Oketch v Republic (Criminal Appeal E124 of 2022)
[2023] KEHC 21980 (KLR) (23 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E124 OF 2022

RPV WENDOH, J

AUGUST 23, 2023

BETWEEN

AOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon S. N. Mutava – Principal Magistrate in Rongo Principal Magistrate's Criminal Case No. E006 OF 2022 delivered on 8/11/2022)

JUDGMENT

1. Albert Okeyo Oketch was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* by Resident Magistrate Rongo Court on 8/11/2023.

2. In the alternative, he had been charged with the offence of commiting an indecent Act contrary to Section 11 (1) of the *Sexual Offence Act*.

3. The particulars of the charge are that on 3/2/2022 in Rongo Sub County, unlawful and intentionally caused his penis to penetrate the vagina of KSO a child aged seven (7) years.

4. The prosecution called a total of six (6) witnesses in support of their case while Accused gave unsworn evidence. Upon conviction he was sentenced to forty-five (45) years imprisonment.

5. The appellant is dissatisfied with the whole judgment of the trial court. He preferred this appeal based on grounds which can be summarised as follows:-

    1. That the offence of defilement was not proved to the required standard;

    2. That exhibits were irregularly produced;

3. That the court failed to consider the long lasting land disputes between the complainant and accused and the various cases in court;

4. That the evidence adduced did not support the charge;

5. That the sentence was harsh and excessive.

The appellant prays that the appeal be allowed.

6. Though the court directed that the appeal be canvassed by way of written submissions, only the Respondent filed their submissions.

7. The appeal was opposed. It was submitted that the complainant who was aged six (6) years identified the appellant as an uncle. The birth certificate was produced in evidence. As for penetration, that the appellant clearly stated what the appellant did to her in the plantation where he took her after he met her going to school; that the clinical officer (PW1) confirmed that the hymen was broken, with tears on the labia majora and blood stains on the vaginal wall; that the P3 form was regularly produced in evidence because (PW4's) colleague was on annual leave. Counsel submitted that the offence was proved.

8. As to the sentence; the mandatory sentence prescribed in law is life imprisonment and hence the sentence meted is not excessive but lenient. Counsel urged the court to dismiss the appeal in its entirety.

9. This is a first appeal and it is the duty of this court to re-examine all the evidence on record, evaluate and analyse it and come up with its own conclusions. The court is guided by the decision of Okeno vs. Republic(1972) EA 32.

10. The prosecution called six (6) witnesses, PW1 KSO, a minor, the complainant; PW2 BAO an aunt to the complainant, PW3 EA the grandmother of the complainant; PW4 Lilian Nyaboke the clinical officer who examined the complainant; PW5 JA, the complainant's mother. PW6 Rosalia Chepchirchir the investigating officer in the matter. DW1 is the accused who gave unsworn evidence.

11. After the court conducted a voire dire examination on PW1, it found that she did not understand the meaning of the oath. PW1 identified the appellant as her uncle. She recalled that on 3/2/2022, when going to school about 7:00a.m, the appellant found her on the road, closed her eyes, took her in the plantation, removed her clothes her uniform;,panty and made her lie on the ground; that he removed his trouser and a small short; that he removed his 'dudu' for urinating slept on her and put the 'dudu' in her 'dudu' for urinating (pointing at her private parts). She felt pain and bled. He threatened to cut her with a panga if she told anyone. She went to school and did not tell anyone even her mother when she returned home in the evening. She however told her sister (B); that her mother noted that she was walking badly and sought to know what had happened. The sister took her to hospital and she told the Doctor what happened and she was injected.

12. PW2 recalled 3/2/2022. She was away and arrived home on Sunday. PW2's mother noticed that the complainant was walking strangely and when asked, PW1 said she was accidentally hit with a stone. PW2 examined PW1 and noticed bruises on her private parts where there was pus and bleeding. PW2 told their parents and they took complainant to hospital and later to the police station,

13. PW3 identified Accused as her fathers brother and that the complainants' mother is her sister; that the accused did not live with the mother but with the grandmother. She denied having any dispute with anyone.

14. PW3 grandmother to complainant recalled 3/3/2022, she saw the complainant come from school while walking in a funny manner and told PW1 that a child hit her with a stone on the waist. She could

not eat and claimed to be in pain. Next day, PW3 informed PW2 about what she had observed. PW2 examined PW1 and informed her what happened and she was taken to hospital later reported to the police station. PW3 told court that she lives with the complainant while her mother lives in Kisumu.

15. PW4, told the court that on 6/2/2022, she examined the complainant who had a history of defilement; the hymen was broken and there were tears to the labia and majora; blood stains to the vaginal walls and bruises with vaginal discharge Genitalia was tender on touch. PW4 said the injuries were about four (4) days.

16. PW5, complainants' mother told the court that the complainant was living with her mother PW3. She produced the complainant's birth certificate indicating that complainant was born on 7/4/2014.

17. PW6 was assigned the case to investigate. PW6 interrogated witnesses; the minor, the grandmother and required statements.

18. In his unsworn defence, the appellant denied knowledge of the offence. He stated that after his father died in 2014, a land dispute arose and was settled in court on 27/1/2022; that an issue arose again on 27/1/2022, that JO and daughter went to his home; they asked what he was doing there, that Ouma had a hammer and metal, the son had a panga and daughter had a stone. He ran away and Ouma went to report at police station. Assistant Chief called them on 31/1/2022 and Ouma's wife said she would file another case. He was called to school where PW3 alleged that he defiled the complainant. He said that Ouma had threatened to kill him.

19. DW2 MAO told the court that JO, AOO, MO and J have cases before the court; that the appellant did not rape the child but that O wants to sell the land; that when called by the Chief, Ouma did not attend instead filed a rape case.

20. DW3 MO, is a brother to appellant. He said he ha s a case before court for malicious damage and that JO has an assault case; that the cases they have are all land issues and that they want the appellant jailed.

21. I have duly considered the grounds of appeal, the evidence before the court and submissions. There is no doubt that the parties herein are family. PW1, the complainant knew the appellant before as an Uncle. From the defence, the appellant is a brother to complainants' father, Ouma. According to the defence they are pending cases between them. The defence alleges a frame up.

22. The court has considered all the evidence, the grounds of appeal and submissions. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*.

23. The prosecution has the duty to prove beyond reasonable doubt whether:-

    1. The complainant was a minor;

    2. Penetration occurred;

    3. Proof of positive identity of the perpetrator.

The complainant's age

24. The complainant underwent a voire dire examination by the court and the court found that she was fit to give unsworn evidence and was cross examined by the defence counsel. She told the court that she is six (6) years old. PW5, JA, the mother of the complainant stated that the complainant was born on 2014 and had the birth certificate to that effect (PEXNO 1). It is now settled law that age of a minor in

a defilement case may be proved by birth certificate expert evidence or evidence of a parent or guardian. In *Mwalango Chichoro Mwanjembe vs. Republic* (2016) EKLR the court held:-

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

See also the case of *Fappyton Mutuku Ngui vs. Republic* (2014) EKLR the court of Appeal held:-

> " ..... that 'conclusive' proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

In *Francis Omuroni vs. Uganda* Criminal Appeal 2/2000 the court was of the same view as above.

25. In this case, the age of the complainant was proved. The complainant was born on 7/11/2014 and therefore on 3/2/2022 when the offence allegedly occurred, she was about to turn eight (8) years old and hence a minor.

Proof of penetration

26. The complainant narrated clearly what was done to her once she was taken into the plantation; that the appellant inserted his 'dudu' for urinating into hers. Children will ordinarily refer to their genital organs as 'dudu'. PW1 did not reveal what had happened to her until her grandmother (PW3) noticed how she was walking with difficulty and asked PW2 to interrogate PW1 and informed her. PW1's testimony was corroborated by the findings of PW4, the clinical officer who examined the complainant about three (3) days later on 6/2/2023 and found the hymen broken, tears to the labia and majora, vaginal walls had bruises and had a bloody vaginal discharge; the vagina was tender to the touch. PW4 said that the treatment notes which he produced in court also tallied with his findings. The testimony of PW4 was not controverted in any way. The court finds the testimonies of PW1 and PW4 to be creditworthy and believable. There was overwhelming evidence that PW1 was defiled.

Identity of the perpetrator:

27. There is no doubt that the complainant, the prosecution witnesses PW2, 3 and 5, the appellant and defence witnesses are all related. It is clear that there is bad blood between the parties, over land. During cross examination of the prosecution witnesses, the said alleged dispute did not feature as the source of this case. The complainant who is a child of about 8 years, was very clear on her narration and was her evidence shaken by the defence. It is her uncle whom she met and who took her into the plantation, defiled and threatened to kill her if she revealed and she did just that, being a child.

28. The fact that there may have been a land dispute could also be the reason for the attack on the child (PW1). I am satisfied as was the trial court, that the appellant was properly identified as the perpetrator. The conviction is sound and I affirm it.

Whether exhibits were properly produced:

29. The appellant submitted that production of the P3 form was irregular in relation to the appellant as it was not produced by the maker. The same was produced by PW4 who was a colleague of the maker at work.

30. The appellant was represented by counsel and he never objected to its production. Besides under Section 77 of the *Evidence Act*, a document may be produced by another professional who knows the maker, or has worked with the maker, if the maker cannot be availed without unreasonable delay. That ground lacks merit.

Whether the sentence was excessive.

31. The appellant was sentenced to serve forty (45) years imprisonment. Under Section 8 (2) *Sexual Offences Act*, the prescribed sentence is life imprisonment. The court did not give the mandatory sentence but forty-five (45) years. The court of appeal recently declared as unconstitutional the life sentence meted under Section 8 (2) and instead urged that the court should exercise its discretion in sentencing. The trial court already did that. The complainant was a child of tender age. She must have suffered a lot of pain and trauma and the court was correct in sentencing him to forty five (45) years which is a deterrent sentence. In my view however, the sentence is on the higher side and like a life sentence. In the same vein, I hereby exercise my discretion, set aside the forty-five (45) years imprisonment and substitute the sentence with thirty five (35) years imprisonment and the sentence will start running from the date of sentence on 8/11/2022. The appeal succeeds to the extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 23RD DAY OF AUGUST, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Appellant Present

Emma / Phelix –Court Assistant