



**Sitienei v Republic (Criminal Appeal E214 of 2019)
[2023] KEHC 1937 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E214 OF 2019
SM MOHOCHI, J
FEBRUARY 28, 2023**

BETWEEN

PIUS KIBET SITIENEI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the sentence in CMCC SO No. 801 of 2017 - Kapsabet, Republic v Pius Kibet Sitienei, delivered by Hon. P.W. Wasike, S.R.M. delivered on 17.12.2017)

JUDGMENT

Introduction

1. The petition appeals against the conviction and sentence of 10 years imprisonment for the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* 2006 which in this instance was an alternative charge to the principal charge of committing defilement.
2. The Appellant was charged with the offence of defilement Contrary to contrary to section 8 (1) as read together with section 8(2) of the *sexual Offences Act* of 2006 the particulars of the offence are: -

“that on diverse dates between the month of June 2016 and 28th March 2017 within Nandi County, intentionally and unlawfully did cause his penis to penetrate the vagina of CC a child aged 12 years in violation of the said act”.



3. In the alternate, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [sexual Offences Act](#) of 2006, particulars of the offence are;

“On diverse dates between the month of June 2006 and 28th of March 2007 within Nandi County, intentionally and unlawfully did cause his penis to come into contact with the vagina of CC a child aged 12 years”.
4. After calling 4 witnesses, the minor (victim), both parents and a chief, the prosecution closed its case without the investigating officer testifying and or producing documentary records in the nature of birth certificate and medical examination record.
5. The Appellant was Acquitted under section 210 for the main charge while being placed to his defense in the Alternate charge where the Appellant gave an unsworn testimony, that he could recall the testimony of the prosecution witnesses and prayed for forgiveness before closing his case.
6. The Appellant was found guilty, convicted and sentenced to imprisonment for 10years.
7. Being dissatisfied with the conviction and sentence, the Appellant filed this instant Appeal on the 24th December 2019 and without leave of the court filed a further Supplementary Petition of Appeal on the 15th February 2021 and no leave was ever sought from the court subsequently.
8. An appeal filed out of time without leave of the court is incompetent and the court cannot lawfully exercise jurisdiction on such appeal. Limitation of actions is a substantive matter of law and failure to obtain leave to file proceedings out of time is not a mere technical omission but a substantial lapse that goes to the root of the proceeding itself.
9. This court shall accordingly strike out further Supplementary Petition of Appeal on the 15th February 2021 and disregard the grounds introduced therein.
10. The Appellant relied on the following eight (8) grounds,
 - i. That the appellant is a first offender and a young man innocent in the matters of the law.
 - ii. That the appellant is remorseful repentant regretful and reformed and will always serve as teacher and example to others if given a second chance in life
 - iii. That the appellant and complainant were and have and currently stay together as wife and husband as under article 45(1)(4) a,b of [the Constitution](#) of the Republic of Kenya
 - iv. That the appellant and the complainant have been blessed with two children and the family is currently staying with the appellant parents.
 - v. That both the appellant and complainant have had mutual relationship and have agreed on customary marriage because the girl has attained an adult age
 - vi. That may this honorable Court be pleased to find out that the constitutionality of article 53 (1) b, c and e (2) in reliance to article 27 (1, 2 and 4) of [the Constitution](#) of the Republic of Kenya has been contravened through the denial of my children to fatherly responsibilities occasioned by my imprisonment.



- vii. That may this honorable court grant leave under its jurisdiction powers and discretion that I be admitted to a non-custodial sentence to enable me execute my responsibilities as a father
 - viii. That our two families are in good terms and have encouraged and supported us to live as a family.
11. The Appellants written submissions were aligned to the grounds as introduced by supplementary petition struck out and as such are not relevant to the grounds of the Appeal. The Appellant however made oral submission stating that when he was arraigned and charged before the subordinate court he was confused and never understood the process of the law as he had never been arrested before. He beseeched the court to review his sentence.
 12. The Respondent opposed the appeal and wholly relied on its written submissions dated January 13, 2023 urging that the court finds that the Appeal lacks merit, that his fair trial rights were not infringed at all, that the prosecution proved its case beyond reasonable doubt and that the Appeal should be dismissed and the sentence be upheld.
 13. The respondent relied on the decision of *S v Malgas* [2001] SACR 469 (SCA) that provide the guiding principles for interference of a sentence, that such interference can only be possible where the trial court has materially misdirected itself on sentencing, the case of *Oketa v State* (135) [2011] ZASCA 166 holding that sentencing remains preeminently a discretion of the sentencing court, the case *Ogolla S/O Owuor v R* [1954] EACA that the Appellate Court can only alter a sentence where the Trial Court is found to have acted upon a wrong principle or overlooked some material facts and the case of *Shadrack K. Kogo v R* [2003] eKLR holding that for the Appellate court to interfere with the exercise of discretion in sentencing there has to be a finding that the trial court in passing sentence considered irrelevant factor or applied a wrong principle or the sentence is excessive.
 14. The Respondent argued that the trial court considered all relevant factors in sentencing such as the appellant being a first offender, his remorsefulness and seeking of forgiveness and that the sentence as imposed was lawful as the minimum provided.

Prosecution Case

15. PW1, the Victim who was at the time of her testimony 13 years old did identify her birth certificate which was marked as PMFI1, indicating she was born on the October 20, 2005.
16. She testified that in 2015 she met the appellant who was then not going to school and they started having an affair as friends and this continued till October of 2016 when she became pregnant she told a neighbor and the mother and also told the appellant that she was pregnant and the appellant agreed to take care of her.
17. In November of 2016 her father called her, quarreling her while she was pregnant and she was ordered to go to the appellant and she went the appellant's home and he welcomed her and they stayed together for 2 months up to the 1st of March 2017 when she gave birth to a child (a girl) and it is at this juncture that the mother demanded that she goes back home she was given the information by a-1 immaculate teachers are.
18. On 3rd of March 2017 she went back home escorted by the Appellant and when they got near their home the Appellant told her to go in.



19. On the 7th of March 2017 the appellant came and told her to go back to his place and the parents did not know so they both went at 2 p.m. she went with her child.
20. The witness narrated how on the 28th of March 2017 at night she heard that the mother had reported the appellant and that the appellant has been arrested at Centre and take him to Songhor police station and that she too was taken to songor the next morning where she recorded her statement and that by the time of her testimony the child was 1 year and 8 months. She identified the appellant as being responsible for the pregnancy.

No cross-examination

21. PW2, DT, the father of the Victim (PW1), stated that the Victim was his third born daughter and in October 2016 PW1 and the appellant were friends and that PW3 (PW1's mother) was called to the school and informed that their daughter was pregnant and that the mother is betty tirop
22. He narrated how he went to the assistant chief and reported and that the appellant did not go to the office as requested and that in November of 2016 PW1 disappeared from home and went to stay with the Appellant, that PW1 would normally disappear to go to the Appellant and that he forced her to come back home and made a report to the police.
23. The witness narrated how PW1 gave birth in November 2016 at the appellant's home, prompting PW3 to request PW1 to go back home. The appellant took her back home but she shortly thereafter went back to the appellant. eventually the appellant was arrested in 2017 at a date he could not recall and that he always left the issues of Girl children to be dealt with by his wife. He identified the appellant on the dock as the boy who was arrested he recorded his statement and that PW1 was taken to hospital by police and her mother and is now staying at his home The Witness affirmed that PW1 conceived a child with the Applicant.

No Cross-examination

24. PW3 BT the mother of PW1 narrated how in October 2016 she was called by a neighbor who had received a call from the school former teacher at the network Primary School and informed that her child was pregnant, she went to the school where PW1 admitted of being pregnant identifying the appellant as a culprit. The Witness knew the Appellant well and agreed that PW1 delivers the baby and comes back to school. That when she went back home she did not find the PW1 and that she reported to the village elders who advised that the parents of the appellant would come to her home and that she had all along known the appellant whom she identified in the dock.
25. The Witness further testified how she went to the assistant chief's office and the DO's office to report accompanied with her brother and his son and father to the appellant's home to see the appellant's parents under that home the appellant held up a panga ordering them to leave. That it was their desire to meet the parents of the appellant as they wanted to take their daughter away but ran away and left after being threatened and they left PW1 there until after PW1 give birth in January 2017 when she called her and told her to come back home and she sent her sister to go and pick her but the appellant refused.
26. On the 3rd of January 2017 at 8 p.m. the appellant brought PW1 home and PW3 wanted her to go back to school which she accepted but later ran away on the 17th of March 2017 she was found standing outside the road with the child screaming in the company of the appellant who ran away and PW1 came back and PW2 punished her causing her to leave the same night back to the Appellant. That she went and reported to the chief and the DO the two were arrested and taken to Songhor. She was shown



and identified PW1 birth certificate indicating she was born in 2005 stating that the (boy) appellant had taken away her child and made her his wife.

No Cross-examination

27. PW4 Samuel Kimutai assistant chief of Gotnenel testified how in December 2016 PW2 went to his office to report that his child has been taken away by another person and the witness started investigations and noted that the appellant is the one who had married the girl he summoned the appellant's parents but they did not come. It was his evidence that later he was told the boy has been seen and he asked AP officers to arrest him, traced PW1 and took both of them to Songhor Police Station. He identified the appellant on the dock.
28. It is observed from the record of Appeal, that from the hearing date of October 18, 2018 when PW3 and PW4 testified, to the July 11, 2019, the prosecution was unable to present any more witnesses, despite the trial court granting the last adjournment on the February 5, 2019
29. On the July 11, 2019 the Prosecution was granted the very last adjournment with the case being scheduled for hearing on the November 5, 2019 a date which the prosecution closed its case.
30. The Appellant was found with a case to answer on the alternative count owing to the want of presentation of medical documents, P3 form and medical treatment notes in evidence and proof of the charge of defilement in which the Appellant was acquitted.

Defense Case

31. The Appellant gave an unsworn testimony in defense indicating his awareness of what the prosecution witnesses had said in court, praying for forgiveness and closing his case.

Judgment

32. In judgment, the trial court was persuaded of the prosecutions case with regard to the minority status of PW1 from the evidence of all the four witnesses and the birth certificate identified before court that was never produced. The trial court observed attempts to defeat justice by the Investigating Officer by not availing documentary evidence and that the Court cannot be held to ransom.
33. That section 124 of the *evidence act* obviated the need for corroboration in such instances and in the child's best interests and that for the reason it recorded, that it was not in doubt that the Appellant married a twelve (12) year old girl whom she impregnated gave birth to a baby and only sought forgiveness in defense was the clearest proof beyond reasonable doubt.
34. The appellant was accordingly found guilty, convicted and sentenced to imprisonment for ten (10) years.

Analysis and Determination

35. This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of *Charles Mwita v Republic*, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

“In *Okeno v R* [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA. 336) and to the appellate court's own decision on the evidence”.



36. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwala v R* [1957]EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate’s findings 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, see *Peters v. Sunday Post*, [1958] E.A. 424.”
37. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of *Gabriel Njoroge v Republic* [1988-85]1 KAR 1134, that;

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see *Pandya v. R.* [1957] E.A 336, *Ruwala v. R* [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law.”
38. In this case having re-evaluated the evidence I find that the Complainant was truthful in her evidence, she had a relationship with the Appellant resulting in the birth of the baby girl which evidence was corroborated by PW2 and PW3 and that the appellant in his own Appeal concedes admitting that he intends to enter into a customary matrimonial union with the complainant as she is currently staying with the Appellants parents and that his conviction and imprisonment contravenes his constitutional right to family.
39. The appellant still appears unremorseful for engaging in a sexual relationship with a minor and this court finds that the charges of committing an indecent act with a child of tender years was proved to the required standard of proof beyond reasonable doubt. The appellants defense and submission on appeal amounts to a mere denial in the face of apparent proof, his conviction was thus sound and safe.
40. The appellant sought review of his sentence which the court finds to be without basis, the sentence as imposed was lawful, and was not excessive under the circumstances and the trial court did not consider any irrelevant factor(s) or applied a wrong principle in imposing the sentence to warrant interference by this court.
41. Consequently, and for reasons enumerated above, this court finds the Appeal against conviction and sentence to lack merit and accordingly and dismiss the same.
42. The conviction and sentence of the appellant by the trial court is thus confirmed.
43. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 28TH FEBRUARY 2023

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MOHOCHI S.M

JUDGE

28.2.2023



In the Presence of;

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

