



REPUBLIC OF KENYA



KENYA LAW
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**Njiru v Republic (Criminal Appeal 112 of 2016)
[2024] KECA 1020 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KECA 1020 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 112 OF 2016
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
FEBRUARY 2, 2024**

BETWEEN

JULIUS MUGENDI NJIRU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kerugoya
(R. K. Limo, J.) dated 12th February, 2015 in HCCA No 19 of 2012)*

JUDGMENT

Background

1. The appellant Julius Mugendi Njiru, was convicted and sentenced to twenty (20) years imprisonment on 10th January, 2012 for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*.
2. The particulars of the offence were that on 8th July, 2010 at Kirinyaga District, Central Province, he intentionally and unlawfully caused penetration of his penis into the anus of DMM (name withheld) a boy aged 13 years.
3. The prosecution called six (6) witnesses to prove its case.
4. The evidence upon which the appellant was convicted was that DMM (PW1) was 12 years old and as he was passing through a bush on his way home, Mugenda (the appellant) apprehended him and blind folded him. It was PW1's further evidence that the appellant threatened to stab him with a knife if he failed to comply with the appellant's demands or screamed. PW1 further testified that the appellant removed his pants and inserted his penis into PW1's anus. Thereafter, the appellant escaped whereupon PW1 went home but did not inform his mother what had transpired.



5. It was PW1's further evidence that on the next day he went to school but developed pimples all over his body. His teacher, one Mrs. MWK (PW2) took him to Mutira Dispensary where PW1 informed the doctor that he had been defiled. The doctor informed PW1's teachers who informed PW1's parents who in turn reported the matter to the Assistant Chief. The Assistant Chief arrested the appellant and took him to Kerugoya Police Station.
6. PW1 further testified that he was treated at Mutira Dispensary and thereafter at Kerugoya District Hospital. It was PW1's testimony that the appellant was known to him as the appellant had shaved his head at a barber shop prior to the incident.
7. Ms. Carol Wanjiku (PW4) a laboratory assistant at ACK Mutira Dispensary testified that upon examining PW1 on 21st July, 2010, he had wounds on his private parts. It was her further testimony that PW1 had contracted a sexually transmitted disease and that she referred him to Kerugoya District Hospital. Hezron Machira (PW6), a clinical officer testified that upon examining PW1, he found that his genitalia on anal perianal region had septic ulcers.
8. Cpl Joshua Mwongela (PW5) of Kerugoya Police Station testified that he received the report from the Area Chief and 3 teachers that a 12- year-old boy had been sodomized. He escorted PW1 to Kerugoya District Hospital where he was treated and a P3 form filled. It was his further evidence that he charged the appellant for the offence of defilement.
9. Upon considering the evidence, the Senior Principal Magistrate convicted and sentenced the appellant as aforesaid.
10. The appellant was aggrieved by the conviction and sentence and appealed to the High Court at Kerugoya (Limo, J.) who dismissed the appeal in a judgment delivered on 12th February, 2015.
11. Undeterred, the appellant filed an appeal to this Court. The appellant who was unrepresented urged this Court to reduce his sentence as he has been in prison for 10 years. He informed the Court that he is desirous of serving the community upon his release from prison. He urged the Court to give him a second chance as he has reformed
12. Mr. Ngetich, learned counsel for the State opposed the appeal against sentence. Counsel submitted that sentence is at the discretion of the court. Counsel submitted that the trial court took into account the appellant's mitigation and did not err in meting out the mandatory sentence. Counsel urged that the offence committed by the appellant was grave and the sentence of twenty (20) years imprisonment meted out should be upheld.

Determination

13. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only. Section 361 of the Criminal Procedure Code provides that:-

"361

- (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –
 - a. on a matter of fact, and severity of sentence is a matter of fact; or



- b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.”

14. This Court in the case of *Chemagong v Republic* [1984] KLR 213 on page 219 stated as follows:-

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (*Reuben Karari s/o Karanja vs. Republic* 17 EACA146)” See also *Karingo v R.* [1982] KLR 213.

15. With the above in mind, we have considered the appeal, the submissions by both parties, the authorities cited and the law. The appeal is only against sentence. The appellant contends that the sentence of 20 years’ imprisonment that was meted against him by the trial court and upheld by the 1st appellate court was excessive in the circumstances of this case. It is notable that the sentence imposed is the prescribed sentence for the offence of defilement under Section 8(3) of the *Sexual Offences Act*.

16. The record indicates that the trial court took into consideration the appellant’s mitigation, the nature of the offence and its circumstances.

17. The learned trial court stated as follows:-

“I note the accused is a 1st offender. Mr. Mogusu on his behalf asks me to exercise leniency. However, that is not something in my power to do in view of the mandatory provisions of the section of the law under which the accused is charged. Accused is therefore sentenced to serve 20 years imprisonment.”

18. The High Court upheld the conviction and the sentence.

19. We note that from the record, there is enough proof to show that PW1 was twelve (12) years of age at the time the offence took place. The appellant was sentenced to 20 years imprisonment which is the minimum sentence provided for in Section 8(3) of the *Sexual Offences Act*.

20. In the circumstances, the sentence of 20 years’ imprisonment meted out by the trial court and upheld by the 1st appellate court was lawful. Taking into consideration the circumstances of the offence, we find no basis to interfere with the sentence. Accordingly, the appeal against sentence is dismissed.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

