



**Njuki v Republic (Criminal Appeal E041 of 2024)
[2024] KEHC 14478 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E041 OF 2024
LM NJUGUNA, J
NOVEMBER 20, 2024**

BETWEEN

NEWTON MUGAMBI NJUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii, PM in the Magistrate’s Court at Siakago Sexual Offence Case No. E032 of 2023 delivered on 20th March, 2024)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* of 2006. Particulars are that on 07th July 2023 at [Particulars Withheld] Area in [particulars Withheld] Subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of AKN, a child aged 14 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 07th July 2023 at [Particulars Withheld] Area in [particulars Withheld] Subcounty within Embu County, the appellant intentionally and unlawfully caused his penis to touch the vagina of AKN, a child aged 14 years.
2. At the trial, the appellant pleaded ‘not guilty’ to the charge and after the full hearing, he was convicted and sentenced to 20 years imprisonment. The appellant, being dissatisfied with the decision of the trial court, filed a petition of appeal dated 09th April 2024 seeking that the conviction be quashed, judgment be set aside and that he be set at liberty.
3. The appeal is premised on the grounds that the learned trial magistrate erred in both law and fact:
 - a. By convicting the appellant whereas the prosecution evidence was full of contradictions;



- b. By convicting the appellant whereas there was no evidence linking him to the defilement on the material day;
 - c. By convicting the appellant whereas there was no medical proof that the complainant was mentally retarded and/or challenged;
 - d. By disregarding the appellant's defense that the case was framed up against him;
 - e. By convicting the appellant whereas there was no evidence on fresh penetration of the complainant on 07th July 2023;
 - f. By convicting the appellant whereas the prosecution had not proved the offence against the appellant beyond reasonable doubt; and
 - g. By sentencing the appellant to 20 years imprisonment, which sentence was harsh and excessive in the circumstances.
4. At the trial, PW1 was the victim's mother who produced the victim's birth certificate as proof that she was a minor at the time of the offence. She testified that the victim is a child with special needs and she attends a special school where she is taught visual skills and that she has difficulties in speaking. She stated that on the day of the incident, she had sent the victim to the shopping centre at around 11.00 a.m and later on, the victim reported that the appellant had done 'tabia mbaya' to her in a thicket. That she reported the matter to the village elder and a police officer took the victim to the hospital for examination and treatment. On cross-examination, she stated that the victims know the appellant and his father and she is the one who identified the appellant. That the appellant defiled her daughter in a thicket that is on his father's land. That on the material day, the victim had not gone to school and she showed her the thicket where she had been defiled.
 5. PW2 was the victim who stated that on the material day, PW1 had sent her to buy sugar and on her way back, she met the appellant who grabbed her by the hands and led her into a thicket where he did 'tabia mbaya' to her by inserting his penis into her vagina. That it was the first time to go through that but she did not feel pain and afterwards, she went home and did not tell anyone about the incident. That later, she disclosed the incident to her father and she was taken to hospital. She identified the appellant in the dock as her assailant.
 6. PW3 was the victim's father who stated that he was at home at about 7PM when PW2 told him that she had been defiled by the appellant while she was on her way back home from the shop. That the appellant, who was their neighbor, had defiled her in a nearby thicket. He stated that he reported the matter to a village elder who advised him to escalate the matter and he reported to Siakago Police Station. On cross-examination, he stated that he did not visit the scene neither did he enquire from the neighbours if the appellant was there that day. That the village elder had asked the appellant about the incident but he called him and insulted him, a fact that he told the police.
 7. PW4 was John Mwangi, a clinical officer at Mbeere District hospital who stated that upon examining the victim, he noted that the cervix was swollen and there was old penetrated hymen consistent with penetration. He also noted that there was vaginal discharge and high-level yeast in the urine sample. He produced P3 and PRC forms as evidence. On cross-examination, he stated that the findings of the examination did not directly link the appellant to the offence.
 8. PW5 was M N of Siakago Police Station who stated that the incident was reported at the police station on 09th July 2023 by PW2 and PW3. That the victim was escorted to the hospital for examination and it was confirmed that she had been defiled. That she recorded statements and the appellant was arrested



in connection with the offence. She stated that she got a letter from the victim's school confirming that she is mentally challenged. She also ascertained the age of the victim from her birth certificate before the appellant was charged with the offence. On cross-examination, she stated that complainant did not describe how the appellant was dressed but she was not mistaken as to identity of her assailant since her mental incapacity is not acute.

9. At the close of the prosecution's case, the trial court put the appellant to his defense. He gave unsworn evidence as DW1 stating that PW3 had conspired with the police to extort him of Kshs.110,000/= which he had been paid by his uncle. That the victim was not examined to ascertain the state of her mind at the time of the incident. He urged the court to release him so that he can go back to school
10. This appeal was canvassed by way of written submissions.
11. The appellant relied on the cases of *Mercy Chelangat v. Republic* (2022) eKLR, *Patrick Kathurima v. Republic* (2015) eKLR and *Haji v. Republic* (Criminal appeal E020 of 2023) (2023) KEHC 26498 (KLR) and stated that the elements of the offence were not proved beyond reasonable doubt. That the evidence of PW2 on identification of the appellant was not corroborated. He urged the court to reconsider the sentence imposed by the trial court since it is the maximum sentence in the circumstances.
12. On its part, the respondent relied on sections 2 and 8(3) of the *Sexual Offences Act* and the cases of *DS v. Republic* (2022) eKLR and *Edwin Nyambogo Onsongo v. Republic* (2016) eKLR and argued that the elements of the offence were proved beyond reasonable doubt. Further reliance was placed on sections 109 and 124 of the *Evidence Act* and urged that the findings of the trial court should be upheld.
13. The issues for determination are as follows:
 - a. Whether the offence was proved beyond reasonable doubt; and
 - b. Whether the sentence meted out to the appellant is harsh and excessive.
14. The appeal herein is to be determined through reevaluation of the evidence adduced before the trial court. In the case of *Kiilu & Another v. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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; 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.”
15. As to whether the offence was proved beyond reasonable doubt, section 8(1) and (3) of the *sexual Offences Act* provides the elements of the offence as follows:
 - a. The age of the complainant- that the complainant was a child;
 - b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child;
 - c. The perpetrator was positively identified.
16. The age of the victim herein was determined through her birth certificate produced as evidence and it shows that she was born in August 2009. As at the time of the incident, she was 13 years and 11 months



old, a minor. This is sufficient proof of the complainant's age. In the case of *Alfayo Gombe Okello v. Republic Cr App No 203 of 2009* (Kisumu), the court stated as follows;

“In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1).”

17. The element of penetration was proved through the testimony of PW2 which corroborated that of PW4. PW2 stated that the appellant grabbed her by the hands and led her to a thicket where he defiled her. PW4 stated that he examined the victim's private parts and noted that the cervix was swollen and there was an old broken hymen, consistent with penetration. This is sufficient proof of penetration.
18. On the identity of the assailant, PW2 stated that the appellant is known to her since he was their neighbor. PW1 testified that when PW2 told her about the incident, she named the appellant as her assailant. That PW2 was not confused about the person she referred to because she also named his father, whom she knew. PW2 is mentally challenged and the appellant, in his defense stated that the state of mind of the victim was not ascertained at the time of alleged incident. It is my view that the precision with which the victim pointed out her assailant is believable. She also identified him in court.
19. Section 124 of the *Evidence Act* provides that the testimony of the victim in a sexual offence is sufficient to identify the assailant and no corroboration is needed to that effect. The proviso states:

“Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”
20. From the evidence, there is no doubt in the court's mind as to identity of the appellant as the assailant. All in all, the prosecution did prove the case against the appellant beyond reasonable doubt. The appellant argued that the trial court did not consider his defense. In the final paragraphs of his judgment, the trial magistrate did consider the appellant's defense and gave his reasons for dismissing it. I do agree with the trial magistrate on this reasoning since the appellant's evidence in his defense failed to displace the prosecution's evidence. In the same breadth, the testimonies of the prosecution witnesses are not contradictory and they all flow towards a safe conviction.
21. The final issue is whether sentence meted out to the appellant is excessive in the circumstances. The sentence is prescribed under section 8(3) of the *Sexual Offences Act* and the court applied it as is. The supreme court in the 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 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.”



Bearing this in mind, I find that the sentence imposed by the trial court is lawful and need not be disturbed by this court.

22. For the foregoing reasons, I find that the appeal herein lacks merit and the same is hereby dismissed.

23. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

