN MUTUA MUASYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and sentence of the Hon R. W. Gitau, Senior Resident Magistrate in Mavoko Sexual offense case No 15 of 2020 delivered on 9.05.2023)

JUDGMENT

A. Introduction

1. The Appellant, Elvin Mutua Muasya was charged with the offence of defilement contrary to section 8 (1) as read together with section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. The particulars of the offense were that on the 2nd day of April 2020 at around 0800hrs within Athi – River Sub-county, Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of DM, a child aged 16 years.

2. In the alternative, the Appellant was charged with the offense of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offense were that on the 2nd day of April 2020 at around 0800 hrs within Athi – River Sub-county, Machakos County, he intentionally and unlawfully touched the vagina of DM, a child aged 16 years with his penis.

B. Facts at Trial

3. PW1 MK testified that on 02.04.2020 she was at work in Mombasa when she received a call from her sister-in-law at about 10.00am. She told her to tell her daughter DM to leave the house where she was and return home. She called her daughter several times but did not answer her calls. She and her husband travelled back home, found their daughter in the house, and confronted her to reveal where

she was earlier in the day. Her father punished her, and she eventually admitted to having been at the Appellant's house and had sex with him.

4. They took PW2 to Kyumbi Dispensary, where she was placed on PEP treatment but not examined. They reported the matter to Kyumbi Police Station and were referred to Machakos Level 5 Hospital, where PW2 was examined and treated. Later, their niece S identified the appellant's house, and the police apprehended him. PW2 was born on 24.02.2004, and PW1 identified PW2's birth certificate, the PRC Form, and P3 form. Upon cross-examination, PW1 affirmed that PW2 told them that she had sex with the appellant.

5. PW2 DM underwent voire dire examination and the court was persuaded that she possessed sufficient intelligence and understood the solemnity of taking oath. She was born on 24.02.2004 and recalled that on 02.04.2020 she had a date, with the Appellant and went to his House, which was about 10-15 minutes' walk from their home. The Appellant's house was a single room, partitioned by a curtain. He welcomed her and told her to sit on the bed so that his friends who were coming to take tea could not see her. The friends came, took tea, played a game of cards before they left after about 20 minutes.

6. The Appellant thereafter joined her on the bed, removed her trousers and panty and they then had sex. He used a condom and after they completed the act, he gave her a piece of cloth to wipe herself and dressed up. She confirmed that the Appellant knew she was a student and later she returned to their house. Her parents got wind of her escapade and on the following day punished her. She confessed what had transpired and called the Appellant to bring their gate keys, which she had forgotten at his house. The matter was reported to the police and she was also taken to the hospital for examination. The Appellant was later arrested and she identified him in court as the person she had sexual intercourse with and broke her virginity.

7. Upon cross-examination PW2 confirmed that, when she went to the appellant's house, he was alone, but his friends later came and left after about 10 minutes. While at his house, her father called her inquiring about her whereabouts, but she lied to him that she had gone to the shops. PW1 also affirmed that she had told the Appellant that she was a student, and denied his suggestion that she had told him that she was a student at Kenyatta University. She also confirmed that she lost her virginity when she had intercourse with the Appellant.

8. PW3 LMM testified that on 02.04.2020 he was in Mombasa and received a call from his daughter S , who informed him that they had woken up and found their sister PW1 was not at home. Further, on the previous night, they had seen her in the company of Serah, her cousin, and the Appellant. He immediately called PW2, and she informed him that she had gone to the shops at Capital G but when he demanded to speak to the shopkeeper, she disconnected the call. When he arrived back home, they interrogated PW2, who confessed to her indiscretions and confirmed that she had been at the Appellant's house and they had engaged in intercourse.

9. They reported the matter to the police and they were referred to Machakos Level 5 Hospital. PW2 was using his spare phone, which he took and scrolled on the sent messages. He found out that PW2 had left the gate keys at the Appellant's house and had texted him to bring the said keys to her. It also turned out that the Appellant was having an affair with his niece S, and PW2 did not want her to know what had transpired between her and the Appellant. PW2 was 16 years old, and could not explain how the Appellant convinced her into having intercourse with her. He also confirmed that he did not know the Appellant before this incident and it is PW2 who identified him.

10. Upon cross-examination, PW3 stated that he knew the accused when he was identified by PW2 and after his arrest, both of them were taken to hospital for examination, a fact, which could be confirmed by the medical examination documents placed before the court. Further, his two children had also

identified the Appellant as he had gone to their home and introduced himself as Sarah's husband while seeking shelter because of the rains. PW3 denied punishing PW2 to make her confess to what transpired and reiterated that the Appellant was not known to him, before this case.

11. PW4, No 64xxx Corporal Lawrence Mwendwa testified that on 06.04.20 he was the duty officer at Kyumbi police station when he was called by the OCS and assigned to investigate this complaint. PW1 parents briefed him on what had transpired and directed him to the Appellants residence, where they arrested him and took him into custody. The following day they took the appellant and the complainant to Machakos Level 5 Hospital for medical examination after which they had him arraigned before court. The complainant was 16 years of old and he produced into evidence her birth certificate as Exhibit 1. Upon Cross-examination, he confirmed that he had arrested the appellant based on the complaint made and had explained to him the reasons for his arrest.

12. PW5, Doctor John Mutuya, testified that he examined PW1 at Machakos level 5 hospital, and she had given a history of having been defiled on 02.04.2020 by a person known to her. She had no physical injuries and had normal genitalia but her hymen had been broken and had an old scar. She also had normal discharge and the laboratory results for HIV, STI, and pregnancy were all negative. He produced the P3 form, and laboratory examination reports as exhibits.

13. PW6 Fredrick Alemba Ombogo testified that he was a clinical officer based at Kola Health Centre, but previously worked at Machakos Level 5 hospital, where on 07.04.2020 he examined PW1. She indicated that she had been lured by a person known to her to his house and he later forced her to have sex with him. On genital examination, the hymen was not intact, there was whitish vaginal discharge. Anus was normal and no laceration was noted. HIV and Hepatitis laboratory examination returned negative results. He produced the PRC form as an exhibit.

14. Upon cross-examination he stated that he examined PW2, about 5 days after the incident and she had presented herself to the hospital late, hence no abnormality was noted.

C. Defence Case

15. The trial magistrate placed the appellant on his defence and explained to him the import of section 211(1) of the CPC. The appellant opted to give sworn evidence and stated that he was arrested and not informed of the reason for his arrest. The following day was taken to Machakos Level 5 hospital where medical examination/tests were done and PW4 told him that he was being accused of defilement. One detective by the name "Githinji" also interrogated him, but he was categorical that he did not commit the said offense. He was also informed that the complainant had called for a meeting with him, but he refused to attend as he did not want any discussions. He maintained that he never committed the offence.

16. The Trial Court considered the evidence adduced and found the appellant guilty of the offence of defilement of a minor contrary to section 8(1) as read with section 8(2) of the *sexual offences Act* No 3 of 2006. The court considered the appellant's mitigation and proceeded to sentence him to serve ten (10) years imprisonment as provided for in law.

D. The Appeal

17. Being wholly dissatisfied by the said judgment and sentence, the Appellant filed his petition of Appeal and raised the following grounds of Appeal;

    a. The learned Trial Magistrate erred in both law and fact by convicting the appellant for the offence of defilement while the prosecution had not proved the case against the appellant beyond reasonable doubt as required by law.

    b. The learned Trial Magistrate erred in both law and fact by relying on the uncorroborated evidence of a single witness, the complainant to convict the appellant.

    c. The learned Trial Magistrate erred in law and in fact in failing to take into account the medical evidence tendered by PW5 Dr. John Mutuya to the effect that there was no physical injuries on the complainant's genitalia and the complainant's hymen was broken but was old which meant that the said hymen was already broken at the time of the alleged offence was allegedly committed

    d. That the learned trial magistrate erred in law and in fact by failing to find that, there was no medical evidence produced by the prosecution to link the appellant to the offence of defilement despite the appellant having been taken for medical examination by the police.

    e. The trial magistrate erred in law and in fact in inferring that the element of penetration had been established by the fact that the hymen had been broken while the medical evidence showed that thought the hymen was broken it was old which showed the complainant used to engage in sex and the said hymen was broken earlier before the date of the alleged offence.

    f. The trial Magistrate erred in law and in fact by inferring that the complainant and the appellant were together on the alleged date of the offence and that by being together they had sex while there was no evidence to prove any sexual activity between the two.

    g. The learned trial magistrate erred in law and in fact by convicting the appellant on the basis of uncorroborated evidence of the complainant alone whom she alleged was credible but failed to record in his decision as required in law, the reasons for relying on the said uncorroborated evidence of the complainant.

    h. The learned trial magistrate erred in law by passing an excessive sentence against the appellant in the circumstances.

18. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanour. In this regard, the Court of Appeal in Kiilu & Another V Republic, [2005] 1 KLR 174, stated thus:

> " 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."

19. In the case of Republic Vs Edward Kirui (2014) eKLR, the Court of Appeal quoted the Supreme Court of India case of Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688 where the case of Bhagwan Singh Vs State of M. P. (2002)4 SCC 85 was cited as follows:-

> " The paramount consideration of the court is to ensure that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view of ignoring the admissible evidence, a duty is cast upon the High Court to re-appreciate the evidence on appeal for the purpose of ascertaining whether all or any of the accused has committed any offence or not."

20. I have considered the entire record of Appeal, the trial bundle record and the submissions on record filed by the parties and find that the issues for determination are;

    a. Whether the offence of defilement was proved.

    b. Whether the sentence should be quashed and/or set aside

i. Burden of Proof

21. In criminal cases, the burden of proof lies with the prosecution and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, and consequently to have the case established and judgment given in their favour. See Miller vs. Ministry of Pensions (1947) 2 All ER, 372 , Republic Vs Edward Kirui (2014) eKLR, and Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688

22. The Appellant was found guilty of defilement contrary to section 8 (1) as read together with section 8(4) of the *Sexual Offences Act*, No 3 of 2006. The said sections provide that;

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) "A person who commits an offence of defilement with a child aged between sixteen and eighteen years e is liable upon conviction to be sentenced to imprisonment for a term of not less than fifteen years."

23. Three elements to be proven in such a case are;

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the assailant.

(a) Age

24. On this question of age, the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

25. In the case of Francis omuroni versus Uganda, court of Appeal Criminal Appeal No 2 of 2000, it was held thus;

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

26. The PW1, the victim's mother and the victim testified and stated that she was 16 years old. PW4, the investigating officer produced the birth certificate as an exhibit, which indicated that the victim was born on 24.02.2004 which confirmed the victim's age. No contrary evidence was adduced and as such the court finds that age of the Minor was proven beyond reasonable doubt.

(b) Penetration.

27. On the issue of proof of penetration, Section 2(1) of the *sexual offences Act* defines penetration as follows;

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

28. PW1 narrated how the appellant invited her to his house and after his friends, who were visiting had left, joined her in bed, removed her trousers, panty and they proceeded to have protected sex. It was her first time to have sex and after they were done, the Appellant gave her a piece of cloth to wipe herself before she dressed up and went back home as there was consistent phone calls from her parents inquiring where she was.

29. PW1 confirmed that she was called by her sister-in-law, and asked to inform PW2 to leave where she was, she called PW2 incessantly but she refused to answer her phone calls. PW3 was also looped in by his wife, PW1 and when he called PW2, she picked his call and stated that she was at the local shopping center but, when he challenged her to give the shopkeeper the phone to confirm her presence there, she disconnected the phone call. Later, when PW1's parents arrived home, she was punished and confessed to having been with the Appellant and to also have engaged in sex with him. They also scrolled through her phone and retrieved a message sent by PW1 to the Appellant asking him to return their gate keys, which she had forgotten in his house.

30. PW 5 and PW6, confirmed examining PW1 and produced the PRC form, P3 form and laboratory examination results. PW1 did not have any physical injuries and on genital examination, they confirmed that the hymen had been broken and she had an old scar. Placed on his defence, the Appellant denied

committing the offence, he was charged with, without expounding on other aspects of the evidence adduced.

31. The medical evidence adduced was weak and did not establish that the minor was defiled, but be that as it may, it is now well settled that penetration can also be proved by direct or circumstantial evidence. The Supreme court of Uganda put it succinctly in Bassit*a v Uganda S.C. Criminal Appeal No. 35 of 1995* which was quoted with approval in Sammy Charo Kirao v Republic [2020] KLR where the court stated;

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to proved sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

32. This is so because, unlike other crimes where invariably eyewitness evidence is available, it is seldom that eyewitness accounts would be available in a sexual offense as the act will always be perpetrated in secrecy away from the public eye. That explains why the evidence to be relied upon more often than not will be the evidence of the victim corroborated by medical evidence (where available) and circumstantial evidence.

33. The evidence of PW1 was cogent and she did confirm her sexual encounter with the Appellant. PW1 also confirmed she was informed of her daughter's whereabouts and PW3's evidence corroborated PW1's evidence that they incessantly called her and when she eventually answered PW3's call, gave wrong details as to her whereabouts. It was further discovered that PW1 had left the keys to their gate keys at the Appellant's house and sent him a text message to have him drop her the said keys. Though the complainant's evidence was that of a single witness, it was reliable and corroborated by the confession made to her parents.

34. The above evidence adduced confirmed the fact that the Appellant and the complaint were together in his house, and this is a fact the Appellant did not expressly deny. The trial Magistrate did also assess the complainant's evidence at length and correctly found that she had given truthful evidence, which was admissible based on provisions of Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya.

35. The Appellant submitted that the evidence relied upon was not corroborated, was untrustworthy, contradictory, and had discrepancies, especially on evidence lead regarding the time the incident is alleged to have occurred. He urged the court to find that such evidence was unsafe to rely on to convict him.

36. The law as regards the issues of contradiction and discrepancies is very clear. It is trite law that inconsistencies unless satisfactorily explained would usually, but not necessarily result in the evidence of a witness being rejected. (See Uganda Vrs Rutaro (1976) HCB ; Uganda Vs George w. Yiga (1979) HCB 217). In trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case, the high court of Kenya in Philip Nzaka watu V Republic (2016) CR APP 29 OF 2015, had this to say:

> "The first question in this appeal is whether the prosecution case was riddled with contradiction and in consistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gain said that found a conviction in a criminal case, where

the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent version of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

37. In *Joseph Maina Mwangi vs. Republic CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> " In any trial, there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

38. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconsistencies in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence tendered is believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies' in question.

39. In this case, I concur with the trial Magistrate that the evidence adduced did prove the act of penetration. On the issue raised regarding inconsistent evidence, I have myself subjected the evidence adduced to fresh scrutiny and though it is true that there were minor inconsistencies in the evidence of the said complainant and her parents, which is common, I am unable to find that the same were material enough to warrant interference with the decision reached.

(C) Identification.

40. On identification, PW2 confirmed that she knew the Appellant through her cousin S and the Appellant also resided within the vicinity of their home. This was therefore a case of recognition as the victim knew the appellant well and was comfortable enough to go visit him. Considering the totality of the evidence adduced, I do find that the prosecution did ably discharge the burden of proof, and find the Appellants conviction to be safe.

ii. Sentence

41. As regards the sentence, This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

42. The principles guiding interference with sentencing by the appellate court were also properly set out in S Vrs Malgas (1) SACR 469(SCA) at para 12, where it was held that;

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the trial court.....however, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

43. Section 8(4) of the *Sexual Offences Act*, No. 3 of 2006, provides for a sentence of not less than fifteen (15) years, if one is found guilty of defiling a child aged between sixteen to eighteen years. The trial court did consider the facts of this case, the Appellant's mitigation, and exercised her judicial discretion to sentence the Appellant to ten (10) years imprisonment.

44. The Appellant has not pointed out any error of law or material factor which the trial court overlooked nor has it been proved that the sentence meted out is manifestly excessive in the circumstances of the case. Under the circumstances cannot interfere with the sentence reached by the trial court.

E. Disposition

45. Having considered the entire appeal I do find and hold that;

    a. The Appeal against conviction and sentence lacks merit and the same is dismissed.

    b. Right of Appeal 14 days.

    c. It is so 0rdered.

JUDGMENT READ, SIGNED AND DELIVERED IN VIRTUALLY COURT AT MACHAKOS THIS 9TH DAY OF DECEMBER 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 9th day of December 2024.

In the presence of:-

Appellant Present from Kitengela prison

Mr. Mang'are/Ms. Otulo for O.D.P.P

Susan/Sam - Court Assistant