



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 86 OF 2017

PETER NJOROGE KARANJA.....APPELLANT

VS.

REPUBLIC.....RESPONDENT

(An appeal against the conviction and sentence in Criminal Case

No.120/2015 at CM's Court Nakuru by Hon. G.H. Oduor (CM) in a judgement dated 24/10/2017)

JUDGMENT

1. The appellant, Peter Njoroge Karanja, was charged in the Chief Magistrate's Court at Nakuru in **Criminal Case NO. 120 of 2015 with the offence of defilement Contrary to Section 8 (1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2016**. The particulars of the offence are that, on diverse dates between January 2015 and April 2015 at Free Hold Estate within Nakuru County, the appellant intentionally and unlawfully committed an act by inserting his male genital organ, name penis into the female genital organ, namely, vagina of JWM, a child aged seventeen years old which caused penetration. In the alternative, he was charged with committing an indecent act with a child.

2. Upon hearing, the Learned Trial Magistrate found that the prosecution proved their case against the appellant in respect of the count of defilement. After hearing the appellant's mitigation statement on **24th October 2017**, the Learned Trial Magistrate noted that although he was sympathetic of the plight of the child born as a result of the accused's liaison with the appellant, the appellant's act was unlawful and that his hands were tied as far as the minimum sentence was concerned. He proceeded to sentence the appellant to fifteen years imprisonment.

3. Aggrieved by the said decision, the appellant has appealed to this court against the said conviction and sentence, on three grounds;

1. That, the Trial Magistrate erred in law and in fact by failing to appreciate that defilement as an offence should not be limited to age and penetration.

2. That, the Trial Magistrate erred in law and in fact by failing to appreciate that several issues came into focus after hearing the evidence which should be determinant of the judgement.

*3. That, the Trial Magistrate erred in law and in fact by failing to invoke **Section 8 (5) and 8 (6) of the Sexual Offences Act**.*

4. At the hearing of the Appeal on 10th January 2012, the State was represented by Ms. Odero, Learned State Counsel while the appellant acted on his own behalf. The state conceded to the appeal on both conviction and sentence on the grounds that PW1, the victim, had stated to have had consensual sexual relations with the appellant for a long period, the appellant did not know that **PW1** was below 18 years of age, and that the sentence of fifteen years was too harsh. Further, Ms. Odero urged this court to give the appellant a non-custodial sentence so that he could take care of the child with a warning not to repeat the offence.

The facts of the prosecution case during trial forms part of the record of appeal and we need not reproduce the same.

5. Issue for determination.

Whether the concession of the present appeal by the prosecution obligates this court to automatically allow the appeal.

As the first appellate court, it is trite that this court is enjoined to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that the Court did not have occasion to see or

hear any of the witnesses.

This position is lent judicial support in the case of **Issac Ng'anga'a Alias Peter Ng'ang'a Kahiga Vs. The Republic Criminal Appeal No.272 of 2005** as follows:

*“In the same way, a court hearing a first appeal (i.e a first appellate court) also has a duty imposed on it by law to carefully examine and analyse fresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of **Okeno Vs. Republic (1972) EA 32** will suffice. In this case, the predecessor of this court stated:*

6. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (**Shantial M. Ruwala Vs. Republic (1957) E.A. 570**). It is not the function of the first appellate court merely to scrutinize to see if there was some evidence to support the lower court's finding and conclusion, it must make its findings and draw its own conclusion. 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. See also **Kiilu & Another Vs. Republic (2005) 1 KLR 174**.

7. The present appeal before this court is peculiar in its own right. The State, ably represented by Ms. Odero, conceded to the appeal both on the conviction and sentence by the lower court. This raises the pertinent question of whether the said concession necessitates this court to allow the appeal without further deliberation.

Fortunately, courts have pronounced themselves extensively on the fate that a petition of appeal should suffer in instances when the prosecution concedes to the appeal.

8. In **Genya Mwasaha Vs. Republic (2018) e KLR** the court's position was that an appellate court is not enjoined to view the concession by the prosecution to the appeal as the sole basis of allowing it. The court may, as it deems fit and appropriate, conduct an assessment of the facts, evidence and the law by itself. The Leaned Judges (Visram, Karanja and Koome) stated in paragraph 8 of the judgement thus:

“The aforesaid concession notwithstanding, it is still our duty as the appellate court to subject the entire evidence to a fresh examination”.

9. The Learned Judges cited with approval the sentiments of the **High Court in Nyeri in Norman Ambich Miero & Another Vs. Republic, Cr. App. No. 379 of 2005** where the court stated as follows:

“We restate that this court is not bound by the views of the State Counsel as we have a duty to reassess the matter and make our own findings on whether or not the evidence presented before the trial court which was confirmed by the High Court support the conviction of the appellants”.

10. In **Paul Thiga Ngamena Vs. Republic, eKLR** the prosecution had conceded to the appeal on both conviction and sentence of two counts of dangerous driving Odunga J, posited in **paragraph 31** of the judgement as follows:

“Even though the state conceded the appeal, it does not follow that in those circumstances, this court must allow the appeal since the court has the duty to put the evidence to a fresh scrutiny and arrive at its own determination:.

The same position was upheld in **Odhiambo Vs. Republic (2008) KLR 565**, where the court stated:

“The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has the duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence”.

11. The authorities cited above serve to support the position that this court is not obliged to allow the present appeal as a result of the concession by the prosecution. It will therefore engage in a full deliberation of the matters canvassed in the appeal and evidence adduced in the Trial Court so that the interests of justice are met.

12. A common thread that runs through the cited authorities is that before the appellate court allows the appeal in cases where the prosecution concedes to the same, the court must first satisfy itself that the prosecution properly conceded to the appeal. Suffice to say, the court must set out on a sojourn by itself to test the strength of the appeal.

Issue for Determination.

Whether this court ought to grant the appellants prayers as sought, to wit, to quash the conviction and sentencing of the Trial Court and replace it with a non-custodial sentence.

13. The **Sexual Offences Act No. 3 of 2006** codifies the offence of **defilement in Section 8**. The appellant was charged with the **offence of defilement Contrary to Section 8 (1) as read with Section 8(4) of the Act**.

It is trite law that in cases of defilement, the prosecution must prove each of the following ingredients beyond reasonable doubt;

(a) That the victim was below 18 years of age.

(b) That a sexual act was performed on the victim.

(c) That it is the accused who performed the sexual act on the victim.

14. As regards the age of the victim, the High Court sitting in Mombasa stated in **Hadson Ali Mwachongo Vs. Republic (2016) e KLR**.

“The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredients of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of the victim”.

15. In the appeal, the appellant asserts that he was operating under the belief that the victim was above 18 years of age. He further avers that he was not aware that **PW1** was a school going child. He maintains that he had a relationship with her and that she was of a marriageable disposition. When **PW1** got pregnant, the appellant promised to take care of the child.

16. The **Sexual Offences Act** provides as follows in **Section 8(5) and 8(6)**:

“(5) it is a defence to a charge under this section if-

(a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

(b) The accused reasonably believed that the child was over the age of eighteen years.

(c) The belief referred in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.

17. Further, the court in **Eliud Waweru Wambui Vs. Republic (2019) e KLR quipped** as follows:

“Subsection (5) states that it is a defence to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. I think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and the closer to 8 years the child is, the more likely the deception, and the more likely, the belief that he or she is over the age of 18 years”.

18. I find merit in the appellant’s contention that in all the circumstances of the case, he reasonably believed that the complainant was over the age of 18 years. The burden of proving the deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the appellant’s subjective view of the facts.

I find, as the above case, that the appellant reasonably believed that the complainant was above 18 years of age. Consequently, his defence under **Section 8 (5) of the Sexual Offences Act succeeds**.

19. Having considered all obtaining factors at the time the offence was committed, and the trial court’s judgement, as well as the Judiciary’s sentencing policy, and the fact that the state conceded to the appeal for quashing both the conviction and the sentence, I find merit in the appeal.

Consequently, I proceed to quash the conviction and set aside the sentence.

The appellant is thus set at liberty unless otherwise lawfully held.

Orders accordingly.

Delivered, signed and dated in Nakuru this 2nd Day of April 2020.

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J.N. MULWA

JUDGE