Njenga v Republic (Criminal Appeal E071 of 2022)
[2024] KEHC 7840 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 7840 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E071 OF 2022

PN GICHOHI, J

JULY 2, 2024

BETWEEN

SIMON THUO NJENGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence by Hon. Y. Khatambi (PM) in Nakuru Chief Magistrates Court S.O Case No. 137 of 2018 in a judgment delivered on 15th September 2022)

JUDGMENT

1. Simon Thuo Njenga (the Appellant) appeared before trial court on 19/07/2022 where he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 18th day of July 2018 within Nakuru County, he unlawfully and intentionally committed an act by inserting his male organ namely penis into the vagina of DWK a girl aged 9 years which caused penetration.

2. He also faced an alternative count of committing indecent act with a child contrary to section 11 (1) of the Sexual fences Act No. 3 of 2006. The particulars were that on 18th day of July 2018 within Nakuru County, he unlawfully and intentionally indecently assaulted DWK a girl aged 9 years by touching her private parts namely vagina with his penis.

3. He pleaded not guilty to the charges and after hearing both the prosecution and defence witnesses, the trial magistrate convicted the Appellant on the main charge and sentenced him to life imprisonment.

4. He was dissatisfied by that judgment and preferred this appeal, vide amended appeal filed on 20/02/2024 which also contains submissions. He seeks that the conviction and sentence quashed and he be set at liberty on Six (6) grounds as follows :-

1. That the learned magistrate erred in law and fact he failed to note that the evidence presented at trial was contradictory.

2. That the learned magistrate erred in law and fact he failed to consider that PW1 was not a credible witness.

3. That the learned magistrate erred in law and fact he failed to consider that the defence witnesses gave credible evidence.

4. That the learned magistrate erred in law and fact he failed to consider that the prosecution did not prove its case as required.

5. That the learned magistrate erred in law and fact in that he failed to note there was no proof age by a birth certificate .

Appellant's Submissions

5. Regarding the issue that the complainant was defiled as alleged, the Appellant submitted that the witness (PW1) was not truthful in that it was only during cross- examination that she talked of having screamed during the act. In the Appellant's view, there is no way a child of tender age can have sex and not feel pain or see blood at her private parts. He submitted that the evidence was contradicted by the doctor who testified that the complainant was assaulted during the act.

6. Regarding what transpired on that date, the accused submitted that his wife's evidence that the Appellant had left the house for work at 6.30 am was the truth as opposed to the complainant's evidence.

7. Regarding the complainant's age, he submitted that while the complainant's evidence was that she was 9 years old, no other witness mentioned the exact age. Further, he submitted that the investigating officer went to hospital to confirm but came with documents bearing two different names that is DWK and DK.

8. He therefore submitted that the evidence adduced before the trial court was contradictory and the trial court did not state why the Appellant's defence was unacceptable yet he had even called his wife as a witness. Lastly, he submitted that the life sentence was unconstitutional.

9. The Respondent opposed the appeal vide submissions filed on 27/02/2024 by Mr. Kihara, the learned prosecution counsel. He submitted that through the five prosecution witnesses, the Respondent had proved the age of the victim, the identity of the offender and that there was penetration.

10. On the issue of age, it was submitted that the clinic card proved that the complaisant was born on 24/04/2009.

11. Regarding the identity of the offender, the Respondent submitted that the that the offender (Appellant) was well known to the victim and the victim's mother.

12. Regarding penetration, it was submitted that the child's evidence was that the Appellant forcefully undressed and defiled her. That she went back to recover her pant but it could not be traced. Further, she was taken to hospital on the same day and on examination by the doctor, she was confirmed as having been defiled. That her hymen was freshly torn. That this was also noted in the P3 Form and PRC Form.

13. It was submitted that the Appellant's defence did not support his case and it was confirmed that the Appellant and the minor had never disagreed and therefore, the trial court's judgment was sound.

14. In regard to the sentence, the Respondent submitted that the life sentence was deserving. That should the Court be guided by current jurisprudence and decide to alter the life sentence, then the Respondent would urge the Court to consider if the Appellant was remorseful , whether he was a first offender and whether the offence was prevalent and the need for a deterrent sentence.

Analysis And Determination

15. This court's duty as the first appellate court is set out by the Court of Appeal in Okeno v Republic [1972) EA where it was held: -

> " 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".

16. In fulfilment of that duty, this Court is alive to the fact that the issues analysing the main issues for consideration in this appeal are :-

    1. Whether the Respondent discharged its burden of proof on the charge of defilement.

    2 . Whether the sentence was harsh an unconstitutional.

17. Regarding the charge of defilement, the Respondent had to prove three ingredients that is:-

    1 . The age of the victim .

    2 . Penetration.

    3 . The identity of the offender.

18. The *Sexual Offences Act* is framed in a manner that clearly considers the nature of the offence in regard to the age of the victim and that determines the finding of a trial court and ultimate decision on both conviction and sentence.

19. In this case, the sections under which the Appellant was charged provide as follows:-

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

    8 (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

Age Of Victim

20. On issue of age of a victim in sexual offences, the Court of Appeal in Mwalango Chichoro Mwanjembe v Republic [2016] eKLR 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 documentary 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v R Cr. Appeal No.19 of 2014 and Omar Uche v R,Cr.App.No.11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in Francis Omuroni v Uganda, Crim. Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

21. Similarly, the Court of Appeal in Evans Wamalwa Simiyu v Republic [2016] eKLR held:-

> " As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

22. On this issue, the victim (PW1) testified that she was in Standard 3 at [Particulars Withheld] Primary School. Her mother MNK (PW2) confirmed that the child was indeed in standard 3. Further, she told the court that the child was 9 years old having been born in April 2009 and that she had a clinic card but not a birth certificate.

23. She explained that the name indicated on DWK's clinical / Immunization card (P Exh. 3) was Tabitha but they changed it to D. That Card showed the date of birth as 24/4/2009.

24. Doctor Bahati Roduck produced the P3 Form (P Exh.1) which indicated the age of the child as 9 years. The clinical / Immunization card (P Exh. 3) and the PRC form (P Exh. 2) showed that the child was aged 9 years. The date of the alleged defilement was 18/7/2018. The victim's age assessment report by Dr. Rupal Goda dated 22/02/2022 showed the approximate age of the victim as at the time of assessment was 12- 13 years.

25. The Appellant has an issue with discrepancy of the name in the clinical / Immunization card (P Exh. 3). The Victim's mother (PW2) explained it as an error and the reason the name indicated as Tabitha

was cancelled to read Dorcus. This Court is satisfied that it was an error properly noted, explained and rectified. That cannot be considered as a contradiction in the Respondent's case before the trial court.

26. Regarding age and for which the Appellant was convicted and sentenced; the trial court held:-

> "The Complainant testified on 16th August 2018. She stated that she was 9 years of age. The investing officer escorted the complainant for age assessment. An age assessment report dated 22nd February 2022 was presented in evidence confirming that the complainant was 12-13 years of age. The offence is alleged to have occurred on 18th July 2018. Noting the date of the offence and the age of the minor. I am of the view that the subject was a child of tender age."

27. This Court is satisfied that the age of the victim was about 9 years as at the time of the offence and between 12-13 years as at the time of the age assessment. During the assessment, the child was said to be in class 6 and the doctor noted the clinical card showing the date of birth as 29/4/2009. Going by both documentary and oral evidence, age of the victim is proved.

Penetration

28. Section 2 of the *Sexual Offences Act* defines the word penetration as:- "the partial or complete insertion of the genital organs of a person into the genital organ of another person."

29. The Appellant's issue is that it was only in cross- examination that she talked of having screamed during the act. In the Appellant's view, there is no way a child of tender age can have sex and not feel pain or see blood at her private parts. This is what he called contradiction.

30. The victim's evidence that on 18/07/2018, her teacher sent her home to get her book. On the way home, the Appellant who she knew as Baba Njenga and who lived near her home called her to pick a slasher from his house and take it to her grandfather.

31. As she stood at the Appellant's door, he pulled her into the house and to the bedroom. He told her to remove her pant and she complied. He unzipped his trouser and lay on her as she faced up on his bed. He defiled her. She felt pain her vagina but it was not a lot of pain. It was the first time he did it to her. His wife returned home and the Appellant ran away.

32. The Appellant's wife told her to leave the bedroom. The complainant picked her shoes and ran out quietly. On the way, he met the Appellant's grandmother and reported to her. She got hold of her hand and they went back to the house to look for her pant.

33. Then the Appellant's grandmother informed her grandmother what had happened. The Appellant's grandmother told her to accompany her home and report the matter. She then accompanied to school and reported to the headteacher. They were then informed that the Appellant had been arrested. Her grandmother came and they reported the matter to police and then went to hospital where she was examined and treated.

34. The complainant's grandmother (PW2) and who lived with the complainant testified that the complainant went to school in the morning on the material dated. Two hours later PW2 was her husband her husband called her home where she met the complainant and the Appellant's grandmother. The complainant cried on seeing her. She asked her tell her and the Appellant's grandmother what had happened. It is then that the Appellant's grandmother narrated what the complainant had told her. That the Appellant had taken her to his bedroom, removed her pant and placed her on his bed and defiled her.

35. They took the complainant to school and reported the class teacher who in turn called the headteacher and the child was interrogated. They then went to police station and reported the matter. They recorded statements and the were issued with a P3 Form. They went to hospital and the child was examined and the P3 Form filled.

36. In cross -examination, the victim maintained that the Appellant did bad manners to her causing her pain in her vagina. Her mother testified that she examined the victim and noted that she was not wearing a pant. She saw that the vagina was red but she but she did not see blood.

37. This evidence reveals that the victim was examined on the same day that she was allegedly defiled that is on 18th July 2018. The medical records produced herein and on which Doctor Bahati Roduck testified was that on examination, the victim's hymen was freshly torn. There is no doubt, therefore, that there was penetration . The child was defiled.

Identity Of The Offender

38. The Appellant's defence was that on 18/7/2018, he woke up and left the house at 6.30 am. He went to his place of work. That at about 7.00 am, two men came to him and told him that the head teacher had sent them to inform him that he was need in school. He told them that he would go after work. They forced him to join them and instead of heading to school, they led him to his home area where he found a mob and among them were two police officers. He was handcuffed and taken to the police station where he found the complainant (PW1), her mother, the School Principal and the complainant's grandmother (PW2). He told the trial court that he knew them as they were his neighbours and the complainant's mother was his girlfriend when they were in primary school but he decided to stop the relationship and they separated in 2008.

39. That he asked the police what offence he had committed and they replied that a child had been defiled and that he was the suspect.

40. In cross examination, he told the trail court that no grudge existed between him and the complainant (PW1).

41. This appears to be an alibi defence and 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."

42. 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."

43. The Appellant's witness was his wife (DW2) who restated that the appellant left the house at 6.30 saying he was going to work. It is then that later he heard noise on the road at 8.30 am and went to check. He found the Appellant handcuffed. In cross examination, she could not tell if the Appellant actually went to work.

44. While finding the victim's testimony as consistent with clear chronology of events before and after the incident and despite cross - examination and later being called for further cross- examination, the trial found no reason to doubt her evidence.

45. Consequently, the trial court had this to say in its judgement about the Respondents defence: -

> " I note that the accused alleged that the complaint's mother bore a grudge against him due to the fact that he broke off their relationship in the year 2008. ...the offence in question occurred more than 10 years later. Asa consequence the accused cannot allege that he was frame for the said reason. Consequently, the issues raised in the accused's defence were never raised and tested in cross- examination. The defence witness could not account for the accused person's whereabouts at the time the incident occurred."

46. This Court finds dismissal of the Appellant's defence justified. That was an alibi defence raised only at defence stage which was too late in the day. The Appellant's wife could not confirm whether the Appellant went to work or not. That defence was properly considered by the trial court. It was a defence that had no effect on the Respondent's case.

47. The evidence was clear. The Appellant was a neighbour to the victim and this is a fact he acknowledged. She knew him as baba Njenga. The incident occurred during the day and by a person known to this victim. There was no chance of mistaken identity. This Court is satisfied that the Appellant was properly identified as the perpetrator. As a consequence, the conviction was safe.

Sentence

48. The record shows that the Appellant was a first offender. The trial court called for the pre-sentence report where the Appellant maintained his innocence but prayed for leniency. While sentencing, there is nothing to show that the trial court was bound by mandatory sentence provided by the Act.

49. He considered the gravity of the offence and the circumstance under which it was committed even as he considered the mitigating factors and the report before finally stating:- "I am inclined to sentence the accused to life imprisonment."

50. Sentencing is a discretion exercised by the trial court. The offence was committed by a 29- year-old married man and who allegedly had his own children. This Court has considered the gravity of this offence and the impact it has on a 9-year-old child and is satisfied that a deterrent determinate sentence is most appropriate. However, life imprisonment has since been declared unconstitutional.

51. This Court therefore sets aside the life imprisonment and substitutes it with a sentence of 30 years imprisonment. The appellant was out on bond but his bond was later cancelled for jumping bond.

He remained in custody from 20/4/2021. Under Section 333(2) of the Criminal Procedure Code, the period spent in custody should be considered while computing the sentence.

52. In the upshot, this Court disposes off this appeal in the following terms:-

1 . The appeal on conviction is dismissed.

2. The sentence of life imprisonment is substituted with a sentence of thirty (30) years imprisonment.

3. The period the Appellant spent in custody, that is from 20/4/2021 when he was re-arrested be taken into account in computing the thirty (30) years imprisonment.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 2ND DAY OF JULY, 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

Simon Thuo Njenga - Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant