Obwao v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 206 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEHC 206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E011 OF 2022

JN KAMAU, J

JANUARY 23, 2023

BETWEEN

JACOB OTIENO OBWAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon F. M. Rashid (PM) delivered at Winam in the Senior Principal Magistrate's Court in SOA Case No 08 of 2019 on 9th March 2022)

JUDGMENT

Introduction

1. The Appellant herein was tried and convicted of the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The Learned Trial Magistrate, Hon F. M. Rashid (PM) convicted him on the main count and sentenced him to twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 17th March 2022, he lodged the Appeal herein. He set out thirteen (13) grounds of appeal challenging both conviction and sentence.

3. On 25th April 2022, he filed a Chamber Summons application dated 19th April 2022 seeking to be released on bail pending appeal. As it was going to take the same amount of time to hear the Appeal, the lower court and proceedings having been availed to this court, this court proposed that parties proceed with the main Appeal to save time, a proposal that was both accepted by the Appellant and the Respondent herein. The Appellant withdrew the said application and the court gave its directions on the filing of Written Submissions in respect of the Appeal herein.

4. The Appellant's Written Submissions were dated 26th May 2022 and filed on 27th May 2022 while those of the Respondent were dated 14th July 2022 and filed on 15th July 2022. The Judgment is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. This being a first appeal, it is the duty of this court to evaluate afresh the evidence adduced before the Learned Trial Magistrate in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the cases of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and [1985] EA 424 where in the latter case, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

7. Having looked at the Appellant's and State's Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

   a. Whether or not the Charge (sic) was defective;

   b. Whether or not the Appellant was accorded a fair trial;

   c. Whether or not the Prosecution had proved its case beyond reasonable doubt.

   d. Whether or not, in the circumstances of this case the sentence meted upon the Appellant by the Learned Trial Magistrate was lawful and or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Charge

9. Ground of Appeal No (1) was dealt with under this head.

10. Notably, the Appellant did not submit on this issue. On the other hand, the Respondent argued that the charges against him were not defective.

11. As the Appellant did not demonstrate how the charges that had been preferred against him were defective, this court did not find any merit in Ground of Appeal No (1) and the same be and is hereby dismissed.

II. Fair Trial

12. Ground of Appeal No (2) was dealt with under this head.

13. The Appellant submitted that the Trial Court did not conduct the voire dire examination despite it having the duty to record a finding whether the child was speaking the truth and was sufficiently knowledgeable to testify. He thus argued that the evidence of the Complainant (hereinafter referred to as "PW 1") was inadmissible. The Respondent did not submit on this issue.

14. A perusal of the proceedings showed that before the trial commenced on 26th June 2019, the Trial Court recorded the following:-

> " Minor (Voire dire)
>
> I am SA. I am 10 years old. I go to school at [Particulars Withheld] Primary School at Class 4 (sic). My teacher is Madam N. We don't go to Church. I know I should tell the truth.
>
> Court- I have interviewed the minor and she understands her environment. We can proceed by way of sworn evidence."

15. It is evident that the Trial Court enquired about PW1's age, where she went to school, the class she was in and if she knew if she was to tell the court the truth which she answered in the affirmative. From her observation as a Trial court, she determined that PW1 was intelligent enough to adduce sworn evidence that would call for cross-examination as opposed to unsworn evidence which also has less weight. This court was thus satisfied that the Trial Court conducted a proper voire dire examination and it exercised its discretion to direct that PW 1 adduce sworn evidence.

16. In the premises foregoing, this court found and held that Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

III. Proof of Prosecution's Case

17. Grounds of Appeal Nos (3), (4), (5), (6), (7), (8), (9), (10), (11) and (12) were dealt with together under this head as they were all related but under separate and distinct headings.

A. Age

18. The Appellant submitted that age was an important component in proving the offence of defilement and that the same could be proved by an age assessment report, birth certificate, the victim's parents or guardian, by observation and common sense as was held in several cases he relied upon amongst them, the case of *Kaingu Elias Kasomo v Republic* [2016] eKLR.

19. He argued that the Prosecution did not prove PW 1's age. He pointed out that no Birth Certificate or age assessment was undertaken (sic). He asserted that despite the Prosecution having sought an adjournment on 26th June 2019 to have PW 1 taken for age assessment case, no report was availed to the Trial Court. He argued that there was no basis for the Trial Court to have believed that PW 1 was aged ten (10) years at the time of the alleged defilement.

20. On the other hand, the Respondent averred that PW 1 stated that she was aged ten (10) years at the material time which was corroborated by PO (hereinafter referred to as "PW 2"). It added that the Trial Court also noted PW 1's physical appearance to have been between nine (9) and twelve (12) years.

21. As can be seen in the voire dire examination, PW 1 stated that she was aged ten (10) years old at the time of trial which was corroborated by PW 2 who was her paternal aunt. In its Judgment, the Trial Court indicated that it observed PW 1's frame to have been between nine (9) and twelve (12) years and hence believed PW 1 and the mother (sic) to have been telling the truth.

22. The Post Rape Care (PRC) Form indicated that PW 1 was born in 2009. As the alleged defilement occurred on diverse dates in January and February 2019, PW 1 would then have been about ten (10) years of age.

23. Having said so, this court noted that on 26th June 2019, the Prosecution asked that PW 1 be taken for age assessment. However, no Age Assessment Report was adduced in court by the time the Prosecution closed its case. There was nothing in the proceedings to show why the Prosecution felt it necessary to seek for the age assessment to be undertaken and why the Age Assessment Report was not tendered in evidence, if at all the age assessment was done.

24. Section 8(2) of the *Sexual Offences Act* stipulates that:-

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

25. Further, Section 8(3) of the *Sexual Offences Act* provides that:-

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

26. It was therefore evident that in the event the Trial Court had convicted the Appellant on PW 1's testimony that she was aged ten (10) years, then he would have been sentenced to life imprisonment. The observation by the Trial Court that PW 1 may have been between nine (9) and twelve (12) years pushed PW1 to the next category where the penalty for defiling a child between twelve (12) and fifteen (15) years was twenty (20) years imprisonment.

27. Notably, the Appellant had argued that the Trial Court did not conduct a voire dire examination to ascertain that the child was knowledgeable to tell the truth. The Trial Court had in fact conducted a voire dire examination which persuaded this court to find and hold that PW 1 was a child of tender years.Bearing in mind that determination of age can be based on common sense, it is unlikely that the Trial Court could have confused between a ten (10) year old child and a child who was between fifteen (15) and eighteen (18) years where the penalty for a person convicted of defilement in that age group was fifteen (15) years.

28. This court did not find the Trial Court's assertion that PW 2 was PW 1's mother to have been a material fact in determining PW 1's age. It therefore came to the conclusion that despite there being no age assessment report, PW 1's age was proven by common sense as was envisioned in the case of Francis Omuroni v Uganda CR A 2/200 that the Appellant relied upon and that the Prosecution proved that PW 1 was a child of tender years.

B. Identification

29. The Appellant submitted that PW 1's and PW 2's evidence was contradictory. He stated that PW 1 testified that the alleged defilement occurred along the road on 25th February 2019 at 9.00 pm as she left PW 2's house. He pointed out that she had said that she only recognised him from his voice.

30. He questioned how she knew that he was wearing the jeans he was dressed in on the day of the trial on 26th June 2019 as the alleged incident occurred at night.

31. He added that she did not also tell the court where the Appellant was on 27th February 2019 when she was watching TV in his house with her friends G and L, PW 2's children, before he defiled her. He expressed surprise at how PW 1 would have stayed in the Appellant's house alone watching TV when he had allegedly raped and threatened that he would kill her if she told anyone what had happened.

32. He took issue with the Trial Court's contention that PW 1 was watching TV in PW 2's house when he went into the house, undressed and defiled PW 1 because PW 1 was clear in her evidence that they were watching TV in his house.

33. He wondered how PW 2 could have allowed PW 1 to walk from [Particulars Withheld] when it was dark instead of hiring a Tuk Tuk for her to go home. He also pointed out that PW 2 lived at Kano and not in Kisumu East Sub County in Kisumu County as had been indicated in the Charge Sheet.

34. On the other hand, the Respondent submitted that PW 1 positively identified the Appellant herein because they were neighbours and that she identified his voice and pointed at him in court as the person who defiled her on the material night.

35. PW 1 testified that she stayed at [Particulars Withheld] and that the Appellant was her neighbour. PW 2 lived at [Particulars Withheld]. In his testimony, the Appellant testified that he used to live at [Particulars Withheld] but at the time he was adducing his evidence, he was living at Nyalenda. It was not clear from his evidence when he moved out from Mowlem.

36. His assertions that there was a disparity between PW 2's evidence and the Charge about where she stayed was neither nor here. This court took judicial notice that Mowlem that had been indicated in the Charge Sheet is in [Particulars Withheld] which is in Keino. Having said so, Milimani and Mowlem were quite a distance from each other. The distance between the two (2) places was confirmed by PW 1's statement that she recorded with the Police as she indicated that PW 2's house was far from her house.

37. It was therefore apparent to this court that the first incident occurred near PW 2's house along the road around 9.00 pm. In the Statement PW 1 recorded at the Police Station, she stated that when she left PW 2's house, she noticed someone she knew, Baba Tony, the Appellant herein leaning on the wall. He got hold of her hand and led her to a deep ditch (pit latrine and septic tank) and instructed her to remove her panty and lie down which she did and he penetrated her vagina with his penis. Her evidence was that he had placed a piece of cloth in her mouth so that she could not scream and that after he finished, he told her to wear her panty and threatened her not to tell anyone or else he would kill her.

38. In the case of *Ogeto v Republic* [2004] eKLR , the Court of Appeal held that a fact can be proved by the evidence of a single witness if care and caution was exercised while placing reliance on such evidence.

39. In the case of *Roria v Republic* (1967) EA 583 at page 584, Sir Clement De Lestang V.P. was said to have rendered himself as follows:-

> "...A conviction resting entirely in identity invariably causes a degree of uneasiness ...That danger is of course greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction resting or based on such identification should never be upheld, it is the duty of this court to satisfy itself that in all circumstances, it is safe to act on such identification."

40. Further, in the case of *Abdalla Bin Wendo v Republic* (1953) EACA 166 it was held as follows:-

> "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult".

41. In the case of *Andrea Nahashon Mwarisha v Republic* [2016] eKLR, the Court of Appeal also held as follows:-

> "Identification parades are necessary though not absolutely where the witness purports to identify a suspect in extremely difficult conditions, which say, where the offence was conducted at night and when visibility was a challenge having regard to the availability or lack of light and when the circumstances under which the offence was committed were so harrowing to the witness thereby impairing his ability to positively perceive and with certainty identify the culprit or where the incident lasts for a short time..."

42. Going further, in the case of *Choge v R* [1985] KLR 1, the Court of Appeal also rendered itself that:-

> "……There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight. In *Rosemary Njeri v Republic* [1977] Criminal App. No. 27, a victim of the offence of grievous harm testified she heard the appellant say 'break her legs'. The reception of this evidence was upheld in the High Court on the first appeal and also on the second appeal in which this Court said:-

43. Further, in the case of *Simon Mbelle v Republic* (1 KAR 578 at 583), the Court of Appeal also stated that:-

> "In relation to the identification by voice, care would obviously be necessary to ensure
>
> (a) that it was the accused person's voice
>
> (b) that the witness was familiar with it and recognized it and
>
> (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it."

44. There is no guarantee that a voice that a single witness recognises as belonging to a person who he or she thought was her perpetrator was actually the voice of his or her perpetrator because there could be a similarity of people's voice which could lead to a witness thinking it was a particular person when it was not. It is also not uncommon for some people to have the gift of mimicking other people's voice or changing their voices. It is therefore important that there be no confusion as to whom the voice belonged to before a court accepts identification of a person by a single witness on voice recognition only.

45. It is apparent from the facts of the first incident that the Appellant's conviction was hinged on the sole identification by PW 1. Notably, the Prosecution did not lead any evidence to demonstrate how PW 1 recognised the Appellant herein considering that it was dark. There was no evidence that there was sufficient light for PW 1 to have identified the Appellant herein. There was also nothing to suggest that in addition to being neighbours, she was familiar with his voice. This court therefore took the view that recognition of the Appellant by PW 1 based on voice recognition was risky.

46. Assuming that this court was wrong on its determination of recognition, it found PW 1's evidence to have been inconsistent. In the absence of proof of adequate lighting conditions on the road, it was not clear to this court how she could state with certainty that the jeans the Appellant was wearing in court were the same jeans he was wearing during the first incident.

47. Further, this court found her evidence to have been contradictory. Her testimony in court and what she wrote in her Statement at the Police Station were at complete variance. In court, she stated that the Appellant raped her along the road near PW 2's house. In the Statement that she wrote at the Police Station, she said that the Appellant was standing behind PW 2's house when he grabbed and took her to a deep ditch.

48. It was expected that the evidence that she recorded closer to the date of the incident would have been more accurate. In view of the fact that it was a traumatic incident and the fact that she was aged ten (10) years, it was not expected that the testimony in court would have been diametrically different from what she wrote at the Police Station.

49. Taking into consideration the distance between PW 2's house and where she stayed and was a neighbour to the Appellant, it was not clear to this court how the Appellant knew that he was at PW 2's house on that material night to await her outside PW 2's house and rape her. No evidence was placed before the court to show that the Appellant followed PW 1 to PW 2's house, waited for her till 9.00pm, waylaid and raped her. Notably, PW 2 testified that she did not know the Appellant and only knew him after the incident.

50. If indeed he was staying at Mowlem at this material time, it was an issue that ought to have been espoused to the court for it to understand how he came to wait for PW 1 when at the time they were not neigbours as she was at all material times staying at Milimani. If at the material time he was staying at Nyalenda and she at Milimani, it would have assisted this court to have understood how the Appellant knew PW 2's house so as to waylay PW 1.

51. Going further, this court noted that during trial, PW 1 testified that she did not know "what" the Appellant raped her with. In the Statement that she wrote at the Police Station, she stated that he penetrated his penis into her vagina. This court formed the opinion that PW 1 was inconsistent and may have not been truthful regarding this incident.

52. Turning to the second incident which was the same month of January 2019, this court also found her to have been inconsistent and contradictory. She told the Trial Court that she was with two (2) of her friends, L and G watching TV at the Appellant's house. She said that the Appellant sent Gabby to buy airtime and after some time, L left for her house leaving her and the Appellant in his house. Her testimony was that he then defiled her before G came back and that he also threatened that he would kill her if she told anyone about the incident.

53. It was not lost to this court that in her testimony, PW 1 referred to G and L as her aunt's children. In the Statement that she wrote at the Police Staton, she said that G and L were her friends. A description of Aunt's children and friends were totally different.

54. Notably, the Prosecution did not seek to demonstrate how PW 1 found herself in the Appellant's house considering that he was a person who had threatened to kill her during the alleged first incident. Indeed, the circumstances under which PW1 came to be at the Appellant's or the Appellant at PW2's house were thus not explained and interrogated by the Prosecution.

55. Whilst the court noted the case of *Bernard Kebiba v Republic* [2000] eKLR that was relied upon by the Respondent to justify why the Trial Court relied on the evidence of PW 1 as a single witness, this court came to the firm conclusion that the circumstances herein did not support the reliance on the sole evidence of PW 1 to convict the Appellant herein.

56. The proviso to Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) states as follows:-

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.

57. In the case of *Ndungu Kimanyi v Republic* 1980 KLR 282, it was held that it was unsafe to accept evidence of a witness who created an impression that he was not a straight forward person.

58. There were gaps in the Prosecution's case. The inconsistencies and contradictions led this court to treat PW 1's evidence with a lot of caution. This was not a case that this court could rely on the aforesaid proviso to convict the Appellant herein.

59. Ordinarily, if any one ingredient has not been proven, then the court must give the benefit of doubt to the alleged perpetrator. Having said so, an appellate court could also misdirect itself on the law. It was for that reason that it found it prudent to interrogate the third ingredient to establish if the Prosecution proved the offence of defilement against the Appellant herein beyond reasonable doubt.

C. Penetration

60. The Appellant submitted that the Prosecution did not prove its case beyond reasonable doubt. He pointed out that the PRC Form did not indicate if PW 1's hymen was freshly broken, whether a test was done to establish if there was presence of spermatozoa or to link him to the offence. He asserted that the findings were that the outer genitalia was normal, there was whitish discharge in the vagina, hymen was absent anus and other orifices were intact. He added that the Prosecution did not adduce in evidence the P3 Form.

61. On its part, the Respondent submitted that Esther Pendo Mambo (hereinafter referred to as "PW 3"") tendered in evidence the PRC Form that indicated that there was penetration of PW 1's vagina as the hymen was absent and there was a whitish discharge. It averred that the PRC Form was sufficient evidence despite the Prosecution not having produced the P3 Form.

62. According to PW 3, the history said that there had been penetration and absence of hymen. The epithelial cells and pus indicated that there was an infection. She confirmed that the Appellant was taken to hospital. There was nothing to suggest that he was examined so as to link him to the whitish discharge that PW 1 had if the same was an infection. There was also nothing to prove that the Appellant was responsible for the penetration and breaking of the hymen.

63. The standard of proof in criminal cases is proof beyond reasonable doubt. The burden and incidence of proof lay with the Prosecution as provided in Sections 107 and 108 of the *Evidence Act*. The onus was on the Prosecution to have proven that the Appellant was responsible for having broken PW 1's hymen. It was not for him to have proven that he did not do so.

64. It is also important to point out that the Prosecution was under a duty to disprove the Appellant's alibi. As was held in the case of *Benson Mugo Mwangi v Republic* [2010] eKLR, once an accused person raises an alibi, it is the duty of the prosecution to disprove it.

65. Karanjah J interrogated this issue in the case of *Republic v Peter Aguko Okumu & 3 others* [2019] eKLR where he cited the case of *Said v Republic* (1963) EA 6. He held that an alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. He also had due regard to the case of *Kiarie*

v Republic [1984] e KLR where a similar conclusion was arrived at. This very court also made a similar determination in the case of *David Otieno Olum v Republic* [2022] eKLR.

66. The lack of scientific proof to connect him to the offence of defilement and the gaps, inconsistencies and contradictions in PW1's evidence led this court to entertain doubts in its mind. In such a case, it would be best to give the benefit of doubt to an accused person or appellant. It would be better to acquit a guilty person than to convict an innocent. This court thus came to the firm conclusion that the Prosecution did not dislodge the Appellant's alibi and thus did not prove its case beyond reasonable doubt.

67. In the premises foregoing, it found and held that there was merit in the Grounds of Appeal Nos (3), (4), (5), (6), (7), (8), (9), (10), (11) and (12) and the same be and are hereby allowed.

IV. Sentence

68. Ground of Appeal No (13) was dealt with under this head. As the court had already found that there was merit in the Grounds of Appeal Nos (3), (4), (5), (6), (7), (8), (9), (10), (11) and (12), it did not also find it necessary to address itself to Ground of Appeal No (13) regarding the legality or otherwise of the sentence that was meted upon the Appellant herein. Suffice it to state that if the Prosecution had proved its case to the required standard, the sentence that the Trial Court meted out on him would have been justified.

Disposition

69. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 17th March 2022 be and is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate be and is hereby set aside and the conviction and sentence be and are hereby set aside and/or vacated as it was unsafe.

70. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

71. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JANUARY, 2023.

J. KAMAU

JUDGE