**Ojwang v Republic (Criminal Appeal E155 of 2022)**
**[2023] KEHC 21680 (KLR) (Crim) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21680 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E155 OF 2022**

**LN MUTENDE, J**

**AUGUST 10, 2023**

**BETWEEN**

**TIMOTHY CLINTON OJWANG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 105 of 2021 at the Chief Magistrate's Court Kibera, by Hon. P. Mutua – SPM on 25th August 2022)***

## JUDGMENT

1. Timothy Clinton Ojwang was arraigned before court following allegations of having committed the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 (SOA). Particulars of the offence being that on 30th day of September, 2021 in Langata Sub County within Nairobi County intentionally and unlawfully caused his male genital organ (penis) to penetrate into the anus of ICO a boy child aged 12 years.

2. In the alternative he faced the charge of committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars of the offence were that on 30th day of September, 2021, in Langata Sub County within Nairobi County he intentionally touched the buttocks and anus of ICO a boy child aged 12 years.

3. Upon being taken through full trial he was convicted for the alternative charge of committing an Indecent Act and sentenced to serve ten (10) years imprisonment.

4. Aggrieved by the conviction and subsequent sentence he appeals on grounds, as amended, that the trial court failed to observe that he was not properly identified as the perpetrator of the offence; voire dire

was not taken lawfully as required by section 19 of the *Oaths and Statutory Declarations Act*; and, that essential prosecution witnesses were not availed to prove basic facts in the case.

5. Briefly, facts of the case were that on the 30th September, 2021 the complainant, ICO; was asked by the perpetrator of the act to pay him a visit. Pursuant to the request he went at 1:00 pm and found the culprit alone in the house. They engaged in a conversation and in the process, he asked him to remove clothes. The assailant proceeded to remove the complainant's clothes, the white trouser and T-shirt that he had, then he inserted his penis into his anus.

6. In the meantime, PW2 DMK, got information about an individual who lived on their plot that was molesting children. He went to their house to find out whether his nephew was at home but did not find him as he had gone to the toilet per the information that he got. However, he proceeded to the house of the appellant and upon knocking the door the appellant took time prior to opening. When he ultimately opened, his trouser was unzipped. He asked him for Kshs. 20/- but he locked the door. He decided to stay on and he heard a child talking. He decided to call other people. They knocked the door but the appellant declined to open hence they decided to break the door. They found the complainant with the trouser lowered to the knees. People assaulted the appellant as a result.

7. PW3 JAN, found the child inside the house of the appellant per her testimony. He was arrested and taken to Langata Police Station. The complainant was taken to hospital for examination and treatment, while PW5 No. 101208 P.C Jessy Pato took up investigations of the matter. Consequently, the appellant was charged.

8. Upon being placed on his defence the appellant explained that PW3 the complainant's mother a member of Sex Workers Sacco (Mama Sacco Sex Workers) requested him to engage in a sexual activity with her but he declined. That on the 20th September, 2021 she encountered her and she hurled insults at him. Regarding 30th September, 2021, he stated that he was inside his house at 6:30 pm when he heard a knock on the door. He opened only to find PW3 and three men who identified themselves as police officers. They arrested and took him to Highrise Police Station where he was placed in cells. The officer on duty later called him and said PW3 wanted to be paid Kshs. 70,000, but, he declined to give the money. That PW3 had previously lied, as she had a similar case where the suspect was made to pay Kshs. 20,000 by a village elder.

9. The appellant concluded his testimony by pointing out that the charges as drawn were defective; there was no indication of what was used to touch the anus and buttocks. He also faulted the court for not finding that the date indicated as for his arrest was not correct.

10. The appeal was disposed through written submissions. It is urged by the appellant that the charges were trumped up because of the information allegedly received and the action taken by PW2 of not going to the toilet where the child was alleged to having gone when PW2 asked for him. That the person who allegedly said the appellant was sodomizing children was not called to testify. Reliance was placed on the case of Elizabeth Waithiegeni Gatimu Vs. Republic (2015)eklr where the court held that:

> " The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

11. And, Bukenya & others Vs. Uganda (1972) EA549

> " It was a duty upon the director to make or call upon witnesses necessary to establish the truth."

12. That the court failed to carry out voire dire examination yet the complainant was twelve (12) years old. In this respect reliance was placed on the case of Nyasani Vs. Regina (1958) EA 190 where the court held that:

> " It is clearly the duty of the court under that section to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child
>
> "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."
>
> This is a condition precedent to the proper reception of unsworn evidence from a child, and it should appear upon the face of the record that there was due compliance with the section."

13. And, the case of Johnson Muiruri Vs. Republic (2013) eKLR where the Court of Appeal stated that:

> " We once again with to draw attention of our courts as to the proper procedure to be followed when children are tendered as witnesses. In Peter Kariga Kiune, Criminal Appeal No 77 of 1982(unreported) we said:
>
> > "Where in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination , whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if it is the opinion of the court he is possessed of sufficient intelligence and understands the duty of talking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (sec.19, *Oaths and Statutory Declarations Act*, cap 15. The *Evidence Act* (section 124, cap 80). It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions."

14. Through the learned Prosecution Counsel, Mr. A. A. Otieno, the State/Respondent opposed the appeal. It is submitted that the prosecution was required to prove the age of the victim and positive identification of the assailant. That the victim was a few days shy of 12 years. That evidence of PW1 was not shaken, evidence that was corroborated by that of PW2.

15. Further, that the trial magistrate complied with section 19 of the *Oaths and Statutory Declarations Act*; and, the sentence imposed was not hash.

16. This being a first appellate court it is duty bound to consider matters of fact and law as well (See section 347 (2) of the Criminal Procedure Code (CPC). It ought to look at evidence adduced afresh and reconsider it bearing in mind that it had no opportunity of seeing and hearing witnesses who testified so as to note their demeanor hence giving that allowance prior to reaching its conclusions. This was well captured in the case of Okeno Vs. Republic 1972 EA. 32 where the court stated that:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

17. On the main charge the Prosecution was required to prove the elements of the charge of defilement that are provided for Section 8 (1) of *Sexual Offences Act* that enacts thus:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

18. To prove the age of the victim the Prosecution produced in evidence a birth certificate which was uncontroverted evidence of IC having been born on the 10th October 2009. As at 30th September 2021, he was of an apparent age of twelve (12) years.(Also see the case of Francis Omuroni Vs. Uganda; Criminal Appeal No. 2 of 2000)

19. On the question of penetration, section 2 of the *Sexual Offences Act* defines penetration as:

> The partial or complete insertion of the genital organs of a person into the genital organs of another person;

20. The victim alluded to the assailant having penetrated his anus using his penis anatomy. Subsequently he was examined, but according to the Post Rape Care Form, the anus was normal. It had no laceration. The P3 (Medical Examination Report) filled also confirmed that there was no injury on the genitalia. This, in the opinion of the trial court, was proof that there was no penetration. The trial court which had the opportunity of seeing the demeanor of the victim reached a decision that cannot be faulted.

21. On the alternative count of committing an Indecent Act with a child. Section 2 of the *Sexual Offences Act* defines an Indecent Act as:

> a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;
>
> b. .....;

22. The particulars of the offence state that:

> " On 30th day of September, 2021 at Kibera in Langata Sub County within Nairobi County intentionally touched the buttocks and anus of ICO a boy child aged 12 years."

23. It was argued that the charge was defective. Section 134 of the Criminal Procedure Code provides that:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

24. In the case of Sigilai Vs. Republic (2004) 2KLR 480 it was held that

> " The principle of law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused person to prepare his defence."

25. The question to be posed is whether the defect alluded to is curable. Section 382 of the CPC provides thus:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

26. Looking at the particulars of the offence, there was an omission as to what was used to touch the buttocks and anus of I.C.O. Evidence adduced was at variance with what was stated in the charge. In the case of Isaac Omambia v Republic, [1995] eKLR

> " In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence."

27. The appellant herein was prejudiced as he did not know the part of the body that was alleged to have been used to touch the buttocks and anus of the victim, hence the defect is not curable.

28. On the question of voire dire examination having not been conducted; in the case of Kibageny Arap Korir vs Republic (1959)E.A 92, the court held that a child under fourteen (14) years is a child of tender years and that voire dire is necessary to establish child's competency in giving evidence before court.

29. By virtue of case law, the complainant herein was a child of tender years. The court is expected to interrogate whether such a child understands the nature of the oath and if he is seized of sufficient intellect to adduce evidence that is believable. To do this, the court conducts a voire dire examination. The record is clear. The trial court conducted a voire dire examination and opined that the witness was intelligent enough to testify and he understood the severity of oath.

30. On the issue of identification, according to the defence part up parties were known to each other hence the issue of questionable identification could not arise.

31. The only omission in this matter was the defect in the charge. It was prejudicial for the trial court to conclude that the accused must have used his penile shaft to touch the buttocks and anus of the complainant, something that was not mentioned.

32. It is apparent that the trial was vitiated as a result of an omission of the Prosecution and the court was also to blame for having accepted and acted on a defective charge. The question to be answered is therefore whether a retrial should be ordered.

33. In the case of Opicho Vs. Republic (2009) KLR 369 it was held that:

> " In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."

34. This is a case where the Prosecution will be given an opportunity of filling the lacuna that is apparent, if given a chance of prosecuting the case afresh. This indeed will be prejudicial to the appellant. The appellant has been incarcerated for two (2) years. The interest of justice would call for his release.

35. To that end, I find the appeal being meritorious, hence allowed. The conviction is quashed and sentence set aside. The appellant shall be released forthwith unless otherwise lawfully held.

36. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 10TH DAY OF AUGUST, 2023.**

**L. N. MUTENDE**

**JUDGE**

**In The Presence Of:**

Appellant – present virtually

Mr. Kiragu for the State/Respondent

Court Assistant - Mutai