Nyongesa v Republic (Criminal Appeal E101 of 2021)
[2023] KEHC 3690 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E101 OF 2021

REA OUGO, J

APRIL 28, 2023

BETWEEN

SIMON JUMA NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon G.P Omondi, PM dated 18th October 2021 in Criminal Case No. 118 of 2019 at the Magistrate's Court at Bungoma)

JUDGMENT

1. The appellant, Simon Juma Nyongesa, was charged before the subordinate court 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. Particulars of the offence being that on diverse months between January 2019 and November 11, 2019 in [particulars withheld] location within Bungoma county intentionally and unlawfully caused his penis to penetrate the vagina of JN a child aged 13 years. The appellant further faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The complainant and place of alleged offence are the same as in the main charge.

2. The appellant pleaded not guilty to both the main charge and the alternative charge. The matter proceeded to hearing and the trial magistrate after considering the evidence of the prosecution witnesses and that of the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt and proceeded to convict and sentence the appellant to serve 20 years imprisonment.

3. The appellant now appeals against conviction and sentence on the grounds set out in his petition of appeal and amended grounds of appeal. The appellant also filed written submissions in support of his appeal. The thrust of the appeal is that the prosecution failed to prove its case beyond reasonable doubt as Pw2 was not a credible and trustworthy witness. He also contends that the medical evidence did

not support Pw2's testimony and that there were contradictions in the prosecution case. He has also challenged his arrest and argued that it was unconstitutional to be held for a period of more than 72 hours before being arraigned in court. His appeal was also on grounds that his rights under article 25 and 50 (2) of the *Constitution* had been violated. On sentence, he has challenged the 20 year sentence as excessive. He has urged the court to consider that the sentence is not a mandatory one and that this court has discretion to reduce and consider the presentence report that proposed a non-custodial sentence.

4. The appeal is opposed by the prosecution who filed their written submissions.

5. This being a first appeal, this court is under a duty to re-evaluate the evidence and draw its own inferences of fact so as to come to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained. (See *Okeno v Republic* [1972] EA 32, *Kiilu and another v Republic* [2005] 1 KLR 174).

6. The evidence that adduced before the trial court was as follows:

7. JON (Pw1) testified that she resides with her father BWW (Pw3). She knew the appellant who is a herdsman at Ben's farm. She would go to collect firewood at Ben's shamba and the appellant would then call her. He would instruct her to lie down, and when she refused, he would forcefully lay her down. She testified that:

> " ...he lays me down forcefully and removed my pants. The accused then lays on me and does 'tabia mbaya'. He puts his thing into mine. He puts his thing for urinating into mine for urinating. When he does that I feel pain. When somebody comes by, he tells me to get up and go. He has done this three times."

8. Ann (Pw4) recalled that on the material day she was in her shamba when she heard children playing and laughing. She followed the sound and noticed it was from Ben's Shamba. She found Pw2 standing and told her to go home. She saw the appellant open the gate on the opposite side into the home of Ben. Pw3 received a call from his neighbour Mercy who asked him to go back home because there was a problem. He went home and found Pw4, examined Pw2 and saw blood stains on her pant. He took Pw1 to Mayanja dispensary. He reported the matter at the chief camp where there is a police patrol base and later came to Bungoma Police station with 2 officers.

9. The clinical officer at Bungoma Referral Hospital, Elias Adoko (Pw1) examined the complainant. He observed that her hymen was rugged and she had a foul white discharge. She had no pregnancy and the HIV and syphilis tests were also negative. Pw1 reached the conclusion that the complainant had been defiled and that there was full penetration.

10. The investigating officer, PC Caroline Osiya (Pw5) testified that the complainant and the appellant are neighbours and know each other. The complainant and her father reported the matter on November 12, 2019 that the child had been defiled by a person known to her, the appellant. She escorted them to Bungoma Referral Hospital and the child was examined by a doctor. She recorded their statement and the appellant was charged. The child was taken for age assessment and it shows that she is 13 years old. PC Alex Mbithi Nguta No 256219 (Pw6) testified that he arrested the appellant at the home of Lukorito. He was accompanied by the complainant's father, Pw3, who knew the appellant.

11. The appellant on his defence denied committing the offence. He was arrested and taken to Mayanja then to Bungoma Police station for 3 days.

Analysis And Determination

12. The main issue is whether the prosecution proved its case to the required standard. The prosecution was required to prove three main ingredients being the age of the victim (must be below 18 years), penetration and the proper identification of the perpetrator.

13. The appellant submitted that the evidence on the age of the minor was not conclusive for reasons that the age of the minor captured in the P3 form was 12 years as opposed to 13 years. The respondent argued that the age of the minor was proved as there was scientific evidence to support that the minor was 13 years old. The age of the victim was proved through the age assessment report which reveals that the minor was 13 years at the time of the offence. The minor's father, Pw3 also testified that she was 13 years old. I have however observed that the P3 form indicates that she was 12 years old at the time of the offense, which may raise a minor inconsistency with the evidence regarding Pw1's age. Nevertheless, the available evidence indicates that Pw1 was a minor when the offense was committed. In any event, the age of the minor is taken into consideration as a determining factor when determining the appropriate sentence for the perpetrator once it is proven that the offense was committed. I am therefore constrained to agree with the trial magistrate's decision that the age of 12 years or 13 years both attracts the same sentence. Taking account of both the scientific and evidence of Pw3, I find that there was sufficient evidence that Pw2 was a child aged13 years old.

14. The appellant also submitted that he was not positively identified but was framed by Pw3 who coached Pw2 with the intention to incriminate him. The prosecution submitted that the victim knew the appellant well and there was no chance that she could have mistaken him for someone else. The prosecution evidence was clear that the appellant and the complainant were neighbours. Pw3 and Pw4 both testified that the appellant worked for their neighbour Ben as a herdsman. Pw2 had met the appellant several times when she went to Ben's homestead to collect firewood. She narrated that the appellant had defiled her 4 times in different places, i.e., in the shamba, near a tree and by the river. The evidence points to the fact that the complainant knew the appellant very well and had spent a considerable amount of time with the appellant. It is also clear that the incidents described by Pw2 took place during the day and the minor clearly saw and identified the appellant as the perpetrator.

15. The appellant in his submissions also challenged the element of penetration. He submitted that an absent or rugged hymen does not prove that there was penetration. He argues that the evidence from the P3 form, PRC form and treatment notes exonerated him for reasons that the medical evidence did not reveal that there were tears sustained by Pw1. There was also no evidence of a sexually transmitted disease and pregnancy. The medical evidence did not support penetration and therefore ought to have raised suspicion as to the trust worthiness of Pw2 as a witness.

16. The respondent submitted that the clinical officer testified that there was full penetration. They also pointed out that the trial magistrate found that the minor was telling the truth and relied on her evidence.

17. Section 2 of the *Sexual Offences Act* defines penetration as 'the partial or complete insertion of the genital organs of a person into the genital organ of another person'. In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence and it is not necessary that the hymen be ruptured (see *Erick Onyango Ondeng v Republic* (2014) eKLR).

18. The evidence of Pw2 was that the appellant had been having penetrative sex with her at least 3 times before he was arrested. Pw2 gave clear evidence that the appellant removed her clothes, lay her down

and put his penis in her vagina. The trial court in compliance with proviso to section 124 of the *Evidence Act* noted as follows in the proceedings:

> " I found the complainant composed. She was clear, coherent and consistent as to what had happened. Her testimony was not shaken on cross-examination and she never faltered in her response to questions put to her. I believe that she was telling the truth."

19. Pw2's evidence was further corroborated by that of Pw1. Pw1 testified that upon examining the minor it was found that the hymen was rugged and that she had a foul smelling discharge. The treatment notes indicated that the hymen was not intact. Pw2 concluded that the complainant had been defiled and that there had been full penetration.

20. The appellant in his defence denied committing the offence and testified that on November 12, 2019 he was at home with his parents. The appellant contends that he put forward a defence of *alibi*.The prosecution presented evidence that contradicted the appellant's alibi, as the evidence indicated that the appellant was present at Bens shamba on various dates and times when the offense was committed, thus undermining the appellant's defense.

21. The appellant also challenged the conviction on account of violation of article 25 and 50 (2) of the *Constitution* of Kenya arguing that he was not taken to court within 24 hours but was arraigned upon expiry of 24 hours. It is now settled thatsuch violations, if they occurred, do not affect the integrity of an ensuing criminal trial itself, and in any event, recourse for such violations would be pursued through civil proceedings (see *Mutiso Maingi v Republic* [2019] eKLR).

22. On the issue of sentence, the appellant submitted that the court failed to exercise its discretion in sentencing him. The respondent on the other hand submitted that the sentence was commensurate to the offence. The court in*Maingi & 5 others v Director of Public Prosecutions & another* (petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) held as follows in regard to minimum mandatory sentence in the *Sexual Offences Act*:

> " To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences."

23. In this case, the trial magistrate considered that the appellant was a first offender, the probation report recommending non-custodial sentence and the appellant's mitigation when sentencing. The 20 year sentence meted by the trial magistrate was therefore lawful.

24. In the end,I find that the prosecution did prove its case beyond all reasonable doubt. The appeal herein has no merit and is dismissed in its entirety. The conviction and sentence by the trial court is upheld, but shall ran from the November 15, 2019.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister: C/A