John v Republic (Criminal Appeal E032 of 2024)
[2024] KEHC 10484 (KLR) (27 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E032 OF 2024

LM NJUGUNA, J

AUGUST 27, 2024

BETWEEN

ERICK KARENGA JOHN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. J. Ndeng'eri in the Chief Magistrate's Court at Embu S.O. Case No. 25B of 2018 delivered on 13th October 2021)

JUDGMENT

1. The appellant has filed petition of appeal dated 27th January 2024 seeking that the appeal be allowed, conviction and 40-years imprisonment be set aside and the appellant be set at liberty. The appeal is premised on the grounds that the trial magistrate erred in law and facts:
    a. Convicting the appellant on charges that were not proven beyond reasonable doubt as stipulated by the law;
    b. By convicting the appellant based evidence that was full of contradictions;
    c. Failing to consider that the sentence meted out to the appellant was excessive and unconstitutional; and
    d. Failing to observe that the *Sexual Offences Act* is discriminative as it targets the male child only; and
    e. By rejecting the appellant's defense without giving cogent reasons.
2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that, on 13th July 2018 at Embu North sub-county within Embu County, the appellant intentionally caused his

penis to penetrate the vagina of NMG, a child aged 2 years. The alternative charge was the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006, whose particulars are that on 13th July 2018 at Embu North sub-county within Embu County, the appellant intentionally and unlawfully touched the vagina of NMG a child aged 2 years with his penis.

3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.

4. PW1 was JGN, the victim's father who stated that on the material day, the appellant found him planting cabbages near the river and he wanted to know how come he had so much work to do. That he told him that he will continue with the work and will leave once he is done. That the appellant picked some guavas from a tree and then left. That he continued working until one Mama Mwende, a neighbour called him and when he went home, he found his father making noise saying that the appellant had defiled the minor. That he took the child to the appellant's mother who is a village elder and she recommended that they go to the hospital.

5. He stated that his wife and Mama M joined him along the way to the hospital and it was his evidence that he saw blood on the child's dress and he carried all the clothes that the minor was wearing to the hospital. That he reported the matter to Ruth Kaari, the appellant's aunt. That the child was examined and a P3 form was filled the following day. He stated that he has known the appellant all his life and that he is part of the family. On cross-examination, he stated that he had not left the child under the appellant's care. That the minor's clothes were taken by the police and she was examined and treated 2 hours after the incident. He produced the child's birth certificate as proof that she was a minor.

6. PW2 was the victim who gave unsworn evidence with her father as an intermediary. She stated that the appellant removed her clothes and (saambe) pants and inserted a finger in her behind. They were both standing behind the house. That it was painful and that she did not see any blood. She stated that she knew the appellant prior to the incident. On cross-examination, she stated that she did not cry when the appellant pierced her and she also did not fall to the ground.

7. PW3 was the victim's grandfather who stated that he had been left caring for the child and he went to the coffee plantation and the minor followed him. That the appellant went to the coffee plantation and helped him to uproot weeds for feeding the cows. That as the appellant was uprooting the weeds, he (PW3) was carrying the weeds to the cows. That at some point, the appellant carried the child and went with her and soon afterwards, he heard the child screaming and crying. He testified that when he went to find out what was happening, he saw the child covered with a blanket and the appellant was lying on top of her, having sex with her. That the appellant had lowered his pants and the child's clothes were wet and looking bad. That the incident occurred at around 2PM and the child's parents arrived one hour later and took her to hospital. On cross-examination, he stated that he did not know the age of the minor. That her clothes were bloodstained.

8. PW4 was Felista Muthoni Mugo who stated that on the material day, she had been out fending for the cows when she was called and informed that a neighbor's child had been defiled. That she picked the child and they were escorted by a female officer from Karau Police Station to the hospital in Embu but the child was not treated because the doctor had already left. That she carried the child using a leso but she did not check the private parts. She stated that the child was crying and she was muddy.

9. PW5 was P.C. Naima Omar, the investigating officer who stated that she interviewed the parents of the minor and established that the child had been defiled by the appellant. That the minor had followed her grandfather to the farm and the appellant brought her back home and defiled her. That the child's grandfather found the appellant lying on top of the child defiling her. She testified that she visited the

home and took the child to hospital where she was examined the following day. That the appellant was arrested in connection with the offence. That the minor was 2 years old at the time of the incident and she produced the birth certificate as an exhibit. On cross-examination, she stated that when the minor was taken to the police station, her clothes were muddy but not bloodstained. That it is the Nyumba Kumi members who looked for the appellant and assisted in arresting him.

10. PW6 was Humprey Mwendwa of Embu level 5 Hospital who stated that he examined the minor and prepared the P3 and PRC forms. That he examined the child the day after the incident and in the company of her grandfather. He observed that there was a lateral vaginal laceration, a broken hymen and a perianal laceration. That there were no spermatozoa shown and nothing remarkable from the high vaginal swab. The child was treated with the appropriate medication. He concluded that the injuries were caused by penile penetration causing mild vaginal bleeding. He produced the P3 and PRC forms. On cross-examination, he stated that the injuries were a sign that the penetration was forceful.

11. At the end of the prosecution's case, the court found that appellant had a case to answer and he was placed on his defense.

12. DW1, the appellant, was a minor aged 17 years at the time, age being determined through baptismal and immunization cards. The court conducted voire dire and he gave sworn evidence. He stated that the father of PW1 used to give him menial jobs and pay him Kshs.100/=-150/= a day. That on the material day, he was at the home of PW1 and the child followed him into the shamba and she fell in the mud and began to cry. That the child's grandfather found him picking the child up and threatened him for defiling her. He denied having removed his and the child's clothes. That he later returned home and was accosted by a mob who beat him up and took him to Karau Police Station. On cross-examination, he stated that at the time of the incident, he had been sent home for lack of school fees. That he used to go to PW1's home during school holidays and weekends to do the menial jobs.

13. DW2 was Ndwiga Rose Kageni, the appellant's aunt/guardian who stated that she heard that the appellant had been arrested. That since it was raining heavily, she could not do anything about it. That the appellant was a good child and he was well behaved. That he had a cordial relationship with the victim's family. On cross-examination, she stated that she does not have proof of the appellant's mother's death but she has been living with him since his mother died. That his father was living in Meru at the time of the incident.

14. At the end of the defense case, the court delivered its judgment, finding the appellant guilty of the offence of defilement. He was sentenced to 40 years imprisonment while considering the probation officer's report and the mitigating factors.

15. This appeal was canvassed by way of written submissions.

16. It was the appellant's submission that the evidence of the victim was not corroborated since the minor was of tender age. He relied on the cases of *Johnson Muriuki v. Republic* (1983) KLR 445 and *John Otieno v. Republic* (2009) eKLR.

17. The respondent submitted that the elements of the offence were proved beyond reasonable doubt. It relied on sections 2 and 8 of the *Sexual Offences Act* and stated that the victim's birth certificate showed that she was 2 years old at the time of the incident. It relied on the cases of *EE v. Republic* (2015) eKLR and *Hadson Ali Mwachongo v. Republi*c (2016) eKLR. That the victim's grandfather caught the appellant red-handed defiling the child and so the identity of the assailant is not in question. Regarding the sentence, it submitted that the statutory prescribed sentence under section 8(2) of the *Sexual offences Act* is life imprisonment in this case. However, the trial court considered many factors including section 239(6) of the *Children's Act*, 2022 and considered that the offender was a minor at

the time of the offence. That the sentence of 40 years imprisonment is fair in the circumstances. It urged that there is no basis for disturbing the findings of the trial court on both conviction and sentence.

18. The issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt; and

    b. Whether the sentence imposed was excessive.

19. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno vs. Republic* [1972] EA 32 I agree with the court when it held:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

21. According to the birth certificate of the victim, she was born on 10th March 2016 meaning that she was 2 years old at the time of the offence. This is not in question and the trial court rightly determined the same. In the case of *Edwin Nyambogo Onsongo Vs Republic* (2016) eKLR the Court of Appeal held that:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof." ...." we think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

22. On the element of penetration, the victim testified that the appellant inserted his finger in her back side. However, PW6 testified that the victim had suffered penial penetration which was forceful leading to injuries. Even though there were no spermatozoa cells present, he observed that there was lateral vaginal laceration, a broken hymen and a perianal laceration. This is sufficient proof of penetration.

23. PW2 and PW3 placed the appellant at the scene of the crime. PW3 testified that he saw the appellant lying on top of the victim and he was having sex with her. PW2, the victim, stated that he knew the appellant prior to the incident and so she could identify him well. In his defense, the appellant did not deny that he was at the scene. With this, I say that there is sufficient evidence placing the appellant at the scene committing the offence.

24. As to whether the sentence is excessive, the trial magistrate sentenced the appellant to 40 years imprisonment even though section 8(2) of the *Sexual Offences Act* prescribes a mandatory life imprisonment sentence for this offence. The trial magistrate considered the age of the appellant at the time of the sentencing, mitigating factors and the probation officer's report before departing from the mandatory prescribed sentence. She noted that that no borstal institution would accept to detain him since the appellant was 19 years old then. This finding by the trial court is sound because the *Sexual Offences Act* does not distinguish punishment for child offenders.

25. In that regard, I do not think that the sentence is excessive, neither is it unconstitutional.

26. In the end, I find that the appeal lacks merit and the same is hereby dismissed.

27. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF AUGUST, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State