Muriithi v Republic (Criminal Appeal 132 of 2019)
[2025] KECA 430 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 430 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 132 OF 2019

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

FEBRUARY 21, 2025

BETWEEN

SIMON MURIITHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Chuka (R.K. Limo, J.) dated 4th March 2019 in HCCRA No. 18 of 2018)

JUDGMENT

1. The appellant, Simon Muriithi, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* at the Principal Magistrate's Court at Marimanti. The particulars of the offence were that on 8th January 2018 at Tharaka South District of Tharaka Nithi County, he intentionally caused his penis to penetrate the vagina of L.K. a child aged 11 years. On the same facts, he faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charges and the case proceeded to full hearing. The prosecution called five (5) witnesses in support of its case. On his part the appellant testified on oath and called no witnesses. In a judgment dated and delivered on 11th April 2018, the trial court found the case against the appellant proved to the required standard convicted and sentenced him to life imprisonment.

3. Aggrieved by the conviction and sentence, the appellant filed his appeal before the High Court at Chuka. In a judgment dated 4th March 2019, the High Court (R.K. Limo, J.) dismissed the appeal in its entirety and upheld both conviction and sentence.

4. The appellant is now before us on a second appeal in a last bid to secure his freedom. While not losing sight to the fact that on second appeal we are enjoined to deal with matters of law only, we find it

necessary to rehash, albeit briefly, the evidence adduced before the trial court in order to place the appeal in proper context.

5. The minor, hereafter L.K., testified as PW2. She testified that she was a class four pupil at [particulars withheld]School, but did not know how old she was. She recalled that on 8th January, 2018 she was herding goats at their farm and was seated under a tree and had not seen the appellant. She stated that the appellant came and grabbed her hand and blocked her mouth, grabbed her leg, pulled her down and she fell down facing up. He then undressed her and proceeded to defile her.

6. L.K. stated that she was alone and could not scream as the appellant was blocking her mouth. She stated that the appellant left after M found them and she and M went home where they reported the matter to her mother who after observing her, took her to the hospital and later reported the matter to the police station. She testified that the appellant was a watchman at [particulars withheld]School which was her school and that the incident had happened at around 6.00pm.

7. Her mother, LM (PW3) testified that L.K. was eleven (11) years old, she produced her birth certificate which showed the date of birth as 24th June 2005. She stated that L.K. was her last born and she knew the appellant as a neighbour and a distant relative. She stated that on 8th January 2018 she came home in the evening and found the goats tethered in their shed and saw a young man called I M who came and told her that he had found the appellant lying on L.K. and when the appellant saw him, he pretended that they were grazing and he squatted.

8. I M, (PW4), the young man referred to by PW2 repeated PW2's evidence. He was 17 years old and stated that he knew both L.K. and the appellant well. He testified that on 8th January 2018 he was coming from a nearby canteen at [particulars withheld] Market and while on his way he saw the appellant lying facing down at a nearby thicket. That he went to the scene and found the appellant lying on L.K., and on spotting him they rose up. He said that L.K. was holding a red pant. That he took her home and found no one was at home. That later he returned and reported to her mother what he seen.

9. L.K. was taken to the hospital where she was examined by a medical officer who confirmed that L.K.'s vaginal walls were reddish and her swollen hymen was missing and that there was a whitish fluid on her pubic hair and vagina which could have been spermatozoa. The appellant was arrested later and charged with the offence stated earlier.

10. When placed on his defence the appellant gave sworn evidence.

    He testified that at the material time he was the watchman at [particulars withheld] Primary School where L.K. was a pupil. He denied defiling L.K. saying he spent the day at home and reported for work at 5.00pm. He stated that the whole matter was actuated by a grudge between him and L.K.'s mother over a piece of land.

11. Before us, the appellant has raised six grounds of appeal, to wit, that the trial Judge erred in law by failing to note that the appellant was not examined by a doctor; by not observing that the evidence adduced before the court was conflicting and inconsistent; by failing to note that the trial was not fair as some of the witnesses were not availed before the court; by failing to note that the prosecution case was not proved beyond reasonable doubt and by rejecting the appellant's defence without giving cogent reasons.

12. The appeal before us was heard by way of written submissions with brief oral highlights. The appellant appeared in person for the plenary hearing while Ms. Nandwa, learned prosecution counsel, represented the respondent.

13. The appellant submitted that the crucial elements of the offence were not proved. As regards penetration the appellant submitted that the medical evidence was inconclusive as the medical officer did not state the date the complainant attended their facility and that in the evidence on the genitalia examination, she had normal genitalia but her vaginal wall was reddish and her swollen hymen missing. He also submitted that penetration was not proved.

14. As to the age of the complainant, it was submitted that the same was not proved beyond reasonable doubt. He stated that PW3, testified that she was the mother of L.K. who was 11 years old, however he asked the court to note that L.K. was allegedly defiled on 8th January 2018 and as such she was thirteen (13) years old and not eleven years old as alleged. The appellant submitted that age was an essential ingredient in the offence of defilement and that the sentence was dependant on the age of the complainant. Reliance was placed on Alfayo Gombe Okello -vs- Republic [2010] eKLR.

15. In regard to the sentence, it was submitted that the same was harsh, excessive and unconstitutional in the circumstances and that there is a good reason to interfere with the same. Reliance was placed on Manyeso -vs- Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) for the proposition that life sentence was found to be unconstitutional.

16. The respondent submitted that all the ingredients of defilement had been proved. With regards to the age of the complainant it was submitted that the age of L.K. was proved to be 10 years and that the P3 form indicated the age of L.K. as 11 years having been born on 24th June 2007 which proved that the alleged time of defilement L.K. was 10 and a half years old.

17. On penetration, it was submitted that the same was proved through the evidence of PW2, PW4 and PW1. Their evidence was also corroborated by the medical evidence which confirmed that the child had been defiled.

18. On the identity of the perpetrator, it was submitted that the appellant was positively identified by PW2 and PW4 as he was a watchman at the school that L.K. went to and PW4 used to attend, and as such the issue of mistaken identity could not arise as the offence took place at 6.00pm in broad daylight and the identification of the appellant was by recognition. Reliance was placed on Wamunga -vs- Republic [1989] KLR 426.

19. In response to ground 3, it was submitted that the witnesses who testified were enough and their evidence was adequate, that it should be noted that where the evidence is adequate and proves to the required standard the elements of the offence, then not calling all other remaining witnesses is not fatal. Reliance was made on Daniel Ombasa Omwoyo -vs- Republic [2016] eKLR, Section 143 of the *Evidence Act*, Julius Kalewa Mutunga -vs- Republic [2006] eKLR and Keter -vs- Republic [2007]1EA 135.

20. In response to ground 2, it was submitted that the prosecution evidence was clear, concise and consistent. That the evidence of PW2 was corroborated by that of PW4, the eye witness and the medical evidence of PW1. Further it was submitted that if there were any inconsistencies then the same did not go to the root of the prosecution case. Reliance was placed on James Karumba vs- Republic [2016] eKLR.

21. In response to ground 5, counsel submitted that the appellant's defence was taken into consideration by both the trial and High Court that the appellant's defence was a mere denial and the prosecution's case outweighs that of the defence. It was stated that the evidence of PW2 and PW4 placed the appellant at the scene of crime and that the appellant's allegation that he was framed because of a land dispute had already been resolved which position the appellant confirmed.

22. In regard to the sentence, it was submitted that the sentence meted out to the appellant was not excessive but was well within the law. Further, that the appellant took advantage of a minor. Reliance was placed on section 43(4)(f) of the *Sexual Offences Act*. Counsel noted that the appellant was old enough to be L.K.'s grandfather yet he took advantage of her and that she had been traumatised. Reliance was placed on Onesmus Musyoki Muema -vs- Republic [2023] KECA 1023 (KLR). We were urged to uphold both the conviction and sentence.

23. On a second appeal such as this one, our jurisdiction is restricted to issues of law only by dint of section 361 of the *Criminal Procedure Code*. This Court will not also interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. (See Chemogong -vs-R. [1984] KLR 61; Ogeto -vs- R- [2004] KLR 14 and Koingo -vs- R. (1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See Reuben Karari S/o Karanja -vs- R. [1956] 1 E.A.C.A. 146).

24. With the above caution in mind, we have considered the record, the grounds of appeal and the submissions of both parties. The main issues that we discern for our determination are: whether the two courts below were right in finding the elements of the charge of defilement proved; and whether this Court should interfere with the sentence that was imposed on the appellant.

25. The appellant complains that the medical evidence was insufficient to prove penetration. We do not think so. The clinical officer who examined the child, testified that the minor's vaginal walls were reddish and her swollen hymen was missing and that there was a whitish fluid on her pubic hair and vagina which could have been spermatozoa. This evidence was corroborated by the testimonies of PW4, an eyewitness who testified that he had found the appellant lying on L.K. having sex with her and that when they spotted him, they stood. There was, in our view, sufficient evidence to prove penetration beyond reasonable doubt.

26. As regards the identity of the appellant, we note that he was well known to the PW2 and PW4 who testified that he used to work as a watchman in their school and was also a neighbour. The appellant confirmed that he was known to the complainant's father as he had a land dispute with him. This was a case of recognition. We have no doubt that PW2 and PW4 were able to recognize the appellant. We are, therefore, in agreement with the concurrent finding of both the trial court and the 1st appellate court, that, indeed, the appellant was properly identified as the perpetrator of the offence.

27. On whether there were material contradictions in the prosecution evidence, the question is whether the alleged contradictions were so material as to undermine the core evidence relied upon. The test in this regard is that set by the Court in Sigei -vs- Republic [2023] KECA 154 (KLR) that:

> "In assessing the impact of contradictory statements or discrepancies on the prosecution's case, our understanding is that firstly, for contradictions to be fatal, it must relate to material facts. Secondly, such contradictions must concern substantial matters in the case. Thirdly, such contradictions must deal with the real substance of the case."

28. There is nothing on the record to suggest that the evidence led by the prosecution was plagued with grave contradictions. The appellant has failed to demonstrate that there were any contradictions that were fundamental, or that materially affected the prosecution evidence as to justify an acquittal on that ground.

29. There is also the appellants complaint that his defence was not considered. The appellant in defence denied the charge and stated that he was framed because he had a land dispute with the minor's father and that he framed him using the child. The allegation that there was a land dispute which was the cause

of the complainant's family framing the defilement case against him did not dislodge the prosecution's evidence against the appellant.

30. Turning to the issue of age, it was the appellant's submissions that the birth certificate produced showed that L.K. was born on 24th June 2005 which would mean that she was a few months shy of 13 years of age at the time of the alleged incident on 8th January 2018 and not 11 years old as indicated in the charge sheet. He submitted that the evidence of PW1 stated that L.K. was 11 years old which evidence was a contradiction and as such the age of L.K. was not sufficiently proved.

31. In the case of Kaingu Elias Kasomo -vs- Republic, Malindi Criminal Appeal No. 504 of 2010, this Court stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

See also, Edwin Nyambaso Onsongo -vs- Republic [2016]eKLR, citing the case of Mwolongo Chichoro Mwanyembe -vs- Republic.

32. The above authorities confirm that the evidence adduced by the prosecution in terms of the birth certificate and the evidence of the witnesses was sufficient to prove that the complainant was a minor aged slightly below 13 years, but definitely above 12 years old at the time of the alleged incident. The appellant thus ought to have been charged with the offence of defilement contrary to section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*.

33. It is true that the charge sheet talks of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* while the minor herein was almost13 years old. Was the defect fatal? While this would not affect the conviction, it would, certainly, be relevant when it comes to sentencing.

34. In the instant appeal it is not in doubt that the charge of defilement is provided for under section 8(1) of the *Sexual Offences Act*. Section 8(2) and 8 (3) of the *Sexual Offences Act* define the penalties and in this case the trial magistrate issued a sentence prescribed under section 8(2) of the *Sexual Offences Act* as it ought to have been if the minor was 11 years old as indicated in the charge sheet. However, this was an error as the minor was over 12 years old and the appellant ought to have been charged under section 8(3) of the *Sexual Offences Act* which prescribes the penalty of not less than twenty years where the victim is between the ages twelve and fifteen years.

35. From our re-evaluation of the proceedings on the record, we hold the considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is clear from his defence and submissions that he understood that he was being accused of having committed the offence of defilement, against the complainant. In our view, the omissions did not render the charge sheet fatally defective on its face. In so finding, we are guided by the decision in the case of Willie (William) Slaney -vs- State of Madhya Pradesh [A.I.R. 1956 Madras Weekly Notes 391], where it was held:

> " We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent."

36. From our analysis of the case herein the finding on conviction by the trial court was sound and we see no reason to interfere with it and the same is thus upheld.

37. However, with regard to the sentence and in view of the above, we are inclined to interfere with the sentence as subsection 8(3) of the *Sexual Offences Act* which the appellant should have been sentenced under provides for imprisonment for a term not less than 20 years.

38. We accordingly set aside the life imprisonment meted upon the appellant. After considering the mitigation proffered by the appellant as recorded, the sentence that commends itself to us is 20 years' imprisonment from the date of plea, as the appellant appears to have been in custody from the date of plea to the date he was sentenced. We so order.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF FEBRUARY 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a the true copy of the original.

Signed

DEPUTY REGISTRAR