Njoki v Republic (Criminal Appeal E013 of 2023) [2024] KEHC 5149 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E013 OF 2023

AK NDUNG'U, J

MAY 14, 2024

BETWEEN

ZACHARY MATHIRU NJOKI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

((From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E074 of 2021– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Zachary Mathiru Njoki, was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on diverse dates between 15/08/2021 and 07/09/2021 within Nyeri County intentionally caused his penis to penetrate the vagina of PW a child aged 15 years. On 05/09/2022, he was sentenced to twelve (12) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he appealed to this court challenging the conviction and the sentence vide a petition of appeal filed on 14/02/2023 which he later amended and filed amended grounds of appeal together with his submissions. The conviction and the sentence are being challenged on the following grounds;
   1. The learned magistrate erred passing a conviction based on contradictory and uncorroborating (sic) evidence.
   2. The learned magistrate failed to appreciate that the identity, recognition of the assailant was not conclusive.
   3. The learned magistrate failed to appreciate that penetration was not proved to the required standard.

iv. The learned magistrate erred relying on his weak defence and failure to challenge evidence without advising him on his constitutional right under Article 50 (2) (k).

v. That he was convicted on a case that was not proved to the required standard.

vi. That the learned magistrate erred convicting him without due regard to his constitutional rights to a fair trial as guaranteed under Article 50 (2)(g) and 27(1) of *the Constitution*.

vii. His defence was quashed without the trial court giving reason why it was rejected.

viii. That the wrong principles were applied in meting out a harsh and excessive sentence.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that there was contradiction on dates as to when the complainant disappeared from her home as the complainant testified she went to live with him on 15/08/2021, PW2 testified that the complainant went missing on 22/07/2021 and PW4 testified that the complainant told her that she had stayed in his house since 04/07/2021. That the inconsistencies go to the root of the prosecution's case as it was not clarified on which date the complainant went missing from home. That the complainant testified that he knew her but she did not state whether she knew him.

4. Further, it was unfair for the court to rely on his weak defence to convict him without watertight evidence from the prosecution. Even though PW3 and PW5's evidence went unchallenged, it did not mean that their testimonies were infallible and prosecution's evidence which is not tested by cross examination cannot be held as conclusive per se. On penetration, he submitted that the trial court failed to record its findings in terms of PW1's demeanour and credibility but captured this in its judgment which was an afterthought. That the medical evidence was produced by PW5 who was not the maker. Further, the medical evidence did not show that PW1 had been defiled safe for an old broken hymen which raised question that if she was examined 24 hours after being together with the assailant, why didn't she have other signs of sexual activity in her genitalia. That even though protection was used, there could have been other signs like epithelial and pus cells.

5. The Appellant further submits that the fact that the complainant was not given any medication is proof that there was no penetration. That the clinical officer testified that PW1' hymen had been previously broken as she had had sex before therefore not offering corroborative evidence on a recent sexual encounter. The medical evidence did not state when the hymen was perforated. Furthermore, a broken hymen is not proof of penetration as has been held in several cases. Therefore, it was important for the medical evidence to state the cause of the broken hymen and to indicate the age of the injuries on the P3 form and failure to indicate the age so that it corresponds with the time the sexual attack is alleged to have occurred disprove the entire medical report. Therefore, the medical evidence failed to corroborate PW1's testimony.

6. On infringement of his rights, he submitted that the trial court failed to explain the impact of his waiver to cross examine the witnesses and therefore he was not accorded a fair trial as guaranteed under Article 50(2)(k) as his right to cross examine the witnesses was not fully explained to him. The court also failed to promptly notify him of his right to counsel and his right to equality before the law was infringed. The fact that he was unrepresented made the trial unfair. That failure by PW4 to produce any photographic evidence to show that PW1 was found in his house, failure to call his sister as a witness, failure to avail the OB on missing child report or even prove that PW1 went missing from her home as purported was proof that the case failed to meet the threshold of proof beyond reasonable doubt. That the gaps in the prosecution's case proved that section 169(1) of the Criminal Procedure Code was not complied with.

7. On the sentence, he submitted that being regarded as a first offender, young and in prime youth, the sentence of 12 years was manifestly harsh and excessive.

8. The Respondent's counsel in opposing the appeal submitted that the ingredients of the offence were proved. The age was proved through the complainant's birth certificate produced as Pexhibit1. That even though the Appellant did not dispute the age of the complainant, it is important to note that PW1's mother testified that she was 16 years old at the time she testified before the trial court. She further, produced the complainant's birth certificate. On identification, she submitted that the complainant testified that she lived with the Appellant for a period of 2 weeks where they engaged in consensual sex and therefore she was able to identify him. On penetration, she submitted that PW5 who examined the complainant stated that from examination, the complainant had engaged in sexual intercourse. That PW1 testified that the Appellant took her to his house where they engaged in sex on several occasions which proves the charge of defilement.

9. On the Appellant's defence, she submitted that the trial court considered it and found that it did not dislodge the prosecution's evidence. The appellant did not attempt to give an explanation that would cast doubts on the facts set out by the prosecution hence, the burden of proof was met. As to the inconsistencies, she submitted that the issue has never been whether there are contradictions in evidence but rather whether contradictions or inconsistencies go to the root of the charges and quality of the evidence. Further, no two people remember the exact set of facts in the exact same way hence contradictions in the prosecution's case is a sign of forthrightness not insincerity. That there was no contradiction as to identity, age of the complainant and penetration and therefore if there were contradictions, they would be peripheral hence inconsequential.

10. As to the sentence, counsel submitted that an appellate court cannot interfere with the sentence unless the sentence was manifestly excessive, the trial court overlooked some material factor or took into account wrong material or acted on a wrong principle. That it was upon the Appellant to demonstrate one of the above reasons for the court to interfere with the sentence. The sentence was not only lawful but was lenient in the circumstances.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. I have taken time to consider the evidence as recorded by the trial court. In doing so, I have taken cognizance that I neither saw no heard the witnesses testify and I have given due allowance for that fact. I have had due regard to the applicable law, the submissions by the parties and case law cited.

13. In a nutshell, the prosecution evidence was as follows. PW1, the complainant, gave sworn testimony and told the trial court that the Appellant was her boyfriend and on 15/08/2021, she went to live with him at his home as his wife. They had sex and she stayed with him for two weeks. On 07/09/2021, she stayed at Appellant's sister and during that period, they had sex occasionally. They used protection. Her parents did not know where she was. On 13/09/2021, the sub-chief and the police went to pick her at Appellant's house and they were taken to Naromoru Police station. She was thereafter taken to hospital.

14. PW2, the complainant's mother testified that the complainant went missing on 22/07/2021. She reported to the police and alerted the villagers and the sub-chief. She was alerted by the sub-chief on 13/09/2021 that PW1 was found and on the following day, she found her at Naromoru police station and she took her to hospital. She stated that she was informed that the complainant and the Appellant were found together. She stated that she did not know the Appellant.

15. PW3, the assistant chief, testified that he received a call from head teacher, [Particularas Withheld] primary school who informed him that PW1 had not reported to any secondary school and asked him to look for her. That her uncle confirmed that she ran away from home. He got intelligence on 13/09/2021 that she was married at Naromoru and went to the disclosed residence. He contacted the OCS who sent two police officers. He directed them to a single room house, knocked the door which the Appellant opened. The complainant was inside sleeping on a mattress on the floor.

16. PW4 the investigating officer testified that they were led by the chief to a house where they found the complainant and the Appellant. She stated that the complainant was sleeping on a mattress on the floor. They arrested the Appellant and took the complainant to hospital. She stated that the complainant informed her that she had stayed at the Appellant's house from 04/07/2021 whereby they lived as husband and wife and engaged in sexual intercourse.

17. PW5, the clinical officer testified that she filled the P3 form but relied on the PRC form to fill the P3 form. She stated the clinician who prepared the PRC form was off duty but she had worked with her for a period of three years and she was familiar with her handwriting and signature. She testified that on examination of the complainant, her hymen was previously broken as she had had sex before. Nothing abnormal was detected on her genitalia and no treatment was given. She produced the health book as Pexhibit2, the P3 form Pexhibit 3 and the PRC Pexhibit4.

18. After the close of prosecution's case, the Appellant was placed on his defence. In his unsworn testimony, he testified that on 13/09/2021 he went back home from work and found his wife and children and a girl given work by his wife to wash clothes. The wife had left to look for money to pay the girl. The police appeared and he was arrested together with the girl and he was taken to police station. The wife later went to the station and she was told to return the following day. He was arraigned in court where he learnt about the charges.

19. That was the totality of evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove; the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

20. Having established the ingredients of the charge, the question now ripe for determination is whether the prosecution has proved its case to the legal threshold.

21. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

22. In the present appeal, the complainant's age was not disputed. PW2, the complainant's mother produced the complainant's birth certificate as Pexhibit1 which shows that the complainant was born on 03/04/2006. The offence was committed between 15/08/2021 and 07/09/2021 and therefore the complainant was 15 years at the material time and hence a child for the purpose of *Sexual Offences Act*.

23. What is disputed is penetration and identity of the perpetrator. As seen earlier, the complainant testified that the Appellant was her boyfriend. They met in town on 10/07/2021 and went to his house. On 15/08/2021, she went to live with the Appellant at his house where they lived as husband and wife. She was however taken away on 13/09/2021 by the chief and the police. She testified that during this

period she stayed with the Appellant, 'tukafanya tabia mbaya' they had sex occasionally and they used protection.

24. PW2 confirmed that indeed the complainant had disappeared from home and she made a report of her disappearance to the police. PW3 and PW4 confirmed that the complainant had disappeared from home and she was later found at the Appellant's house with him. The fact of her disappearance was proved by Pexhibit5, the investigation diary which shows that PW2 made a report on 04/07/2021 of her disappearance.

25. PW5, the clinician testified that on examination of the complainant, her hymen was found to be broken as she had had sex before. Nothing abnormal was detected in her genitalia and no treatment was given. She did not examine the complainant but relied on the PRC form that was filled by her colleague to fill the P3 form. The PRC form did not indicate any abnormality on the complainant's genetalia safe the broken hymen.

26. As to proof of penetration, it is trite that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessary calling for medical evidence. This is in line with section 124 of the *Evidence Act* which states that corroboration is not necessary in sexual offences. This was further affirmed in the case of Kassim Ali v Republic Cr. App. No. 84 of 2005 (Mombasa) where the court stated:

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

27. The trial court while convicting the Appellant held that the medical evidence sufficiently confirmed penetration of the complainant's genitalia. The court further held that the complainant's evidence could be relied on without corroboration. The court found that the complainant was firm in her testimony and she was able to recall the details of the material day and period she stayed with the Appellant.

28. While I agree with the trial court on the finding that penetration can be proved through the evidence of the complainant without corroboration within the ambit of Section 124 of the *Evidence Act*, it is clear that the trial court misapprehended the medical evidence tendered. That medical evidence did little or nothing at all to prove penetration. The evidence merely indicated that the hymen was long broken and in no way demonstrated recent sexual activity on the part of the complainant and nothing else was noted on the complainant's genetalia to suggest that she had a recent sexual encounter.

29. This case thus turns on the evidence tendered by the complainant as regards the ingredient of penetration. Her evidence, was that she went to live with the Appellant in his house where she stated 'tukafanya tabia mbaya. We had sex...we used protection during the sex.'

    Nothing more was stated as to the act of having sex and what it entailed.

30. She did not explain in graphic details what transpired between her and the Appellant in the period she stayed with him. She only stated that they had sex. She did not explain whether the act of sex meant that the Appellant penetrated her vagina. To my mind, her testimony was vague. I am guided by the case of Julius Kioko Kivuva v Republic [2015] eKLR where Nyamweya J (as she then was) stated that;

> " Penetration" under section 2 of the Act is defined to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

The complainant (PW1) testified as follows in this regard:

> "The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept up to 9.00 a.m the following day"
>
> PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

31. Kemei J in P M M v Republic [2017] eKLR in furtherance of this exposition stated that;

> " As noted in the case of Julius Kioko Kivuva =vs= Republic (Machakos HCCRA No. 60 of 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*..."

32. Also, in Furaha Ngumbau Kagenge Versus Republic, Criminal Appeal No. 141 Of 2016, Mombasa (Cr); the court observed that;

> " .....it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the *Sexual Offences Act*, which is required to be proved beyond reasonable doubt....."

33. The complainant's testimony in this regard was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened.

34. I need to emphasize that the burden of proof in a criminal trial rests with the prosecution and an accused person shoulders no obligation to prove his innocence. That burden remains even where an accused person offers no evidence. In the particulars of the charge herein it was stated that the accused 'intentionally caused his penis to penetrate the vagina of PW'. This element ought to have been proved by way of evidence in graphic details and it was not enough for the complainant to say "tukafanya tabia mbaya. We had sex...we used protection during the sex.'

35. Whereas evidence of the complainant would be adequate to sustain a conviction within the parameters set in Section 124 of the *Evidence Act*, that evidence must in itself must be reliable and clearly demonstrate the manner in which penetration occurred leaving nothing to conjencture.

36. The resulting effect of the foregoing is that the prosecution has failed to prove the ingredient of penetration and this appeal therefore succeeds. I quash the conviction and set aside the sentence by the trial court and substitute thereof an order of acquittal. The Appellant shall be set at liberty unless otherwise lawfully held under a separate warrant.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY MAY,2024

HON. JUSTICE A.K. NDUNG'U

JUDGE