Ogal v Republic (Criminal Appeal E037 of 2022)
[2023] KEHC 19147 (KLR) (26 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E037 OF 2022

MS SHARIFF, J

JUNE 26, 2023

BETWEEN

ELI ONYANGO OGAL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon F. Rashid (P.M) in original Winam PMC Sexual Offence Case No. 9 of 2018 delivered on 5/08/2022)

JUDGMENT

1. Eli Onyango Ogal was charged with the offence of defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*, 2006. The particulars were that on January 19, 2018 in Kisumu East Sub County, within Kisumu county, intentionally caused his penis to penetrate the vagina of LAO, a child aged 7 years.

2. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Act*. Upon plea, the appellant denied both charges.

3. PW-1 the minor (LAO) stated that one Friday while home with her younger brother, the appellant came to her home to charge his laptop. He gave them Kshs 5/- to buy a balloon and when they came back, the appellant sent away her younger brother and defiled her in his bed. She didn't inform her mother immediately of the incident until she experienced some pain. She was taken to the hospital for examination.

4. PW-2, SMO stated that her daughter PW-1 came home on February 12, 2018 from school complaining of pains in the private parts. She checked and saw some pus on the minor's vagina. She interrogated the minor who said she had been defiled by the neighbour after buying them sweets. She took the minor to the hospital that very evening.

5. PW-3, Winfred Awuor Sibuor from Jaramogi Oginga Odinga Hospital testified that the minor was examined on February 16, 2018 and found the outer genitalia normal, broken hymen and pus on the vagina. She concluded there had been penetration.

6. PW-4 PC Veronica Kanila stated the complaint was reported at the police station on February 16, 2018. They recorded the statements and issued P3 on February 17, 2018 and arrested the appellant.

7. The appellant was subsequently put on his defence and elected to give sworn testimony.

8. His testimony was that he left for work on January 19, 2018 at 7.45 am and was picked by DW- 2, a motorcycle operator. He spent the entire day in the office leaving at 5.00pm arriving home at 5.30 pm. He denied seeing the minor on that day.

9. DW-2 Peter Ogwel Orwa stated that on the material day, he picked DW-1 from his house at 7.45 am and at 4.5o pm, he picked him from the office.

10. Subsequently, the trial magistrate convicted and sentenced the appellant to 25 years imprisonment provoking the instant appeal which is anchored on the following grounds;

    a. The learned trial magistrate erred both in law and fact in shifting the burden of proof to the appellant's prejudice.

    b. The learned trial magistrate erred in lowering the standard of proof to the appellant's prejudice.

    c. The learned trial magistrate erred in misapprehending the law relating to the defence of alibi by shifting the burden of proof to the appellant.

    d. The learned trial magistrate erred in failing to appreciate the evidence on record which was favourable to the appellant and putting unjustified capital on a weak prosecution case.

    e. The medical evidence both in documents and testimony by witnesses was contradictory and insufficient to form the basis of a sound conviction.

    f. The learned trial magistrate erred in appreciating the law on production of secondary evidence.

    g. The learned trial magistrate erred in failing to find that the prosecution's case was riddled with inconsistencies, contradictions and gaps that would create a doubt in any tribunal properly addressing its mind on the facts.

    h. The learned trial magistrate erred by failing to properly apply and comply with the mandatory provisions of Section 200 of the Criminal Procedure Code.

        i. The judgement of the trial court is against the weight of the evidence on record.

    j. The sentence imposed upon the appellant is manifestly harsh and excessive in the circumstances of the case.

11. In the submissions filed the appellant contends that the provisions of Section 200 of the *Criminal Procedure Code* was not complied with upon a new magistrate taking over the matter. He also contends that the language used in the trial is not indicated. That this is a violation of Article 50(2)(m) of *the*

Constitution. Counsel relies on the authorities in *Diba Wako Kiyato v Republic* (1982-1988) 1 KAR 1974.

12. Further that Section 89(3) of the *CPC* requires a charge sheet to be signed by the magistrate which was not done in the instant case. counsel relies on *Ndegwa v R* (1985) KLR 535, *Anthony Otieno Ndonji v Republic* [2019] eKLR, *Richard Charo Mole v Republic* [2010] eKLR and *Henry Kailutha Narichia & another v Republic* [2015] eKLR.

13. Counsel also contends that the P3 was not produced in the trial but marked for identification and cannot therefore be relied upon. Reliance is placed on *Justus Musau Wambua & another v Repubic* [2020] eKLR.

14. On the issue of the burden of proof, it is submitted that the same is on the respondent and the issue of penetration was not proved by the available evidence. Counsel cites *Woolmington v DPP*[1932] AC 462, *Festus Mukati Murwa v R* [2013] eKLR, *Miller v Minister of Pensions* [1947] 2 ALLER 372.

15. On penetration, it is submitted that the available evidence did not show that there was penetration of the minor's vagina. Reliance is placed on *PKW v Republic* [2012] eKLR and *Michael Mugo Musyoka v Republic* [2015] eKLR.

16. On the reliability of witnesses, it is contended PW-1's evidence is doubtful as she did not report the fact of defilement to her mother or teacher, pW_2 on her part noticed nothing amiss with the minor's genitals despite bathing her that very evening. That similarly, PW-3's medical evidence did not show that there was penetration and that the testimony of this witness is doubtful. Reliance has been placed on *Ndungu v Kimanyi v Republic* [1980] KLR 282, *Paul Gitari v Republic* [2016] eKLR, *John Mutua Munyoki v Republic* [2017] eKLR and *Paul Kanja Gitari v Republic* [2016] eKLR.

17. Finally, on the issue of the defence of alibi, it is submitted that the defence was not dislodged and that the court erred by shifting the burden of proof to the appellant. The authorities in *Kiarie v Republic* [1984] KLR, *Victor Mwendwa Mulinge v R* [2014] eKLR and *S v Malefo En Andere* 1998 (1) SACR 127 (W) at 158.

18. The respondent its part submitted that the prosecution sufficiently proved the offence of defilement and that there was no contradiction in the witness testimony as none was highlighted by the appellant.

Analysis and determination.

19. In *Okeno v Republic* [1972] EA 32 at 36, the duty of a fisrt appellate court was stated thus:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M Ruwala v R, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] EA 424."

20. In a charge of defilement, the prosecution is required to establish; complainant's age, the fact of penetration and positive identity of the assailant.

21. Before delving into the specific ingredients, I will deal with the preliminary issues raised by the appellant thus; failure to comply with Section 200 of the *Criminal Procedure Code* and the language used in the trial.

22. On the issue of section 200 of the *CPC*, Sub-Section (3) thereof provides;

> " 200.
>
> (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -
>
> (a) .....; or
>
> (b) .....
>
> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right"

23. This provision has been interpreted in several decisions of this court some of which I highlight as follows; in *Ndegwa v Republic* [1985] KLR at 534 the Court of Appeal stated:-

> " Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

24. In *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR it was held;

> In Ndegwa v R (Supra) it was held that Section 200 (3) CPC should sparingly be applied. The application of Section 200 (3) CPC in my view is commonly abused especially where the application is made with a view to defeat the ends of justices and specially where the accused knows the witnesses cannot be traced or are dead or the complainant cannot be traced or cannot get the witnesses without enormous expense or the application is made to cause witness have no faith with the court system and fail to turn up or where the case has been pending for long period without being determined, such applications for witnesses to be recalled in my view should not be granted specially where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time. This is because granting such an application, court may be acting contrary to Articles 47, 50 (2) (e) and 159 (2) (d) of *the Constitution* which demands that justice shall not be delayed, and trial should be concluded without unreasonable delay and lastly everyone has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

25. Looking at the record in this matter, Hon Rashid FM took over the conduct of the matter from Hon Njalale who was on transfer. Subsequent proceedings that show that on March 14, 2019, the matter came up for mention to confirm the progress of typing the proceedings. On March 28, 2019, the matter came up again in the presence of defence counsel. On that date, a hearing date was fixed.

26. My perusal of the record shows that counsel did not raise the issue of failure to comply with Section 200 of the *CPC*. I find that if counsel deemed the directions taken on February 13, 2019 was unfavourable to the appellant, an application to that court would suffice. In this case, the matter has been raised on appeal and not in the trial court.

27. In the circumstances, I find that the directions given on the said February 13, 2019 were not a violation of the appellant's right to fair trial. I thus reject this line of argument.

28. On the issue of language, I note that the appellant was represented all through the trial. The issue of the language used in the proceedings is not material at this moment.

29. Going back to the ingredients of the offence, on the element of age, I note that a birth certificate was produced without objection from the defence in the trial court. I find this limb was proved.

30. The other element is penetration which is defined by section 2 of the Act as; the partial or complete insertion of the genital organs of a person into the genital organs of another person.

31. In this case, the minor testified that; he told me to lie on his bed, he removed his dudu and inserted it in my dudu. He uses his dudu to urinate and use mine to urinate too.

32. According to PW-3, a clinical officer who examined the minor, she found that the hymen was broken and the vagina pus-filled. She concluded that the minor had been defiled as it was not normal for a vagina to have pus.

33. The language used by the minor, that is; 'dudu' to connote sexual activity was discussed in *Muganga Chilejo Saha v Republic* [2017] eKLR and held;

> Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a court room. If the trend in the decided cases is anything to go by, courts in this country have generally accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE V R, Kapenguria HC Cr Case No 11 of 2016), "he pricked me with a thorn from the front part of this body.", (Samuel Mwangi Kinyati v R, Nanyuki HC CR A No 48 of 2015), "he used his thing for peeing", (David Otieno Alex v R, Homa Bay HC Cr Ap No 44 of 2015), "he inserted his "dudu" into my "mapaja", (Joses Kaburu v R, Meru HC Cr Case No 196 of 2016), "he used his munyunyu", (Thomas Alugha Ndegwa, Nbi HC Cr Appeal No 116 of 2011), as apt description of acts of defilement. We, however, need to remind trial courts that the use of certain words and phrases like "he defiled me", which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See A M V R Voi HC Cr App No 35 of 2014, EMM V R Mombasa HC Cr. Case No 110 of 2015, among several others. Trial courts should record as nearly as possible what the child says happened to him or her.

34. It is also trite law that penetration can be proved by way of the victim's evidence and or medical evidence which clearly showed that the minor had injuries on her genitalia.

35. On the appellant's identity, the record shows that the appellant was a neighbour to the minor and that the appellant would occasionally charge his laptop from the minor's home. The minor's mother indeed confirmed that the minor enjoyed a cordial relationship with the appellant. During the trial, the minor identified him from the dock as Elly.

36. I find the element of identification by way of recognition to have been proved satisfactorily.

37. The appellant also faults the trial court for rejecting his defence of alibi and shifting the burden of proof to him. The defence was to the effect that the appellant was at work on the date of the offence and left work at 5.30 p.m carried by DW-2 on his motorcycle.

38. To that extent, he produced an attendance register showing that he reported to work at 7.45 am.

39. My analysis of the same shows only the reporting time. According to the evidence tendered by the prosecution, the offence occurred after the minor had come back from school which must be in the evening.

40. When an accused, in this case the appellant raises a defence of alibi, the evidence of such defence has to be weighed against all the other evidence presented by the prosecution. In *Abdullah Bin Wendo v Rex* 20 EACA 166, it was stated:

> Subject to certain well-known exceptions it is trite law that a fact may be proved by a testimony of a single witness but this 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. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

41. In this case, the time of the offence was after the minor had returned back home from the school, the exact hour is not indicated. The trial magistrate having considered the same found it not to have been sufficient to displace the prosecution's evidence.

42. I equally find that in light of the evidence tendered by the prosecution in the trial court, the defence was not proved to the required standard and I reject it.

43. On the issue of sentence, Section 8(2) provides for a life sentence, the appellant herein was sentenced to 25 years imprisonment. I find this to be lenient in the circumstances. The appellant has not shown that the trial magistrate in handing down the sentence considered irrelevant factors or failed to take into account material factors before handing down the sentence.

44. It was stated in *Ahamad Abolfathi Mohammed & another v Republic* [2018] e KLR that;

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive."

45. Premised upon the above reasons, I do find that the appeal is without merit and I proceed to dismiss it.

46. The conviction and sentence are hereby confirmed.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 26TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF

JUDGE