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SNN v Republic (Criminal Appeal 1 of 2017)
[2022] KEHC 11467 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11467 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL 1 OF 2017

GWN MACHARIA, J

JULY 25, 2022

BETWEEN

SNN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Principal Magistrate's Court at Engineer in Cr. Case No. 508 of 2016 delivered by Hon. G.N. Opakasi (RM) on 13th January 2017)

JUDGMENT

1. The Appellant, Samwel Ngerere Njoroge, was charged with two counts of defilement contrary to Section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of Count I were that on diverse dates between 5th and May 27, 2016 in Kinangop within Nyandarua County, he intentionally caused his penis to penetrate the vagina of SNW, a child aged 7 ½ years. He also faced an alternative charge to count one of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between the 5th and 27th day of May, 2016 in Kinangop within Nyandarua County, intentionally caused his penis to come into contact with the vagina of SNW, a girl aged 7 ½ years.

2. The particulars of Count 11 were that on diverse dates between 5th and 27th of May 2016 in Kinangop within Nyandarua County, he intentionally caused his penis to penetrate the vagina of JNW, a child aged 3 ½ years. He also faced an alternative charge to count one of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 in that on diverse dates between the 5th and 27th day of May, 2016 in Kinangop within Nyandarua County, intentionally caused his penis to come into contact with the vagina of JNW, a girl aged 3 ½ years.

3. He pleaded not guilty to all the charges. Upon trial, he was convicted of the offence of the principal charges of defilement and sentenced to serve life imprisonment for both counts and which sentences were ordered to run concurrently. Aggrieved by both his conviction and sentence, he preferred the instant appeal.

Grounds of Appeal

4. The Appeal is based on the following five (5) grounds contained in a Petition of Appeal filed on 24th January 2017.

   1. Thatthe pundit trial magistrate erred both in law and fact when she convicted him on the basis of contradictory evidence.

   2. Thatthe pundit trial magistrate erred both in law and fact when she convicted him yet the prosecution failed to comply with the mandatory provisions of section 2 (1) of the *Sexual Offences Act* No.3 of 2006.

   3. Thatthe learned trial magistrate erred both in law and fact when she convicted him yet vital exhibits were not produced in evidence.

   4. Thatthe learned trial magistrate erred both in law and fact when she convicted him yet the allegations raised against him were not proved.

   5. Thatthe pundit trial magistrate erred both in law and fact when she dismissed his plausible defence on weak reasons.

Summary of Evidence

5. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. (See *Okeno v Republic* (1972) EA 32).

6. The prosecution's case can be summarized as follows: In the month of May 2016, PW1, SNW who was seven year old then and her brother PW3, SMN returned from school and went to their mother PW4, HWM's place of work to pick the house keys. Upon arrival, PW4 told them that she did not have the house keys since she had left their father, who is the Appellant herein, in the house. They went home and found Appellant. They removed their school uniforms and put on other clothes and then the Appellant sent PW3 to the shop to buy him cigarettes. After PW3 had left, the Appellant told PW1 not to put on her trouser. He then did 'tabia mbaya' in her mouth and in her thing for urinating while on PW4's bed and PW1 felt pain. The Appellant also put his finger and penis in PW2 JNW's genitals.

7. When PW3 returned from the shop, he found the door locked. He knocked severally but no one opened. He therefore sat outside but later the door was opened by the Appellant upon which he gave him the cigarettes and went away. The next day while on their way home from school, PW1 told PW3 that she was feeling pain in her genitals and that their dad had put his finger insider her genitalia but she asked him not to tell anyone especially PW4.

8. On May 27, 2016 at about 6.00 p.m., PW4 decided to go to Engineer town to buy vegetables and avocado. PW2 told her that she wanted to accompany her as she did not want to remain at home. PW4 did not know why PW2 cried on that day because she always left her at home and she never complained. They went together and while in the market, PW2 tapped her and told her "mum at least today you did not leave me at home because whenever you leave me at home, dad takes me to your bed and put

his dudu in my vagina and mouth and at times I bleed". PW4 fainted when she heard what PW2 had told her. The women who were at the market checked PW2 and when she regained consciousness they told her that there was pus in the child's genitals. PW2 told her that their father had also done the same to PW1.

9. When she got home, PW3 went and told her to go and pick PW1 since she was unable to walk and had sat down by the road side. PW3 told PW4 what PW1 and disclosed to him. PW4 went to pick PW1 and the child told her that she wanted to tell her something but urged her not to beat her. PW1 told her what the Appellant had done to her when PW4 was not at home. The Appellant was PW4's boyfriend although her children knew him as their father and they had only lived together for about two weeks when he defiled the minors. PW4 reported the matter at Ndunyu Njeru Administration Police Post and she was referred to Kinangop Police Station then took PW1 and PW2 to Engineer District Hospital. When PW4 confronted the Appellant, he took a knife and threatened to kill her if she ever told anyone what had he had done to the children.

10. On May 28, 2016, PW6, P.C. Everlyne Cherotich of Kinangop Police Station perused the station's occurrence book and found that the case had been minuted to her for investigation. PW1 and PW2 were later taken to the station by PW4 and she took them to Engineer District Hospital for purposes of filling the P3 Forms since they had already been treated. On 30th May, 2016, PW5, Dr. Maingi Muchiri of Engineer District Hospital examined PW1 and PW2. Regarding PW1, he found that the hymen was recently broken, the labia Minora were tender, there was a whitish foul smelling discharge, and a high vaginal swab revealed pus cells. His conclusion was that there were signs of forceful penetration on the patient. As for PW2, there were tears around the interior entrance of the vagina, the hymen had been recently broken, there was a yellowish discharge which was foul smelling, and a high vaginal swab revealed pus cells and HIV test was negative. He also concluded that there were signs of forceful penetration. He filled both the PRC and P3 Forms on the same day and produced them in court.

11. When the P3 Forms were being filled in hospital, the Appellant called PW4 and asked her where she was and she lied to him that she was at her sister's place. When they were done, the Appellant called her again and she told him that she was at her place of work. She then liaised with the officers from Ndunyu Njeru Administration Police post who arrested the Appellant at her place of work. PW6 recorded the statements of the witnesses and then charged the Appellant with the subject offence upon obtaining the P3 and the PRC Forms. PW6 did not find any malice on the part of the minors or PW4 in reporting the matter to the police.

12. Upon being placed on his defence, the Appellant gave an unsworn testimony. He testified that prior to this case, he worked at [Particulars Withheld] as a driver and his duty was to transport milk to Nairobi. On the May 27, 2016at about 5.00 am, he woke up and went to collect milk from Kinangop Dairy Ltd which he took to Nairobi. He had land in Nyahururu and had earlier planned to go to Nairobi with PW4 to buy construction materials. However, since he was in Nairobi on that day and had the company lorry which was convenient for him to use to carry the building materials, he saw no need for them to go back to Nairobi again the following day as they had earlier planned. As such, he called PW4 and informed her of his decision but PW4 was not pleased that he had decided to buy the construction materials on his own. He bought the materials which costed Kshs. 175,000/=. On his way back, he decided to use the Nyeri-Nyahururu route as opposed to the usual Naivasha route. He was at Nyahururu village at about 4.00 pm. He off-loaded the materials then started his journey back since the vehicle was needed at work. He arrived at Kinangop at about 7.30 pm upon which he returned the vehicle to work and proceeded to PW4's place of work.

13. While there, Administration police officers approached him and asked him if he was the husband to PW4 which he confirmed that he was. The officers told him that they had arrested a friend of his who

was at their post and he needed help from him. They therefore proceeded to the Administration Police Post at Ndunyu Njeru where he was told to sit as they call the person who needed his help. A short while later, PW4 appeared together with her children and informed the Sergent officer who was present that he had defiled two of her children. He was immediately put in the cells and at 10.00 pm and thereafter escorted to Kinangop Police Station where he was charged with the offence before court. He denied committing the offence and stated that the complainants' family was his family as he had stayed with them for a long time and he had been of great help to them. Further, that while at the police station, he asked PW4 why she had falsely accused him and PW4 told him that it was because he went to Nairobi alone to buy the construction materials. PW4 also told him that one of her cousins had coached the children on what to say and that the said cousin wanted him to rot in prison so that he could forget his family.

Analysis and Determination

14. The Appeal was canvassed through oral submissions which this court has duly considered. The only issues for determination are: whether the prosecution proved its case beyond a reasonable doubt and whether the sentences should be set aside.

Whether the prosecution proved its case beyond a reasonable doubt.

15. The Appellant reiterated his position of innocence and added that he requested for a DNA test to prove his innocence but the same was not granted. He complained that the women who examined PW2 in the market were not called as witnesses. He also urged court to take note of the contradicting dates of the alleged offence as per the prosecution witnesses and prayed that the appeal be allowed.

16. The State opposed the appeal through learned State Counsel, Ms. Maingi who submitted that the prosecution established all the ingredients of defilement. She submitted that there were no contradictions in the testimonies of the prosecution witnesses. She stated that the Appellant's defence was duly considered and rejected by the trial court. Further, counsel submitted that a DNA test is not necessary in establishing defilement.

17. Section 8(1) of the *Sexual Offences Act* provides as follows regarding the offence of defilement:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

18. For the Prosecution to prove the charge of defilement, it must establish the following three ingredients to the required standard of proof: age of the complainant, penetration and identification of the perpetrator.

19. On the age of the complainants, no documentary evidence was adduced in evidence to prove this. In the case of *Francis Omuroni v Uganda* Court of Appeal; Criminal Appeal No. 2 of 2000, it was held that:

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

20. See also *Musyoki Mwakavi v Republic* [2014] eKLR, and *PMM v Republic* [2018] eKLR on the same position.

21. From the above authorities, it is clear that documentary evidence is not mandatory in proving the age of a minor in defilement cases. In this case, PW1 and PW2's testimonies that they were 7 and 3 years old respectively was corroborated by their biological mother PW4 who testified that they were aged 7 ½ and 3 ½ years respectively. In the absence of documentary or medical evidence, a parent is the best person suited to establish the age of his/her child. I therefore find that PW1 and PW2's ages were proved accordingly.

22. On penetration, PW1 and PW2 gave detailed accounts of what the Appellant did to them. They testified that the Appellant inserted his penis in their mouths and genitals. Their evidence were corroborated by both PW3 and PW4. Further corroboration was evident in the medical evidence tendered by PW5. Indeed, PW5 stated that on examination of PW1, he found that her hymen was recently broken, the labia Minora were tender, there was a whitish foul smelling discharge, and a high vaginal swab revealed pus cells. As for PW2, there were tears around the interior entrance of the vagina, the hymen had been recently broken, there was a yellowish discharge which was foul smelling, and a high vaginal swab revealed pus cells. PW5 formed the opinion that these were signs of forceful penetration on the minors. I therefore find that penetration was proved to the required standard.

23. As regards the identity of the perpetrator, this was a case of recognition as the Appellant admitted that PW1 and PW2 were well known to him because he lived with them. There was consistent and corroborative evidence from PW1, PW2 and PW3 that the Appellant defiled the minors when PW4 was at work.

24. Additionally, it is clear that PW1 and the Appellant spent a considerable amount of time together from the moment they met on the evening he returned from grazing cows to the next morning when he helped her cross through the fence. This element was therefore proved to the required standard.

25. In his defence, the Appellant purported that the charges were actuated by malice on the part of PW4 because he went to buy construction materials without her. In my view, this was an afterthought as he never raised the issue during cross examination of PW4. Further PW6 confirmed that she did not establish any malice on the part of PW4 during her investigation. Moreover, the Appellant now contends that he requested for a DNA test and he was ignored. It is a well-established principle that a DNA test is not necessary to prove the offence of defilement or rape. See: *AML v Republic* [2012] eKLR. For the foregoing, I find that the prosecution proved that the Appellant committed the offences herein.

26. Further, the Appellant faulted the prosecution for failing to call crucial witness being the women who examined PW2 in the market. It is trite that the prosecution reserves the discretion to determine the witnesses who are material to its case and is thus not obliged to call all witnesses. ({See: *Bukenya and Others v Uganda* [1972] EA 349). In this case, the witnesses who testified sufficiently established the offence and the women in the market would not have added any value to the case.

27. As regards the contradicting dates of the alleged offence, I hold the view that the same is minor and does not qualify to be considered as having the possibility of occasioning injustice. It also does not lessen the fact that the offence was committed and the perpetrator was the Appellant. In *Willis Ochieng Oderro v Republic* [2006] eKLR, the Court of Appeal held thus:-

> "As for the contradictions in the prosecution evidence it may be true that such contradictions, particularly with regard to the date indicated on the P3 form as the date of the offence, is different. But that per se is not a ground for quashing the conviction in view of the provisions of section 382 of the *Criminal Procedure Code*."

28. The upshot is that the prosecution proved its case against the Appellant beyond any reasonable doubt. His conviction was therefore well founded and is hereby upheld.

Whether the sentences should be set aside.

29. As regards the sentences, despite giving the Appellant a chance to tender his mitigation, the trial magistrate noted that her hands were tied by the minimum mandatory sentence of life imprisonment prescribed for the offence under Section 8(2) of the *Sexual Offences Act*. This was indeed the position of the law as at 13th January, 2017 when the sentence was imposed.

30. In the case of *Philip Mueke Maingi & amp; 5 others v Director of Public Prosecutions & anor*: Machakos HC Petition No. E017 of 2021, Odunga J. recently found that minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional to the extent that they deny trial courts the discretion to consider the peculiar circumstances of each case so as to arrive at an appropriate sentence informed by those circumstances. For that reason, the learned judge held that courts are at liberty to impose the prescribed sentences provided they are not deemed to be the mandatory minimum sentences.

31. The Appellant herein was sentenced to life imprisonment for each of the principal charges which sentences are to run concurrently. The record does not indicate whether or not he was a first offender. Be that as it may, I consider the life sentences to be harsh and excessive, more so on account that apart from a sentence serving the deterrence factor, it should also help reform the offender. Too long sentences may sometimes harden the offender as opposed to reforming them. In the premises, the life sentences are hereby set aside and substituted with twenty five (25) years imprisonment for each of the two counts of defilement. The sentences shall run concurrently commencing the 28th May, 2016 when the Appellant was arrested as he remained in custody throughout the trial.

32. The upshot is that the appeal succeeds on the sentence only while the conviction is hereby affirmed. It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 25THDAY JULY, 2022

...

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Appellant in person.

Ms. Maingi for the Respondent.