Njue v Republic (Criminal Appeal E060 of 2022)
[2023] KEHC 1034 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1034 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E060 OF 2022

LN MUGAMBI, J

FEBRUARY 17, 2023

BETWEEN

JOSEPH NYAGA NJUE ..... APPELLANT

AND

REPUBLIC ..... PROSECUTOR

(An appeal against the conviction and sentence in the SPM's Court at Siakago (Hon. W. Ngumi, PM) dated 2.9.22 in Criminal Case No. (S.O) 17 of 2022)

JUDGMENT

1. The appellant Joseph Nyaga Was charged with the offence of defilement contrary to Section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence were that on the 3rd day of April 2022 at 1800 hours in Mbeere North Sub-County intentionally caused his penis to penetrate the vagina of MK a child aged 15 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual offences Act* No 3 of 2006.

4. The particulars were that on the 3rd day of April 2022 at 1800 hours in Mbeere North Sub-County intentionally caused his penis to penetrate the vagina of MK a child aged 15 years with his penis.

5. The Appellant was found guilty of the main offence of defilement contrary to Section 8 (1) as read with section 8 (3) and sentenced to serve fifteen (15) years imprisonment.

6. The Appellant was aggrieved by the conviction and sentence and hence filed this appeal.

   He appealed on the following grounds:-

   1. That the learned Trial Magistrate erred in both law and fact by failing to note that the prosecution witnesses gave inconsistent, contradictory and conflicting evidence.

2. That the learned Trial Magistrate erred in both matters of law and facts by convicting the Appellant based on evidence of single witness without warning herself of the dangers of relying on such evidence contrary to Section 124 of the *Evidence Act*.

3. That the learned Trial Magistrate erred in both matters of law and fact by failing to conduct a pre-trial before convicting and sentencing the Appellant.

4. That the learned Trial magistrate erred in both law and fact when she disregarded the Appellant's defence without giving cogent reasons.

5. That the learned Trial magistrate erred in both matters of law and fact by failing to give the Appellant chance to cross examine the witness's evidence contrary to Article 50 of the *Constitution*.

7. This being the 1st Appellate court, I am under an obligation to re-examine the entire evidence and draw my own independent conclusions bearing in mind the judgment of the lower court and also the fact that I did not see or listen to the witnesses as they testified (*Okeno v Republic* [1972] EA 32).

8. The Complainant MK testified that she was a form 2 student. She also identified her birth certificate in court (Pexh 1) and confirmed that she was born on 8.12.2006.

9. She recalled that on April 3, 2022 at about 3.00 pm.; she and her mother (PW2, JM) were from attending a church service at the Full Gospel Church at [Particulars Withheld] when a Probox vehicle with the name "*Shemeji*" on the front approached. The mother stopped it and the driver alighted. She requested him to carry the complainant and drop her at a place called [particulars withheld] where the Complainant would alight. The Appellant said the fare was Kshs 100/- shillings but after negotiation with the complainant's mother, he agreed to take Kshs 50/-.

10. The Complainant entered the car and the appellant drove off. There were other passengers inside the vehicle but on reaching at a place called Mutuobare, the rest of the passengers alighted leaving the complainant with the Appellant who was driving the Probox car. When they reached [particulars withheld] where the Complainant was to alight, she alerted the Appellant but he declined stop. He instead drove on insisting that the mother to the Complainant had instructed him to drop her off at her grandmother's home. Even after they reached the grandmother's home area, the Appellant did not stop, he in fact accelerated.

11. They reached at a place called [particulars withheld] junction and he asked the complainant to alight there promising that he would pick her shortly after he had finished with someone he wanted to see. A short moment later, the Appellant came back and told her to get into the car.

12. However, rather than driving back to Isako with the complainant, he drove towards a bush in the vicinity of [Particulars Withheld] dam. He then stopped inside some thicket and instructed her to alight. He was at the time carrying a bunch of keys which had pen knife attached to it.

13. He warned her not to raise any alarm. He removed her skirt and had sexual intercourse with her. After he finished, he ordered her back to the vehicle.

14. He drove to [particulars withheld] junction and asked her to alight. He then came back riding a motor cycle and carried her on it to the grandmother's home.

15. The Complainant explained that she was feeling lots of pain and was crying prompting her grandmother inquire where she had been. She told her she was at [particulars withheld] because the Appellant had threatened her with death if she disclosed what had happened.

16. When her mother came, she disclosed what had transpired. She was taken to [particulars withheld] Health Centre and a report was made to [particulars withheld] police station. She was stitched for the vaginal injury she had suffered during the ordeal.

17. She positively identified the Appellant as the person who defiled her.

18. She also identified her blood-stained pink panty that she wore on that day (P Exh.5).

19. The evidence of her mother (PW2) was similar to that of complainant regarding what transpired on 3.4.22 at about 3.00 pm. when the complainant boarded the Probox car christened '*Shemeji*' that was being driven by the Appellant.

20. Later on, when PW2 called the grandmother to find if the complainant had arrived, she was told she had not and panicked. It was about 7.00 pm already. She informed the complainant's father who insisted that they had to go look out for her. In the meantime, she called the Appellants sister and asked for the Appellant's mobile number. She called the Appellant and demanded to know the whereabouts of her daughter. The Appellant insisted that she had alighted at [Particulars Withheld] as the mother had requested.

21. Meanwhile, they reached the grandmother's home. They found the Complainant had shortly arrived. She questioned her on what had transpired.

22. The Complainant explained in detail what had befallen her.

23. That night at 1.00 a.m. they visited Mutuobare police post where they lodged a report and were also advised to go to Kiritiri police station the following morning. They visited Kiritiri Health Centre where she was examined and treated the following day. P3 form and post-rape care (PRC) forms were also filled. Her panty was blood stained panty was recovered by police.

24. She confirmed that her daughter was born on 8.12.2006 per birth certificate – (P Exh.1).

25. Referring to the Accused she explained

> " Nyaga is on the dock. I knew him prior. I have known him for a long time from when I was young. I was surprised he could do such a thing to my baby as we had not differed."

26. Clinical Officer, James Ireri (PW4) from Kiritiri Health Centre told court that he was the one who examined the Complainant when she was presented at the Health Centre on 4.4.2022. He also filled the P3 form and post rape care forms (PRC). The panty was blood stained (P exhibit.5). It was pink in colour.

27. There was vaginal tear that was approximately 1.5 cm in length. The hymen was also absent. Lab test indicated presence of spermatozoa pus cells in urine. He sutured the vaginal tear. He produced the treatment notes (P. exhibit-4) and the P3 form (P exhibit-3).

28. The Investigating Officer was corporal Mary Mwema (PW3) of Mutuobare police post. She said that the case was minuted to her for investigation by Officer in charge of the Police Post. The Complainant went to the post accompanied with her mother to the Police Post. She interviewed them and issued them with P3 form. She also recovered the pink panty that the Complainant wore on the date of defilement.

29. She arrested the Appellant three months later, that is, on 13.6.2022 after identification by the complainant's mother as he had disappeared after this incident.

30. She also recovered the birth certificate of the Complainant which showed she was born on 8.12.2006. She produced the birth certificate in evidence as P. exhibit-1. Also produced by the Investigating Officer was the Complainant's blood-stained pink panty P. exhibit- 5.

31. She explained that the Appellant she arrested while on his way from Isako to Mutuobare after identification by the Complainant's mother.

32. The Appellant gave an unsworn statement of defence in which he denied committing the offence. He denied threatening the Complainant with pen-knife and said he did not have any. He wondered that the Complainant told court that he left her at [particulars withheld] junction, a place which is less than 100 metres from [Particulars Withheld] Police Post yet she could not bother report him for the offence she said he had allegedly committed against her.

33. He also denied that he took her to [particulars withheld] on board a motor cycle (*boda boda*).

34. In an offence of defilement, three key elements that must be proved are:-

    i). Penetration

    ii). Age of the Complainant, and

    iii). Positive identification of the perpetrator of the offence.

35. On whether the Complainant was sexually penetrated, she explained vividly how she was driven into a bush by the Appellant who threatened her with a pen knife before undressing her and sexually penetrating her in the private part (vagina).

36. Medical evidence adduced also corroborated the fact there was sexual penetration as her hymen was broken, there was vagina tear 1.5 cm long and presence of spermatozoa that was detected after laboratory examination was done on her.

37. The above evidence is clear proof beyond reasonable doubt that there was sexual penetration.

38. Age was also proved as well. The Complainants birth certificate was produced (PExh.1) which indicated she was born on 8.12.2006. In addition, there was the mother's testimony and that of the Complainant.

39. There was thus no contradictory evidence concerning her age. Considering that the date for the commission of the offence was on 3.4.22, it is thus clear that the Complainant was 15 years and approximately 4 months old which places her within the age bracket of the offence committed against her.

40. The other issue was evidence of identification. The Complainant was categorical that the person who defiled her was the Appellant. He refused to drop her at Isako as instructed by her mother and accelerated the probox vehicle only to stop another place called Ngiiri junction where he dropped her and shortly thereafter, picked her and drove her into a bush where he threatened her with a pen-knife and defiled her.

41. The Appellant did not confront/challenge this testimony during cross – examination at the trial court. In his petition of appeal he stated that he was not given a chance to cross-examine the prosecution witnesses. I have however perused the record and I have satisfied myself that this is not correct as the trial court gave him opportunity and noted the appellants response every time a witness testified. In almost all the instances, it is the appellant who told the court that he had no questions to ask. He was thus

given the chance to cross-examine but he chose not to utilize it. That was not being denied a chance to cross-examine, it was his choice.

42. In the written submissions he insisted that the Complainant was not credible. He submitted that he could not have refused to stop at [Particulars Withheld] where the complainant was to alight and submitted:-

> " Your honour, whom am I to refuse her decision after all these people (mother and girl) are my immediate neighbours. Again, in the vehicle there were other passengers so she could have raised alarm if there was that issue of failing to alight her..."

43. The submission that the Complainant failed to raise alarm in the presence of other passengers is misleading and is not borne out of evidence. The Appellant's claim that there were other passengers on board is new fact for he did not raise during the trial, not in his own statement of defence or through cross-examination of the complainant. It is thus disregarded. He cannot introduce new evidence by way of submissions.

44. The only evidence that gave a descriptive account of what transpired that day between the Appellant and the Complainant was the uncontroverted testimony of the minor which she narrated in court. She stated that at [Particulars withheld], everybody alighted except her and the Appellant.

45. The appellant in ground of his appeal insisted that the trial court erred by convicting the Appellant based on evidence of single witness without warning itself of the dangers of relying on such evidence contrary to Section 124 of the *Evidence Act*. Section 124 of the *Evidence Act* obviates the need for corroboration in sexual offences where the Court believes the evidence of the victim and records its reasons for the belief. This offence was committed in broad-daylight and after considerable time spent between the victim and the perpetrator who was the appellant herein. The testimony of the complainant was thus free from possibility of any error in identification of the perpetrator. Further, despite implicating the appellant in her testimony, he did not even challenge her testimony by cross-examination. I thus believe the complainant was stating the truth.

46. The mother of the Complainant (PW2) was also clear in her testimony that the person she handed her daughter to carry in his Probox car at cost of Kshs. 50/-was the Appellant whom she knew well from childhood. That is the same person her daughter said turned against her moments later by refusing to heed the instructions of the mother to drop her at Isako. Even when the complainant reminded him to stop he blatantly refused and took her far from there. It turned out to be a scheme he had hatched to make the complainant stranded and exercise full control on her as he did so as defile her.

47. The Appellant further raised the ground that the learned Trial Magistrate erred in both matters of law and fact by failing to conduct a pre-trial before convicting and sentencing the Appellant. I am not sure what the appellant meant but I suppose he meant that the voire dire examination of the complainant was not conducted by the Court. In this case, I find it was not necessary as the victim was above 14 years of age. Though a child of tender years is not defined under the *Evidence Act* or under the *Oaths and Statutory Declarations Act*, judicial authorities have made it clear that competency of a child to testify should be ascertained prior only if it is established that a child is under 14 years of age. In this case, the complainant was fifteen years and four months old. In *Patrick Kathurima v Republic* (2015) eKLR the Court of Appeal held:-

> " ...Whereas the question of whether a child is of tender years remains a matter for good sense of the Court as was stated by this Court in Mohammed v Republic (2008) 1 KLR 1175, we

see no reason for departing from the observation made in Kibageny v Republic (*supra*) that the expression 'child of tender years' for the purpose of section 19 means

> 'in absence of special circumstances, any child of any age, or apparent age, of under fourteen years.'"

I find no merit in this ground of appeal.

48. The defence of the Appellant was thus a mere denial. Evidence of identification by the complainant was thorough and was also circumstantially corroborated by the events that preceded her defilement.

49. There was thus no doubt that the offence of defilement was proved and the person who committed that offence against the complainant was the Appellant.

50. On Sentence, I have noted that if the Court was to impose the statutory defined minimum sentence as in section 8 (3) of the *Sexual Offences Act*, the appellant should have been given a minimum of twenty years. However, the Court of Appeal has frowned on mandatory statutory sentences as unnecessary fetter on judicial independence. In Criminal Appeal No 84 of 2015- *Joshua Gichuhi Mwangi v Republic* the Court of Appeal held:-

> " ... We acknowledge the powers of legislature to enact laws as established in the *Constitution*. However, the imposition of mandatory sentences by legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentence yet it does not adjudicate particular cases hence it cannot appreciate the intricacies faced by judges in their mandate to dispense justice..."

51. The sentence cannot thus be interfered with unless it can be shown it was decided on wrong principles. In my view, I see nothing wrong in the manner the trial court imposed the sentence.

52. I find no merit in the appeal and dismiss the same accordingly.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY, 2023.

L.N. MUGAMBI

JUDGE

In the presence of :-

Coram:

Court Assistant: Kinyua

Appellant: Present (in prison)

DPP for Respondent: Mr. Gacharia

COURT

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE