Muriuki v Republic (Criminal Appeal 74 of 2017)
[2024] KECA 1045 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 1045 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 74 OF 2017

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

APRIL 12, 2024

BETWEEN

PETER KINYUA MURIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kerugoya (L. W. Gitari, J.) dated 10th May, 2017 in HCCRA No. 24 of 2016)

JUDGMENT

1. The appellant, Peterson Kinyua Muriuki, was charged before the Principal Magistrate's Court at Baricho for the offence of defilement of a girl contrary to Section 8(1)(3) (sic) of the *Sexual Offences Act*. The particulars of the offence were that on 14th January, 2015 at Kirinyaga West District within Kirinyaga County, he intentionally caused his penis to penetrate the vagina of ENM, a child aged 15 years.

2. At the trial, the prosecution called five (5) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted and sentenced to twenty (20) years imprisonment.

3. Dissatisfied with the conviction and sentence, the appellant filed an appeal before the High Court at Kerugoya (L. W. Gitari, J.). The appeal was unsuccessful prompting the instant appeal against both conviction and sentence.

4. The appellant complained that the 1st appellate court erred in law: by finding that the prosecution proved its case against him beyond any shadow of doubt; by failing to consider that identification of the appellant was not properly done to the required standard; by relying on a medical report that was done two weeks after the incident; and that the police did not visit the alleged crime scene.

5. Further grounds were that the 1st appellate court relied on scanty and contradictory evidence; failed to consider that the trial court did not comply with Section 211 of the *Criminal Procedure Code* (*CPC)*; that the age of the victim ought to have been indicated as 16 years and not 15 years; and that the 1st appellate court erred in law when it failed to consider his defence.

6. The jurisdiction of this Court on a second appeal is well settled. In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows: -

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

7. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.

8. ENM (PW1), the complainant gave sworn evidence after a voire dire examination where the trial court found that she was intelligent and understood the solemnity of an oath and ordered that she give sworn evidence.

9. It was PW1's evidence that on the 14th January, 2015 at about 4pm, she was sent by her grandmother with whom she lived, to the councillor of Kibirigwi area to take her bursary form. It was her testimony that on her way there she met with the appellant who was riding a motorcycle. That he enquired where she was going and he offered to take her to her destination. It was her evidence that she initially declined and subsequently accepted the ride and he dropped her at the councilor's office and waited for her. It was her evidence that the appellant offered her a ride back home but she declined and proceeded to run other errands. It was her testimony that he again offered her a ride home and she accepted but instead of taking her home, he diverted to a different route.

10. It was her further evidence that the appellant took her to a homestead where he alighted from the motorcycle and forcefully pulled her by her right hand and took her to a two-roomed house. It was her evidence that he locked the door and placed his motorcycle against it to block her escape. It was her further evidence that he made indecent advances to her which she resisted. That he switched on the radio and put it on high volume and proceeded to defile her.

11. It was PW1's further evidence that after the ordeal, he offered to take her home and she agreed and he dropped her a short distance from her home. That she found her grandmother at home but was unable to tell her what had happened to her out of fear. It was her further testimony that she felt unwell and sought treatment at a nearby dispensary. Further, that she was feeling mentally disturbed and was considering committing suicide and asked her aunt for rat poison. PW1 testified that her aunt did not have rat poison and she proceeded to a neighbour's house, one Isaiah where she found a jerrican of petrol. It was her further testimony that she carried with her a cup full of petrol. That she subsequently informed her grandmother that she had been defiled and was taken to the police station and subsequently to the hospital for treatment. It was her further evidence that subsequently, she was informed that the appellant had been arrested. It was her further evidence that that she identified the appellant as the perpetrator.

12. PW2 EMM, the complainant's grandmother testified that on the material day at about 4pm, she sent the complainant to take her bursary form to the councilor and run a few errands. That the complainant returned home at about 7.30pm resulting in PW2 picking a stick to cane PW1 but decided against it when PW1 informed her that she had attended a crusade. PW2 further testified that the following day, PW1 informed her that she was feeling unwell whereupon PW2 gave her money to seek medical treatment. It was PW2's further testimony that the following day she returned home unexpectedly and found PW1 with motor vehicle oil in a cup which she threatened to drink and started crying. PW2 testified that PW1 disclosed to her that on the day that she had said that she had attended a crusade, the appellant had defiled her at his house and that she was afraid that PW2 would cane her. PW2 testified that she informed PW1's father (PW3) about the defilement and they reported the matter at the police station where PW1 identified the appellant as the perpetrator. Subsequently, she took PW1 to the hospital for examination and treatment. PW2 testified that the appellant was known to her as a motorcycle operator.

13. JMM (PW3) who was PW1's father testified that on 26th January, 2015, PW2 called him and informed him that PW1 had been defiled. That on 27th January, 2015 he met PW1 and PW2 and proceeded to the police station and subsequently to the hospital. PW3 further testified that PW1 informed him that she was defiled by the appellant who was known to PW3 as he had seen him in their neighbourhood.

14. Dr. Makori Obed (PW4) of Karatina sub-county Hospital testified on behalf of Dr. Wahome who had examined PW1. The medical report indicated that a pregnancy test was negative and PW1's hymen was broken. PW4 testified that Dr. Wahome had made a finding that PW1 had been defiled.

15. PC Jane Losusu (PW5) of Baricho Police Station was the Investigations Officer. She testified that on 28th January, 2015 she was assigned PW1's case. That PW1 narrated to her that the appellant had defiled her leading to his arrest. It was her testimony that she obtained PW1's birth certificate which indicated that PW1 was born on 11th February, 199 and was therefore 15 years old when she was defiled.

16. The appellant was put on his defence and gave sworn evidence and called no witness. He denied that he had defiled PW1 and stated that he had been framed as he was a witness in a case.

Submissions by Counsel

17. At the hearing of the appeal, the appellant was unrepresented and relied on his written submissions. He submitted that this is his last appeal and that he did not commit the offence for which he was convicted and sentenced.

18. In his written submissions, the appellant submitted that the complainant was not a truthful witness as she reported the matter more than 13 days after the incident. Further, that the complainant did not disclose to anybody that she had been defiled but told her grandmother that she had attended a crusade.

19. The appellant further submitted that the trial court did not warn itself of the danger of convicting on the basis of a single identifying witness; and that he was not accorded a fair trial as the prosecution evidence was not watertight. The appellant further submitted that the prosecution failed to prove its case and that the trial court did not consider his defence that there was a grudge between him and one MW who was related to PW1's family who sought to frame him to deter him from testifying against her.

20. On sentence, the appellant stated that at the time the offence was committed, PW1 was 16 years old and the sentence imposed on him should therefore be reconsidered. He urged this Court to allow his appeal on conviction and sentence.

21. Mr. Naulikha, learned counsel for the State submitted that the complainant and the appellant knew each other. It was his submission that the identity of the perpetrator was not in dispute as the appellant and the complainant were together for a period of about 2 to 3 hours largely in the appellant's house. Counsel submitted that it was a case of identification by recognition as the complainant knew the appellant having seen him in the neighbourhood.

22. Counsel further submitted that the prosecution proved its case beyond any reasonable doubt. That the prosecution called the complainant as PW1, the grandmother (PW2), who was PW1's custodian and the doctor (PW4) who produced the medical report of the doctor who examined and treated PW1. Counsel asserted that the prosecution evidence was overwhelming, consistent, cogent and corroborated each other in all material ways. Counsel submitted that there were no contradictions or inconsistencies in the prosecution evidence.

23. Counsel further submitted that the identification of the appellant by the complainant was done to the required standard. Counsel emphasized that the incident took place during the day and the complainant and the appellant spent more than one hour together. Counsel asserted that the complainant and the appellant knew each other well. Counsel further asserted that the complainant knew the appellant prior to the incident and the evidence was that of recognition as opposed to that of identification.

24. On the ground that the age of the complainant was 16 years and not 15 years as contended by the appellant, counsel submitted that from the evidence on record, the age of the complainant at the time of the incident was 15 years.

25. In conclusion, counsel urged that the appellant's second appeal to this Court should be dismissed both on conviction and sentence.

Determination

26. We have considered the record of appeal, the submissions, the authorities cited and the law. The appellant was charged with the offence of defilement. It is settled law that to warrant conviction for an offence of defilement under Section 8(1) of the *Sexual Offences Act* three elements should be satisfied before conviction of an accused person can arise. These are proof of penetration, the age of the victim, and the identity of the perpetrator. See: John *Mutua Munyoki v. Republic* [2017] eKLR.

27. We discern the issues arising for determination in this appeal are whether the charge against the appellant was proved to the required standard; and whether there were material contradictions in the evidence that ought to have been resolved in favour of the appellant.

28. It is evident that the appellant's conviction was hinged on the evidence of PW1, a minor who upon the trial court conducting voire dire gave sworn evidence. PW1 testified that she was defiled by the appellant, a person who was well-known to her. She informed her grandmother (PW2) who informed her father (PW3), who both knew the appellant as he was a boda boda rider in their neighbourhood. PW2's testimony was consistent with that of PW1. In the circumstances, the appellant's contention that the prosecution evidence was contradictory cannot hold as the evidence of PW1, PW2 and PW4 was sufficient to prove the charge against the appellant.

29. Section 124 of the *Evidence Act* provides as follows:-

> " Corroboration required in criminal cases.

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

30. This Court in *Mohammed V Republic* [2006] 2KLR, 138, this Court held that:

> "It is now well settled that the courts shall no longer be hum strung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

31. The trial court accepted PW1's evidence as truthful and in its judgment stated as follows:-

> "I had the opportunity of observing the demeanor of the witnesses herein, especially the complainant. She gave a narration of the circumstances surrounding the incidents (sic) which I consider vivid and true. Her evidence remained consistent even on cross-examination."

32. On the question of proof of penetration, it is clear from the record that the complainant's testimony was corroborated by medical evidence. PW4 testified that the medical examination revealed that there was penetration and produced the P3 form.

33. Regarding the identification of the appellant, PW1 identified the appellant as the person who had defiled her. From the record, it is a case of identification by recognition as the appellant and PW1, PW2 and PW3 lived in the same neighbourhood.

34. On the question of PW1's age, we find that the same was proved by the evidence of PW5 who testified that the complainant was born on 11th February, 1999 as per the birth certificate that was produced in evidence. Further, the P3 form indicated the age of the complainant as 15 years.

35. The totality of the evidence of PW1, PW2, PW3, PW4 and PW5, therefore, provided overwhelming evidence against the appellant and was consistent, cogent and corroborative. We are satisfied that all the ingredients of the offence of defilement were established to the required standard and that the concurrent findings of the two courts below were based on credible evidence. In the circumstances, we are satisfied that in light of the overwhelming evidence adduced against the appellant, his defence denying committing the offence of defilement was properly rejected. His conviction was, therefore, sound.

36. On sentence, it was confirmed by the production of PW1's birth certificate that she was 15 years old at the time the offence was committed.

37. Section 8(3) of the *Sexual Offences Act* provides as follows:

> "8

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

38. Accordingly, we find that the sentence meted out on the appellant by the trial court and upheld by the 1st appellate court was lawful.

39. Accordingly, we find no basis to interfere with the findings of the trial court as upheld by the High Court. The upshot is that the appeal is devoid of merit and is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR