Muchonge v Republic (Criminal Appeal 176 of 2014)
[2024] KECA 433 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 433 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 176 OF 2014

AK MURGOR, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

APRIL 26, 2024

BETWEEN

BENSON WAITHIMA MUCHONGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Kimaru, J.) (as he then was) delivered on 2nd May 2019 in (Nairobi HCCRA No. 225 of 2011)

JUDGMENT

1. The appellant was charged before the Chief Magistrate's Court at Thika with the offence of defilement of a child contrary to section 8(1) and (2) of the *Sexual Offences Act*. The particulars were that, on the 1st day of January 2011 in Muranga County, the appellant intentionally caused his penis to penetrate the vagina of the complainant, a child aged 5 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars being that, on the 1st day of January 2011 in Muranga County, the appellant intentionally touched the vagina of the complainant, a child aged 5 years, with his penis. The appellant denied the charges and a plea of not guilty entered.

3. The thrust of the prosecution case was that, on the material day, the complainant's mother, PW3, had left the complainant, PW2, at home with her other two children and went to the river to fetch water. The appellant went to the complainant's home and picked the complainant allegedly to take her to the dam. PW2 testified that the appellant carried her on a donkey cart and took her to a 'shamba' where he defiled her. PW2 felt pain and cried during the ordeal, and the appellant bought her 3 'ndazis' afterwards. PW2 stated that the appellant had previously defiled her at his home and thereafter the appellant threatened to cut off her head if she told anyone.

4. PW1, a neighbour, had seen the appellant carrying PW2 on the donkey cart and saw PW2 returning home an hour later carrying 3 'ndazis'. PW1 inquired as to where PW2 had gotten the 'ndazis' from. PW2 told her that it was the appellant who bought them for her, but she would not say why. Her suspicions raised, PW1 took PW2 to the house and checked her private parts and found that PW2 was swollen and had a discharge. They reported the matter to the chief and to the police, and then went to Thika District Hospital. The appellant was arrested later that night.

5. PW4 produced a P3 form prepared by his colleague, Dr. Kinyua, to the effect that the complainant's hymen was missing, which was consistent with defilement. PW5, the investigating officer, conducted investigations and procured statements which led her to the decision to have the appellant charged with the offence of defilement.

6. In his defence, the appellant gave an unsworn statement to the effect that, on the material day, he was at his home constructing a chicken pen and that, at about 4:00 pm, he and his wife went to the farm to pick tomatoes and later returned home. He was arrested that night, but denied defiling the appellant. The appellant's wife testified as DW2 and stated that, indeed, she went to the farm with the appellant on the material day and returned home, leaving the appellant behind when he went into the complainant's compound to get an order for cabbages. DW2 stated that the appellant later returned home with the complainant on his donkey cart and gave the child Kshs. 10/= to buy 'ndazis'. DW2 added that it was not usual for the appellant to carry children on the donkey cart.

7. The trial magistrate found that there was no dispute that the complainant had been defiled and that there was penetration as corroborated by the medical evidence. The trial magistrate found no reason to doubt the complainant's testimony that she was defiled by the appellant, who later bought her 3 'ndazis'; and that her testimony was corroborated by that of PW1 and DW2, who saw the complainant being carried on the appellant's donkey cart. The learned trial magistrate did not believe the appellant's defence. The appellant was found guilty and convicted accordingly and thereafter sentenced to life imprisonment.

8. The appellant lodged his first appeal against the conviction and sentence in the High Court at Nairobi. The grounds for the appeal were that the trial court improperly admitted the P3 form into evidence as it was not produced by its maker; that the appellant's right to a fair trial under Article 25(c) of the *Constitution* had been violated as he was not given the opportunity to cross-examine the maker of the P3 form; that the trial court failed to abide by the set rules regarding the conduct of voir dire examination; and that the evidence adduced by the prosecution was insufficient to sustain a conviction.

9. In his judgment, the learned judge held that, even though no documentary evidence was adduced to establish the age of the complainant, the evidence of PW3 and the trial court's observation that the complainant was a child of tender years was sufficient. Regarding the element of penetration, the learned judge held that the same was corroborated by the evidence of PW1 and PW3, who examined the complainant's genitalia, as well as the medical evidence adduced by PW4,which established that the complainant's vagina had been penetrated. On the question of whether or not it was the appellant who defiled the complainant, the learned judge held that the complainant identified the appellant by recognition, which was corroborated by the evidence of PW1, while DW2's evidence displaced the appellant's evidence regarding his whereabouts on the material day.

10. On the issue of the production of the P3 form, the appellant had been asked if he had any objection to PW4 producing the report on behalf of Dr. Kinyua, and he stated that he had no objection. Therefore, the appellant could not complain that the P3 form was irregularly admitted into evidence.

11. The learned judge held that the appellant's guilt was established beyond any reasonable doubt, and that section 8(2) of the *Sexual Offences Act* provides a sentence of life imprisonment for any person convicted of defiling a child aged 11 years or less. Accordingly, the learned Judge dismissed the appeal in its entirety.

12. Still aggrieved by the High Court judgment, the appellant lodged the present appeal on the grounds that the learned Judge upheld the conviction and sentence notwithstanding that:

    1. The primary ingredients of the charge were not proved.

    2. The prosecution failed to prove its case beyond reasonable doubt.

    3. Crucial witnesses were not availed to buttress the prosecution hypothesis.

    4. Circumstantial evidence relied on was weak.

    5. The prosecution evidence on record was contradictory, inconsistent and defective.

    6. The charge sheet was defective.

13. The appellant submitted that before a conviction for the offence of defilement can be secured, the elements of penetration, age of the victim and that it is the accused who committed the offence must be proved beyond reasonable doubt. He contended that the prosecution did not conclusively prove that there was penetration on the genital organ of PW1. The appellant questioned why PW1 failed to inform her parents of the defilement incident voluntarily and had to be beaten, and why she never reported the earlier time she was allegedly defiled. The appellant questioned PW4's mention that pus cells were present in the complainant's genitalia, and yet the P3 only indicated that the hymen was broken. The appellant cited P.K.W vs. Republic and Another where the court dissuaded against the assumption that absence of the hymen in the vagina of a girl child was automatic proof of defilement.

14. The appellant submitted that the evidence of PW2 was not obtained voluntarily, but that she was beaten in order to disclose what had happened to her. He cited the case of Paul Kanja Gitari v Republic [2016] eKLR where the court held that where a complainant was beaten to disclose information, such evidence was involuntarily obtained and necessitated the acquittal of the accused.

15. Regarding his sentence, the appellant submitted that his sentence should be reconsidered and reduced in line with the Supreme Court decision in the Muruatetu case. The appellant contended that he was framed on account of a land dispute, and that his wife conspired with the complainant.

16. Mr. Njeru, learned counsel for the respondent, submitted that the appellant had not advanced any viable grounds to warrant this Court to disturb the findings of facts by the two courts below. On penetration, counsel submitted that the complainant's testimony and that of PW1 and PW3 pointed to the penetration of the complainant, and that the treatment and medical report corroborated their evidence.

17. On the issue as to the identification of the appellant, counsel pointed out that the complainant identified the appellant in court, PW1 had seen the appellant carrying the complainant on his donkey cart, which was also confirmed by DW2. The complainant also confirmed to PW3 that she had been with the appellant.

18. Regarding the age of the complainant, counsel submitted that her mother's testimony was that the complainant was 5 years old, and the trial court also observed that she was a child of tender years. Counsel relied on the case of *Richard Wahome Chege vs. Republic* [2014]eKLR for the proposition that the evidence of the mother, who was present at birth is the best evidence.

19. On the appellant's contention that the P3 form was improperly admitted into evidence, counsel contended that the appellant himself was not opposed to the production of the report by PW4, and that the court may presume the signature appearing on a document purporting to be in the hand of a medical practitioner is genuine. The appellant therefore suffered no prejudice. Although section 77(2) of the *Evidence Act* provides that a medical report is an expert opinion which may not be binding upon the court, counsel submitted that even if the report is discounted, there was other independent evidence which was sufficient to sustain the conviction.

20. In a second appeal, the Court ought to confine itself to matters of law as mandated under section 361(1) (a) of the *Criminal Procedure Code*, unless it is shown that the findings of fact by the two courts below are based on no evidence, or if it is shown that the courts acted on wrong principles in making the findings. See *Chris Kasamba Karani vs. Republic* [2010] eKLR.

21. Upon considering the record before us, two basic issues stand out. These are:

    1. Whether the charge sheet was defective.

    2. Whether the prosecution evidence was sufficient to sustain a conviction.

22. While one of the grounds of the appeal was that the charge sheet was defective, the appellant did not point out the alleged defects in the charge sheet in his written or oral submissions. The ingredients that were to be proved to sustain the conviction for the offence were the age of the complainant, that there was penetration, and that the appellant was the perpetrator of the offence. The age of the complainant was not disputed by the appellant at the trial or on the first appeal; and the evidence on record is sufficient to establish that, at the material time, the complainant was a child of tender years and more precisely 5 years of age based on the testimony of her mother, PW3.

2. Regarding the ingredient of penetration, the prosecution relied on the evidence of the complainant and the medical evidence produced by PW4. Even though the complainant was the only witness to the act of penetration, her evidence would still be sufficient to secure a conviction so long as the trial court had satisfied itself that in all the circumstances of this case, it was safe to act upon the evidence of the single witness. See *Abdalla bin Wendo & Another vs.Republic* (1953) 20 EACA 166; and *Kiragu vs. Republic* [1985] eKLR.

24. The appellant contested the complainant's evidence as having been given involuntarily and through coercion. The appellant pointed to the complainant's testimony that she had been beaten before she disclosed what had happened to her. The appellant relied on the decision of this Court in *Paul Kanja Gitari vs. Republic* [2016] eKLR which is distinguishable from the present case in certain respects.

25. In that case, although the fact that the complainant's testimony seemed to have been procured by threats was a matter of concern, the conviction was primarily rendered unsafe by other significant contradictions and inconsistencies in the prosecution evidence. There were contradictions about the complainant's aunt's conduct vis-à- vis her suspicions, inconsistencies about whether it was the first incident or whether the appellant habitually had sex with the complainant; and the variance between the aunt's testimony and that of the investigating officer. In addition, a defence witness testified that the complainant was beaten and coerced to implicate the appellant. The totality of the evidence was riddled with contradictions and inconsistencies to an extent that the evidence could not support a conviction.

26. The circumstances of the present case are different from the one in the *Paul Kanja Gitari* case. The reluctance of the complainant to disclose that the appellant had defiled her was understandable in the face of the threat to cut off her head. Moreover, the prosecution evidence as a whole did not raise any

doubts as to the veracity of the complainant's testimony, but rather corroborated the complainant's testimony.

27. The P3 form further supported the complainant's evidence pointing to penetration. As the learned Judge rightly pointed out, the appellant himself did not object to the production of the P3 form in evidence by PW4 and, therefore, he could not turn around and contest the introduction of the same. While the appellant contested the PW4's interpretation of the report to the effect that pus cells were present on a high vaginal swab, the P3 form at page 4 clearly reflects these findings. The P3 form also indicated that the findings were in keeping with defilement.

28. As for the final ingredient of identification of the appellant as the perpetrator, the learned Judge rightly found that this was a case of identification by recognition. The complainant knew the appellant and testified that he had previously defiled her in an earlier incident. PW1, and DW2 all saw the appellant return with the complainant on his donkey cart, further corroborating the complainant's testimony.

29. All in all, the appellant has failed to demonstrate sufficient grounds to disturb the findings of the two courts below. The prosecution had proved its case beyond reasonable doubt and the conviction remains safe. The appeal against conviction is therefore dismissed.

30. As for the sentence, the recent Supreme Court directions regarding their decision in the Muruatetu case, *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR,clarified that the decision did not invalidate mandatory or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute; and that the decision would only be applicable to sentences imposed in murder cases. Therefore, the mandatory life sentence for the offence of defilement of a child aged eleven years or less under section 8(1) as read with 8(2) of the *Sexual Offences Act* still stands. The appeal on sentence is also dismissed.

31. This Judgment has been signed and delivered under Rule 34(4) of the *Court of Appeal Rules*, Mbogholi Msagha, JA. (as he then was) having since retired from judicial service. The judgment was drafted but not approved by all the Judges for delivery on the due date, and its absence from the list of delivered judgments was only discovered recently during an audit of pending judgments. The delay is highly regretted.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR