Okongo v Republic (Criminal Appeal E036 of 2024)
[2024] KEHC 13146 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13146 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E036 OF 2024

KW KIARIE, J

OCTOBER 30, 2024

BETWEEN

FELIX OTIENO OKONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. case NO. E026 of 2021 of the Principal Magistrate's Court at Ndhiwa by Hon. B.W. Murangasia-Resident Magistrate)

JUDGMENT

1. Felix Otieno Okongo, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 0f 2006.

2. The particulars of the offence are that on diverse dates between November 2020 and April 2021 at Kabuoch location, Ndhiwa sub-county within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of BA.., a child aged fifteen years.

3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and the sentence. He was represented by Ongoso Ayoma & Company Advocates. He raised grounds of appeal as follows:

    a. The honourable learned Resident Magistrate erred in fact and law in misdirecting himself as per the dictates of law in failing to call for a DNA test.

    b. The honourable learned Resident Magistrate erred in fact and law when he sentenced the appellant on a very grave judicial practice in law; even after that, despite having been stated by PW1 that the said child was born and died, the prosecution and neither the court ordered for a DNA sampling on the dead foetus to confirm parentage linkage to the said defilement.

c. The honourable learned Resident Magistrate erred in fact and law by overlooking the fact that despite the complainant PW1's statement that he shared a room with his co-workers, he never cautioned himself against entering such a conviction before the court. As such, he arrived at an unconstitutional and illegal sentence and set a very dangerous precedent in law practice.

d. The honourable learned Resident Magistrate erred in fact and Law by arriving at a judgment and sentencing that was not equivocal [sic] on the evidence presented before court and that he failed to caution herself of the dangers of overlooking the weighted of the evidence raised by the defence vis-à-vis the prosecution evidence and especially the complainants testimony, the PRC documents, the P3 and the treatment books which were all suspect and went against the root cause of the alleged defilement.

e. That the judgment was full of judicial errors/omissions, was flawed in the circumstances, and was a miscarriage of justice as the same was uncorroborated by the documents presented before the court.

f. That the honourable learned Resident Magistrate erred in fact and law by putting himself in the arena of events, relying on the totality of the evidence presented before him, and completely overlooking the defence of the accused/appellant.

g. That the ruling of the learned magistrate goes against the rules of natural justice and the rule of law, and the judgment and sentence were prejudicial and excessive in the circumstances, and the same was unjust.

4. The state opposed the appeal through the prosecution counsel, who contended that all ingredients of the offence were proved.

5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.

6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

   a. That there was penetration of the complainant's genitalia;

   b. That the accused was the perpetrator and

   c. The victim must be below eighteen years old.

   These are the ingredients the prosecution must prove beyond any reasonable doubt before the trial court.

7. The complainant's evidence was that the appellant defiled her. She said they had a boyfriend-girlfriend relationship since the year 2020. She further stated that the appellant gave her a mobile phone to facilitate their communication. They engaged in sexual intercourse severally, and this led to her pregnancy.

8. When it was discovered that she was expectant, she disclosed the person who had impregnated her. The baby unfortunately died at birth.

9. Bernard Otieno (PW5) is a clinical officer who examined the complainant. He testified that on the 14th day of September 2021, he examined her and found her to be sixteen weeks pregnant. At the time of

examination, she was fifteen years old. This evidence corroborated the complainant's claim of having been defiled.

10. The complainant was assessed to be fifteen years and six months old. The report was produced as an exhibit.

11. The prosecution proved the age of the complainant and the issue of penetration to the required standards.

12. According to the complainant, the appellant defiled her. After she had informed the appellant that she was pregnant, he took her to a doctor to procure an abortion, but they did not find him. He later took to her some concoction. He told her to take it to abort. After taking it, she did not abort.

13. The appellant contended that he did not commit the offence and faulted the prosecution for not conducting a DNA test on the fetus. On the issue of DNA, the Court of Appeal in *Nzau v Republic (Criminal Appeal 11 of 2020)* [2022] KECA 502 (KLR) said:

> The argument that a DNA test was required to prove penetration is not well founded. As this Court stated in Robert Mutungi Mumbi vs Republic [2015] eKLR, Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing, to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also Hadson Ali Mwachongo vs Republic [2016] eKLR.

I agree that, in the circumstances of this case, this was not necessary.

14. The complainant's evidence was supported by circumstantial evidence from Enos Nyawade (PW3). His evidence was that the complainant took them where the appellant was repairing phones and identified him. In the case of Republic vs Kipkering arap Koskei & Another 16 EACA 135, the Court of Appeal held:

> In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

15. The evidence of this witness and that of the complainant's father (PW2) leaves no doubt that the complaint identified the appellant as the culprit. Section 124 of the *Evidence Act*. 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.

In this case, I am satisfied that the complainant's evidence identified the person who defiled her.

16. Section 8 (3) of the *Sexual Offences Act* provides:

> A person who commits an offence of defilement with a child between theage of twelve and fifteen years is liable upon conviction to imprisonment for a termof not less than twenty years.

The sentence meted out to the appellant was the prescribed under the section.

17. The appeal lacks merit and is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 30TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE