



**Njoroge v Republic (Criminal Appeal E003 of 2020)  
[2024] KEHC 8216 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8216 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E003 OF 2020  
JK NG'ARNG'AR, J  
JUNE 26, 2024**

**BETWEEN**

**PETER KIMANI NJOROGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence of the Chief Magistrate's Court at Thika (E. Riany, SRM.) delivered on 16th June 2020 in CMCC (SO) No. 113 of 2020)*

**JUDGMENT**

1. The appellant Peter Kimani Njoroge was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offence Act. The particulars of the offence were that on 10<sup>th</sup> March 2015, at Gatanga sub-county, Murang'a county, the appellant intentionally and unlawfully touched the vagina of MMM a child aged 6 years old.
2. When the appellant was arraigned before the trial court, he pleaded not guilty to the offence. After full trial, the appellant was convicted of the offence and sentenced to serve 10 years' imprisonment.
3. The appellant is aggrieved with those findings. He filed a petition of appeal and a memorandum of appeal that raised 5 grounds disputing the findings of the trial magistrate. In summary, the appellant lamented that PW1 had been coached and as such, her evidence was wholly unreliable. He opined that the prosecution had failed to establish the crucial elements to the charge. He continued that since the evidence levelled against him was marred with inconsistency and contradictions, his defence was improperly rejected and had been framed, his appeal was merited. In the circumstances, he urged this court to quash his conviction and set aside the sentence that was imposed on him.
4. During the hearing of the appeal, (appellant's submissions are not on record. Do we just state that he rehashed his memorandum of appeal?). Learned counsel for the state Mr. Baraka relied on his written



submissions dated 22<sup>nd</sup> January 2023 and filed on 24<sup>th</sup> January 2023 to submit that all the ingredients to a charge of committing an indecent act on a child were proved to the required standard. He thus prayed that the conviction and the sentence be upheld.

5. I have considered the record at trial and the rival submissions, examined the evidence and analyzed the law. As a first appellate court, this court's duty is to reconsider and re-evaluate the evidence before the trial court afresh in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect. [See *Selle & Another vs. Associated Motor Boat Co Ltd & others* [1968] EA 123].
6. According to the fact sheet as presented by the prosecution, the appellant was a fundi that had been employed by her father PW4 DMG to work in their homestead. During the pendency of the task assigned, he was living in one of the quarters within the homestead. On 10<sup>th</sup> March, 2015, PW1 was went to the appellant's house during the evening hours. It was then that the appellant sexually assaulted her by putting his finger in PW1's private part. At around 8:00 p.m., when she went to use the bathroom to attend to a call of nature, PW1 informed their house help FW and PW3 that she was in pain. PW3 then told PW2 FW, the complainant's mother, what she had observed.
7. On being notified by her house help that the complainant was in pain, PW2 physically observed PW1 when she returned home from work at 9:30 p.m. She discovered that PW1's underwear was stained with blood. Her private part was reddish. She interrogated PW1 who told her that the appellant had inserted his finger on her private parts that evening. PW2 notified her husband PW4 about what had occurred.
8. Following those allegations, the appellant was locked inside the house as they sought to report the matter to the police station. He was arrested therein. Meanwhile, PW1 was taken to Thika Level 5 Hospital by PW2 and PW4. PW5 Dr. Kamiro Muthua, employee at Thika Level 5 Hospital, testified that PW1 was seen by his colleague Dr. Wangithi. He found that PW1 had bruising and redness on her vagina. Her hymen and anus were intact. There was no evidence of penetration but she suffered a urinary tract infection. PW5 produced the treatment notes and P3 form handwritten and executed by his colleague Dr. Wangithi. The medical conclusion was that PW1 has suffered trauma and sexual assault.
9. PW6 CPL Frida Wathuma took over the investigations from CPL Cheruiyot when the matter was reported at Kirwara Police Station. She interrogated the witnesses, collected the evidence and charged the appellant with the present offence. PW6 produced the blood stained underwear belonging to PW1 and the complainant's birth certificate as evidence.
10. PW7 Dr. Anthony Waithira a clinician at Thika Level 5 Hospital testified that at all material times to the offence, he was working at Naidu Hospital. He prepared a referral note to Thika Level 5 Hospital dated 10<sup>th</sup> March 2015. According to the treatment notes, the complainant had blood on her private parts that had stained her underwear. She had bruises and lacerations on her vaginal wall and the hymen was broken. Her urine sample was not clear and had been infected. His diagnosis was that there was rape defilement.
11. At the close of the prosecution case, the trial court established that the prosecution had established a prima facie case as to place the appellant on his defence. The appellant gave an unsworn testimony. He testified that he worked as a mason for PW4. His testimony was that on that fateful day, he was working and was informed that he would be paid his dues. He was asked to await payment within the homestead. At around 10:00 p.m., PW2 approached him accusing the appellant of committing the offence. He was then arrested and arraigned in court. He denied committing the offence.



12. An indecent act is defined under the *Sexual Offences Act* as:

“An unlawful intentional act which causes;

- a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
- b. Exposure or display of any pornographic material to any person against his or her will.”

13. Thus to establish the offence of committing an indecent act on a child, the prosecution had to establish the age of the victim, the indecent act and the positive identification of the perpetrator. On the age of the victim, this court notes that PW1 was emphatic that she was nine years of age. The prosecution also produced her birth certificate marked into evidence as to corroborate that evidence. Based on that evidence, this court finds that age was proved to the required standard.

14. On the indecent act and identification of the perpetrator, the trial court relied on the evidence of the victim as to establish those ingredients in the affirmative. Section 124 of the *Evidence Act* provides that a conviction shall not be sustained on the evidence of a single identifying witness except in cases of sexual offences so long as the court can ascertain that the witness was deliberately telling the truth. In this case, PW1 testified that the appellant placed his finger on her private part. This testimony was also corroborated by her mother PW3 who informed the court what PW1 informed her after the incident. The trial court further observed that when PW1 had initially testified, she broke down and started crying when she saw the appellant. Furthermore, PW5 and PW7 testified that on physically observing the complainant’s vagina, she suffered redness and bruising. PW3 also noted blood stains on PW1 underwear that was produced in evidence.

15. One needs no rocket science to be persuaded that based on the recognition of the appellant at the dock in court, coupled with the incredible and unshaken testimony of PW1, she was telling the truth. In the circumstances, I find that the appellant was properly identified as the perpetrator that indecently touched the minor’s private parts. In the circumstances of the foregoing, I find that the appeal against the conviction lacks merit and it is hereby dismissed with costs.

16. On sentencing, section 11 (1) of the *Sexual Offences Act* provides that any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for term of not less than ten years. During his mitigation, the appellant stated that he was sorry and did not intend to commit the offence. The trial court considered his mitigation and sentence the appellant to ten years’ imprisonment. In my view, the trial court’s sentence was lawful as it is provided in law. For those reasons, I find that the appeal against the sentence similarly lacks merit and is hereby dismissed with costs.

It is so ordered

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE, 2024.**

.....

**J.K. NG’ARNG’AR, HSC**

**JUDGE**

**In the presence of:-**

No appearance for the Appellant



No appearance for the State  
Court Assistant- Peter Ong'idi

