Nganga v Republic (Appeal E027 of 2021) [2024] KEHC 5041 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

APPEAL E027 OF 2021

GL NZIOKA, J

MAY 6, 2024

BETWEEN

FRANCIS MACHARIA NGANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Honourable H. O. Barasa Senior Principal Magistrate (SPM) delivered on 16th September 2021 vide Engineer Principal Magistrate's Court Criminal Sexual Offence case No. E014 of 2020)

JUDGMENT

1. The appellant was arraigned before the Principal Magistrate's court at Engineer charged vide Principal Magistrate's criminal case S/O No E014 of 2020 with the offence of defilement contrary to section 8(1) as read with (3) of the Sexual Offence Act No. 3 of 2006. (herein the Act). He was charged in the alternative count with the offence of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each count are as per the charge sheet.

2. The appellant pleaded not guilty to both counts and the case proceeded to full hearing. The prosecution case is that, on 4th October 2020, PW1 LNK a girl aged 16 years old disappeared from home without the knowledge of her parents. The mother, PW2 Margaret Njeri Kariuki, looked for her in vain and reported the matter at Mwiki Police Post in Nairobi. Apparently prior to her disappearance PW1's mother had gone through her phone and noticed she was exchanging love messages with a man. That when she questioned her over it, she disappeared. Upon reporting the matter, she gave the police the number of the man where the complainant was suspected to be.

3. It is the prosecution case that, the number was dialled and the recipient identified himself as Macharia, and informed the police that, the complainant was his friend, and that she was in Molo. On 20th October 2020, the complainant's mother travelled to Molo and found Macharia and the complainant at the nearest police station. She picked the complainant and returned with her to Kasarani in Nairobi.

4. However, on 27th October 2020, the complainant ran away again. The complainant's mother called Kasarani Police Station and reported the matter. As the investigation went on, it was established that, the complainant was at Molo and once again the mother went to Rironi Police Post and reported that she was missing. By that time she knew where the appellant was staying and led the police officers there. He was found in his house and arrested. By that time the complainant was at her auntie's place. She was picked up and taken to Rironi Police Post and together with appellant, taken to Miharati Police Station. The complainant was taken to Manunga Health Centre and referred to Engineer District Hospital where she was examined and found to be pregnant. The appellant was arraigned in court and charged as herein stated.

5. At the close of the prosecution case, the appellant was placed on his defence. He denied commission of the offence and stated that, he was not with the complainant during the time alleged in the charge sheet. That during that time he was in Timuri where he was working in the butchery. Further, he did not have her phone number and therefore there is no way he could have called her.

6. That, the complainant was her neighbour but they had no sexual relationship. That when the complainant's mother "looked" for his phone and called him to inquire as to where the complainant was, he told her, he did not know. That a week later, he was arrested and taken to Miharati Police Station where he learnt that he was arrested because of the complainant and charged.

7. That after release on bond, he inquired as to whether her parents had differences with the complainant's parents and he learnt that they differed over a cow. That, he further inquired to establish the age of the girl and he leant that she was 19 years old and the birth certificate was in school. That she did not attend secondary school as claimed.

8. At the conclusion of the case, the trial court vide a judgment dated 16th September 2021, found the appellant guilty as charged on the main charge convicted him and sentenced him to serve fifteen (15) years imprisonment.

9. However the appellant is aggrieved and has appealed against the decision of the trial court based on the following grounds:

    a. That, I pleaded NOT guilty to the offence

    b. That, I am a young man whose life is greatly going to be affected by the long sentence imposed.

    c. That, my parents are aged and wholly dependent on my efforts for their daily bread thus I urge the court to consider the same and review the said sentence.

    d. That, I am asthmatic and always prone to tuberculosis thus afraid that the congestion in prison might be the end of my life considering that covid 19 pandemic is not friendly to such deceases.

    e. That, Article 50 (2)(q) of our Constitution gives this court power to do a sentence review.

    f. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgement.

    g. That, further grounds shall be adduced at the hearing of this appeal.

    h. That, I wish to be present during the hearing and determination of this appeal.

10. In addition the appellant filed supplementary grounds of appeal albeit without court's leave, which states:

a. That the learned trial Magistrate erred in both law and fact when he convicted the appellant in this instant case yet failed to note the age of the victim was not conclusively proved as required by law.

b. That the learned trial Magistrate erred in both law and fact when he convicted the appellant in this case basing his conviction on the evidence adduced yet failed to apply the principles applicable under such evidence thus being circumstantial.

c. That the learned trial Magistrate erred in both law and fact when she convicted the appellant in this present case to a mandatory minimum sentence of 15 years yet failed to note that the same denies the judge discretion to decide cases according to the circumstance of the individual case.

11. As a result thereof, the appellant seeks that, the appeal be allowed in it's entirely the conviction be quashed and sentence set aside.

12. However, the appeal was opposed vide filing of grounds of appeal dated 20th January 2023, which states:

a. The Appeal is misconceived and without merit.

b. The Learned Magistrate's decision was appropriate and correct given that the Prosecution proved its case beyond reasonable doubt.

c. In accordance with section 215 of the Criminal Procedure Code, the Learned Magistrate's finding of guilt was based on an assessment of the material facts and evidence presented by both the State and the Appellant as well as the mitigation of the Appellant thereto.

13. The appeal was disposed off vide filing of submissions. The appellant submitted that, the age of the complainant was not conclusively proved as the prosecution did not produce any evidence on the same. That, PW2 Njeri, the complainant's mother stated that, all their documents were burned in a fire in their home and stated that she was in the process of applying for another birth certificate. That, in the circumstances, the prosecution should have obtained an age assessment report.

14. Further, the appellant inquired from the complainant her age before befriending her and she informed him she was 19 years old. That, her birth certificate was in Rayetta Primary School and that her mother did not want to go for it as it would establish the complainant's real age and they conspired to say she was 16 years old. That, the complainant was not a credible and truthful witness and therefore cannot be relied on. He relied on the case of John Gardon Wangues & others vs Republic Nairobi HCCR APP No. 405 and 406 of 2009 where the court held that where a witness gives contrary testimony of what he/she had formally said or written without a satisfactory reason, such evidence should not have much weight.

15. The appellant argued that, the case against him was a frame up after the complainant stole Kshs. 5,700 from PW2, her mother, and used it to go back to the appellant's house. Further, there was bad blood between the families of the appellant and the complainant concerning a cow.

16. The appellant submitted that, there was no direct evidence linking him to the commission of the offence as it was the evidence of the complainant that when she went to Nakuru between 6th and 15th October 2020, she stayed at the appellant's brother's house but that appellant was not there. Further, there is no circumstantial evidence linking him to the offence.

17. The appellant invoked the defence under section 8 (5) of the Act and claimed that he did not in any way persuade the complainant to stay with him or his brother. That, she sneaked out of her home for

a second time after returning home from Molo Police Station and went to the complainant's home and engaged in sexual relations. That, the complainant acted as an adult and knew what she was doing. He relied on the case of; Edward Ambecha Muyengo vs Republic Criminal Appeal No. 2 of 2009 wherein the complainant therein went and stayed in the house of the appellant for three days and that the appellant did not know she was a student. The court held that, the complainant knew what she was doing and acted in a manner that led the appellant to believe that she was an adult and in the circumstances the defence under section 8 (5) of the Act was applicable.

18. The appellant further submitted that, the trial court sentenced him to the mandatory minimum sentence provided for under the Act. That, minimum mandatory sentence are unconstitutional as they violate the right to free hearing under Article 50 of *the Constitution* as they derive an accused person from the right to review to a higher court and mitigation that is enjoyed by other accused persons. Further, it robs the trial court of discretion to consider mitigating factors and forces them to impose sentences pre-determined by the Legislature which are in some instances excessive. He relied on the South African decisions in; S vs Toms 1990 (2) SA 802 (A), S vs Mchunu & another (AR24/11) (2012) ZAKZPHC6 Kwa Zulu Natal High Court, and S vs Jansen 1999 (2) SACR 368 (C) where the courts stated that sentencing and/or inflicting punishment is a matter of discretion of the trial court as mandatory minimum sentences can be excessive and leave no room for rehabilitation of offenders and reduces the court to a mere rubber stamp.

19. The respondent in submissions dated 20th January 2023 argued that the ingredients of the offence were proved beyond reasonable doubt. That, the age of the complainant was proved through the testimony of the complainant and her mother both of whom testified that she was 16 years old. Further, PW2 Njeri, testified that the complainant's birth certificate had been burnt but had applied for a replacement. That, PW3 was recalled and produced the complainant's birth certificate that showed the complainant was born on 23rd March, 2004.

20. On penetration, the complainant testified that she ran away from home on two occasions to go to the appellant and that they engaged in sexual intercourse. Further, the second time the complainant was staying at the appellant's brother's house and that the appellant would visit her there and they would engage in sexual intercourse. Furthermore, the complainant ran away the second time so as to inform the appellant that she was pregnant and that the complainant was considering what to do. That, the complainant's evidence was corroborated by the medical evidence produced by PW5 which showed that the complainant's hymen was torn and that she was pregnant.

21. On whether the appellant was the perpetrator, PW2, the complainant's mother, got the appellant's mobile number from the complainant's mobile phone. That, she gave it to the police officer who in turn called the appellant who admitted that he was with the appellant. That, PW2 travelled to Molo to pick the complainant she met with the complainant and the appellant. Further, the complainant confirmed that she was in a relationship with the appellant from April, 2020 and she had ran away to go and leave with him.

22. The respondent submitted that, it was the duty of the appellant to exercise reasonable judgment and refuse to engage in sexual relations with a secondary school girl. That, the trial Magistrate considered the evidence of the appellant and found it to be an afterthought. Further, the sentence was befitting of the offence and in the circumstances, the appeal lacks merit and should be dismissed in its entirety.

23. At the conclusion of the hearing of the appeal, I have considered the material placed before the court and as I evaluate the same, I note the role of the 1st appellate court as held by the Court of Appeal in the case of; Okeno vs. Republic (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

24. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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] E.A. 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 court's 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"

25. In that regard, the court has to establish that, based on the evidence adduced in the trial court, the prosecution proved the case beyond reasonable doubt. In this matter the offence which the appellant was convicted of is provided for under section 8(1) which states:

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

26. Pursuant thereto the elements of the offence as discussed by the Supreme Court of Uganda in the case of; Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995, laid down the ingredients of the offence of defilement, which the prosecution must prove beyond reasonable doubt as; (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

27. As regards the element of age, the prosecution vide the charge sheet stated that LNK was 16 years old. In her testimony she stated that, she was 16 years old. That she was in form three at Bridge Hill Girls High School. PW2 Margaret Njeri, her mother, testified that she would be 16 years old on 23rd March 2021. Finally, the Investigating Officer PW3 No. 119441 PC Woman Violet Atieno Sikiku was recalled and she produced a birth certificate which indicated that, the complainant was born on 23rd March 2004. The offence herein was committed on diverse dates between 6th October 2020 and 15th November 2020 and therefore, the complainant was 16 years old by then. Thus the evidence revealed that she was a minor or a child as defined under the *Children Act*.

28. As regards penetration it was the complainant's evidence that, the appellant had sex with her which led to her pregnancy. PW5 Dr. Antony Mureithi Gitonga confirmed that the complainant had a broken hymen and that, the hymnal tears were multiple but healed. Further the pregnancy test was positive. He produced the P3 and PRC forms he filled in evidence as to the afore finding. Thus based on the afore evidence the element of penetration was proved. Penetration is defined as the partial or complete insertion of the genital organs of a person into the genital organs of another person

29. The last ingredient is proof of the perpetrator. According to PW1 LNK, it is the appellant who defiled her and made her pregnant. She gave a detailed account of how her mother discovered she was in a love relationship with the appellant vide phone messages exchanged. That, the appellant was her boyfriend since April 2020. That although she was staying in the appellant's brother's house, the appellant visited the brother and they had sex. That even after she was brought back to Nairobi she ran away and went back to stay with the appellant for two weeks as she had discovered she was pregnant and the appellant was figuring out what to do.

30. In cross-examination she stated that, she went to Molo to inform the appellant that, her mother had discovered their relationship. That, she lived with the appellant's brother, but the appellant would seek for permission from work and visit his brother's house.

31. It suffices to note at that, although the appellant in an unsworn statement in his defence denied the offence, and the fact that, he knew the complainant, her phone number or even that he was with her in Molo, the appellant did not cross-examine the complainant on all these issues. As such it renders the appellant's evidence to that extent an afterthought.

32. Even then, PW1's evidence was corroborated by several other witnesses. PW2 Njeri, the mother, corroborated that by her testimony that, she found love messages in the complainant's phone from the appellant. Further, she led the police to the appellant's house after the appellant called her and told her the complainant was in Nakuru and that he was with her.

33. Again it suffices to note at this stage that, although the appellant avers his parents had a grudge with the complainant's parents over a cow, during cross-examination of PW2 Njeri, the complainant's mother, the appellant did not ask her over the same.

34. Be that as it were, PW3 NO. 119441 PC Woman Violet Atieno testified that she found the appellant and complainant detained at Rironi Police Post and took them to Kipipiri Police Station, and she took the complainant for medical examination. The appellant did not cross examine her much on her evidence. PW4 No. 80593 PC Isaac Chebon stated that upon arresting the appellant he admitted that he was with the complainant (however, this was not reduced into a confession and cannot be used against the appellant).

35. The analysis of the afore evidence reveals that, the complainant was well known to the appellant. In fact, her entire testimony which was given on oath as against the appellant's unsworn statement was meant to shield the appellant. She admitted he was her boyfriend. She admitted she ran home to go and stay with him as the mother had discovered their relationship. In fact, even after she was brought to Nairobi, she still ran away to the appellant's house therefore, the appellant's evidence that, he did not know her and never had a relationship with her is dishonest and mere denial. Finally, PW2 Njeri has confirmed the communication between the complainant and appellant which assisted in tracing the appellant and the complainant. I therefore find and hold that, the prosecution proved the case beyond reasonable doubt and I confirm the conviction.

36. As regards sentence, I find that, the provisions of section 4 of the Sexual offence Act states that:

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

37. The sentence for the offence herein is a minimum of 15 years. The appellant was sentenced to 15 years imprisonment. Therefore the sentence is lawful. Although the charge sheet referred to sub-section (3) as the section for the sentence, the trial court guided itself properly meting out the sentence, for the sentence under sub section (3) is more severe.

38. In that regard, I find that the appeal herein has no merit and I dismiss it on its entirety.

39. It is so ordered

DATED, DELIVERED AND SIGNED THIS 6TH DAY OF MAY, 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present, virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

3 | Page