Njoki v Republic (Criminal Appeal E127 of 2021)
[2023] KEHC 294 (KLR) (Crim) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 294 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E127 OF 2021

K KIMONDO, J

JANUARY 27, 2023

BETWEEN

EDWIN GITHINJI NJOKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment in Criminal Case No. 1237 of 2013 in the Chief Magistrates Court at Makadara by A.R. Kithinji, Chief Magistrate, dated 28th September 2021)

JUDGMENT

1. The appellant was charged with defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* (hereafter the Act). He also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Act. He was adjudged guilty on the main count and sentenced to life imprisonment.

2. The particulars were that on 14th March 2013 at 2017 in Njiru District within Nairobi, he caused his penis to penetrate the vagina of PNM [particulars withheld] a girl aged 5 years. The particulars of the alternative charge were that on the same date and place he rubbed his penis against the buttocks of the said minor.

3. The petition of appeal was lodged on 16th November 2021 which was well within 14 days of the sentencing. There are eight grounds which can be condensed into two: Firstly, that penetration was not proved; secondly, that all the necessary ingredients of the offence were not proved beyond reasonable doubt.

4. Learned counsel for the appellant, Mr. Mathenge, filed submissions dated 19th August 2022. He contends that that the prosecution's case was riddled with contradictions; and, that the learned trial

magistrate misapprehended the evidence. In a synopsis, he argues that neither the main charge nor the alternative charge was proved to the required standard.

5. The appeal is contested by the respondent through grounds of opposition dated 22nd June 2022 and written submissions dated 12th October 2022. In a nutshell, the State submitted that all the elements of the offence of defilement were established beyond any reasonable doubt.

6. On 6th December 2022, both learned counsel for the appellant and respondent informed me that they were relying wholly on their submissions.

7. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E.A. 32.

8. The complainant was a child of tender years. The trial court conducted a detailed voire-dire examination. The learned trial magistrate was satisfied that she understood the duty of telling the truth but did not comprehend the nature of an oath. She thus gave unsworn evidence. In the course of the trial and for reasons on the record, the court also appointed an intermediary as provided by section 31 of the Act.

9. I am thus satisfied that the trial court employed the correct procedure in taking the evidence of a minor. See generally, *Republic v Peter Kiriga Kiune* Criminal Appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

10. At the time of the trial, the minor had grown to 7 years but at the time of the incident she was in pre-unit or class one. On the material day, she was waiting to be picked up from school by her aunt. She testified that the appellant (whom she knew well as a part-time teacher at the school) entered the classroom, locked the door, removed her underwear and inserted his penis into her privates.

11. PW2 was a brother of the complainant. He was sent to pick up PW1. He knew the appellant as a son of the school's proprietor. He heard some noises from the classroom. When he peeped through the window, he saw the appellant on top of PW1. When the appellant saw him, he took off to an adjacent classroom. PW1 informed PW2 that the appellant had done "bad manners to her". He handed her over to Mama Abigael who inspected the minor and established that she had been defiled. By that time, members of the public wanted to lynch the appellant but PW2 locked him up safely in a classroom.

12. When the minor's mother (PW3) arrived, she also inspected her and concluded that she had been defiled. She reported the matter to Police Constable Evalyne Kemunto (PW7) at Dandora Police Station. She was issued with a P3 Form and took the complainant to hospital. The Post Rape Care Form and P3 Form were produced as exhibits 3 and 4.

13. When the appellant was placed on his defence, he protested his innocence. He admitted that he knew the complainant who was a student at the school. The proprietor was the appellant's mother. He also conceded that he was at the school at the time of the incident. He claimed (falsely in my view) that he is the one who fetched the complainant and delivered her to PW2 and that at the time she "was okay, and not crying". In a nutshell, he claimed that he was the victim of a trumped-up charge.

14. From the evidence of the complainant and her brother PW2, I am satisfied that they knew the appellant very well. The incident happened in a school at about 18:00 hours. The accused admitted that he was with the complainant at the material time. I thus entertain no doubt that the appellant was positively identified. This was evidence of recognition; stronger than mere identification. *Wamunga v Republic* [1989] KLR 424, *Maitanyi v Republic* [1986] KLR 198 at 201.

15. From the evidence of the complainant's mother, PW3, and the birth certificate (exhibit 1) I am also satisfied that the complainant was born on 1st April 2007 and was thus about 5 at the time of the incident.

16. The only live question then is whether the appellant penetrated her. Section 2 of the Act defines penetration as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

17. According to the clinical officer, Emmy Kosgei (PW4), there were no visible or physical injuries to the genitalia or any discharge. The hymen was crescent shaped, centrally located and intact. Anus was normal. However, bruises were seen around labia minora and the fourchette. No spermatozoa were detected.

18. From the evidence of the government analyst, Wangechi Nderitu (PW5), the undergarment worn by the complainant was not stained with blood semen or spermatozoa. But according to Dr. Joseph Maundu (PW6) the hymen was broken. He however testified that "the genitalia was normal, no bruises noted, no discharge". Of note is that his examination was carried out on 18th March 2014, four days later.

19. From the expert evidence of PW4, PW5 and PW6, I find that the prosecution failed to prove beyond reasonable doubt that there was partial or complete penetration. It follows that the conviction on the main count was unsafe and is hereby set aside.

20. However, I find from the evidence of PW1, PW2 and PW4 that the appellant's penis had contact with the complainant's labia minora or private parts. It was a failed attempt at penetration; perhaps due to the timely appearance at the scene by PW2 who startled the appellant. As I stated, the examination by the clinical officer (PW4) found that-

> There were no visible or physical injuries to the genitalia or any discharge. Hymen was crescent shaped, centrally located and intact. Anus was normal. However, bruises were seen around labia minora and the fourchette. No spermatozoa were detected.

21. As I stated earlier, the appellant had locked himself up with the complainant in a classroom. He was seen by PW2 lying on top of the complainant in that classroom. The appellant clearly had the opportunity to commit the offence. This amounts to further corroboration. *Opo v Republic* [1976-80] 1 KLR 1669.

22. I partly agree with learned counsel for the appellant that there were some inconsistencies in the evidence of PW1 and PW2. But they were minor and immaterial. Furthermore, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.

23. In the end I readily find that the appellant was guilty of the lesser but cognate offence of committing an indecent act with a child contrary to section 11 (1) of the Act for which he had also been charged. True, the particulars stated he rubbed his penis against the buttocks of the minor. I cannot say it would occasion a failure of justice. I also find that the error is curable under section 382 of the Criminal Procedure Code. I convict him accordingly under section 215 of the Criminal Procedure Code.

24. Under the *Sexual Offences Act*, the sentence for committing an indecent act with a child contrary to section 11 (1) of the Act is 10 years' imprisonment. The Court of Appeal has however given fresh

guidance on minimum sentences under the Act. In *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.
>
> The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.
>
> Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court. [Emphasis added]

24. The record shows that the appellant was not remorseful. When he was granted an opportunity to mitigate, he tendered none. The trial court considered the pre-sentence report. I have taken into account that he is a first offender. But the life of a young child has been scarred by his beastly conduct. Doing the best that I can, I sentence the appellant to serve 7 years in prison.

25. The upshot is that the appeal partially succeeds to the extent that the conviction on the main charge of defilement and the sentence thereon of life imprisonment is hereby set aside. I however convict the appellant on the lesser but cognate offence of committing an indecent act with a child contrary to section 11 (1) of the Act. I sentence the appellant to serve 7 years in prison. The sentence shall run from 28th September 2021, the date of the original conviction. The time spent in remand custody from the date of his arrest on 16th March 2013 to the time when he was released on bail shall be deducted from this sentence.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

Appellant.

Mr. Mobachi holding brief for Mr. Mathenge for the appellant instructed by Wokabi Mathenge & Company Advocates.

Ms. Odhiambo for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.