Njeru v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 10863 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10863 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E037 OF 2023

LM NJUGUNA, J

SEPTEMBER 18, 2024

BETWEEN

JUSTUS NYAGA NJERU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii, PM in Siakago Magistrate's Court Sexual Offence Case No. E039 of 2021 delivered on 01st November 2023)

JUDGMENT

1. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 4th December 2023, seeking that the appeal be allowed, conviction quashed and the sentence be set aside. The appeal is premised on the grounds that:

    a. The learned trial magistrate erred in both law and fact by convicting the appellant without considering the prosecution evidence was inadequate to sustain a conviction;

    b. The learned trial magistrate erred in both law and fact by convicting the appellant without considering the prosecution evidence was uncorroborated and full of inconsistencies contrary to section 163(1) of the *Evidence Act*;

    c. The learned trial magistrate erred in both law and fact by disregarding the appellant's defense without giving cogent reasons; and

    d. The learned trial magistrate erred in both law and fact by relying on the prosecution's evidence which was insufficient and unsatisfactory in law.

2. The appellant was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on 02nd July 2021 within

Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SNN, a girl child aged 15 years. He faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, whose particulars are that on 02nd July 2021 within Embu County, the appellant, willfully and unlawfully touched the vagina of SNN, a girl child aged 15 years with his penis.

3. The appellant pleaded not guilty to the charge and the plea was duly entered. The matter proceeded to full hearing.

4. PW1 was the victim, SNN who produced her birth certificate as evidence. She stated that on the day of the incident, she was returning home from the market when the appellant insisted that he carry her on his motorcycle and that he would take her home. That while on the way, they had a small accident and her items fell off and they picked them. They proceeded but the appellant diverted to some bush, left her briefly and when he returned, he held her by her hand after which he wrested her to the ground, removed her undergarments and inserted his penis into her vagina. That they went back to his motorcycle and on their way her mother saw them and tried to stop the appellant but he refused to stop and accelerated past her home. That he took her to Siakago to a certain house where they arrived at about 7:30PM.

5. She stated that the appellant threatened her if she told anyone about the ordeal and then he removed her clothes again and had sex with her severally that night until the next morning. That the appellant later dropped her off near her sister's place and she proceeded to her sister's house. That she explained what had happened and her mother was called. She was taken to the police station and then to hospital. On cross-examination, she stated that she did not scream that night because the appellant had threatened her. That the appellant was arrested by her father, brother and brother-in-law.

6. PW2 was LMN, the victim's mother. She stated that on the day of the incident, she had instructed PW1 to go for some errands at the market but she did not return home. That she started looking for her and some people at the market said that they had seen her on a motorcycle. That she started looking for her door to door and since it was getting dark, she had a torch. She saw the appellant carrying PW1 on his motor cycle and he did not stop despite being asked to do so and she thought he was taking PW1 home.

7. She stated that she did not find her daughter at home and so she reported at Siakago Police Station. That the following morning, PW1 was found and when the appellant was asked where she had gone, he said that he had left her with a certain girl. That the appellant was arrested after PW1 narrated how he lured and defiled her. On cross-examination, she stated that the appellant's brother said that he did not spend the material night at his place.

8. PW3 was JN, the victim's father. He stated that on the day of the incident, he returned home and did not find her daughter and PW2 said that she had sent her on some errands. That after one hour, PW1 had still not returned and they called her sister who said that she had seen her briefly before she went to the market. That later, they were informed that the minor was seen on the appellant's motorcycle and they reported the matter to the police. That the following day, they were informed that the minor had been seen crying on the road and was picked. She reported having been defiled by the appellant, who was later arrested.

9. PW4 was P.C. Naleah Momenga of Siakago Police Station who stated that the minor was reported missing. That later on, it was reported that she had been seen on the appellant's motor cycle as a pillion passenger. When she was found the next day, PW1 said that the appellant had taken her to a lodging and had defiled her. The victim was taken to Siakago hospital for examination and treatment and the appellant was arrested and charged. She verified the victim's age from her birth certificate.

10. PW5 was John Mwangi, a clinician, who stated that PW1 was examined by his colleagues at Siakago Hospital. He stated that according to the examination, PW1 was on her menses and her hymen had been broken long ago and there was no sign of recent defilement. He produced a P3 form, PRC form filled by his colleague Eliud Fundi and treatment notes.

11. At the close of the prosecution's case, the appellant was placed on his defense, having been found with a case to answer.

12. DW1, the appellant, stated that on the day of the incident between 6-7PM, he carried a female customer to her place and then he got another male customer whom he dropped off at Gangara before he went home. On cross-examination, he stated that the name of his female customer is Nyakio and that he did not at any point transport the victim on his motorcycle.

13. DW2 was Silvano Makenda who stated that he was carried by the appellant on his motor cycle to the chief's place and he paid Kshs.100/=. That the appellant indicated to him that he had another customer. On cross-examination, he stated that he arrived at the Chief's place at 5PM and at about 6:30PM, the appellant returned to the chief's place with a girl of medium age but he does not know where the girl went to.

14. At the close of the defense case, the trial court convicted the appellant and sentenced him to 15 years imprisonment as prescribed in the *Sexual offences Act*.

15. This appeal was canvassed by way of written submissions.

16. In his submissions, the appellant discredited the prosecution's evidence and stated that it was not possible for PW2 to have seen him given that it was a dark night. That the medical examination did not reveal recent signs of defilement. He argued that the prosecution failed to provide receipts of the lodging where he allegedly stayed with the minor and that the records could have been compelled under section 150 of the Criminal Procedure Code. That when he was arrested, the appellant was not presented in court until 4 days later, which contravenes his rights under *the constitution*. That the case is a frame up and that there is a land dispute between the appellants and the parents of the minor.

17. The respondent submitted that the elements of the offence were proved beyond reasonable doubt. It relied on sections 2 and 8 of the *Sexual Offences Act* and stated that the victim's birth certificate showed that she was 15 years old at the time of the incident. It relied on the cases of Hadson Ali Mwachongo v. Republic (2016) eKLR and MTG v. Republic (2022) eKLR. It was its argument that the evidence was sufficient and admissible according to section 124 of the *Evidence Act* and that it did not need corroboration. Further reliance was placed on the case of JWA v. Republic (2014) eKLR. That the sentence imposed was not harsh or excessive and that it was in compliance with section 329 of the Criminal Procedure Code and as prescribed in the *Sexual Offences Act*.

18. The issues for determination are as follows:

    a. Whether the prosecution has proved the case beyond reasonable doubt; and

    b. Whether the sentence should be set aside.

19. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it 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 and the appellate court must itself weigh conflicting

evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

20. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:

    a. The age of the complainant- that the complainant was a child;

    b. Penetration occurred; and

    c. The perpetrator was positively identified.

21. According to the minor's birth certificate, she was 15 years old at the time of the incident. PW1 testified that on 02nd July 2021, the appellant took her into a bush and defiled her and then he took her to a certain house in Siakago where he defiled her severally through the night before dropping her off near her sister's house. In the case of E E v Republic [2015] eKLR the court expressed itself on the question of penetration as follows;

> " Penetration is defined in section 2 of the *Sexual Offences Act* as:
>
> 'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.'
>
> The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No. 35 of 1995, the court stated,
>
> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

22. PW4 testified that PW1 was examined by his colleagues on 03rd July 2021 at Siakago Hospital. The PRC form authored by Eliud Nyaga indicates that there was an old perforated hymen meaning that there was evidence of penetration but not from recent sexual activity. The form also indicated that the victim was on her menses. According to the P3, the medical examiner noted that the lab results were indicative of recent defilement. In my view, there was sufficient proof of penetration.

23. PW1 and PW2 testified that the appellant carried the victim on his motorcycle. PW2 stated that it was getting dark but she had a torch and she saw the appellant zoom past her, carrying the victim on his motorcycle. DW2 stated that at around 6:30PM, the appellant went to meet him at the chief's place and he was carrying a girl on his motorcycle. If no other evidence will compel this court, the testimony of PW1 is sufficient in the eyes of section 124 of the *Evidence Act*.

24. This provision demands that all evidence must be corroborated but in the case of sexual offence, the testimony of the victim alone is sufficient to identify the assailant and there would be no need for corroboration. In his defense, the appellant merely denied the charge and stated that he was working that evening and that he had a customer who had a similar name as that of the victim. His testimony does very little to vindicate him. In my view, the appellant was properly identified by the victim as her assailant.

25. The appellant also challenged the sentence and asked this court to set it aside. Having reaffirmed the findings of the trial court on conviction, I do note that the trial magistrate sentenced the appellant to 15 years imprisonment, being a departure from the statutory prescribed minimum sentence of 20 years imprisonment for this offence. Section 8(3) of the *Sexual Offences Act* provides:

> "(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."

26. The trial magistrate noted that there were no mitigating factors that would compel the court to impose a sentence that is less than the statutory prescribed sentence. However, I do note that the trial magistrate erred in stating that the Act prescribed a minimum sentence of 15 years instead of 20 years imprisonment. Where a law prescribes a sentence, the trial court is bound to impose the said sentence in the case of a conviction. The Supreme Court in the recent case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR) stated that for as long as the sentences prescribed under section 8 of the *Sexual Offences Act* remain undisturbed/constitutionally sound, the mandatory sentences ought to be applied as prescribed. It stated:

> "(66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious."

27. Therefore, I find that the appeal lacks merit and the same is hereby dismissed with orders thus:

    a. The findings of the trial court on conviction are hereby upheld; and

    b. The sentence of 15 years imprisonment imposed by the trial court is hereby set aside and substituted with the minimum statutory prescribed sentence of 20 years imprisonment.

28. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent