Njoroge v Republic (Criminal Appeal 19 of 2019)
[2023] KEHC 1797 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1797 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 19 OF 2019

FR OLEL, J

MARCH 16, 2023

BETWEEN

PETER NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being appeal against judgment conviction and sentence delivered on 27th March 2019 at Baricho SRM's court vide SO case no.38 of 2017 before M. Kivuti SRM)

JUDGMENT

Background

1. The appellant herein Peter Njoroge was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offence Act* no.3 of 2006. The particulars of the offence were that on the 29th day of November 2019 in Mwea West Sub County within Kirinyaga County, wilfully and unlawfully caused your penis to penetrate the vagina of SNM a child aged 6 years.

2. The appellant also faced a second count of committing an indecent with a child contrary to Section 11(1) of the *Sexual Offence Act* no. 3 of 2006. The particulars of the offence were that on 29th day of November in Mwea West Sub County within Kirinyaga County wilfully and unlawfully touched the vagina of SNM with his hand.

3. The appellant pleaded not guilty and was tried and found guilty of the first counts and was sentenced to serve life imprisonment. Being dissatisfied with the judgement, conviction and sentence meter out, the appellant filed this appeal setting out the following amended grounds of appeal.

    a. That the trial magistrate erred in both law and fact to admit doubtful evidence adduced by the prosecution witness.

b. That the trial magistrate erred in both law and fact when she failed to consider that the appellant right to be produced in court within the specific period was contravened by the police.

c. That the learned trial magistrate erred in law and facts to warrant the conviction without considering that penetration was not proved beyond reasonable doubt.

d. That the learned trail magistrate erred in law and facts when she failed to consider that the investigation of the required standard (was not covered out).

e. That the trial magistrate erred in law and facts and overlook my defence which was not challenged by the prosecution side.

4. Though not specifically stated in the memorandum of appeal, in his submission filed the appellant specifically challenged the sentence imposed as harsh and excessive. The appellant did finally adopt his written statement when he appeared before court and urged this court to consider the same.

5. In determining this appeal, the court must fully understand its duty as a first appellant court as stated in the case of *Pendya versus Republic* (1957) EA 336 and *Ruwala versus Republic* 1957 EA 570 which is to subject "the evidence as a whole to frees and exhaustive examination" and for this court to arrive at its own decision on the evidence. It must weigh the evidence presented and draw its own conclusion and it own findings while making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.

Facts at trial

6. PW1 SN underwent voir dire examination and was affirmed. She stated that she lived in [Particulars Withheld] village and went to pre-unit at [Particulars Withheld] primary. She lived with her grandmother and brother SI. She called the accused Baba Shiku" and said he did bad manners to her. She stated the she was at home playing with her brother during the day when the accused came and carried her on his arms and went with her to his house where he removed her clothes and "did bad manners to me" her (pointing to her private parts). He inserted his susu (penis) inside my susu her (pointing to her private parts).

7. The witness said she felt pain during the act and the accused produced some white fluid from his susu after which he wiped the complainant with a piece of cloth and told her not to tell anybody and threw out the complainant out of the house through the window. She fell and the right side of her face got hurt. She went home and told Mama Bob and SI her brother. She was taken to the hospital. She also made further allegations that Baba Shiku had previously done bad manners to her while she was younger and in baby class. In cross examination, the complainant confirmed that she know the appellant and that she had not been coached by her mother on what to say in court.

8. PW2 SI also under went *voir dire* examination and gave evidence under oath. He stated that he was 8 years old and that the complainant (SN) was his younger sister. Both of the attended school at [Particulars Withheld] primary school. The witness recalled that on 29/11/2017 he was at home at 1.00pm and were playing outside with his sister (SN). Their grandmother had gone to the market to sell arrowroots.

9. He stated that the accused 'Baba Shiku' also known as Peter Njoroge as their immediate neighbour. His home/house was directly behind their house. On the said date while they were playing he came and held PW1 (SN) by hand and she resisted. He lifted her with his arms and took her to his home. He said he did not follow them inside the house but saw him enter the house with PW1 (SN) and he shut the

door. He ran to the home of Mama Bob who was their neighbour and told her what had transpired. They walked to the appellant house and called him out. He responded that he was bathing.

10. PW2 and Mama Bob stood outside the door which was locked and PW1 SN emerged from the back of the house. She told them that the appellant had thrown her out of the window and he had removed her clothes and did 'bad manners' on her. Some bodaboda operators arrived to beat up the appellant. PW1 was taken to hospital and they recorded their statement at the police station. The witness was not asked any question in cross examination.

11. PW3 Amos Mbogo was a clinical officer working at Sagana Sub County Hospital. He stated that PW1 S.N was initially treated by his colleague Naomi on 29/11/2017 and he reviewed the patient on 20/11/2017. The history given was that she had been defiled by a person known as 'Baba Shiku'. On genital examination she noted that she had no bruises but the genital area had crythmatods on the vaginal opening meaning it had reddened. The hymen was broken but not freshly so. The reddening was indicative of friction of penetration.

12. PW3 further stated that he examined and interrogated the patient who indicated that the accused had been defiling her between December 2011 and the latest incident was on 29/11/2017. The history was supportive of the observation made. Laboratory tests showed plus cells which was an indication of infection. No spermatozoa was seen and Syphilis and HIV test were negative. The witness produced the treatment notes and P3 form as exhibits. The estimated age of the complainant was 5 years 10 months as date of birth given was 31/1/2012.

13. On genital examination there was no bruises on the libia mayora and minora but the patient had cervical motion tenderness meaning that there was actual penetration. The approximate age of injuries was 1 day. In cross examination, the witness confirmed that he examined PW1 S.N during review. Reddening on the vaginal opening was caused by a penis of big size.

14. PW4 MWG was the mother to the victim SN. She said the complainant was her second born and was in class 1. She was born on 29/1/2011 she identified of certificate confirming birth serial no.A0xxxx.

15. PW5 Cpl Dorcas Ongaki stated that in December 2017, she was attached at Sagana Police station. On 1/12/2017, she perused the occurrence book and noted that a case of defilement had been minuted to her. She recorded the relevant statements and issued the complainant with a P3 form. The accused at the material time was admitted at Kerugoya sub county hospital as he had been subjected to mob justice. When discharged, she arrested him and charged him.

16. From the investigation she gathered that the accused had called the complainant to his house in [Particulars Withheld] village and defiled her. The complainant informed her grandmother who screamed and a crowd of people responded and beat up the accused. She said the complainant was 6 years old and was born on 29/1/2011. She produced the birth certificate as exhibit 3. PW5 also testified that the complainant identified the accused physically and called him by his name 'Baba Shiku'. She also produced the notification of birth as exhibit 4.

17. The appellant was put on his defence and gave sworn evidence. He stated that he comes from [Particulars Withheld] village and was a mason, married with 3 children. He testified that on 28/11/2017 and 29/11/2017 he was working at a construction site within Sagana area. On 29/11/2017 he left the construction site at 4.30pm and went home. At home he was told that there was no milk and decided to go to Sagana town to buy milk as there was a shortage of milk within the village.

18. On his way back home, he got a cell that he was being sought by boda boda operators on allegation that he had defiled a child. According to the appellant he continued to walk home and at the junction of Nyeri-Muranga road he was knocked down by a motor cycle and surrounded by a crowd who beat him

until he lost consciousness. The time of attack was around 7.30pm. Later he required consciousness at Kerugoaya sub county hospital and found himself chained on the leg with handcuffs. He denied committing the offence.

19. He further stated that the complainant's parents and grandparents are his neighbours. He settled on his land in 1990 and he disagreed with the complainant grandfather who did not want him to construct his house in his portion of land. He further testified that the houses are 10 feet away. The complainant's grandfather would usually hurl insults directed at his family whenever he passed by the accused home. He denied defiling the complainant and stated that he had 3 daughters and would have started by defiling his daughter. He also stated that the last time he was charged in court was 1983 but then he was underage. In cross examination he confirmed that he had not witness to confirm that on 29/11/2017 he had worked until 4.30pm and he had never reported the complainant's grandfather to the authorities over the land dispute and/or the insults.

20. In her considered judgment the trial magistrate analysed all the facts and convicted the appellant of the offence charged. He was sentenced to life imprisonment as provided under Section 8(3) of the *Sexual Offences Act* no.3 of 2006.

Submissions

21. The appellant submitted that the prosecutor evidence was doubtful and it was important for the court to note that there was a grudge between PW1 grandfather and the appellant over a land dispute. Secondly the court should have noted that he was away during the alleged time of the offence and came back home at 4.30pm thus was not able to have defiled PW1 S.N earlier in the day and the court should have initially considered this to find the prosecution evidence to be doubtful.

22. The appellant also submitted that he should have been examined by PW3 the clinical officer to find out if indeed he was the culprit. Further the appellant stated that the clinical officer contradicted himself and gave doubtful evidence which evidence was not safe to warrant a conviction.

23. The appellant also stated that his constitutional right had been violated since he was arrested on 29/11/2017 and took plea on 4th December 2017 yet the law provides that he should not be in custody for more than 24 hours and that this issue should be redressed by this appellant court.

24. The appellant also submitted this penetration was not proved, his DNA was never analysed to conclusively prove that indeed he was the culprit nor was the object of penetration confirmed. Finally on sentencing the appellant submitted that this sentence meted was unconstitutional and he should never be considered for a rehabilitative sentence. The sentence should then be reconsidered.

25. The state too did file its submission and stated that the conviction was solid and supported by facts provided by the four witnesses who testified. The evidence was not doubtful and the prosecution had discharged its burden of proof and left no gaps that could raise any doubt.

26. On the allegation that the appellants right was infringed, the stated submitted that the appellant was initially admitted at Kerugoya county hospital because he was subjected to mob justice and upon discharge was arraigned in court on 4/12/2017. His right under article 49(1)(f) was then not violated even then the state submitted that violation of one's rights does not earn one an acquitted as held in *Republic versus Julius Kamau Mbugua* (2010)eKLR.

27. On the final issue raised by the appellant that his defence was ignored, the prosecution submitted that the court did consider the appellant defence and did not error in convicting him on the case was proved beyond reasonable doubt.

Analysis and Determination

28. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanor. This court is guided by *Okeno Vs. Republic* (1927)E.A 32 & *Pandya Vs. Republic* (1975) EA 366.

29. Also in *Peter's versus Sunday Pos*t(1958) E.A. 424 it was said that it is not the function of the first appellant court merely to scrutinize the evidence to see if there was some evidence to support the lower courts finding and conclusion: it must make its own findings and draw its own conclusions. Only then can it be decided whether the magistrate findings should be supported. In doing so it should make allowance for the fact that the trial court had the advantage of hearing and seeing witnesses.

30. The ingredient's provided for under section 8(1) of the *Sexual Offences Act* No.3 of 2006 and which must be proved for a conviction to ensue are Age of the victim (must be a minor), penetration and proper identification of the perpetrator. (see *George Opondo Olunga Vs. Republic* (2016)eKLR) .

31. The appellant submitted that the trial magistrate erred in law as he was convicted of doubtful evidence adduced by the prosecution witnesses. From the evidence presented, it was clear that the appellant was a neighbor of PW 1 family and as per his own evidence his home and that of the complainant's grandfather were barely 10feet away. PW 1 and PW2 knew the appellant as their neighbor and as "Baba shiku". On the material date the appellant found PW1 playing outside her grandfather's home with her elder brother and forcefully carried her away into his own house.

32. PW 1 evidence was very apt. she stated that, " I was at home playing with SI outside our house during the day. Baba shiku came. He lifted me and carried me to his house. He carried me on his arms this way (child demonstrates). He did not talk to me. He is our close neighbor. There was a table, a cupboard and chair in his house. It has three rooms. One of the rooms has shiku bed and the other room has his bed..... Baba shiku placed me on the chair. He removed my cloths. I had put on a pair of trousers and pant which he removed. He removed his trousers. He did bad manners to me here(pointing at her private parts).he inserted his susu(penis) inside my susu here (pointing at her private parts).

33. She further stated that " I felt pain. He produced some white liquid from his susu. He wiped me with a piece of cloth on my susu. He told me if anybody asked me what happened to me I should say that it was dirty from playing. He dressed me up and threw me out of the window. I fell and the right side of my face got swollen. I went home and told mama bob and steve.

34. PW2 also corroborated the evidence of PW1 and testified that the appellant found him playing with his sister and forcefully lifted her with his hands and carried her away. Out of concern he went and told mama bob who was also their neighbor and they walked back together to the appellant's house. Mama Bob started calling out the appellant from outside the door as the door was locked and he responded by saying that he was bathing. While their PW1 emerged from behind the house and narrated what had transpired. By then there were some boda boda operators who had arrived and they beat up the appellant. PW1 was taken to hospital by her grandmother.

35. PW 3 produced the medical report and p3 which confirmed penetration. Their evidence was that there was reddening of the vaginal opening, which was caused by penetration, mostly likely by a big size penis. The complainant also had puss cells which was an indication of infection. PW 4 the complainant mother produced the birth notification serial No A06xxxx. The investigating officer PW5 also testified and produced the certified copy of the certificate of birth and birth notification as Exhibit 3 and 4.

36. A critical analysis of the prosecution evidence adduced show that the appellant was positively identified by the complainant and PW2, who were his neighbor's and knew his as "baba shiku". He committed this heinous act in broad day light and was subjected to mob justice by the public. There is error or doubtful evidence as alleged.

37. The second issue raised by the appellant was that his rights were violated as he was not taken to court within 24 hours as provided for in law. That maybe so but the plain reason as to why that occurred is that the appellant was subjected to Mob justice and was rushed to hospital unconscious. In his own defence he admitted as much. He therefor could have been taken to court within 24 hours. He was arraigned in court on 4th December 2017 upon discharge from kerugoya sub county hospital. In any event as held in *Republic V Julius Kamau Mbugua* (2010) eKLR "violation of the appellant's right to be produced in court within 24 hours would not automatically result in his acquittal."

38. The third issue raised by the appellant was that penetration was not proved but as analyzed above penetration was proved beyond any reasonable by the medical evidence adduced

39. It is also now trite law that medical evidence is not only way of proving the offence of defilement. The Court in the case of *George Kioji- Vrs- Republic* Criminal Appeal no. 270 of 2022 (unreported) held

> " where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which are accused person can be properly convicted for defilement. The Court can convict if it is satisfied that there is evidence beyond reasonable doubt that defilement was perpetuated by the accused".

40. This position was fortified in the case of *Mark Oirori Moses-Vs-Republic* (2013)eKLR the Court stated that;

> " Many times, the Attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed so long as there is penetration whether on the surface , the ingredients of the offence is demonstrated, and penetration need not be deep inside the girls organ.

41. Therefore , it is not necessary a must that a medical evidence be availed to prove penetration, but as long as there is evidence that there was even partial penetration, only on the surface the ingredients of the offence is demonstrated.

42. The appellant also raised the issue that the he trial magistrate did not consider his defense. This also has no basis as the appellant defense was elaborately considered in the last paragraph of the trial courts judgment dated 27th March 2019 and found to be wanting in light of the strong evidence adduced as against the appellant.

43. The final issue raised by the appellant was that the sentence imposed was unconstitutional and reliance was placed in the notorious case of *Francis Karioko Muruateteu & Ano Vs Republic* Eklr(2017). The appellant submitted that he should have been considered for a rehabilitative sentence.

44. In *Maingi & 5 Others Vs Director of Public Prosecution & Another* (Petition E017 of 2021) (2022)KEHC 13118 (KLR) Justice G. V. Odunga in a well-considered judgment did find that there is

need to align legislations that were in existence before the promulgation of the *Constitution* of Kenya 2010 with the letter and spirit of the new constitution. He further made a declaration that;

> " To the extent that *Sexual Offences Act* prescribes minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentences to impose, such sentences run foul of Article 28 of the *Constitution*. However, the courts are at liberty to impose sentences presented thereunder as long as the same are not deemed to be the mandatory minimum prescribed sentences."

45. Sentencing is a discretion of the court of law but the court should look at the facts and the circumstances in the entirety so as to arrive at an appropriate sentence. The Court of Appeal in *Thomas Mwamba Wanyi Vs Republic* (2017)eKLR cited the decision of the Supreme Court of India in *Alister Antony Pereira Vs The state of Maharastra* at paragraph 70 – 71 where the court held;

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate and proportionate sentences commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles; twin objective of sentencing policy is deterrence and correction. What sentence would meet the end of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of crime, motive for the crime, nature of the offence and all the attendant circumstances. The principle of proportionality by sentencing a crime done is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment must bear relevant influence in determining the sentence of the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence."

46. In F*rancis Karioki Muruatetu & another Vs Republic* the Supreme Court did provide guidelines and mitigating factors in re-hearing of sentence. The Judiciary sentencing policy guidelines list the objective of Sentencing at paragraph 4.1 they include the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the applicants to inflict harm.

47. What are the relevant circumstances herein? The Appellant did take advantage of a young girl playing outside her grandmother house. He forcefully carried her away in the presence of her brother and proceeded to shamefully defile the 6 year old child. His action was barbaric to say the least. In mitigation, while the accused was found to be a first offender, the accused only stated that " this is a grudge arising from a dispute between the complainants grandfather and my family"

48. The Court of Appeal in the case of *Benard Kimani Gacheru Vs Republic* (2002) eKLR stated;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

49. The Appellant's only complaint is that the sentence meted out was unlawful and prayed for a rehabilitative sentence. Section 8(3) of the *Sexual Offences Act* no.3 of 2006 has been declared unlawful for not giving the trial magistrate the latitude in sentencing. While this complaint of sec 8(3) of the *sexual offences Act* No 3 of 2006 may be true, it by itself does not invalidate the sentence as the trial court had sentencing discretion having considered all factors and circumstances of the case.

50. Having considered the sentence meted out and circumstances of this case and also having considered that the said Section 8(3) of the *sexual offences Act* no 3 of 2006 fettered the courts discretion in sentencing, I do find that the sentence was manifestly high given a reasonable proportionality between the sentence passed and the crime committed. In *Republic vs Scott* (2005) NSWCCA 152 Howie J Grove & Barn J J it was stated;

> " There is a fundamental and immutable principle of sentencing, that is, sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed... one of the purpose of punishment is to ensure that an offender is adequately punished... a further purpose is to denounce the conduct of the offender.

51. In the circumstances of this case, I hereby set aside the sentence of life imprisonment imposed on the Appellant and substitute it therefrom with a sentence of twenty five (25) years imprisonment to run from the date of sentence in the lower court. This sentence will however be inclusive of the period he was in custody from 4.12.2017 to 27th March 2019 pursuant to provision of Section 333(2) of the *Criminal Procedure Code*.

52. For avoidance of doubt the appeal as against conviction is dismissed.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF MARCH 2023.

RAYOLA FRANCIS

JUDGE

In the presence of;

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