



REPUBLIC OF KENYA



KENYA LAW
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**NCG v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 20290 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E015 OF 2022**

A. ONG'INJO, J

JULY 6, 2023

BETWEEN

NCG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision by Hon. Sandra Ogot, Senior Resident Magistrate on 15th September 2021 in Msambweni Senior Resident Magistrate's Court Sexual Offences Case No. 32 of 2019, Republic v Nyawa Chaka Gombeko)

JUDGMENT

Background

1. The accused NCG was charged with the offence of defilement contrary to Section 8(1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars are that on diverse dates between October 19, 2019 and November 4, 2019 in Vanga Location of Kwale County, unlawfully and intentionally caused his penis to penetrate the vagina of AN a child aged 14 years.
3. In the alternative charge NCG was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. The particulars are that on diverse dates between October 19, 2019 and November 4, 2019 in Vanga Location of Kwale County, unlawfully and intentionally touched the vagina of AN a child aged 14 years with his penis.
5. The trial magistrate considered the evidence of four (4) prosecution witnesses and the appellant's unsworn statement and found that the prosecution had proved the offence of defilement beyond



reasonable doubt. The appellant was convicted and sentenced to serve 20 years imprisonment to run from the date of conviction.

6. The appellant was aggrieved and dissatisfied by the entire decision of the trial court preferred the appeal herein on the following amended grounds: -
 1. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to 20 years without finding that the appellant was deceived by the complainant, her mother and father that she was an adult of 18 years contravening section 8 (5) (a) and (b) of the *Sexual Offences Act* thereby handing down a sentence which was manifestly harsh and excessive.
 2. That the learned trial magistrate erred in law and fact by failing to consider the appellant's mitigation and the fact that he was a first offender and showed remorse ahead of the sentence.
 3. That the learned trial magistrate erred in law and fact by failing to consider the home surroundings of the appellant's children whose mother died and the appellant's arrest made them drop out of school and turned to be beggars.
 4. That the learned trial magistrate court erred in law and fact by failing to consider a recommendation by the Probation Officer for a non-custodial sentence as provided under section 4 (1) and (2) of the *Probation Act*.
7. This appeal was canvassed by way of written submissions.

Prosecution's Case

8. PW1, AN said she was 14 years old and in class 5. That on 19.10.2019, N and F whom she knew were their visitors at home. That N is her cousin while F is her sister-in-law and that PW1's mother cooked for them but N did not eat and said he wanted to go to the toilet where he stayed for too long. That his wife also said he wanted to go to the toilet and that PW1 went with her. That F had carried her bag and PW1 asked why she left with it and she told her that it was because she was on her periods. That it was about 8.00 pm and that F did not want to go back and kept telling PW1 to wait. That N showed up from where the cows sleep and that F held PW1's neck and commanded her to go with them. That it was very dark and that they were a distance from the house.
9. PW1 testified that they went until Mauruni to a house where a woman opened and that N said "Leo kuna game" and that they all slept on the same bed. That N told PW1 to remove her clothes which she did but when she refused to remove her panties, he insisted. That he told her to lie on her back, removed his penis and inserted in her vagina while F was on the same bed. That the next day a person called Martin went and said he wanted one of them to be his wife. That they left and Martin alighted at Perani while they continued until Mwangweni. That they went to his sister's house where they stayed for three days and that he had sex with her for all the days. That when they went to a place called Corner and slept, he had sex with her. That they went to Visangalaweni where they stayed for a week and that they still had sex at the time.
10. PW1 informed court that all the while, N kept saying that she was his wife. That when PW1 was sent to Shadrack's house where they had left clothes, Shadrack told her that her mother was looking for her and that a report had been made to the police and that she told him to tell her mother where she was. PW1 stated that they were arrested at Majoreni and taken to Vanga Police Station and that she was treated at Lunga Lunga where tests were done and urine test showed she had an infection and that she was given medication. That she knew the treatment notes PExh-1 and the P3 Form which had her name PExh-2 and that she was shown the clinic card with DOB 22.3.2005 PExh-3. PW1 identified N as the accused in court.



11. PW2, NBC, testified that PW1 was her child and aged 13 years old. That on 20.10.2019, N, her nephew, and his wife visited them and that she cooked for them except N who declined. PW2 said that she was unwell and that she told them where to sleep. That at 10.00 pm, she went for a short call and noticed N, his wife and PW1 were not there. That PW2 looked for them and even called his brother but he did not find them. That she later made a report to Lunga Lunga and at her school where the head teacher advised her to go to the police. PW2 said that she was later called by the sub-chief and informed that PW1 had been found and that she was with N. That when PW1 was taken to Lunga Lunga, she was found to have had sex with the accused which PW1 confirmed when she was asked. The accused was arrested and charged and that she identified N as the accused in court. PW2 said she did not marry PW1 off, that the accused is his nephew and that she was not paid any dowry.
12. PW3, Dr. Enoch Thwathe from Lunga Lunga Police Sub-County Hospital testified that he examined AN aged 14 years old who said she was defiled from 19.10.2019 to 4.11.2019 against her will and without protection. That she said she bled and her virginity was broken but PW3 did not see abrasions, bruises or blood. That all the tests came out negative and that she did not have any vaginal disease. He stated that he filled a P3 Form (PEXh-2) on 5.11.2019. That the accused was also taken for check up on November 5, 2019. That he said they were related but did not commit the offence.
13. PW4, No. 102125, PC. Zakariya Hayani the Investigating Officer from Lunga Lunga Police Station stated that the mother to the complainant went to the station and reported that her 14 years old child was missing. That the day the complainant got lost is the day they had visitors who were relatives. That in the evening, the complainant took the accused's wife to the toilet and that is when the wife of the accused held down hands and told her not to make noise and if she did, she would kill her. That the accused appeared at that point and told the complainant and his wife to follow them to a place called Magumi where there was a house. That the accused knocked and a lady emerged therein and that they sought a place to sleep and continue with the journey the next day.
14. PW4 testified that when they went to Bengo, the home of the accused's wife, and that they welcomed and stayed there until evening and that during sleeping time, the accused protested the sleeping arrangement and said he would not sleep away from his wives. That the accused had sex with the complainant severally. That when the complainant left aboard a boda boda to pick her clothes, the boda boda rider told the accused that the complainant was being looked for by the police and her parents. That the chief identified the complainant and that they were arrested. That they were taken to Lunga Lunga Police Station for treatment and a P3 Form filled. That the complainant narrated everything that happened and her statement recorded. That the P3 Form confirmed the minor was defiled and that PW4 had a health card to prove that the minor was born on March 22, 2005, and that the accused is a cousin to the complainant.

Defense Case

15. The accused, CNC, gave an unsworn statement and denied the charges that he did not know the complainant but knew her father. That on 17th, the father and the accused had agreed earlier if he could get someone with 2 children as his wife had stomach problems. That on June 10, 2019, the father told him he had two daughters and that the accused would be given the younger one, the complainant herein who was 16 years old and the older daughter had dowry being paid by a Mkamba neighbour in the village, and that they were told the girls were not in school. That on June 17, 2019, they returned to the girl's father at 4.00 pm and sat at a meeting of 4 people, the accused, his father and the complainant's parents and that they agreed that money of Kshs. 15,000 be paid first and that a further Kshs. 15,000 be paid in July as dowry. That on June 18, 2019, the accused went to the home of the complainant at



2.00 pm in the company of his wife FC and that the complainant's father told him to just go collect the girl as he was his wife.

16. The accused further testified that he lived with the complainant as his wife from June 18, 2019 until September 2019 when the girl's father went and said he wanted a balance of the dowry to pay off his debts. That the accused gave him Kshs. 1,000. That on October 6, 2019, the complainant's father again asked for the dowry balance and that the accused gave him Kshs. 1200. That later, the complainant's father called and said that the police had gone looking for him while he was away and that he was going into hiding and advised the complainant to do the same. That the accused, his wife and the complainant left for Bengo but they were arrested at some point and taken to Lunga Lunga Police Station where he admitted that he had married her. That the girl's mother said she reported because she was not given a share of the dowry money. That That even the mother to the complainant admitted to dowry negotiations.

Appellant's Submissions

17. On whether the sentence of 20 years was harsh and excessive, the appellant relied on the case of *Gaston January Stephen v Republic* where it was held that "it is appropriate to reiterate that trial courts in exercising discretion should at all times factor in the sentencing guidelines policy, principles and commentaries developed to overturn court's decision." The appellant contended that the role of sentencing is deterrence and retribution among others, he relied on Criminal Appeal No. 110 of 2006, *Yusuf Dahar Arog v Republic* and *Republic v Javani and another* (2001) KLR 593.
18. Further, the appellant stated that the appellate court will not normally interfere with the discretion of the trial court unless certain circumstances exist as was held in the case of *Bernard Kimani Gacheru v Republic* (2002) eKLR that "sentencing is a matter that rests with the discretion of the trial court. Similarly, sentence must depend on the fact of each case on appeal, the appellate court will not easily interfere with the sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or acted on a wrong principle."
19. The appellant cited Petition No. E017 of 2021, High Court Machakos in *Philip Mueke Maingi & 5 others v Republic* where the court restated that taking cue from the decision in *Francis Karioko Muruatetu & another v Republic* (2017) eKLR (Muruatetu 1), those who were convicted of sexual offences and whose sentences were passed on the basis of that the trial court had no discretion but to impose the said mandatory minimum sentences are at liberty to Petition the High Court for orders of resentencing in appropriate cases. The appellant therefore prayed that the appeal be allowed, the 20 years sentence be reduced to a lenient and less punitive sentence or any other orders that the court deems fit and just.

Respondent's Submissions

20. The Respondent submitted that the prosecution's case had no contradictions as all the witnesses gave credible evidence. Further, the respondent averred that in all criminal cases, the prosecution is supposed to prove its case beyond all reasonable doubt which was defined by Denning, J. in *Miller v Minister of Pensions* (1947) where it was stated that "it did not reach certainty, but it must carry a higher degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law will fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt and nothing short of that will suffice."



21. The respondent stated that Lord Diplock in the case of *Walter v Republic* (1969) explained reasonable doubt as the quality and kind of doubt which when you are dealing with matters of importance in your own affair you may allow to influence you one way or the other. The respondent further pointed out that in any case of defilement, the prosecution is required to prove three ingredients as was held in the case of *GOA v Republic* (2018) eKLR to include proof of age of the complainant, proof of penetration, and proof that the appellant was the perpetrator. The appellant submitted that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt.
22. On the ground that there was lack of corroboration between the doctor's and minor's evidence, the respondent stated that the minor testified that the accused person had sex with her on several occasions when they were staying together. The doctor testified that on examining the complainant, he saw that her hymen was broken and she had an infection. He stated that the minor did not have abrasions and bruises which he attributed to the time that had lapsed between the commission of the offence and the date of examination of the complainant and that the injuries had healed because of lapse of time.
23. On the ground that his defence was not considered, the respondent submitted that the appellant gave unsworn statement and admitted that he had married the complainant as his wife. That the act of marrying a child under the age of 18 years is an offence and the accused committed an offence and did not give the court any credible defence to exonerate himself.
24. On mitigation, the respondent submitted that the appellant gave the trial court his mitigation but failed to convince the court to mete out a non-custodial sentence to him. The respondent cited the case of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR where the Supreme Court considered the issue of mandatory minimum sentences. The respondent further stated that the issue of sentencing is a discretion of the trial court and the same should not be interfered with until and unless it is shown that the trial judge acted upon wrong principles as was held in the case of *Ogolla s/o Owuor v Republic* (1954) EACA 270 and *Shadrack Kipkoech Kogo v Republic*, Criminal Appeal No. 253 of 2003. The respondent therefore prayed that the sentence meted out to the appellant should not be interfered with.

Analysis and Determination

25. This being the first appellate court, I am guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”
26. This court has considered the grounds of appeal, records of the trial court and submissions and the issue for determination is whether the sentence was harsh and excessive in the circumstances.
27. It appears that the appellant was in custody from November 6, 2019 to November 24, 2021 when he was sentenced to serve 20 years imprisonment but the trial magistrate did not factor in his right under section 333 (2) of the *Criminal Procedure Code*.



28. While passing sentence, the trial magistrate indicated that the intent of prescribing minimum sentences is indicative of the seriousness of the offence and intended to punish the offender and at the same time deter others of a similar mindset. The trial magistrate did not therefore apply her mind to the principle in Philip Mueke Petition that minimum sentences in the *Sexual Offences Act* are unconstitutional.
29. In this regard, courts of concurrent jurisdiction and the Court of Appeal in similar matters have substituted the minimum mandatory sentences for the offence of defilement under section 8 (3) to 10 years imprisonment. This court therefore substitutes the sentence of 20 years with 10 years imprisonment to take effect from November 6, 2019. 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 6TH DAY OF JULY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Bebora- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

