



**Njoroge v Republic (Criminal Appeal E013B of 2021)
[2023] KEHC 18121 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18121 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E013B OF 2021**

FR OLEL, J

MAY 31, 2023

BETWEEN

PETER WANJOHI NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offence Act* No.3 of 2006. The particulars of the offence were that on the 24th day of July 2014 in Mwea West Sub county within Kirinyaga County intentionally cause his penis to penetrate the vagina of CNW a child aged 17 years old.
2. The appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. The particulars of the offence were that on the 24th day of July 2014 in Mwea West Sub County within Kirinyaga County, intentionally and unlawfully touched the vagina of CNW a child aged 17 years with his penis.
3. At trial the prosecutor called eight (8) witnesses to testify in support of their case. The appellant was placed on his defence and gave sworn evidence. At the conclusion of the trial, the trial magistrate convicted the appellant and sentenced him to serve fifteen (15) years imprisonment as provide for under provision of Section 8(4) of the *Sexual Offence Act* No. 3 of 2016.
4. Being dissatisfied with the judgment of the trial court, the appellant instituted this appeal against both conviction and sentence. He filed his grounds of appeal dated 20th September 2021, which he later amended on 11th January 2023. In the amended memorandum of appeal the appellant raised the following grounds;
 - a. That the learned trial magistrate failed to consider that the instant matter was a case of retrial having been initially arrested on 24th July, 2014 where I was in custody since arrested.



- b. That the learned trial magistrate failed to appreciate that my mitigation factors for outweighed the aggravating factors hence prejudiced.
- c. That the learned trial magistrate failed to consider the time spent in remand custody since the date of arrest on 24th July 2014 as provided for under Section 333(2) of the Criminal Procedure Code and Article 50(2)(f) of the constitution.
- d. That I humbly seek this court to consider my humanitarian grounds of failing health and review the sentence downwards and accord a non-custodial sentence.

Background Facts at Trial.

5. PW1 Dr. Joseph Thuo testified that he was a medical doctor and was a psychiatrist attached to Embu level 5 hospital. He had a bachelor of medicine degree, and master's degree in psychiatry from University of Nairobi. On 17/12/2014 a child known as CNW was brought to him for examination and to have her examined for mental assessment. The child was a victim of sexual abuse. He did examine her and conclude that she suffered from mental retardation. He did make a report dated 17/12/2014 and produced it as exhibit 1.
6. PW2 Hezron Macharia testified that he was a registered clinical officer and specialised in ENT. He held a diploma in clinical medicine and surgery from KMTC and a higher diploma in ENT and Audiology. His registration no. was 4402. The witness testified on behalf of his colleague Mr. John Mwangi Kichumba, whom they had worked together for over 4 years at Kerugoya County Referral hospital and he was conversant with his handwriting and signature. The said Mr. John Mwangi Kichumba had retired in 2018.
7. PW2 had a P3 form filled and endorsed by Mr. John Mwangi Kichumba on 30/9/2014, it related to a child CNW aged 17 years who was treated under out-patient no.xxxx/2014. She had been defiled by a person known to her. On physical examination, she had blood stained school dress on the rear part. She was in good general condition but appeared mentally challenged. On genital examination, the hymen was broken and she had lacerations on the labia majora and labia minora. She was also discharging blood through the vaginal cavity. She underwent laboratory examination and vaginal swab, it showed presence of spermatozoa. No bacterial infection was found. There was evidence of fresh penetration due to lacerations, broken hymen and blood in the vaginal cavity. Presence of spermatozoa also further confirmed penetration. The appellant did not ask the doctor any question.
8. PW3 NWK testified that she was a teacher at [Particulars Withheld] primary school for the mentally handicapped and had taught the special needs class from May 2013. PW4 CNW was her pupil and had enrolled in the said school in January 2014. On 24/7/2014, at about 11.00am she was in school and gave the pupils a break at 11.00am. During break time the pupils would normally visit the toilets and take tea. She was informed by other students that CNW was walking in an abnormal manner. She called the child and noticed that she had a patch of blood on the back side of her school dress and some soil on the lower part of her dress. Alarmed by what she saw she immediately called CNW mother who did not take long to arrive in school.
9. The complainant CNW kept on pointing at a construction site within the school compound and which site was near the special need's class. She further pointed at a mabati structure and her action arose the curiosity of PW3 and the complainant's mother. They decided to go and see what the complainant was pointing at. When they drew near the construction site, they saw several men constructing a storey building and the appellant was one of them. When the complainant CNW saw the appellant, she started to shout 'papa, papa' while pointing at the appellant and the structure. They



- all walked into the structure, the complainant again lifted her dress shouting ‘papa,papa’. She then lay on her back. All this time the appellant was engaged in construction work but the complainant again pointed at the appellant. At this point the appellant responded and said that he had not touched the complainant.
10. A crowd had started to gather at the scene and the appellant was amongst them. The complainant CNW singled him out and kept on lifting her dress while pointing at him. Since the school compound shared on compound with Kandongu district headquarters, there were policemen within the compound, the appellant was arrested. PW3, the complainant CNW, and her mother PW5 accompanied the appellant as he was being escorted to Sagana police station. They were referred to Sagana sub county hospital where the complainant CNW was examined.
 11. In cross examination PW3 clarified that she first took the complainant to Kandongu dispensary and met the complainant’s mother on their way back to school. At the said dispensary, they were not attended to and had been asked to bring a police report. At the construction site, there were about 5 workers and the appellant was amongst them. The complainant pointed at the appellant and lifted her dress then laid down. The complainant pointed at the appellant in the presence of police officers and she continued to point at the appellant many times.
 12. PW4 CNW was noted to be mentally challenged and could only communicate with the aid of her sister who was an intermediary. The court noted that she looked jovial and maintained eye contact though she had moments of restlessness. Her intermediary was sworn. She was JN and she stated that she was the elder sister of the complainant and since they had lived together since childhood, she was able to tell if she was in distress and could communicate with her. She confirmed her role to convey questions to the complainant which she did not understand and where she was in distress would alert court. The court proceeded to appoint her as an intermediary.
 13. PW4 gave unsworn evidence. When asked if she knew the accused, she nodded her head back and forth while pointing at the accused, then touched the area between her legs, held her throat with both hands and made as if to tear her skirt, while lifting it. The appellant did not ask PW4 any questions.
 14. PW5 LWM testified that she lives in Kariua village and was a casual labourer. PW4 CNW was her first-born daughter and was born on 13/10/1996. On 24/7/2014 at around midday she was at home when PW4 teacher, called her and told her to rush to school which was within the compound of the DC office. On reaching the school she found her daughter with two teachers and she was pointing at a small structure within the compound next to the construction site and it appeared as if something had happened to her. When she asked PW4 (CNW) what was the matter, she pressed her throat with both hands and started moving her body especially the waist area back and forth.
 15. PW5 further testified that they walked to the structure and a police officer who was within the compound followed them. When they drew near the construction site they found 3 men crushing stones. The appellant was sitting between the two men. PW4 CNW pointed at the appellant, stepped back and started to cry. Three (3) other police officers joined them and one of them a lady officer asked PW4 CNW to show them what happened. PW4 CNW walked straight to the appellant and pointed at him. She moved her body back and forth. When asked where the incident had occurred, she pointed at the structure next to the construction site and they opened it. Inside the said structure there was cement and she had noticed that her daughter school dress had cement. She also checked her thighs and they too had patches of cement.
 16. The appellant was arrested and she took her daughter to Kandongu dispensary which was within the same compound. She was referred to Sagana sub county hospital where PW4 CNW was examined. Later pw4 CNW was taken for mental health assessment at Embu County Referral Hospital. PW5



- produced the birth certificate of her daughter as exhibit 4. She further testified that her daughter was born without any mental problem but she got cerebral malaria when she was 3 years old and would become stiff. She and her other daughters could communicate with the complainant though she attends school (special class).
17. In cross examination she testified that the teacher called her around 11.00am and her daughter pointed at the appellant amongst the three men they found seated. She did not coach the complainant on what to say and was aware that the teacher had taken the complainant to Kandongu dispensary prior to her arrival. PW5 also stated that she had not known the appellant prior to the incident and therefore had no reason to frame him. She reiterated that the complainant only pointed at the accused person and nobody else.
 18. PW6 P.C Joseph Kisau attached to Sagana Police station testified as the investigation officer. On 25/7/2014 he was at Sagan police station when the appellant was brought by officers of G.K prison Kathigiriri. He received the appellant in the presence of the OCS. He obtained his file and noted that the accused was to be retried. Initially he had been charged with the offence of defilement in 2014 and was to undergo fresh trial. He read the file and acquainted himself with the facts therein, which was that the appellant defiled a mentally retarded minor, whose discomfort was noted by her teacher who in turn called PW3 CNW mother. They proceed to the structure which the complainant was pointing at and PW4 CNW positively identified the appellant as the perpetrator of the heinous crime. At the time of the crime, the complainant was 17 years and attending special needs class. In cross examination he confirmed the he was not the initial investigation officer in 2014, when the appellant was was charged, but got the evidence he presented form reading the court file.
 19. PW7 Nancy Muthoni Kebeu testified that she was a clinical officer based at Sagana Sub County hospital and held a diploma in clinical medicine and surgery from KTMC. Her registration number was xxx and had 18 years' experience. She had a booklet being treatment notes from Sagana Sub-county hospital authored by Rose Wangui, a clinical officer she worked with for 5 years. She had left service in June 2017. She was familiar with her handwriting and signature of the said Rose Wangui.
 20. As per the treatment notes PW4 CNW was treated on 24.07.2014. She had a history of being raped and was mentally handicapped. At the time of examination her clothes had blood stains. Her menstrual flow had started. On vaginal examination she had blood stains on her labia minora and majora. She had lacerations at the perineum, that is the entrance of vaginal orifice. HIV test conducted turned negative. The patient was given PEP and emergency contraceptive pills, antibiotics and was vaccinated for tetanus. The bruises of her vaginal orifice was evidence of forceful penetration. The appellant also underwent laboratory test for UPRL, Syphilis which turned negative but he had pus cells and was put on antibiotics. The witness applied to produce the medical reports under provision of section 77 of the *Evidence Act*. The appellant had no objection. The same were produced as exhibit P3 and P5. The appellant had no questions for the witness.
 21. The appellant was placed on defence and gave sworn evidence. He stated that he comes from North Kinangop and was a casual labourer, Prior to his arrest and being charged with the offence of defilement. On the date of the incident, he had gone to Kandonga after a friend told him he could get casual work at a construction site but arrived late. The foreman told him to wait for the boss who would consider hiring him. At about 10.00am a lady emerged from school adjacent to the construction site. She stared at him and went away. She returned 10 minutes later and started talking to the foreman while pointing at him. There was a police officer seated nearby. He came and asked the lady what the problem was and the woman replied that he had defiled the complainant.



22. The appellant further testified that he was arrested and both him and the minor were taken to Kandonga dispensary and later to Sagana sub county hospital where urine samples were taken. He was later charged in court. In cross-examination he confirmed that he was at the construction site at 11.00am on the material day and it was his believe that the complainant had been coached. The complainant did not identify him at the scene and it was PW2 who identified him at the scene. He denied defiling the minor PW4 CNW.
23. The trial court considered the evidence tendered and convicted the appellant. He was sentenced to serve 15 years imprisonment.

Appellants Written Submissions

24. The appellant filed his submission on 11th January 2023 and submitted that he had initially appealed against both conviction and sentence but had amended his appeal to only appeal against the sentence. He submitted that “I am satisfied with the conviction and that I am only approaching this court to review the sentence under Section 333(2) of the *Criminal Procedure Code* and Article 50(2)(p) of *the constitution* with a view to reintegrate him back into the society. The appellant relied on *G.M v Republic* (2017)eKLR, *Duncan Mwai Gichuhi v Republic* (2015)eKLR, *Yawa Nyale v Republic* (2018)eKLR, *Edwin Wachira v OPP and another* in petition 97 of 2021 and *Philip Mueke Maingi and another v Republic* 2022 eKLR.
25. The appellant submitted that he had upgraded his skills and was remorseful and prayed for forgiveness from his family and victim’s family. He prayed that the court involves provisions of section 333(2) of the *Criminal Procedure Code* to allow his sentence run from the date of his arrest on 24/7/2014.

Analysis and Determination

26. The appellant is extremely clear in the submissions filed that he is not challenging his conviction and is satisfied with the same. He is only approaching court to review his sentence under section 333(2) of the *criminal procedure Code* and Article 50 (2)(p) of *the constitution* of Kenya 2010. He submitted that after he was initially convicted, he appealed and the high court at Kerugoya had ordered a retrial vide its judgment dated 9th July 2018. The newly instituted case was baricho srmcc criminal case {S.O} No 38 of 2018, he was tried, convicted and was sentenced to 15 years imprisonment vide a judgment dated 8th September 2021.
27. The appellant further submitted that he had spent over eight (8) years in remand custody, from inception of the criminal case in July 2014, to when the sentence was passed on 8th September 2021. This period was not considered in the said judgement. It was his prayer that the same be considered under provisions of Section 333{2} of the *Criminal procedure Code* as read with Article 50(2)(p) of *the constitution* of Kenya 2010.
28. Section 333(2) of the *criminal procedure code* specifically provides as follows: -
 - “Subject to the provisions of section 38 of the *penal code*, every sentence shall be deemed to commence from and to include the whole of the day on which it was pronounced, except where otherwise provided in the code”.
 - “ Provided that where the person sentenced under sub section (1) has prior to such sentence shall take account of the period spent in custody”.
29. It is clear from this provision that the law requires the trial court to consider and take into account the period the convict has spent in custody while sentencing.



30. In the case of *Bethwel Wilson Kibor Vs Republic* {2005} Klr the court stated that ;

“By proviso to section 333(2) of the *criminal procedure code* where a person sentenced has been held in custody prior to such sentence shall take into account of the period spent in custody. Ombija J who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. in view of the forgoing, we are satisfied that the appellant has been sufficiently punished. We therefor allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held.

31. According to, the Judiciary sentencing policy guidelines;

“The proviso to section 333(2) of the *criminal procedure code* obligates the court to take into account the time already served in custody if the convicted person has been in custody during trial. Failure to do so impacts on the overall period of detention which may result in excessive punishment that is not proportional to the offence committed. In determination the period of imprisonment that should be served by the offender, the court must take into account the period in which the offender was held in custody during trial.

32. Sentencing is also a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirety so as to arrive at appropriate sentence. The Court of Appeal *Thomas Mwambu Wenyi Vs Republic* (2017) eKLR cited the decision of the Supreme Court of India in *Alister Anthony Pereira Vs State of Maharashtra* at paragraph 70-71 where the court held the following on sentencing:

“Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

33. Section 333(2) of the *criminal procedure code*, creates an obligation on the court to take into account the time spent in custody and its purpose is to prevent subjecting a person to more severe sentence than prescribed in law. Accordingly, the section pertains to fair trial and justice. Failure to give full effect of this section will lead to a violation of right in particular Article 50(2)(q), and Article 27(1) and (2) of *the constitution* of Kenya 2010. This court must give effect to these provisions to give effect to the law. Article 165(6) of *the constitution* of Kenya also allows the high court to exercise revisionary power over the subordinate court’s and thus where there is an error of law, the court can intervene and correct the same.



34. The appellant was charged before court on 24th July 2014. He was convicted and appealed. The high court *vide* a judgement dated 9th July 2018 ordered for a retrial and a fresh trial was instituted under new proceedings being baricho spmcr (s.o) case no 38 of 2018. After re trial he was still found guilty and sentenced on 8th September 2021 to serve fifteen (15) years imprisonment. The period the appellant spent in custody was thus Eight (8) years, as he was never released on bond/bail during the trial period or retrial period.

Disposition

35. In light of the above i do review the appellants sentence delivered in baricho spmcr (s.o) case no 38 of 2018 and direct that the period of eight (8) years when the appellant was in remand be included as part of his sentence of 15 years handed down on him *vide* the judgment dated 8th September 2021.

36. It is so ordered.

Judgement written, dated and signed at Machakos this 31st day of May 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 31st day of May 2023

In the presence of;

Appellant

.....For O.D.P.P

.....Court Assistant

