Njogu v Republic (Criminal Appeal E033 of 2023)
[2025] KEHC 903 (KLR) (4 February 2025) (Judgment)

Neutral citation: [2025] KEHC 903 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E033 OF 2023

PN GICHOHI, J

FEBRUARY 4, 2025

BETWEEN

DANIEL NJOGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in S. O. No. E131of 2021 Republic vs Daniel Njogu in the Chief Magistrate's Court at Nakuru by Y.I Khatambi Principal Magistrate on 19th September, 2023)

JUDGMENT

1. The brief background of this Appeal is that Daniel Njogu (herein referred to as the Appellant) was arraigned before the trial court on 24th August 2021 to answer to a charge 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 25th day of July 2021 within Nakuru County, unlawfully and intentionally committed an act by inserting a male genital organ (penis) into a female genital organ (vagina) of L.N. a child aged 13 years.

3. He was also charged with an alternative count of indecent act with a child contrary to Section 11 (1) of the Sexual fences *Act No. 3 of 2006*.

4. The particulars of the offence were that on the 25th day of July 2021 within Nakuru County, unlawfully and intentionally committed an indecent act to L.N. a child aged 13 years by touching her genital organ namely vagina with his genital organ namely penis.

5. After hearing both the prosecution and the defence, the trial court found the Appellant guilty of the main charge, convicted him and sentenced him to serve life imprisonment.

6. Dissatisfied, the Appellant preferred this Appeal, vide a Petition dated 25th September 2023 seeking to have Appeal allowed, the conviction and sentence set aside and the Appellant be set on liberty. The grounds on the face of the Petition of Appeal are that :

    1. That trial court failed to observe that the sentence imposed is /was manifestly harsh and disproportionate.

    2. The trial court failed to consider the defence tendered by the Appellant.

    3. The trial court failed to consider that the investigation tendered was inconclusive.

    4. The trial court failed to consider that the subject as based on fabrication and afterthought.

    5. The trial court erred in law and in fact by failing to consider that there was no medical evidence connecting the Appellant to the offence.

    6. The trial court convicted and sentenced the Appellant on the basis of uncorroborated child's testimony at the alleged age of 14 years which was an account of events that allegedly took place when the child was purportedly aged 13 years.

    7. That the trial court erred in law and in fact by failing to comply with proviso to section 124 of the *Evidence Act*, cap 80 by failing to record reasons for believing the complainant was a truthful witness.

Submissions

7. Pursuant to directions by this Court, the Appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 19th July 2024 and through the firm of Muchiri Gathecha & Co. Advocates, where he framed two issues for determination, that is:-

    1. Whether the offence of defilement was proved to the required standard thus warranting a conviction.

    2. Whether the sentence imposed was appropriate.

8. On the first issue, the Appellant highlighted the ingredients that the Respondent ought to have proved in regard to the charge of defilement, being age, penetration and proper identification of the perpetrator.

9. On proof of age, the Appellant cited the Court of Appeal decision in Edwin Nyambogo Onsongo [2016]eKLR and submitted that the Birth Certificate produced in court was in the name of the grand parents appearing as parents of the child yet PW2 admitted that she was not the minor's mother. Consequently, it was submitted that the said document did not represent the true facts hence not authentic and ought not have been relied on.

10. As regards penetration, he submitted that the Respondent failed to ascertain the age of the broken hymen and that it could be broken in other ways apart from the penis.

11. He submitted that there were no other bodily injuries noted on the victim and therefore all that cast doubts as to whether there was penetration by the Appellant arguing that:-Medical examination was conducted a month after the commission of the offence.The Appellant was arrested and charged one month after the occurrence of the alleged offence which raises issues as to the motive for the arrest and charge.

12. While emphasising on the alibi defence, reliance was placed on the Court of Appeal decision in Republic v Sukha Sighn s/o Wazir Sigh & others (1939) 6 EACA 145 as regards when such defence is presented and its effect. He therefore submitted that the trial court failed to consider the Appellant's alibi defence despite that the Appellant availed a witness to corroborate the same.

13. The Appellant relied on the case of Woolmington v DPP 1935 A C 462 on degree of proof in criminal cases and submitted that where there is doubt of any kind in a criminal matter, it should go to the benefit of an accused person.

14. In this case, it was submitted that there are questions as to whether there was actual penetration based on the fact that the examination was done a month after the offence was allegedly committed.

15. On the sentence, the Appellant highlighted the provisions of Section 8 subsection (1) to (8) of *Sexual Offences Act* and further cited the Court of Appeal decision in Bernard Kimani Gacheru vs Republic [2002] eKLR on guiding principles in regard an appellate court's interfering with the discretion of the trial court.

16. It was submitted that the trial court failed to consider the Appellant's mitigation that he was the sole bread winner of his family, had no previous records and that he did not resist arrest. In conclusion, he urged that his Appeal be allowed as prayed.

17. The Respondent filed its submissions dated 29th October 2024 by James Kihara Prosecution Counsel for the Respondent. As regards age and the identity of the perpetrator, he submitted that the two ingredients are not in contention in that the Birth Certificate was produced by the Investigating Officer.

18. On the issue of identity of the perpetrator, the Respondent submitted that the Appellant was well known as the class teacher of the victim's sister at Piave and had known the Appellant for a long time.

19. As regards the issue as to whether the victim's evidence required corroboration, he rehashed the victim's testimony and her response during cross examination by the Appellant and submitted that she never wavered at all. It was his submissions that the evidence need not be corroboration as the incident occurred in private and no one witnessed it happen.

20. On penetration, the Respondent submitted that the victim's statement was that the Appellant had defiled her twice and the incidents were one month apart. Arguing that the Appellant's Counsel did not raise with the victim and the guardian, the issue of fabrication of the evidence, he cited the case of Remigous Kiwanuka v Uganda SC. Criminal Appeal No. 41 of 1995 where it was held that:-

> " Proof of penetration is normally established by the victim's evidence, medical evidence and any other cogent evidence."

21. It was his submissions that the victim narrated the incidents to school teacher and her neighbour, who later informed her guardian He argued that it was the trial court that was in a position to observe demeanour of the victim and to determine if she was telling the truth.

22. Further, he submitted that the medical evidence adduced before the trial court was persuasive in nature and that at the time of examination, Dr. Kipkurui Cheruiyot confirmed that the victim had an old broke hymen no laceration noted and that several days had lapsed by the time he carried out the examination. It was further submitted that the doctor filled the P3Form to that effect.

23. It was further submitted that the Investigating Officer covered the evidence herein conclusively pinning the Appellant as the perpetrator and besides, there was no evidence of any grudge against the Appellant so as to frame him.

24. He submitted that the Appellant did not dislodge the evidence tendered by the Respondent. Terming the trial court's judgment as well analysed and sound, he submitted that the Respondent proved its case beyond reasonable doubt.

25. As regards the sentence, the Respondent argued that the same was not harsh in that a person who defiles a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years.

26. He therefore submitted that the sentence passed by the trial court was within the threshold of sentencing guidelines and that in the event the sentence threshold goes against the sentencing guidelines, then the Court has power to align it with the offence.

27. While citing the Supreme Court decision in Petition No. E018 of 2023- Republic v Joshua Gichuki Mwangi the Respondent submitted that the said Court set out reasons why mandatory sentences should be applicable and that discretion was no longer applicable in defilement cases and the Court proceeded to reverse the initial sentence of 15 years and substituted it with one of 20 years. He submitted that likewise, this Court can review the sentence herein and pass the appropriate one.

Anaysis and Determination

28. This being a first appeal, this Court's duty is well cut out as stated by the Court of Appeal in the case of Okeno v. R [1972] EA 32 thus: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424."

29. As this Court evaluates and re- examines the evidence before the trial court, it is borne in mind that in defilement cases, there must be proof of age of the victim, penetration and the identity of the perpetrator.

30. Flowing from there, the broad issues for determination in this Appeal are:

    1. Whether the Respondent proved its case as required by law to warranting a conviction.

    2. Whether the sentence imposed was appropriate.

31. The Respondent's case before the trial court was advanced by four witnesses including the victim.

32. As to whether, by their evidence, the Respondent proved its case as required by law, the Court of Appeal in John Mutua Munyoki vs Republic (2017) eKLR emphasised that:-

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:-
>
> i. The victim must be a minor.

ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

33. Regarding age of the victim, the Court of Appeal in the case of Edwin Nyambogo Onsongo (supra) held: -

> ".. the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

34. She testified on 19/1/2021 as PW1 and stated that she was aged 14 years, was in Class 8 in at [Particulars Withheld] School and that her date of birth was 23/3/2007.

35. In cross examination, she told the court that her mother is L. N. and her father is S. That she lived with her parents and two sisters L.W and N.W and that her paternal grandmother is M. W.

36. PW2 testified on 19/5/2022. She told the court that her name was L.N and lived at Piave with her two daughters, her husband and her grandchild named L.N.

37. In cross examination, she told the court her name is L. N. W. That her husband was S. W and that they lived with L.N since she was young. That L.N's mother is V.W but the father is unknown. She explained that having raised the child, she introduced herself as her mother and her husband's name as the father.

38. On his part and during cross- examination, the Investigating Officer (PW4) told the trial court that the Birth Certificate he produced before court showed the date of birth as 23/3/2007. He established that it bore the grandmother's name because the subject had been neglected by parents since childhood and they are the ones who took care of the child.

39. In his submissions dated 2/11/2022 and filed before the trial court, Counsel for the Appellant argued on the issue:-

> "The prosecution provided a birth certificate with the name of the grandparents as the parents of the child. The birth certificate was therefore not authentic and the information thereon cannot be relied upon. The birth certificate should represent true facts on the matter on the face of it. PW2 admitted that she was not the minor's mother hence the same should not be admitted. The court cannot be sure if other details are correct such as the age of the child. The Investigating Officer was not even aware that the Birth Certificate had information that was not true."

40. In its judgment, the trial court held:-

> "The complainant testified that she was 14 years of age PW4 confirmed the said position and produced the minor's Birth Certificate serial number 31XXX10 issued on 30th October 2014.The court has considered the complainant's date of birth and the date the offence is alleged to have occurred. I find the prosecution has proved the complainant was 13 years of age when the offence occurred.

> The court observes that the defence raised issue with the fact that the certificate captured PW2's name as the mother of the subject and yet she was the grandmother. The court observes that PW2 gave a plausible explanation to the effect that the complainant's mother abandoned her child when she was several months old and that she had raised her since then. The birth certificate was issued close to 7 years prior to the incident. In absence of evidence to the contrary, the court finds no reason to doubt its authenticity."

41. Prima facie, the Registrar of Births and Deaths charged with the mandate of issuance of the Birth Certificate in question must have been satisfied with the information provided in the application for its issuance on 30/10/2014 so as to issue it in the form that it is.

42. In the circumstances and from the evidence on record, the issue of its authenticity cannot arise in this case. The documents availed show that the PW1 was aged 13 years as at the time she was allegedly defiled on 25th July 2021. The reasoning by trial court on this issue is sound. The finding therefore upheld.

43. As regards penetration, the victim testified that the perpetrator who she knew even by name as Njogu "raped" her twice in the same month. On the first one, he allegedly met her on her way home from church. They did not speak. He followed her and when she arrived home, he told her to open the door but she declined.

44. He pushed her and took the keys. He opened the door and he asked her to show her the bedroom. She took him to one of the two bedrooms. There was no one else. He called her to lie on the bed, took of her pant lay on top on her and inserted his penis in her vagina. She screamed but there was no one present. He ordered her not to tell anyone or else he would kill her. He had not had sex before.

45. On the second incident in the same month, the schools were closed and she was selling melons when she met the perpetrator near the school. He asked her to take melons to his mother's home. He accompanied her. His mother was not in There were two houses. He took her to his one bedroomed mud house. He gave her Kshs. 100/= and told her to stop schooling but she declined to leave school but took the money.

46. He pushed her to bed and told her that he loved her. He removed her pant, he removed the shorts he was wearing and lay on top of her. He threated to kill her and therefore, she did not scream. He had sex with her twice that day.

47. She however reported the incidents to their neighbour who she referred to as Mama Peter who in turn told her grandmother (PW2) and she was taken to police station and then to hospital.

48. When PW3 examined the victim, he noted that she had an old broken hymen meaning there was penetration. Both the PRC Form and the P3 Form confirmed penetration. That evidence was maintained even during cross examination.

49. Penetration is defined in Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organ of another person." The evidence herein is conclusive on the issue of penetration.

50. On identity of the perpetrator, the Appellant brought about an alibi defence. The Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say on such defence:-

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the

prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

51. The Court of Appeal then went on to say: -

> " In considering an alibi, we observe that:
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

52. In his defence, the Appellant stated:-

> On 25/7/2021 I was at home. I cut grass I was alone at 9.00 - 11.00 am. I washed clothes... My friend Stephen Mecha came. We were together to 3.00 pm. I live in the compound with my mother...no grudges exist between myself and L's family. I never went to L's house...I believe that was a frame by someone. I never defiled the complainant...On the material day, I spent the day at home. Never went to complainant's home. I was preparing for work."

53. In cross examination he told the court that he knew L's family since 2012 and that he knew the complainant for 3 years. That she could go from house to house selling fruits and that she came to the Appellant's home close to 5 times. That on the material date, he was cutting grass in his compound and the complainant's home was 800 m away and that there was no grudge between him and the complainant's family.

54. He went on to say:-

> I went to complainant's home under police escort We have several houses within the compound one house for grandfather, the other for boys, family. I never went to the said compound. I have gone to the grandfather's shop. The shop is in the compound where the complainant lives with her family."

55. His witness DW2 testified that he arrived at Appellant's house between 11.00- 11.30 am. The Appellant prepared lunch in his mother's kitchen as she was not in They had lunch and he left the Appellant at 3.00 pm using his (DW's)motor cycle. In cross examination, he told the court that he was not with the Appellant the whole day.

56. The Appellant's alibi defence was not only raised at defence stage but also failed to create any doubt in the Respondent's case. He was a person known to the minor for several years and there was no grudge between him and her or her family so as to believe to have been framed.

57. A look at the trial court's judgment shows that the court bore in mind the guiding principles in regard to an alibi defence raised by an accused person.

58. The court was guided by the Court of Appeal decision in Charles Anjare Mwamusi v R CRA No. 226 of 2002 particularly that when an accused person raises it as a defence, raises in answer to the charge, he does not assume the burden of proving that answer and that it is sufficient if such defence introduces into the mind of a court a doubt that is not unreasonable.

59. This Court is satisfied that indeed, the Appellants defence was simply an afterthought and with no effect on the Respondent's case. The trial court properly found it so and that finding was based on law and facts. The evidence on record proved that the Appellant was perpetrator. Ultimately the Respondent proved it case beyond reasonable doubt as required by law. The conviction is upheld.

60. On sentence, the Appellant was charged under Section 8(1), (3) of the *Sexual Offences Act* which provides that:-

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

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

61. Regarding an appellate Court's interference with a sentence passed by the trial court, the Court of Appeal in Bernard Kimani Gacheru vs Republic [2002] eKLR held:-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

62. In this case, trial court record shows that sentencing was done by Hon. A.P Ndege (SPM) and according to the Respondent, the Appellant had no previous conviction. His Counsel therefore told the court that the Appellant was a first offender and a family man hence sought a lenient sentence.

63. In sentencing, the honourable Magistrate stated:-

> I am aware of the controversy generated by the Muruatetu Judgment as to mandatory nature of minimum sentences however, there have been several clarifications from Supreme Court itself that Muruatetu does not apply to sexual offences I do hereby hold that my hands are tied. Accused sentenced to mandatory life imprisonment provided by Section 8 (2) SOA. Right of appeal 14 days."

64. The above reasoning is a misdirection of the law. As earlier stated, the Appellant was charged under Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* and not 8 (2) as stated in that sentencing. Further, the sentence provided for under section 8 (3) is "not less than 20 years."

65. In Petition No. E018 of 2023- Republic v Joshua Gichuki Mwangi (supra) the Supreme Court dealt with two issues being:-

i. Whether mandatory minimum sentences as prescribed in the *Sexual Offences Act* are unconstitutional; and,

ii. Whether courts have discretion to impose sentences below the minimum mandatory sentences as prescribed in the *Sexual Offences Act*.

66. In so doing, the Supreme Court held:-

> " 58. The amici..submitted, and we agree, that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. They cite instances in which the courts have been influenced by myths that; attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and, the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability.
>
> ..., the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.
>
> We take cognizance of the fact that upon delivery of the judgment of the Court of Appeal reducing the Respondent sentence from 20 years to 15 years, the Respondent had since been released from prison. The consequent effect of our decision herein of setting aside the judgment of the Court of Appeal would be reinstating the initial sentence of 20 years and it is upon the relevant organs of State to abide by our decision.
>
> ... The Respondent, Joshua Gichuki Mwangi, should complete his 20-year sentence from the date of imposition by the trial court."

67. Flowing from the above, this Court is satisfied that the life sentence imposed on the Appellant herein is manifestly excessive in the circumstances considering that the Appellants mitigation was also not considered. The circumstances herein call for interference by this Court in regard to the sentence imposed. The life sentence is therefore set aside and substituted with a sentence of 20 years imprisonment.

68. Lastly, this Court notes that the Appellant was arrested on 23rd August 2021 and brought to Court on 24th August 2021 where he pleaded not guilty. He was given a bond of Kshs. 100,000/= with a surety of similar amount with an alternative of a cash bail of Kshs. 50,000/=. He immediately deposited the cash bail and was released on the same day. He therefore spent only a day in custody. Nevertheless, that day spent in custody should be taken into account in compliance with Section 333 (2) of the Criminal Procedure Code.

69. Consequently, the Appeal partially succeeds and is disposed of in the following terms : -

1. The Appeal on conviction herein lacks merit and is therefore dismissed.

2. The sentence of life imprisonment is set aside and substituted with a sentence of 20 years imprisonment.

3. The one (1) day the Appellant spent in custody on 23rd August, 2021 to 24th August 2021 when he was released on cash bail be taken into account in computation of the said sentence.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF FEBRUARY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Nyambuto for Ms Gathecha for Appellant

Ms Okok for Respondent

Daniel Njogu- Appellant

Ruto, Court Assistant