Munyao v Republic (Criminal Appeal E005 of 2024)
[2025] KEHC 7952 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7952 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E005 OF 2024

EN MAINA, J

MAY 29, 2025

BETWEEN

DAVID MUSYI MUNYAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Conviction and sentence delivered on the 1st day of November 2023 at the Kithimani Principal Magistrate's Court Sexual Offence No. E013 of 2022 by Hon. P. Wechuli ,Principal Magistrate)

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars of the charge were that on 17th of April 2022 in Masinga Sub County within Machakos County, the Appellant intentionally caused his penis to penetrate the vagina of MN, a child aged 11 years.

2. In count two, the appellant was charged with committing 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 date and place he intentionally touched the vagina of MZ a child aged 11 years with his penis.

3. At the trial four witnesses testified against the Appellant who was found to have a case to answer on 18/07/2023 and was put on his defence and he was the only witness. After evaluating the evidence by both sides, the trial Magistrate found the Appellant guilty on the main charge, convicted him and sentenced him to life imprisonment

4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant preferred this appeal on grounds that;

a. The learned Trial Magistrate erred in law and fact in overlooking fairness due to a flawed trial as grave violation of the procedural law and constitutionality fundamental an non- derogable rights.

b. The learned Trial Magistrate erred in law and fact by admitting a grossly defective charge sheet contrary to sections 134 and 214 (1) of the *Criminal Procedure Code*.

c. The learned Trial Magistrate erred in law and fact by admitting and relying on evidence of witnesses who were both hostile and incredible

d. The learned Trial Magistrate erred in law and fact in illegally admitting evidence contrary to the exclusionary rule of article 50 (4) of *the Constitution*.

e. The learned Trial Magistrate erred in law and fact by disregarding vital features of the case, appreciating scrutiny which was not free from care and caution hence failure to consider the evidence objectively and dispassionately which gravely violated section 107 of the *Evidence Act*

f. The learned Trial Magistrate erred in law and fact in analyzing and/or evaluating the Respondent's evidence separately, forming a considered opinion or impression thereof and then laying the burden disapproving and/or dispelling the pre meditated impression upon the appellant contrary to the established principle in Criminal law , which cast the burden of proof upon the Respondent

g. The learned Trial Magistrate erred in law and fact in failing to consider and/or disregarding the Appellant's defence and thus arrived at a conclusion which was contrary to law and weight of evidence on record.

h. That the life sentence meted has overridden the proportional legal tenets of punishment thus does not achieve the objectives intended in our justice system and goes against the new developments in matters law hence sentence illegality.

5. The appeal was canvassed by way of written submissions. On his part the Appellant relied on the submissions dated 19th February 2025 in which he condensed the issues into six. First, he argued that his constitutional rights were violated as he was not given a fair trial and he did not have legal representation or an intermediary as required under Article 50 of *the Constitution*. To support this issue, reliance was placed on the case of Evans Wanjala Siibi vs Republic, Criminal appeal no 314 of 2018 and the case of Kenga Hisa vs Republic [2020] eKLR.

6. Secondly, he submitted that there were contradictions in the evidence of the prosecution witnesses more especially on the time. That from the evidence of PW1, PW2 and PW3, the matter was reported on 17/4/2022 at 2.25pm prior to the incident which was said to have occurred at 5-6.30pm; that it was alleged that the suspect was arrested on 17/4/2022 at 1am which was before the first report which was at 2.25pm and that the charge sheet was defective as it indicates that the date of arrest was 18/4/2022. The Appellant concluded that the charges were false. He further relied on the case of Jason Akumu Yongo vs R [1983] eKLR, Isaac Omambia vs Republic, Cr Appeal 47 of 1995 and State of Uganda vs Wagara [1964] E.A 366.

7. Thirdly, he submitted that the birth certificate produced was a copy and not the original and urged this court to expunge it from the record; that the PRC form and P3 forms did not correspond with the evidence tendered; that the victim testified that saliva was used while her mother said it was oil which was contradictory; that since the saliva was not detected in medical examination, it resulted in great prejudice. Further, he questioned how spermatozoa was not found in the minor's canal yet she was

taken to hospital immediately; that penetration was not proved; that there was no corroboration and that he was not positively identified. The Appellant also submitted that his evidence was not considered and lastly that the sentence was severe; the conviction was not safe and it should be quashed and the sentence set aside.

8. For the Respondent it was submitted the prosecution had proved its case beyond reasonable doubt; that the birth certificate indicted that the victim was 11 years old and that from the medical evidence adduced there was penetration. It was also submitted that the victim's testimony was corroborated by PW2, PW3 and PW4; that the Appellant chose to give unsworn evidence and not to call witnesses to corroborate his testimony and that there were no inconsistencies or contradictions in the prosecution case. Further, that the Appellant was positively identified by the victim as the perpetrator. Reliance was placed on the cases of FOD vs Republic (2014) e KLR, George Opondo Olunga vs Republic [2016]eKLR, Victor Mwendwa Mulinge vs R [2014] e KLR, Richard Munene vs Republic [2018] e KLR and Peter Musau Mwanzia vs Republic [2008] eKLR.

9. Learned prosecution counsel urged this court to dismiss the appeal and instead uphold the conviction and sentence imposed by the trial court.

Determination

10. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses – (see the case of Okeno v Republic [1972] EA 32). I have also taken into consideration the rival submissions, the cases cited and the law.

11. Section 8 (1) of the *Sexual Offences Act* provides as follows:

    1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement'

12. The elements of the offence of defilement are thus: -

    a. That the complainant/victim is a child and the age of the child for purposes of the sentence.

    b. Penetration of the genital organ of the child with the genital organ of the perpetrator whether complete or partial.

    c. Identification of the perpetrator.

    (see the case of Manyeso v Republic (Criminal Appeal 12 of 2012) [2023] KECA 827 (KLR) (7 July 2023) (Judgment).

13. In regard to age, the victim testified that she was 11 years old. This was corroborated by the birth certificate produced which shows that she was born on 11th April 2011. The incident is said to have taken place on 17th April 2022 by which time the victim was 11 years old.

14. The Appellant took issue with the birth certificate but in my considered view his objection to it has no basis. To begin with this issue was raised on appeal but not during the trial so it is an afterthought. Secondly the certificate was obtained in 2017 long before the commission of this offence hence its validity does not come into question. Thirdly it is admissible as is under Sections 38 and 80 of the *Evidence Act* and accordingly it is good evidence. There are no plausible reasons to warrant it to be expunged and I am satisfied that the age of the child was proved beyond reasonable doubt.

15. The next issue is penetration. Section 2 of the *Sexual Offences Act* defines penetration as:

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

16. Section 124 of the *Evidence Act* contains a proviso which removes the need for corroboration in cases of sexual offences. That proviso states-

> " .....
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

17. In this case the victim testified that the Appellant found her on the road near his place and took her to his house. She described what he then did to her as follows-

> " ..... he removed my clothes. He then did bad manners to me. The accused removed his clothes. He applied saliva in my private parts and inserted his manhood in my vagina. He continued. When he was done I went home.
>
> He did tell me not to tell anyone.
>
> He gave me ksh.10/- When I reached home I told mum. She took me to police and the hospital. Know him. He is a neighbour.
>
> He is the one"

18. Her mother testified as PW2. She stated that when the victim returned to their home she was walking slowly and told her that the Appellant has raped her. She stated that she took the victim to Ekalakala Hospital. Her testimony was confirmed by the Clinical officer (PW3) who testified that he saw and examined the victim at the facility on 21st April 2022 and that there were lacerations in the victim's genitalia. He also testified that she was walking with a limp. After the examination he completed her P3 and the PRC form all of which attest to the offence. clinician from the said facility. The Appellant's defence was that he was framed by the victim's father because of his sister's children who were working in Delmonte. I consider this a very weak defence given the cogency of the victim's testimony which was corroborated by other evidence even though it is not a requirement. The Appellant did not demonstrate the nexus between him and the so called children of the children of the sister of the victim's father. On the other hand the victim gave very cogent and consistent evidence which remained unshaken even in the face of rigorous cross examination, this court is convinced that she told the truth and that her testimony was reliable and trustworthy.

19. There is no requirement that spermatozoa must be found during examination so as to prove the offence of defilement as contended by the Appellant. What is crucial is proof of penetration whether partial or complete.

20. As already stated, I am satisfied that the complainant was a truthful and reliable witness. Her very detailed description of what was done to her and the evidence of her mother (PW2) which to a great extent was confirmed by the officer who investigated the case leaves no doubt that she was speaking the truth. Her evidence also proves the fact of penetration beyond reasonable doubt. That the Appellant

was not examined is immaterial. Incidentally, the Investigating Officer (PW4) asked whether he should take the Appellant to hospital but he refused to be taken.

21. On the issue of contradiction as to the time of the offence, I find that the same is curable under Section 214 of the *Criminal Procedure Code*. It does not in any way discredit the victim's testimony or the prosecution case in general and as it did not prejudice the Appellant it is hence not fatal. Moreover, the medical examination was done on 21st April 2022 four days after the commission of the offence and this is clearly indicated in the P3 form.

22. On the identification of the Appellant, the complainant testified that she knew the Appellant as a neighbour. This was confirmed by her mother (PW2) who stated the same thing and added that she had known the Appellant for a long time. She also stated that the offence took place when she sent the victim to the posho mill at 5pm and that the victim overstayed and returned home at 6.30pm meaning the offence occurred in broad daylight. Further, PW4 stated that during the investigations, she discovered that the Appellant's house was 50 meters from the victim's house. The element of identification was therefore also proved beyond reasonable doubt.

23. The issue of legal representation was not raised in the Petition of Appeal but in the submissions, which makes it an afterthought. Be that as it may, having considered the record as a whole I find that the Appellant clearly understood the nature and gravity of the offence. He extensively cross examined the witnesses and clearly the lack of an advocate did not occasion him prejudice to warrant this court to nullify the trial.

24. On the issue of the charge sheet being defective the appellant raises issues that are related to contradictory testimonies and not in the manner of drafting of the charge sheet. I find that the charge sheet was properly drafted in accordance with Section 134 of the Criminal procedure code, the charge, particulars, accused person, date of arrest inter alia are all well captured. It is also not lost to this court that such a defect would be curable under Section 382 of the Civil Procedure Code as clearly there was no failure of justice.

25. Turning to the issue of contradictions, I am guided by the finding of the Court of Appeal in the case of In Philip Nzaka Watu vs. Republic [2016] eKLR, where it was held that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to 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 versions 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. 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 recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

26. I make further reference to the case of John Cancio De SA vs. V N Amin Civil Appeal No. 27 of 1933 [1934] 1 EACA 13 where the court stated-

> " Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

27. The Appellant contends that there are contradictions especially on the date, from the record, according to the evidence of PW4, the Appellant was booked in at 1.05am on 17/4/2022 however the charge sheet indicated that he was arrested on 18/04/2022. It was the Appellant's testimony that he came back from Kanyonyoo on 16th at 6.30 pm and on 17th in the morning, the complainant's father was the first to go to his home and opined that he had a grudge with him. I find that the evidence of the charge sheet is sufficient to prove that the Appellant was arrested on 18/04/2022. He also corroborated the evidence of PW2 that 17th April 2022 was a Sunday. I therefore find that the prosecution produced sufficient evidence in support of the incident taking place on 17/04/2022.

28. The discrepancies highlighted by the Appellant have been noted but they do not go to the core of the offence before the court. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the conviction.

29. As regards the sentence, the trial court sentenced the Appellant to life imprisonment which is the punishment provided for the offence he was charged with. Section 8 (2) of the *Sexual Offences Act* provides as follows;

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

30. The *Sexual Offences Act* thus provides for a minimum sentence which this court cannot interfere with as held by the Supreme Court in the case of Republic vs Mwangi, Initiative for Strategic Litigation in Africa & 3 others (amicus curiae) Petition No. E018 of 2023[2024] KESC 34[KLR] (12TH July 2024) (Judgment).

31. The sentence is therefore not excessive or harsh as alleged. It is a lawful sentence and I find no merit in the Appeal on sentence.

32. The upshot is that the case against the Appellant was proved beyond reasonable doubt and as the sentence is also lawful this court finds no reason to interfere. The appeal is dismissed in its entirety and the conviction and sentence are upheld.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E. N. MAINA

JUDGE

In The Presence Of:

Miss Kaburu for the State/Respondent.

The Appellant in person.

Geoffrey-Court Assistant/Interpreter.