Njenga v Republic (Criminal Appeal E096 of 2022)
[2024] KEHC 1569 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1569 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E096 OF 2022

A. ONG'INJO, J

FEBRUARY 15, 2024

BETWEEN

FREDRICK MUNGAI NJENGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of Hon. D. O. Odhiambo (SRM) delivered on 16th December 2022 in Shanzu S. O. Case No. 82 of 2019, Republic v Fredrick Mungai Njenga)

JUDGMENT

Background

1. The Appellant, Fredrick Mungai Njenga was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. Particulars were that Fredrick Mungai Njenga on 15th July 2019 in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to be sucked by DM a boy aged 13 years.

3. Based on the evidence of the prosecution and defence, the trial magistrate found the appellant guilty and he was convicted and sentenced to 7 years imprisonment.

4. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -

    1. That the learned trial magistrate erred in law and fact in coming to a finding that the prosecution had proved its case against the accused.

    2. That the honourable magistrate erred in law and fact to convict on a charge that was defective.

3. That the learned magistrate erred both in law and fact in making a finding of guilt without critically examining the evidence of prosecution witnesses.

4. That the learned magistrate erred in law and fact by simply believing the victim's story without asking why. So many steps were not taken.

5. That the learned magistrate erred in law and fact in dismissing the appellant's defence without any analysis.

6. That the learned trial magistrate erred in both law and fact in treating submissions as part of evidence.

7. That the learned trial magistrate failed to understand the appellant.

8. That the learned trial magistrate erred in both law and fact in arriving at the conviction without the weight of the evidence.

9. That the sentence was manifestly harsh and excessive.

Prosecution case

5. PW1, DMM said that he was 13 years old and that he was born on 1.1.2006. He said that he stayed in (name withheld) Estate in Nyali with his parents and some relatives. He said that his mum drops him to school in the morning and he gets picked up in the afternoon by a bodaboda person. He said that they normally leave school at around 4.30 pm and that on 15.7.2019, he left school at 6.30 pm. He said that his mother had been at work and she told him that she would ask his aunty to send him a taxi. That after some time, she sent him a taxi with registration number KCM 867N that would pick him.

6. PW1 said that the motor vehicle arrived after 6 minutes and that the driver was a man. He said that he got inside and sat on the front seat. That PW1 knew that the driver knew where he was to take him. That the driver started caressing his thighs and asked him where his mother was working. That PW1 asked him why he was touching him and told him to drop him. That the driver stopped shortly before the house, unzipped his trousers and told PW1 to such his penis. That PW1 got scared so he decided to comply. That he got up and saw his aunty approaching. That the accused had pushed his head down and that it took about 4 to 7 minutes.

7. PW1 said that the driver then covered himself with the shirt, turned on the full lights and started moving towards the gate. That he then unlocked the gates and PW1 got out. That PW1 did not tell the aunty what happened. That he waited for his mother and explained everything. That they went to hospital on 16.7.2019 and to Nyali Police Station where they recorded their statements. That they proceeded to Makadara where a form was filled. That he then went back to school and went to see a counselor for sessions.

8. PW2, NNM the maternal aunt to the accused said that on 15.9.2019, she was at home when her sister called and told her to request for an Uber to pick her son from school. That she got a Nissan Note KCM 867N and she then sent the registration number to the school watchman. That at 6.39 pm, PW2 got notification that the trip had started. That at 6.50 pm, she got notification that the trip had ended. That she waited for the boy to go and get the money but he did not. That at 6.55 pm, she called the driver but he did not pick. That she then got outside and saw a motor vehicle had been packed under a tree. That as she approached the vehicle, the driver switched on its head lights and started moving towards her. That PW2 asked the driver why he was parked on the road and what they were doing. That he told him the boy did not know the house. That he then stopped and the boy got out and went

to the house. That PW2 asked the boy what he was doing and he said nothing. That she then paid the driver via Mpesa and he left.

9. PW3, EM the mother of the complainant said that he drops his son to school in the morning and sends someone to pick him. He said that on 15.7.2019, she was supposed to pick him from school but she could not make it. That she called her sister to send Uber to pick him up which she did. That when she got home at around 9.30 pm, he told her that he wanted to speak to her privately. That the Uber driver asked her where his mother was working and that when they were 20 meters away from the gate, the driver started touching him and told him not to worry as they were men. That he then told him to such his penis. That he feared but complied as he thought he would be attacked. That they then went to hospital and to the police, and the following day the accused was arrested. That they recorded their statements and proceed to Coast General Hospital where they were given a form.

10. PW4, Alfred Deya, an advocate of the High Court of Kenya appearing on behalf of Uber BV, a company based in the Netherlands. That they instructed the firm of Loulor Harry LLP to appear on their behalf in these proceedings and that Uber is not a transportation operation but a technology company providing digital lead generation services for transportation and logistics section. That it does not own or operate cars. That the drivers are not Uber employees but independent contractors.

11. PW4 testified that as regards this matter, a report was made to Uber BV to provide information pertaining a trip that was allegedly made on 15.7.2019 in respect of motor vehicle registration number KCN 867N driven by one Fredrick Njenga. He said that a trip was requested on the said date at 6.44pm at Parklane Mombasa Kenya which ended at 6.53 pm at Nyali Road Mombasa Kenya. That the trip was of a distance of 3.68 km taking approximately 8 minutes. PW4 produced receipts for the day as ExP4, NTSA driving license for the driver as ExP5, letter from Uber dated 14.8.2019 as ExP6.

12. PW5, No. 81719, Sergeant Elizabeth Kombe initially attached at Nyali Police Station stated that on 15.7.2019 at 0115 hours, a report was made by the complainant namely aged 13 years who went to the station in the company of his mother. She stated that the boy was to be picked from school by his mother but she was held up somewhere. That the mother then called her sister to pick the boy from school and the said sister called for Uber registration KCM 867N driven by Fredrick Mungai. That the sister informed the driver to pick the boy from school and that she sent a message to the gate man so that the boy could be allowed to get out of school to be picked by Uber. That the boy got out of the gate and found the Uber and got inside.

13. PW5 said that the driver proceeded to where the boy directed him and that the driver went and parked the car at the yard 50 meters away from the bot's house. That the driver locked the house and started caressing the boy. That he unzipped his trousers, removed his penis and ordered the boy to suck it. That after the boy refused his demands, the driver forcefully dragged his head and made him to suck his penis. PW5 testified that while still at the parking yard, the boy's aunty got outside the gate and saw the car parked. That when the driver saw her coming, he switched on the car, opened the doors, the boy got out and walked to the house, and never told his aunty what had happened to him. That when the mother got back in the evening, the boy told her what had happened to him.

14. PW5 informed court that after the report was made, they recorded statements and managed to find the driver. That both were escorted to Coast General Hospital for examination and a P3 and PRC Forms filled. That the motor vehicle was detained and dusted by the scene of crime personnel, and the accused charged in court. PW5 produced the birth certificate of the minor as ExP1.

15. PW6, No. 80772 Sergeant Benson Ingisi attached at the Coast Regional Headquarters in the Crime Scene Investigation Unit said that on 18.7.2019 at 1.00 pm, he was requested by Corporal Warui of Crime Prevention Unit Mombasa to accompany him to Nyali Police Station. PW6 said that on arrival,

he showed him motor vehicle registration number KCM 867N Nissan Note black in colour and the motor vehicle had been detained in relation to an offence of indecent act which he was investigating. PW6 said that he took photos of the motor vehicle and prepared a certificate showing his name being a gazette Crime Scene Officer. That the photos were processed by the supervisor and he produced the photos as ExP7 (a) to (d), the report dated 157.2021 as ExP8 (a) and the certificate as ExP8 (b). That PW6 then took the photos to Nyali Police Station.

16. PW7, Dr. Nuzla Ali from Coast General Hospital testified that she was in court on behalf of Dr. Deep Nakesh who filled the P3 Form. She said that she was familiar with his handwriting and signature. That the P3 Form was for the complainant aged 13 years and filled on 16.7.2019 who complained of being defiled by an Uber driver not known to him on 16.7.2019. That the complainant was in fair general condition in upper limbs and that the probable weapon on him was a penis.

17. PW7 said that the complainant was put on PEP and the nature of the offence was oral defilement as indecent act. She said that the PRC Form was filled on 16.7.2019 and the complaint was oral defilement. She testified that the complainant boarded an Uber and the driver held his head and asked him to suck his penis. That the tests done were oral swab for culture and sensitivity, and the form was filled by Said and Dorcas. PW7 produced the PRC Form as ExP3 and the P3 Form as ExP9.

18. PW8, No. 236106 Corporal Andrew Warui from DCI Anti-Human Trafficking Child Protection Unit said that he was the investigating officer and that the incident happened on 15.7.2019 in the evening and the same was reported the following day. He said that he took over investigations and recorded statements of witnesses. That they visited the crime scene and charged the accused before court. That the offence was indecent act where the accused forced the victim to lick his penis while he was inside his Uber car which was photographed.

19. PW8 informed court that the minor was taken to Coast General Hospital where the PRC and P3 Forms were filled and that the mother of the victim took him to a pediatrician, Dr. Abuto who provided a report dated 16.7.2019. That the victim was wearing a shirt which had been washed and that by the time they got it, they could not get anything from it.

20. PW8 said that they did a rough sketch of the scene, they obtained documents showing that the accused was an Uber driver and that they got the driver performance on that day showing the motor vehicle that he was driving. PW8 said that the accused was on duty on 15.7.2019 at 6.39 pm driving Motor Vehicle Registration Number KCM 867N, the trip charge was Kshs. 250 and the time taken was 8 minutes 17 seconds for a distance of 3 km. PW8 said that they also had the map data from the point of picking the victim to the point he was dropped.

21. PW9, Dr. Wanjiri Abuto from Nyali Children's Hospital said that he had known the complainant since he was a newborn and that the mother called him on 15.7.2019 that the complainant had been sexually assaulted by an Uber driver between 6.39 pm and 6.57 pm. That PW9 asked the mother to take the complainant to hospital and

22. PW9 interrogated the complainant who told him that an Uber stopped at a dark place covered with trees and switched off the engine and lights. That the driver grabbed him by the neck and forced him to such his penis while issuing threats. That after a while, he managed to lift his head to spit on his shirt and that he saw his aunty approaching the car. That the driver then lifted his hand, switched on the car and moved ahead. That the complainant then got out as soon as the motor vehicle stopped and went straight to the house.

23. PW9 said that the mother then took the shirt that the complainant had to hospital and that it had spit. That PW9 examined the complainant who was scared but able to calm down. PW9 said that he did

not have physical injuries but put him on PEP and the mother went and reported to the police station. PW9 said he prepared a report which he produced as ExP11.

Defence Case

24. The accused, Fredrick Mungai Njenga, gave sworn evidence that in 2019, he was an Uber driver and that on 15.7.2019, he received a request from NM and that she told him to go to (name of school withheld) to pick a child and drop him at (name withheld) Estate. The accused said that he did not know the boy and that he was told the boy was waiting at the gate. The accused said that he went to pick the boy and started the trip at 6.44pm. That they went up to the destination and the boy directed him to their gate where he ended the trip at 6.53pm.

25. The accused said that after 2 minutes, his aunt went to the car and asked what he had been doing. That she then called the mother of the boy to ask for payment who said she had left some money at the house. That at 7.03, the accused was paid Kshs. 250 by Mpesa. That he then left after the gate was opened by the guard. He said that he had no argument with the aunt after dropping the boy and that thereafter he went and picked his children from their mother and went home.

26. That the following day when he went to City Mall, he was approached by police officers who arrested him and he was taken to Nyali Police Station. That he was told that he had done bad manners to a child and he was taken to Makadara for tests. He said that he was taken to the station and then to court. The accused said that the uber system does not stop as long as the trip is on. That the client is also able to notice when the motor vehicle stops before arriving at the destination. He said that he was given a certificate by Uber when he started working and he was paid by Mpesa through his number 0705xxx153 by 0791xxx580. That at the end of each trip, there was a certificate. He produced the certificate as exhibit 3.

27. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

28. The appellant's submissions were dated 23th October 2023 and filed on 31st October 2023. The appellant submitted that the issues for determination were summarized into one major ground, that is, the trial court erred in finding that the prosecution had proved its case beyond reasonable doubt as required in law.

29. The appellant argued that it was the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt. The appellant relied on Section 107 and 108 of the *Evidence Act*, Cap 80 as well as the decision in *Woolmington v DPP* where the House of Lords held: -

> " ...throughout the web of the English Common Law, one thread that passes through is that it is the duty of the prosecution to prove the guilt of the accused beyond a shadow of doubt... this is no matter what the charge or where the trial court is held...it is indeed preferable that 99 guilty persons be set free than 1 innocent person to be convicted..."

30. The appellant stated that the correct legal position is stated in the case of *Chila v Republic* (1967) EA 722 at page 723 par C: -

> " The judge should warn himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is

satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

31. The appellant argued that corroboration can be by way of medical report, witnesses or any other form of evidence. According to the appellant, he was convicted in this case based on the evidence of the minor only without any corroboration. He pointed out that the evidence of Alfred Deya, Dr. Wanjiri Abuto and Dr. Nuzia Ali did not support the testimony given by the minor. That the conviction is therefore unsafe and should be set aside.

32. The appellant cited the decision of *Musili Tulo v Republic* (2014) eKLR that properly captures the law applicable in circumstantial evidence cases. That for an accused to be convicted on the basis of circumstantial evidence, it is necessary that the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. That those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. That the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

33. The appellant submitted that the appeal was well merited and the same should be allowed and the conviction set aside.

34. The Respondents did not file any submissions.

Analysis and Determination

35. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze 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."

36. After considering the grounds of appeal, records of the trial court, submissions and grounds of opposition, the issues for determination are as follows: -

    i. Whether the prosecution proved its case against the appellant

    ii. Whether the appellant was convicted on a defective charge

    iii. Whether the appellant's defence was considered

    iv. Whether the sentence was harsh and excessive.

37. In the submissions, the appellant's counsel summarized the issues into one major ground that the trial court erred in finding that the prosecution had proved its case beyond reasonable doubt as required in law.

Whether the prosecution proved its case against the appellant

38. Section 11(1) of the *Sexual Offences Act* provides: -

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.

39. The ingredients for the offence of indecent act as provided above are the age of the complainant and proof of indecent act.

40. The Court of Appeal in the case of *Richard Wahome Chege v Republic* (2014) eKLR held: -

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself".

41. Section 124 of the *Evidence Act* gives the proviso that: -

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person of it, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

42. In the case of *J.W.A v Republic* (2014) eKLR, the Court of Appeal held that: -

> " 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".

43. In *George Kioji v Republic* (UR) the Court of Appeal expressed itself as: -

> " Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

44. The submissions by the appellant was that the evidence of PW1 was not corroborated as the trial court did not warn itself of the uncorroborated evidence of the complainant. While considering the complainant's evidence at paragraph 28, the trial magistrate said that there is no difficulty in finding that the fact that the accused caused his penis to come into contact with the mouth of the complainant clearly amounted to indecent act as defined in the *Sexual Offences Act*. He went further to say that PW11 aged 13 years old at the time of the offence was clear and consistent in his testimony. That the viore dire examination conducted on him before he testified showed that he understood the duty of telling the truth and gave sworn testimony. These sentiments by the trial magistrate passed the test in *Chila v Republic* (1967) EA 722 at 723 and complied with provisions of Section 124 of the *Evidence Act*.

45. Although the appellant's grounds of appeal do not refer to any issue of circumstantial evidence, submissions have been tendered are that for an accused to be convicted on the basis of circumstantial evidence, it is necessary that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established. It was submitted that the circumstances surrounding this case do not conclusively lead to the inference that the accused is guilty of the offence as charged. However,

in this case, there is direct evidence by the complainant that the appellant caused him to suck his penis while he was carrying him in his taxi. Principles of circumstantial evidence cannot therefore apply.

Whether the appellant was convicted on a defective charge

46. This was a ground of appeal which submissions have not been tendered. A reevaluation of the charge sheet does not indicate if there is any defect.

Whether the appellant's defence was considered

47. The appellant's defence was considered at paragraph 29 and the appellant did not give any reason that could be termed as a grudge between him and the complainant and his aunt. The defence was therefore disregarded.

Whether the sentence was harsh and excessive

48. Section 11(1) of the *Sexual Offences Act* provides: -

> 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.

49. The appellant was sentenced to serve 7 years imprisonment despite the fact that the Act provides that such a convict is liable to imprisonment for a term of not less than 10 years.

50. The appellant's counsel did not make any submissions on why the sentence was harsh and excessive. It is obvious that the trial magistrate exercised his discretion to pass a lesser sentence than that provided in the *Act*. However, 5 years would be sufficient punishment in the circumstances of the case. The same to take effect from the date of conviction.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 15TH DAY OF FEBRUARY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the Respondent

Mr. Chege Advocate H/B for Mr. Mwanzia Advocate for the Appellant

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE