



**PNN v Republic (Criminal Appeal E014 of 2024)
[2024] KEHC 13797 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E014 OF 2024
LM NJUGUNA, J
NOVEMBER 6, 2024**

BETWEEN

PNN APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. J. Otieno (SRM) in the Chief Magistrate’s Court at Embu Sexual Offence No. 16 of 2019 delivered on 23 rd November 2023)

JUDGMENT

1. The appellant has filed a petition of appeal dated 15th February 2024 seeking that the appeal be allowed, conviction be quashed, sentence be aside and the appellant be set at liberty, on the grounds that the learned trial magistrate erred in law and facts by:
 - a. Convicting the appellant on a charge whose particulars were not proved, were inconsistent and not supported by evidence;
 - b. Convicting the appellant for the offence of committing an indecent act with an adult contrary to section 11A of the Sexual Offences Act yet he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act;
 - c. Convicting the appellant on uncorroborated evidence;
 - d. Convicting the appellant when no medical examination had been done on the appellant to link him to the alleged offence;
 - e. Convicting the appellant when the clothes worn by the complainant were not tendered in evidence;
 - f. Convicting the appellant on insufficient evidence;



- g. Convicting the appellant whereas the prosecution's case was full of inconsistencies and contradictions;
 - h. Convicting the appellant when the prosecution did not prove its case beyond reasonable doubt;
 - i. Disregarding the appellant's defense; and
 - j. Sentencing the appellant to serve 5 years imprisonment and a fine of Kshs 10,000/=, which sentence was harsh and excessive in the circumstances.
2. The appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on 12th April 2019 at around 1800HRS, within Embu County, the appellant, being a male person, caused his penis to penetrate the vagina of HMW, a female person, who is to his knowledge, his niece. The alternative charge was committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act* whose particulars are that on 12th April 2019 at around 1800HRS, within Embu County, the appellant, intentionally touched the vagina of HMW with his penis against her will.
 3. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
 4. PW1 was the victim who stated that the appellant is her uncle. She testified that on the day of the incident, her grandmother had sent her to the market to sell maize and she was taken to the market by the appellant using his motor cycle. That when she was done with selling the maize, the appellant took her to Don Bosco where he had said he wanted to pick some goods and while enroute, he received 2 phone calls which he did not answer. That he asked for her phone and he put it in his pocket, saying that he would use it later. That he took a shortcut route home and at some point he stopped the motor cycle and said he wanted to urinate but she became suspicious and started running.
 5. That he chased after her and caught her, removed a rope from the motor cycle and then used it to beat her up and told her that he wanted to have sex with her. That she refused and even told him to find another girl but he overpowered her, forced her to the ground and then he forcefully had sex with her after tearing her clothes. She stated that he forced her to board the motor cycle and warned her that he would kill her if she told anyone about the incident. That when they reached her grandmother's home, she told her what had happened.
 6. The following day, she reported the matter at Itabua Police Station where she was given a P3 form and was referred to Embu Level 5 Hospital for treatment. On cross-examination, she stated that it was her grandmother who asked him to take her to the market. That when she told her grandmother about the incident, she went to talk to the appellant's mother about it. That she could not tell anyone about the incident because the appellant had threatened her.
 7. When she was recalled for further cross-examination, she stated that the shortcut that the appellant led her through did not have any pedestrians. That he struggled with her but he overpowered her and in the process her clothes tore and she fell down. That he inserted his penis into her vagina and afterwards he forced her to board the boda-boda again. That the clothes she was wearing were taken by the police. That she had never had sexual intercourse before this incident.
 8. PW2 was RWM, the victim's grandmother testified that she had requested the appellant to take PW1 to the market to sell maize. That they overstayed and when they arrived, the appellant told her that PW1 had taken too long to finish selling the maize. That PW1 denied and told her that the appellant



- had defiled her and she was crying and her trouser was wet. That she went to the accused's mother to report this incident and the accused's mother said that she will talk to him but the accused never returned that day.
9. That PW1 was taken to hospital the following day and she reported the matter to the police. On cross-examination, she stated that she is PW1's guardian and her instructions to the appellant that day were that he should take PW1 to the market and when the maize was sold, she would pay him his dues. That she did not witness the incident but it pained her that he defiled her granddaughter. That PW1's clothes were dirty when she arrived at home and so she was persuaded that PW1 was telling the truth.
 10. PW3 was Dr. Godfrey Njuki Njiru of Embu Level 5 Hospital who produced the P3 and PRC forms. He stated that he examined PW1 and observed that there were bruises on her vaginal walls but the hymen had been broken before. On cross-examination, he stated that the appellant was not examined since he was not brought to the facility. When he was later recalled for further cross-examination, he stated that the vaginal canal was bruised due to blunt force consistent with penile penetration.
 11. He stated the hymen was perforated earlier but it had healed since it takes 48-72 hours for bruises to heal. He stated that the vagina is elastic but initial penile penetration could cause bruising since there was no lubrication. That the hymen can be broken through other means like gymnastics and congenital deformity besides penile penetration and the force needed to break the hymen is not the same as that needed to cause the bruising on the vaginal wall. That there were no spermatozoa cells present but showering or urinating can minimize the chance of finding spermatozoa. By the time she was being examined, the victim had showered and urinated.
 12. PW4 was PC Nancy Njoki of Itabua Police Station. She stated that the matter was investigated by an officer who has since been transferred. She stated that the incident was reported at the police station and the facts were as narrated by PW1. That the victim was issued with a P3 form which was filled by PW3 and the appellant was arrested and charged with the offence.
 13. At the end of the prosecution's case, the court found that the appellant had a case to answer and he was placed on his defense.
 14. DW1, the appellant, stated that PW2 had sent him to go with PW1 to the market to sell some maize. That the maize was sold and they returned home where PW2 refused to give him his commission. That the following day, he was arrested and charged for something he knows nothing about. That PW2 and his mother have a disagreement about land.
 15. The trial magistrate found the appellant guilty of the offence of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*. The trial magistrate noted that the victim's grandmother and the appellant's mother are sisters, thus the relationship does not fall within the meaning of section 22(2) of the Act thus he cannot be held liable for incest.
 16. The appeal was canvassed by way of written submissions.
 17. The appellant submitted that the prosecution's evidence was not sufficient to sustain a conviction. He argued that the medical examination evidence revealed that the victim was not a virgin, and that the clothes the victim was wearing at the time of the offence were not produced as evidence. That the trial court wrongly convicted him for being the last person seen with the victim. He relied on the case of *David Njoroge Mugo v Republic* (2006) KEHC 2775(KLR) where the court discussed the amendment in the *Evidence Act* to include a proviso at section 124.
 18. It was his argument that even though the evidence of the victim of a sexual offence does not need to be corroborated, the law requires that the court records its reasons for believing the testimony of the



victim. Further reliance was placed on the case of *John Mutua Munyoki v Republic* (2017) KECA 376 (KLR) and he urged that a suspicion is not enough to convict the appellant. He argued that the trial court failed to consider his defense where he stated that there was a land dispute between PW2 and the appellant's family, which is the reason why he was framed for the offence. He relied on the case of *Victor Mwendwa Mulinge v Republic* (2014) KECA 710 (KLR) where the court faulted the trial and first appellate courts for failing to consider the appellant's defense. He urged the court to allow his appeal.

19. In its submissions, the respondent relied on the provisions of section 2 of the *Sexual Offences Act* on the meaning of indecent act and argued that the appellant overpowered the victim, ripped off her clothes and forced himself on her. That this amounts to committing an indecent act with an adult contrary to section 11A of the Act. That the appellant's argument that he should have been convicted under section 11(1) of the *Sexual Offences Act* is misplaced because the victim was not a minor at the time of the incident. It relied on the cases of *Phillip Nzaka Watu v Republic* (2016) eKLR and *Shadrack Kipchoge Kogo v Republic*, Eldoret Criminal Appeal No 253 of 2003. It argued that the findings of the trial court on conviction and sentence should be upheld.
20. Through the memorandum of appeal, the appellant has challenged his conviction for the alternative charge. Therefore, the issues for determination are:
 - a. Whether the alternative charge was proved beyond reasonable doubt; and
 - b. Whether the sentence imposed was harsh and excessive.
21. 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 v 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.”

22. The appellant decried the fact that he was convicted under section 11A instead of Section 11(1) of the *Sexual Offences Act*. Section 11(1) speaks of an indecent act with a child. In this case, PW4 testified that the victim was 20 years old at the time of the incident and there was no evidence to the contrary. Therefore, he rightly faced the alternative charge under Section 11A of the *Sexual Offences Act* which provides:

“Any person who commits an indecent act with an adult is guilty of an offence and liable to imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both.”

23. Section 2 of the Act provides:

“"indecent act" means any unlawful intentional act which causes-

- (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;



- (b) exposure or display of any pornographic material to any person against his or her will;”
24. The evidence adduced proves that the appellant had contact with the genital organs of the victim against her will. It was the victim who identified the appellant as her assailant. According to proviso section 124 of the Evidence Act, the testimony of the victim of a sexual offence regarding identification of the assailant, does not require to be corroborated for it to hold. It provides:
- “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.”
25. Through his submissions, the appellant has taken issue with the fact that the trial court did not record its reasons for believing the testimony of the victim. According to page 8 of the trial court’s judgment, the trial magistrate examined the evidence of PW1 and explained the reason why she was persuaded that the appellant touched the victim’s vagina with his penis. While it is true that the appellant was not medically examined to link him to the offence, the evidence of PW1 was sufficient to place him at the scene when the offence occurred.
26. PW1 testified that she had been sent by PW2 to go to the market to sell maize and she was taken by the appellant. It was her testimony that the appellant overpowered her and had his way with her against her will. PW2 stated that she had called the appellant to take PW1 to the market and when PW1 returned crying and narrated the ordeal to her, she believed that PW1 was telling the truth.
27. PW3 stated that by the time he was examining the victim, she had showered and urinated thus there was no presence of spermatozoa. For clarity, the evidence for the offence of indecent act should show that the appellant touched the victim’s genitals with his penis. It is not necessary to prove penetration in that regard. From the consistency of the evidence, I find that the appellant, was properly identified, and that he touched the victim’s vagina with his penis.
28. The appellant, through his submissions, has faulted the trial court for failing to consider his defense. I have perused the trial court’s judgment and in page 9 thereof, the trial magistrate labored to explain why the defense offered by the appellant was untenable, even though she acknowledged that there could be a land dispute between PW2 and the appellant’s family. The trial magistrate termed the defense as a mere denial after giving her reasons for this finding.
29. As to whether the sentence meted out to the appellant was harsh and excessive, the trial court sentenced the appellant to 5 years imprisonment and a fine of Kshs.10,000/=. Section 11A of the Sexual Offences Act prescribes imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand shillings or to both. The trial magistrate sentenced the appellant well within the confines of the law, thus there is no basis to review the sentence.
30. In the premises, I find that the appeal lacks merit and the same is hereby dismissed.
31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant



.....for the Respondent

