



REPUBLIC OF KENYA



**Njoroge v Republic (Criminal Appeal 9 of 2021)
[2024] KEHC 7067 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 7067 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 9 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JANUARY 25, 2024**

BETWEEN

LEONARD NJUGUNA NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Garsen (R. Lagat Korir J.) delivered on 17th February 2020 in High Court Criminal Appeal No. 52 of 2018 arising from the original trial in Mpeketoni PMC Criminal Case No. 184 of 2017)

JUDGMENT

1. Leonard Njuguna Njoroge, the Appellant herein, is aggrieved by the dismissal of his first appeal by the High Court (R. Langat J.), which he had lodged against the conviction for the offence of defilement and the sentence of life imprisonment imposed upon him by the Principal Magistrate's Court at Mpeketoni (Hon. V. K. Asiyu RM) (hereinafter the 'trial Court'). The particulars of the offence were that on 15th August 2017 at Lake Amu area, Bahari Location within Mpeketoni sub- County of Lamu County, the Appellant intentionally caused his penis to penetrate the vagina of SWK, a child aged 10 years. The Appellant was also charged with the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offence Act No. 3 of 2006.
2. The Appellant has now filed a second appeal in this Court, which we heard on the Court's virtual platform on 26th July 2023. The Appellant, Leonard Njuguna, was present in person appearing virtually from Malindi Prison, while the Respondent was represented by the Learned Principal Prosecution Counsel, Ms. Nyawinda. The Appellant and Ms. Nyawinda opted to rely on their respective written submissions, with the Appellant's submissions being undated, while the Respondent's submissions were dated 23rd May 2022.



3. The following facts giving rise to this appeal are summarised from the evidence of the six witnesses who testified on behalf of the prosecution and the Appellant's testimony during the trial. The complainant (SWK), who testified as PW1, was guarding crops while in the company of the neighbour's children on 15th August 2017 when at around noon, the Appellant called her; told the other children to leave; took the complainant into his house where he told her to sleep on his bed and removed her panty; removed all his clothes; and put his penis in her vagina. The Appellant then told the complainant not to tell anyone, gave her his black jacket as a gift and she went back to the farm to guard the crops with the other children. When the complainant's mother found the jacket and inquired about it, the complainant told her it was the Appellant's jacket and explained what the Appellant had done and she was taken to the hospital and the police station. She pointed out the Appellant in the Court and stated that he was called Leonard Njuguna.
4. JKM, the complainant's father (PW5), produced the complainant's birth certificate showing that she was born on 12th October 2007 and recalled that on 22nd August 2017 when he went home, he found his wife with a jacket found with the complainant, and on asking the complainant, she refused to say who it belonged to. However, that on 23rd August 2017, his wife told him that the Appellant had given the complainant the jacket and he had slept with her. PW5 then called for the village headman and police reservists who came to his home with neighbours, and asked the Appellant, who was also a neighbour, if he was the one who gave the jacket to his daughter and he confirmed it. They then escorted the Appellant to Mpeketoni police station, and he later took his daughter to the hospital.
5. Two of the neighbours' children who were with the complainant on the material day, namely SW and PK, gave unsworn testimony as PW2 and PW3 respectively, after voire dire examinations. PW 2 recalled that the Appellant held the complainant by the arm and took her to his house, where the complainant roasted maize and made one egg while the Appellant was seated outside. PW3 testified that PW1 went to the Appellant's home and they remained on the road, and later went to the Appellant's house and sat outside while the complainant was making an egg. That after they left he saw the Appellant going to the shop with a bicycle. The complainant was examined by Musyoka Kisilu (PW4), a clinical Officer at Mpeketoni Clinic, who produced post rape case form dated 23rd August 2017 and a P3 form which indicated that the complainant's hymen was broken, though there were no lacerations on, and no discharge from her genital organs.
6. CPL Kosmas Kipruto Kiptoo (PW6) was attached to Mpeketoni Police station when PW1 was brought by her parents and police reserve officers on 23rd August 2017, and he recorded her complaint that the Appellant had defiled her on 15th August 2017 and 16th August 2017. PW6 then took the Appellant and complainant to Mpeketoni sub county hospital and both were tested, and later visited the scene of the crime, a two roomed house divided by a bed sheet, saw the bed and place where the complainant cooked the eggs and maize. He stated that the Appellant was found to be HIV positive and the victim was given ARVs and found to be negative after two months. He also recorded the statement of the children who saw the Appellant entering his house with the complainant.
7. The Appellant on his part stated that on 15th August 2017 he returned home around 4.00pm then went to his farm to cultivate vegetables, went to the shops, came back home, cooked supper and slept. That similarly on 16th August 2017 he returned home at 3.00pm and on 23rd August 2017 he was on his way back from the shops in the morning when he met the complainant and her family, and the complainant's father informed him that he had defiled the complainant and given her a jacket, and he voluntarily went with the KPR officers to the police station where he was charged. He denied defiling the complainant and only saw the children in court when they came to testify.



8. After hearing the evidence, the trial Court in its judgment held that the prosecution was able to prove that the complainant was a minor and that the complainant's vagina was penetrated, the complainant's evidence testimony was clear and cogent and the Appellant did not deny giving the black jacket to the complainant, and it was therefore proved beyond reasonable doubt that the Appellant had committed the offence of defilement. After convicting the Appellant for the offence, the trial Court took into account the Appellant's mitigation and noted the offence attracts a mandatory custodial sentence, and consequently sentenced him to imprisonment for life.
9. The Appellant then proffered his first appeal to the High Court at Malindi, which upheld the findings of the trial Court as well as his conviction and sentence of life imprisonment. The first appellate Court also found that the Appellant was the complainant's neighbour, and was known to her, her parents and PW2 and PW3. In addition, that the Appellant was not prejudiced by the omission of the term unlawful from the charge sheet as he was aware of the charges against him, was able to put up an appropriate defence and had no difficulty cross-examining witnesses, and the omission was therefore curable under section 382 of the Criminal Procedure Act. Lastly, the first Appellate Court, while noting that the mandatory nature of sentences under the Sexual Offences Act are under scrutiny, held that the minimum sentences in the Act had not been outlawed and that the trial court only has discretion not to impose them where the peculiar circumstances of the case so dictate. However, that there were aggravating circumstances in this case that warranted the imposition of a stiff sentence, and thereby confirmed the life imprisonment sentence.
10. Dissatisfied with the High Court's decision, the Appellant has raised four grounds of appeal in his second appeal to this Court, namely:
 1. That the Learned High Court Judge erred in law by not considering that there were massive contradictions and invariances.
 2. That the Learned High Court Judge erred in law by not considering section 163 (1)(c) of the Evidence Act.
 3. That the Learned High Court Judge erred in law by not considering the age of the complainant was not proved.
 4. That the Learned High Court Judge erred in law by not considering his defence.
11. In commencing our determination, it is crucial to restate the role of this Court as a second appellate Court as set out in section 361 of the Criminal Procedure Code and in *Karani v R* [2010] KLR 73 namely, that we are enjoined to consider only matters of law, and we cannot interfere with decision of the superior court on fact unless it is demonstrated that the trial Court and the first appellate Court considered matter they ought not to have considered or that looking at the evidence as a whole they were plainly wrong, in which case such omission or commission is treated as a matter of law.
12. The grounds of appeal and submissions thereon by the Appellant and Respondent herein raise two matters of law, namely whether the first appellate Court carried out its duty of re-evaluating the evidence as required in law, and secondly whether the sentence meted on the Appellant was legal. On the first issue, the Appellant submitted that the prosecution witnesses differed severally in their testimonies and placed reliance on the case of *Paul Kanja Gitari v R* [2016] eKLR for the position that the variances were not minor ones, and that the first appellate Court should have been interrogated and resolved them in the Appellants favour, and should have found that the prosecution witnesses were unreliable.



13. In particular, the Appellant submitted as follows:

“... Also in her statement on the 4th page of the proceedings PW1 says it was on 15th August 2017 while PW3 on the testimony on page 7 of the proceedings at law court says that it was on 10th August 2017. In his statement PW2 says that it was outside the house where they were when W (the complainant) was roasting maize, this means that they were all at the victims home while PW3 on page 7 on his statement says that they remained on the road. This means that the others did not go together with W (the complainant) to the victims house.

My Lords, in her statement PW1 says that they were given watermelons which they ate while PW2 talks of PW 1 roasting maize and cooking egg, the two stories fail to add up causing a contradiction and a worry to who among the two was saying the truth and who is lying among them. My Lords while still on the contradictions PW2 and PW3 never spoke of the victim who is PW1 being given any jacket or cloth by the appellant herein, a story which is fabricated by PW1 the victim and PW5 who is the father accusing that the victim was awarded a jacket a story which was never supported by the other witnesses since it as a fabricated idea of indicating (sic) the appellant into the matter.

My Lords on his statement PW2 on page 6 of the proceeding in his testimony he said that the victim who is W (the complainant) was held by hand by the applicant then taken into the house, while PW1 contradicts him as well on page 7 of the proceedings the last three lines of the same page. he notes that it is only W (the complainant) who went into the house and Njuguna the appellant herein was seated outside and didn't enter into the house...”

14. The Appellant also pointed out that PW1 testified that she was defiled once whereas the investigating officer (PW6) stated that she was defiled twice on 15th and 16th August 2017. In addition, that the evidence of the investigating officer that the complainant was given the jacket during the second incident of defilement did not correlate with the testimony of the victim, and it was not true that he accompanied the victim to the hospital after the purported incident. According to the Appellant, the complainant was pushed to the corner after being found with the jacket, and she decided to frame him. He also contested the medical evidence on the ground that PW4 failed to bring forth other causes of tearing of the hymen apart from the sexual intercourse, and failed to explain the absence of lacerations on a young child aged 9 years who was alleged to have been defiled by a 50-year old man. The Appellant also urged that the complainant and himself had different HIV/AIDS status, and whereas he was HIV positive, the complainant was found to be HIV negative.
15. Ms. Nyawinda on her part submitted on two issues namely: whether the prosecution proved its case beyond reasonable doubt and whether the sentence was safe. On proof, the counsel submitted that the prosecution produced a birth certificate which indicated that PW 1 was 9 years old with only two months to turning 10 years old, as confirmed by her father (PW 5). Therefore, that the prosecution sufficiently proved that the victim was a minor below 10 years, hence within the bracket of section 8 (2) of the *Sexual Offences Act*. with regards to proof of penetration, the Respondent placed reliance on section 2 of the Sexual Offence Act for the definition of penetration and submitted that it was trite law that the key evidence which Courts rely on in cases of defilement in order to prove penetration was the complainant's testimony which was usually corroborated by the medical report presented by a medical officer. Ms. Nyawinda in this regard referenced the testimony by PW 1 and placed reliance on section 124 of the *Evidence Act* to submit that the trial Court clearly stated the reason why he believed the complainant's testimony. Further, that the complainant's testimony was corroborated by the evidence of PW 4, and the evidence of PW 5 that they found PW 1 with the Appellant's jacket. It was urged that



the fact that the complainant did not test HIV positive could not be a ground to prove that she was not defiled since she was put through antiretroviral treatment. Lastly, with regards to identification of the perpetrator, Ms. Nyawinda submitted that the Appellant was positively identified as the perpetrator since the complainant knew him as did PW2 and PW 3.

16. We note that the Appellant did not raise the ground of contradictory evidence in his first appeal, and only questioned the sufficiency of the evidence adduced by the prosecution to support a conviction. Be that as it may, the threshold in determining whether any variances and contradictions in the evidence will affect its probative value was set out by this Court in the case of Josephat Manoti Omwancha vs Republic [2021] eKLR while citing the decision in Stanley Mathenge Karani v Republic [2015] eKLR, as follows:

“The role of a court of law when confronted with allegations of contradictions, discrepancies in the prosecution case has now been crystallized. See Joseph Maina Mwangi versus Republic CRA No.73 of 1993; Njuki & 4 Others versus Republic [2002] 1KLR 771, Vincent Kasyula Kingoo versus Republic Nairobi Criminal Appeal No.98 of 2014, all for the proposition that when confronted with such allegations an appellate Court should apply the guidelines set in Section 382 of the Criminal Procedure Code Cap 75 Laws of Kenya to determine whether such discrepancies, contradictions or inconsistencies are such as to cause prejudice to the appellant or that they are inconsequential to the conviction and sentence. Where these do not affect an otherwise proved case against an appellant, they should be ignored. In addition, an appellate Court has an obligation to reconcile these where the trial court failed to do so and determine the effect of that reconciliation on the appellant’s conviction and sentence. See the case of Josiah Afuna Angulu versus Republic Nakuru Criminal Appeal No. 277 of 2006 (UR) and Charles Kiplang’at Ng’eno versus Republic Nakuru CRA No.77 of 2009 (UR), both of which this Court sitting as a first appellate court reconciled discrepancies resulting in the substitution of the appellant’s conviction for the disclosed offence in the Angulu case and an outright acquittal in the Charles Kiplang’at Ng’eno’s case.”

17. The Appellant has pointed out contradictions between the evidence of PW1, PW2 and PW3 as regards their recollections of the events of the day they allege they saw him with the complainant. The evidence of PW1 in this respect was as follows:

“...I recall on 15/8/2017 I was at home. At around noon the accused called me. I was with K and S the neighbours children. We were at the farm guarding the crops from wildlife. The accused called us. He was on the road. He gave us melons. We were the four of us. It was me S, K and W. So W the youngest ate water melon with us. He told the other children to go outside and he took me by my arm into his house. He told me to sleep on his bed. Then he removed my panty. I was wearing a dress on that day. Then he removed all his clothes and he became naked. He then put his penis in my vagina. He entered like that without wearing.

When he finished he woke up. I did not bleed on that day. I felt pain but I didn’t bleed. The other children were outside their house. I went back to the farm to guard the crops.

The accused asked me not to tell anyone. He only did that to me once. He never did it again. The black jacket belonged to the accused. He gave me the jacket as a gift.”



18. PW2's account which he reiterated during cross-examination by the Appellant was as follows:

“... I recall it's the year is month of August. I recall Njuguna held W (the complainant) by the arm and took her into his house: W (the complainant) went and roasted maize. W then made one egg. That is all I saw. Then I went home.”

19. PW3 on his part testified as follows:

“...We were on the road guarding the crops from wild animal. Then W (the complainant) went to Njuguna's home. She went with W. We remained on the road. Then we also went to Njuguna. We sat outside the house. Then W (the complainant) entered the house. Then she got outside the house. W (the complainant) made an egg then we left. All of us left. Njuguna was there on that date. He was also seated outside. When W (the complainant) was making an egg Njuguna was sitting outside. W (the complainant) is the only one who entered the house. She was alone in the house. Njuguna was seated outside did not enter the house. That is all.”

20. The relevant facts in our view in the various testimonies were that on the material date, the Appellant was seen entering his house with the complainant, and the complainant detailed what happened in the said house. The recollection of the witnesses as regards the number of children present, and what happened before and after the complainant went to the Appellant's house are not material in this respect and are minor. In addition, contradictory testimony involves events that cannot happen together, that are mutually exclusive, and it is evident that in this respect there was no contradictory evidence on the relevant evidence- PW2 and PW3 both testified that they saw the Appellant on the material day, that he was at his house, that the complainant entered the Appellant's house.

21. Lastly, any differences in the recollection of events will be inevitable, given that the two witnesses were minors, with PW2 being 9 years old, and PW3 who did not know his age, stated that he was in class two. Similarly, PW1 was a minor aged 9 years, and any conflict in her testimony and that of PW6 as to the number of times the Appellant defiled her is not fatal, and is only relevant as an aggravating factor. We are also in agreement with the observation by the learned Judge of the High Court that it was apparent from the complainant's testimony that she had been defiled before, although it was not indicated who by. We therefore find that the evidence adduced by PW1, PW2, PW3 and PW6 was credible and the trial and first appellate Court did not err in relying on the said evidence.

22. As regards the sufficiency of the evidence adduced, we see no reason to deviate from the analysis of the evidence and findings by the trial and first appellate Court as regards the evidence of penetration by PW1 as corroborated by the evidence of PW4; on the age of the victim; and on the identification of the Appellant as the perpetrator. We can only add that the evidence of the absence of lacerations on the genital organs of the complainant, or of the different HIV/AIDS status of the complainant and Appellant, is not capable of dislodging the evidence that the Appellant committed the alleged offence.

23. On the issue of the legality of the sentence of life imprisonment, while the Appellant has appealed against both the conviction and sentence and prayed that we set aside the said sentence, we note that he did not make any submissions on the legality of the sentence. Ms. Nyawinda submitted that the Appellant was sentenced to life imprisonment pursuant to section 8 (2) of the Sexual Offence Act and the first appellate Court upheld the sentence citing existence of aggravating circumstances that warranted a stiff penalty. The counsel placed reliance on the case of *David Mutai v Republic* [2021] eKLR (Petition No. 27 of 2019) where the Court observed that it was trite law that an appellate Court cannot interfere with the sentencing Court's discretion unless it established that there was real error



on application of the sentencing principles and in this case there was no indication that there was any apparent error in the sentence meted by the trial Court.

24. We note that the learned Judge of the High Court, in exercising her discretion in favour of upholding the sentence of life imprisonment considered the Appellant’s mitigation vis-à-vis the aggravating factors and in so doing, stated that “it is my understanding, however, that the minimum sentences in the SOA have not been outlawed, but rather that the trial court has discussion not to impose them where the peculiar circumstances of the case so dictate”. There is however, also now emerging jurisprudence that the sentence of life imprisonment is also unconstitutional, to the extent that an indeterminate life sentence without any prospect of release or a possibility of review was degrading and inhuman punishment, and violated the right to dignity under Article 28 of *the Constitution*. (See the decisions of this Court in *Manyeso v Republic (Criminal Appeal 12 of 2021)* [2023] KECA 827 (KLR) and *Evans Nyamari Ayako v Republic, KSM CA Criminal Appeal 22 of 2018*).
25. To this extent, we find that we have legal ground to interfere with the sentence of life imprisonment imposed on the Appellant, while also taking into account the aggravating factors highlighted by the High Court. We therefore uphold the conviction of the Appellant for the offence of defilement contrary to section 8 (1) of the *Sexual Offences Act*, and only partially allow the appeal against the sentence by setting aside the sentence of life imprisonment, and substituting it with a sentence of thirty-five (35) years imprisonment, which shall run from the date of sentence by the trial Court on 25th April 2014.
26. This judgment is delivered in accordance with Rule 34(3) of the Court of Appeal Rules of 2022, as Gatembu Kairu J.A. declined to sign.
27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

