Njagi v Republic (Criminal Appeal E041 of 2022)
[2022] KEHC 16003 (KLR) (30 November 2022) (Judgment)

Neutral citation: [2022] KEHC 16003 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E041 OF 2022

LM NJUGUNA, J

NOVEMBER 30, 2022

BETWEEN

DOMINIC KARIUKI NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence and conviction by Hon. Ngumi W. in Sexual Offences Case No. 22 of 2018 in the SPM's Court at Siakago and delivered on 16.04.2020)

JUDGMENT

1. The Appellant was charged in Siakago Sexual Offences Case No 22 of 2018 with three offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006 as follows;

   Count i. On diverse dates between March 13th and June 2nd 2018 at [Particulars withheld] village in Mbeere North Sub-County within Embu County, intentionally and unlawfully committed an act which caused his genital organ namely penis to come into contact with the genital organ namely anus of SMN, a child aged 12 years.

   Count ii. Indecent Act With A Child Contrary To Section 11(1) of The *Sexual Offences Act* No 3 of 2006

   On May 30, 2018 between 1200 am and 2.00 am at [Particulars Withheld] village in Mbeere North within Embu County, intentionally and unlawfully committed an act which caused his genital organ namely penis to come into contact with the genital organ namely anus of KI, a child aged 12 years.

   Count iii. Indecent Act With A Child Contrary To Section 11(1) Of The *Sexual Offences Act* No 3 of 2006

   0n March 30, 2018 at about 2.00 am at [Particulars withheld] village in [Particulars withheld] Mbeere North Sub County within Embu County, intentionally and unlawfully committed

an act which caused his genital organ namely penis to come into contact with the genital organ namely anus of CMN, a child aged 14 years.

2. He was subsequently tried and convicted of the said charges and sentenced to serve ten (10) years imprisonment in each of the three counts, which sentences were ordered to run consecutively as the offences were committed on different dates.

3. Being dissatisfied with the said judgment, the appellant lodged the petition of appeal dated May 23, 2022 which he amended on October 18, 2022 and wherein he relied on five grounds of appeal challenging his conviction and sentences.

4. The court gave directions that the appeal be disposed off by way of written submissions and both parties complied with the said directions.

5. The appellant submitted that the case was not proved beyond reasonable doubt by the prosecution to warrant a safe conviction and further that, PW1, PW2 and PW3 were coached given that they were not able to link the appellant with the charges preferred herein. That it was not possible to penetrate a minor without him/her feeling pain. That PW1 upon cross examination testified that he could not see whether the appellant was dressed since it was dark. He submitted that the evidence of PW6 stated that the minors were in a fair general condition and infact showed that no penetration or indecent act took place. The appellant relied *inter alia* on the case of *Ndegwa v Republic* (1985) and HCCRA Nyamira *Joseph Ateka Kinaga v Republic*. In the end, this court was urged to quash the conviction and set aside the sentence by the trial court.

6. The respondent on the other hand submitted that upon evaluation of the seven witnesses together with the unsworn testimony of the appellant, the trial court convicted the appellant to serve ten years imprisonment in each of the counts. That the appeal herein is devoid of any merit and thus, should be dismissed. In response to grounds 1, 2, 3 and 4, it was submitted that the offence of indecent act with a child is created under section 11 of the SOA to include any contact between the body of a person with a genital organ, breast or buttocks of another but does not include an act which causes penetration. Reliance was placed on the case of *Paul Rukaria v Republic* [2020] eKLR. In reference to age, it was submitted that PW1 in his evidence indicated that he was born on April 5, 2006 and identified his birth certificate. PW5 who is PW1's mother testified and identified the complainant's certificate which was produced as Exhibit 1 and that at the time of the commission of the offence, PW1 was 12 years old. PW3 was referred for age assessment and upon examination he was found to be aged 14 years of age. In regard to PW2, the birth notification dated August 26, 2005 was produced which showed that he was born on July 8, 2005 and was aged 13 years at the time the offence was allegedly committed. That the respective ages of the complainants were therefore sufficiently proved.

7. In regards to proof of contact between the accused person's body and those of the buttocks of the complainants', it was submitted that PW1, PW2 and PW3 gave an account of what happened to them. PW1 testified on how they slept together in the same bed with the appellant and his son who was a friend of his. That the appellant touched his shoulder and buttocks and instructed him to take off his clothes and at that time, he had knelt on the bed. PW2 also testified that on different dates, he spent the night at the appellant's home and on waking up, his trouser was removed and anus painful; PW3 equally testified that on a different date from that of PW1 and PW2, he spent the night at the appellant's home who carried him at night to his room, he felt pain at his back and when he woke up, the accused was defiling him. Reliance was placed on the Court of Appeal decision in *AML v Republic* (2012). That the complainants' despite their young ages, gave a clear and consistent evidence of how the appellant committed the offence against them.

8. PW6 produced the P3 Forms for the complainants, however, the forms failed to record any type of injury on the complainants. That the doctor explained that it was because there was a gap in time between the dates of the offences and the examination. On the issue of inconsistency, it was submitted that the particulars of the alleged contradictions by the prosecution witnesses were not specified. It was its case that the testimony of the prosecution witnesses was clear and consistent. On sentence, it was submitted that SOA stipulates a minimum and mandatory sentence of not less than ten years. Reliance was placed on the case of *Shadrack Kipchoge Kogo v Republic* eKLR to the effect that for this court to interfere with the sentence meted out by the trial court, it must be shown that the trial court made an error in law, considered irrelevant factors or that the sentence was excessive and disproportionate. In the end, it was its case that the appeal herein should be dismissed for it is devoid of any merit.

9. I have read the grounds of appeal, the submissions by both parties and I opine that the main issue for determination is whether the appeal is merited.

10. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

11. Under the *Sexual Offences Act*, "an indecent act" is defined as follows:-

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

12. On perusal of the record herein, PW1 testified that in the month of April, 2018, as he was sleeping in the same bed with the appellant and his son, he heard the appellant holding his buttocks and shoulders and that he asked him to remove his clothes. That during that time, the appellant knelt on the bed but he did not see whether he was dressed since it was dark. On a diverse date, he stated that they spent the night in the same room with the appellant herein and in the morning he found his trouser torn at the buttock and further, he sensed coldness in the back (anus). In reference to PW2 he testified that on March 30, 2018, he spent the night in the appellant's house and on the same bed with him and upon waking up, he found his trouser down on his knees and his anus was painful. That he left the appellant's house and scampered for safety; further, he stated that the appellant's genitalia was exposed and that he penetrated him on the said date. PW3 on the other hand testified on how the appellant invited him to join his son in preparing supper and at night as they were sleeping, the appellant penetrated him on the anus and that he undressed him to the knee level. That the appellant threatened him with dire consequences if he told anyone of the happenings of that night.

13. From the evidence of PW6 who filled the P3 Forms for the complainants, the forms failed to record any type of injury on the complainants. The doctor explained that it was because there was a gap in time between the dates of the offences and the examination. From my perusal and analysis of the evidence and circumstances of the case herein, there is a systematic semblance of what the appellant allegedly did to the complainants herein. The same in my view add credence to the evidence of PW1, PW2 and PW3. That notwithstanding, the complainants vividly narrated what transpired between them and the appellant on various dates.

14. Of importance is the fact that under section 124 of the *Evidence Act*, sexual offences do not require corroboration of evidence where the victim of a sexual offence is a child of tender years, if the court is satisfied that the child is truthful. This was reaffirmed in the case of *JWA v Republic* [2014] eKLR, the Court of Appeal observed: -

> " We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

15. Further, the Supreme Court of Uganda held in the case of *Bassita v Uganda* SC Criminal Appeal Number 35 of 1995, that: -

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt".
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> [See *Sigei v Republic* (Criminal Appeal E009 of 2021) [2022] KEHC 3161 ((KLR)].

16. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act No 8 of 2001 which defines a "Child" as "……..any human being under the age of eighteen years."

17. In the case of *Martin Okello Alogo v Republic* [2018] eKLR the court stated that:-

> " On the issue of whether the age of complainant was proved, the importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. The age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim. See Alfayo Gombe Okello v Republic Cr Appeal No 203 of 2009 (KSM) where the Court of Appeal stated:-
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> > "In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim as necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8 (1)....."

18. PW1 in his evidence indicated that he was born on April 5, 2006 and his birth certificate was produced to that effect and marked as an exhibit and it shows that at the time of the commission of the offence herein, he was 12 years old. PW3 testified and stated that he was 13 years old, a birth notification was produced as exhibit 2 which captured his date of birth as July 8, 2005 as at the time when the offence was perpetrated. With regard to PW2, an age assessment report was produced as an exhibit indicating that he was estimated to be 14 years old. I am therefore convinced that the respective ages of the complainants were therefore sufficiently proved.

19. On the ground that his defence was never considered by the trial magistrate, I am of the view that, the weight of evidence adduced by the prosecution outweighed the evidence offered by the appellant. I find that the appellant was responsible for the sexual assault on the complainants and his defence was a mere denial.

20. On the ground that the prosecution witnesses were not consistent, though nothing has been submitted on the same, it is trite that there are cases where the inconsistency is so minor that, clearly, it will be of little effect and certainly would not necessarily mean that the witness is lying or that his/her testimony cannot be relied on. The court must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. [See *Nyakisia v REACA* Crim App 35-D-71; -/5/71; Duffus P, Spry, VP & Lutta, JA, in the East African Court of Appeal].

21. Having found that the conviction was safe, I now turn to the issue of sentence. The Court of Appeal sitting at Nyeri in the case of *Francis Nkunja Tharamba v Republi*c [2012] eKLR held as follows with regards to sentencing:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

22. Section 11(1) of the *Sexual Offences Act* provides as follows:-

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years (emphasis court)."

23. Therefore, a person convicted of the offence of committing an indecent act with a child 'is liable', upon conviction to a sentence of ten (10) years imprisonment under Section 11(1) of the *Sexual Offences Act*. This was the holding in the case of *Daniel Kyalo Muema v Republic* [2009] eKLR where the Court of Appeal stated that the words "shall be liable to" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court.

24. Guided by the above decision, a person convicted of the offence of an indecent act with a child is 'liable' upon conviction to a sentence of 10 years imprisonment which is the sentence that the trial court imposed on the appellant.

25. For the foregoing reasons, I humbly hold the view that the appellant's appeal has no merits.

26. Further, the trial magistrate ordered the sentences to run consecutively as the offences were committed on different dates. In *Peter Mbugua Kabui v Republic* [2016] eKLR the Court of Appeal stated as follows:

> " As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.

27. Similarly, in *Sawedi Mukasa s/o Abdulla Aligwaisa* [1946] 13 EACA 97, the Court of Appeal for Eastern Africa considered the issue of a consecutive as opposed to a concurrent sentence and expressed the view that it was still good practice to impose concurrent sentences where a person commits more than one offence at the same time and in the same transaction save in very exceptional circumstances.

28. Further *Sentencing Policy Guidelines* provide as follows: -

> " 7. 13 – Where the offence emanates from a single transaction the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively".

29. Given that counts I, II and III took place on different dates and on different complainants, it is thus clear that the said offences did not take place at the same time and in the same transaction. They were not so connected together by proximity of time, criminality or criminal intent, continuity of action and purpose, or by relation of cause and effect as to constitute one transaction. They did not constitute a single invasion of the same legally protected interest. The trial magistrate was therefore right when she sentenced the appellant to serve ten (10) years imprisonment in the counts herein and that the sentence was to run consecutively as the offences were committed on different dates.

30. Taking into account all the above, it is my considered view that this court finds and holds that:

    i. The conviction of the appellant herein was safe and the same was based on sound reasons and so was the sentence.

    ii. The appeal is hereby dismissed.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 30TH DAY OF NOVEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent