Muguanah v Republic (Criminal Appeal 13 of 2021)
[2023] KECA 828 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 828 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 13 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 7, 2023

BETWEEN

LUCAS ODHIAMBO MUGUANAH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Nairobi (G.W. Ngenye-Macharia) delivered on 11th April 2017.inNairobi HCCA No. 44 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the trial magistrate dated February 6, 2014, where the appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on the July 7, 2012 at around 4.00 p.m., in [Particulars Withheld] within Nairobi County, he unlawfully and intentionally committed an act that caused penetration with his penis into the vagina of GA a girl aged 9 years.

2. He was also charged in the alternative with the offence of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006, the particulars of which were that on the same day and in the same location, he unlawfully and intentionally had an indecent act with the child, GA.

3. The appellant pleaded not guilty and at the hearing the prosecution called 6 witnesses. After the trial, the trial magistrate found the appellant guilty and convicted him of defilement and sentenced him to life imprisonment.

4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court, where the learned judge upon considering the appeal in a judgment dated April 11, 2017 dismissed the appeal and upheld both the conviction and sentence.

5. Aggrieved by the findings, the appellant filed this appeal on grounds set out in an amended memorandum of appeal that; the first appellate judge wrongly upheld his conviction without considering that he was denied access to witness statements before the case commenced which violated his constitutional rights to a fair hearing under articles 50 (2), (c) and (j) of the *Constitution*, in failing to analyse and revaluate the evidence and reach its own conclusion; in failing to properly consider his defence case which effectively exonerated him from wrongdoing; in affirming the trial court's decision and in failing to appreciate that a key prosecution witness was never availed to prove the prosecution's case; and in failing to find that the burden and standard of proof was not discharged by the prosecution.

6. The appellant filed written submissions which were relied upon in their entirety. When the appeal came up for hearing, the appellant appeared in person from Kamiti Prison. In the submissions, it was submitted that he was not supplied with witness statements and as a consequence was unable to adequately prepare for the trial which was prejudicial to him. He further submitted that the first appellate court did not determine each of his grounds of appeal, and give reasons for declining to allow each ground; that the judge merely summarised the case and dismissed his appeal.

7. On rejection of his defence, the appellant submitted that both the trial magistrate and the first appellate court failed to consider that his defence was unrebutted and ought to have weighed it against the prosecution evidence before arriving to a conclusion. It was further argued that by calling GA as the only eye witness and failing to call other key witnesses, the prosecution failed to prove that there was penetration with the result that it was not proved beyond doubt that he had committed the offence, and as a consequence, the conviction was unsafe.

8. Submitting orally before us on the sentence imposed, the appellant stated that he had been diagnosed with cancer, and requested to be released so as to seek treatment. He stated that he was remorseful, and had undertaken courses and attained many certificates while in prison; that he could now speak English and sought another chance in life. He urged us to consider his appeal.

9. In rebuttal, learned prosecution counsel for the State, Miss. Matiru stated that they would adopt their written submissions, where it was asserted that the prosecution proved its case to the required standards; that all the ingredients of the offence were proved. In particular, it was submitted that there was evidence of penetration both from the testimony of GA, and from the medical evidence by PW 3 that disclosed a torn hymen that had healed.

10. It was also submitted that the child's age was proved by her birth certificate produced by her mother PW2, which showed that she was aged 9 years; that there was sufficient evidence pointing to the appellant as the person who committed the offence. He was well known to the victim who gave a detailed account of how she was defiled; that the trial court that had the opportunity to see and hear the testimony of the witnesses found the victim to have been truthful. It was submitted that the appellant's defence was also considered by the two courts below.

11. On the claim that he was not supplied with witness statements, it was argued that this issue was not raised at any time in the courts below; that by the time the trial commenced, and the witnesses testified, the appellant did not record any further complaint, leading to the conclusion that the statements had been supplied.

12. The mandate of this Court on a second appeal is confined to a consideration of matters of law by reason of section 361 of the *Criminal Procedure Code*. In the case of *Rashid v Republic* (Criminal Appeal 90 of 2021) [2023] KECA 596 (KLR), this Court, when determining a second appeal observed that;

> " As already stated, this being a second appeal, this court is restricted to addressing itself to matters of law only. The court will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings."

13. In view of the record and grounds of appeal, as well as the submissions of the parties, the following issues arise for determination;

    i) whether the offence of defilement was proved to the required standards;

    ii) whether the appellant's defence was considered; iii)whether the prosecution failed to call crucial witnesses;

    iv) whether the High Court re-evaluated the evidence presented before the trial court and arrived at the correct verdict;

    v) whether the appellant's rights to fair trial under Article 50 (2)

    (c) (j) were complied with;

    iv) whether the sentence was improper.

14. We begin with whether the offence of defilement was proved to the required standards. At this juncture, a brief outline of the facts that were before the trial court will be essential.

15. The complainant GA, (PW 1) aged 10 years old, following the conduct of a voir dire examination, gave sworn evidence that on July 2, 2012 at about 4.00 p.m. she was at home. While there, the appellant, her neighbour came and sent her with Kshs 5 to buy a matchbox. When she came back, the appellant told her to take the matchbox and change into his house, and when she entered, he closed the door, removed his t-shirt and trouser, and told her to remove her clothes and undergarment. She stated that he then proceeded to take some cello tape from his toothbrush container, and placed it on her mouth so that she would not scream. He held both her hands behind her, made her lay on the metallic chair on which she was seating, lay on top of her, and defiled her and she felt pain.

16. Thereafter he put on his clothes, told her to wear hers, then gave her Kshs 5 and told her not to tell anyone. He also removed the cello tape from her mouth. She returned home and told no one, though she wanted to tell her mother but was afraid she would be beaten. She later told her and was taken to the hospital. She identified the appellant in court as the person who defiled her.

17. PW 2, GA's mother stated that GA was 9 and a half years old at the time of the offence. She testified that on 25th August 2012 at about 9.00 p.m. while bathing her, she felt that her vagina was enlarged and not small as usual. When she asked her what had happened, GA narrated to her how the appellant had defiled her. She knew the appellant as her neighbour, and asked him whether he had defiled her daughter which he denied. She took GA to hospital, and reported to Mathare North AP post and found that the appellant had filed a report that she was spoiling his name. The appellant was later arrested and the medical forms were prepared. She identified the appellant in court as a neighbour whom she had never differed with before.

18. Irene Gori Nyagwachi, (PW 3), an MSF clinical officer testified that she examined GA on 27th August 2012. The examination found that the labia minora, on the right side, was hyperemic, that is, reddening of the wall that is not normal. The hymen was pink and had an irregular margin with a notch at 6.00 o'clock, meaning it was an old tear. There were no other findings and GA was treated and discharged and a medical report prepared.

19. Dr. Joseph Maundu, (PW 6), the police doctor based in Nairobi Area examined GA on August 20, 2012 following a complaint that she was defiled by a neighbour. He found the hymen was broken and the margins were irregular with old tags.

20. PC Dorister Dimituis, (PW 5), the investigating officer received a report on August 26, 2012 that GA had been defiled by a neighbour. She organized for PC Darius Sowele (PW 4) to arrest the appellant, and she produced GA's birth certificate.

21. The appellant was placed on his defence and he gave an unsworn statement. He stated that on August 25, 2012 he returned home from work at about 3.30 p.m., and then left the house to meet friends up to 8.00 p.m. At 9.p.m. while at home, PW 2 arrived with GA and her father. PW 2 asked the appellant why he slept with GA which had shocked him. The following day he went to meet his cousins in Mathare North Area 2 and to report to the chief that someone was spoiling his name. He was told to go home. Later, he was called and told there was a lady who had reported a case of defilement. On September 5, 2012, he was arrested and charged. He claimed that he had differed with PW2 because he was to marry PW2's sister, but instead, he married a lady called Elizabeth.

22. In the case of *Muthama v Republi*c (Criminal Appeal 3 of 2018) [2022] KECA 1214 {KLR} this court observed that;

> " It is now 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 penetration, apparent age of the victim and identity of the perpetrator."

23. On the age of the complainant, GA testified that she was 9 years old at the time that she was defiled. PW3 produced a Birth Certificate which indicated that she was 9 years old. Hence, her age was sufficiently proved.

24. With respect to whether there was penetration, it was PW1's evidence that the appellant inserted his penis in her vagina and she felt pain.

Section 2 of the *Sexual Offences Act* defines penetration as ;

> "the partial or complete insertion of the male genital organ to the genital organ of a female."

25. The Supreme Court of Uganda in the case of *Bassita v Uganda* SC Criminal Appeal No 35 of 1995 held that;

> The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims 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 prove 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.

"For evidence to be capable of being corroborated it must:

(a) Be relevant and admissible Scafriot [1978] QB 1016.

(b) Be credible DPP v Kilbourne [1973] AC 729

(c) Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99

(d) Implicate the accused."

26. It is clear from the record that GA's testimony was corroborated by the medical evidence of PW3, the clinical officer and PW6, the medical doctor. Upon examining her, PW 3 observed that the labia minora, on the right side, was hyperaemic with reddening of the wall that was not normal; the hymen was pink and had an irregular margin with a notch at 6.00 o'clock meaning it was an old tear. The medical doctor confirmed that from the nature of the injuries she suffered, GA had been defiled.

27. The appellant nevertheless contended that the prosecution only called GA to testify against him on the fact of penetration, failed to call crucial witnesses, and as a consequence failed to prove its case.

28. In addressing this issue, under section 143 of the *Evidence Act*, it is specified that no particular number of witnesses in the absence of any provision of law to the contrary is required to prove any fact.

29. In the case of *Keter v Republic* [2007] 1 EA p 135, it was held that;

> " The prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

30. The charge the appellant faced in the instant case was a sexual offence. GA testified that it took place in the appellant's house where he had locked the door. Clearly, there were no independent eyewitnesses who saw him assaulting her.

30. Furthermore, this Court in the case of *JMM v Republic* [2020] eKLR held that;

> " On whether some witnesses were left out of the trial we note that the charge facing the appellant related to a sexual offence.
>
> The proviso to Section 124 of the *Evidence Act* permits a trial court to accept the testimony of a victim of sexual offence if the same is believable and such evidence may be accepted without corroboration. In the case before the trial court PW1 informed her mother PW2 as soon as she returned home that morning that she had been defiled by the appellant that night. Medical evidence confirmed that defilement had taken place. The case was proved by the prosecution to the required standard in law."

31. Given the above, it is evident that by dint of section 124 of the *Evidence Act*, GA's evidence alone was capable of proving that there was penetration to the required standards.

32. In this case, the trial magistrate was satisfied that the prosecution witnesses were consistent and credible in their evidence. In her evidence, GA gave a graphic narration of how the appellant inserted his penis into her vagina, and that by so doing, she felt pain. In view of her account of the ordeal that was found to be credible, it was not necessary to call any other witnesses. Consequently, penetration was proved to the required standards.

33. On identification, it was GA's evidence that the appellant was her neighbour and was well known to her. It is trite that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant. See *Anjononi & others v Republic*, [1980] KLR 59.

34. The appellant had sent GA with Kshs 5 to go and buy a box of matches. When she returned, he told her to put the matches and the change in his house, which is where he defiled her. This was a case of recognition and not identification of a stranger, and therefore the appellant was satisfactorily identified.

35. On the appellant's defence, the trial court analysed the defence and stated;

> "... the accused did not in his defence, cost out(sic) on the prosecution evidence since his defence does not demonstrate why the witnesses could have framed him, especially PW1, whom he seems not to have had any issues with. He claimed to have had issues with PW2 as he said, but he didn't discredit PW2 in court..."

36. Similarly, the High Court considered the appellant's defence in the judgment and concluded that,

> "This attests that his assertion was an afterthought. It was also a self-serving statement intended to exonerate him from the crime."

We, therefore, find that contrary to his complaint regarding his defence, it is apparent that the courts below considered his defence. This ground has no merit and is dismissed.

37. As to whether the High Court re-evaluated the evidence presented before the trial court and arrived at the correct conclusion, our consideration of the judgment shows that the High Court upon re-examination of the prosecution evidence, found that GA's evidence when considered together with the medical evidence and weighed against the appellant's defence, satisfactorily concluded that the offence was proved to the required standard, which rendered the conviction safe. We have no hesitation in finding that the High Court properly re-evaluated the evidence and in this regard, this ground has no merit.

38. From the foregoing, we find as did the courts below that, the prosecution proved the offence of defilement beyond reasonable doubt and as such, we uphold the conviction.

40. As concerns the appellant's assertion that he was not supplied with the witness statements in time to enable him to prepare his defence, which was a violation of his rights, the issue was addressed by this Court in the case of *Thomas Patrick Gilbert Cholmondeley v Republic*,[2008] eKLR where it was observed that, the prosecution is required to provide an accused person in advance of the trial with all relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial among other materials.

41. In the instant appeal, the records show that the trial magistrate ordered that the appellant be supplied with the witness statements. On September 7, 2013 the court again ordered that he be furnished with the statements. A similar order was made on April 10, 2013 after he complained of not having received the statements and on May 2, 2013 the case was further adjourned on similar grounds. However, when the matter came up for hearing on May 7, 2013, the appellant proceeded with the hearing and was able to cross examine all the witnesses. And in the absence of any complaint from the appellant thereafter, and the manner in which he conducted himself during the trial, it would lead to the conclusion that he was supplied with all relevant materials, as a consequence of which the alleged violation of his rights did not arise. This ground too lacks merit and we dismiss it.

42. As for the sentence, under section 361(1)(a) of the *Criminal Procedure Code*, the severity of sentence is a matter of fact which is outside the scope of a second appeal. The sentence imposed on the appellant is as prescribed under section 8(2) of the *Sexual Offences Act*.It is a legal sentence and this court has no basis upon which to interfere with it.

42. In sum, the appeal fails in its entirety and is accordingly dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR