Ombi v Republic (Criminal Appeal E056 of 2022) [2023] KEHC 22845 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E056 OF 2022

RE ABURILI, J

SEPTEMBER 26, 2023

BETWEEN

SAMWEL OUMA OMBI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the conviction and sentence by the Hon. F.M. Rashid on the 17.10.2022 in the Senior Principal Magistrate's Court at Winam in Sexual Offences Case No. E046 of 2022)

JUDGMENT

Introduction

1. Samwel Ouma Ombi, the appellant herein, appeals to this court against the conviction and sentence imposed on him for the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* of 2006. It was alleged that on diverse dates between March 1, 2022 and March 31, 2022 in Kisumu East sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of CAO., a child aged 13 years.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

3. The prosecution called 4 witnesses in an effort to prove their case beyond reasonable doubt and at the conclusion of the trial, the appellant was found guilty and sentenced to serve 15 years' imprisonment.

4. Aggrieved by the conviction and sentence, the appellant filed the instant appeal *vide* a Petition of Appeal dated October 27, 2022 and filed in court on the November 7, 2022. The appellant raised the following grounds of appeal:

    i. That the appellant pleaded not guilty to the impending charges.

ii. That the trial court erred in both law and facts by convicting and sentencing the appellant on a case marred with lots of inconsistencies, contradictions and gaps hence could not warrant a conviction.

iii. That the trial court erred in both law and facts by convicting the appellant on a case poorly investigated hence not proved beyond reasonable doubt.

iv. That the medical evidence tendered before the court of law was insufficient and inconclusive and as such could not be relied on for safe conviction.

v. That since I cannot recall all that transpired during the trial process, I request this Hon. Court to furnish me with certified trial records to allow me adduce more reasonable grounds of appeal.

vi. That may this Hon. Court treat the appellant as a pauper, hence invoke section 113 of the *Appellate Jurisdiction Act* due to my financial status.

5. The appellant further filed supplementary grounds of appeal dated May 18, 2023 and filed the same in court on the June 6, 2023 in which he raised the following supplementary grounds;

i. That the trial court erred in law and in fact in convicting the appellant without conclusive evidence of identification.

ii. That the trial court erred in law and in fact in proving penetration basing on flawed evidence of pregnancy and long standing hymen.

iii. That the trial court did not warn itself of the dangers of relying on the evidence of a single witness and be satisfied that she was telling the truth uncorroborated and without recording its reason.

iv. That mandatory nature of sentence under section 8 (1) as read with 8 (3) of the *Sexual Offences Act* No. 3 of 2006 is unconstitutional and not warranted on plea so expressly provided by the law any sentence under it can be reduced to a shorter term pursuant to section 26 (2) of the *Penal Code*, article 50 (2) (p) and 24 (e) *C.O.K* 2010.

6. The parties filed submissions to dispose of the appeal.

The Appellant's Submissions

7. The appellant submitted that he was convicted on inconclusive evidence of identification. The appellant submitted that the presence of co-existing circumstances of another man inside the same house destroyed the inference of his guilt and further that his failure to cross-examine PW1 did not shift the burden of proof from the prosecution to himself.

8. The appellant further submitted that his guilt could not suffice based merely on circumstantial evidence of pregnancy and broken hymen without DNA forensic evidence. Reliance was placed on the case of *PON v Republic* [2019] eKLR where the Court held that to base a conviction on circumstantial evidence required that guilt of the suspect should be drawn from the circumstances.

9. It was submitted that the trial court erred in proving penetration based on the evidence of pregnancy and long standing broken hymen. He relied on the case of *Mwangi v Republic* [1984] KLR 595 where the Court held that the presence of spermatozoa alone in a woman's vagina was not conclusive proof that she had sexual intercourse. The appellant submitted that the broken hymen was also not conclusive proof of penetration and thus penetration was not proven beyond reasonable doubt.

10. It was submitted that the trial court did not warn itself of the dangers of relying on the evidence of a single eye witness and was further not satisfied that the complainant was telling the truth nor her evidence corroborated.

11. The appellant submitted that the mandatory nature of the sentence under section 8 (1) (3) was unconstitutional and not warranted and could be reduced to a shorter term pursuant to section 26 (2) of the *Penal Code* and articles 50 (2) (p) and 24 (e) of the *Constitution*.

The Respondent's Submission

12. The respondent submitted that the prosecution proved the case against the appellant beyond reasonable doubt and that there were no inconsistencies in the prosecution's case.

13. On the complainant's age, the respondent submitted that it was proved that her age was 13 years old through the Birth Certificate that showed that the complainant was born on the 24.6.2008 as well as the corroborative evidence of PW3, the complainant's father.

14. Regarding penetration, it was submitted that the same was proven by medical evidence that corroborated the complainant's testimony.

15. As to whether the perpetrator was identified, the respondent submitted that the appellant was positively identified by PW2, the victim's father who used to live with the appellant as well as the victim who also used to live with the appellant.

16. On the sentence of 15 years imposed on the appellant, the respondent submitted that there was no reason to interfere with the trial court's decision as the same was exercised judiciously.

Role of this Court

17. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence afresh and reach its own independent conclusions bearing in mind that it neither saw the witnesses nor heard the evidence of the witnesses as they testified. The said duty was stated by the Court of Appeal in the case of *Mark Oiruri Mose v Republic* [2013] eKLR, in the following words:

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Evidence before the Trial Court

18. PW1, the complainant testified that she was born on June 24, 2008 and that she stayed with her aunt. It was her testimony that in March 2022 they were on a school break and so she went to visit her father who stayed in Kisumu in a one-bedroom house. PW1 testified that her father stayed with a friend called Bob. She further testified that her sister and herself slept in the kitchen.

19. PW1, the complainant testified that on the particular day, Bob came to where she and her sister were sleeping, defiled her and told her not to inform anyone. It was her testimony that Bob defiled her on two different occasions. She further testified that her aunt discovered this when she was 3 ½ months pregnant and took her to hospital at Jaramogi Oginga Odinga Teaching and Referral Hospital. PW1 identified Bob as the accused in court.

20. In cross-examination, PW1 reiterated her testimony insisting that the accused, Bob, was the one who defiled her.

21. PW2, Dr. Lucy Ombok testified on behalf of Dr. Effie Awuor who examined the complainant and filled the P3 form on the 30.6.2022. It was her testimony that on examination, the complainant was found to be in fair condition and 3 ½ months pregnant and further that on examination of genitalia it was normal with no discharge. The P3 form was produced as PEx2. PW2 also produced PEx1, the complainant's PRC form that was filled on the 25.6.2022 that showed that her hymen was broken.

22. In cross-examination, PW2 stated that the appellant was not examined and further reiterated that the complainant was found to be pregnant.

23. PW3, FOO testified that the complainant was his daughter and that in March 2022 she was staying with the complainant and also his nephew P. He testified that on the June 23, 2022 he was informed that the complainant was pregnant and that he was later informed that she was defiled by the appellant.

24. PW3 testified that he started staying with the appellant in December 2021 and stopped when the appellant was arrested. It was his testimony that the complainant was born in 2008 as evidenced by PEx3, the birth certificate.

25. In cross-examination, PW3 stated that he lived with the appellant whom he admitted was his friend and that they had never disagreed. He further stated that he did not realize that the appellant was defiling his daughter.

26. PW4 No. 261896 PC Collins Kibet from Kasagam Police Station testified that on the 28.6.2022, the appellant and the complainant were taken to the police station on a defilement complaint.

27. He testified that he took both the appellant and the complainant to JOOTRH where they were both examined. PW4 produced the Hospital Card as PEx4 and the Investigations Diary as PEx5.

28. In cross-examination, PW4 reiterated that he took the appellant to hospital at JOOTRH. He further stated that he visited the scene at Manyatta. PW4 stated that the complainant identified the appellant.

29. In his defense, the appellant testified that the week of February 27, 2022 and 16.3.2022 he was away at Ugunja for church prayers. It was his defence that he did not know the complainant but only knew her father as they worked in the same workshop. He further stated that there was a time he shared a house with the complainant. The appellant denied defiling the complainant.

Analysis and Determination

30. Having considered the grounds of appeal, the submissions by both parties and the evidence adduced in the trial court by both the prosecution witnesses and the defence proffered by the appellant, the issue for determination is whether the prosecution proved all the elements of the offence of defilement against the appellant and which proof is beyond reasonable doubt.

31. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act* and an alternative charge of Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

32. This being a case of defilement, it is trite law that the ingredients of an offence of defilement be proved beyond reasonable doubt and these elements are: identification or recognition of the offender, penetration and the age of the victim.

33. The age of the minor was not in doubt. The complainant testified that she was 13 years old and this was corroborated by the testimony of PW3, her father who testified that the complainant was born in 2008 and further produced PEx3, a birth certificate that indicated that the complainant was born on the June 24, 2008 placing her age at 13 years and 10 months.

34. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR it was held that:

> "... That "conclusive" proof of age in cases under *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."

35. I am thus satisfied that the age of the complainant was proved to be between 13 years 10 months old as at the time of the incident.

36. On penetration, section 2(1) of the *Sexual Offences Act* defines penetration as:

> "The partial or complete insertion of the genital organs of a person into the genital organ of another person." See the case of *Mark Oiruri Mose v R* [2013] eKLR.

37. The complainant testified that the appellant defiled her on two different occasions in March 2022. She was firm in cross-examination reiterating how the appellant defiled her. It was her testimony that sometime later when she went back to her aunt's place, she finally discovered that she was pregnant.

38. Evidence of penetration was further corroborated by PEx1, the PRC form produced by PW2 that showed that the complainant's hymen was broken. The above medical evidence and witness testimonies prove the fact that there was penetration of the child.

39. On whether the appellant was positively identified as the perpetrator of the offence herein, the appellant then submitted that as there was another man in the house, it was not possible to tell that he was the one responsible as DNA was not undertaken to establish if he was the one responsible. Further, that the evidence that convicted him was that of a single identifying witness and that the trial magistrate did not warn herself of the dangers of convicting the appellant on the basis of such evidence. In his defence, he claimed that he was away in Ugunja for prayers on the dates that it was alleged he had defiled the complainant.

40. The testimony of the complainant and her father was that the appellant lived with them in the same house. The appellant was a friend to the complainant's father. The complainant testified that it was the appellant who had sex with her and she remained firm in cross examination. There is nothing on record to show that the complainant or her father could have framed the appellant with such a heinous offence and as the complainant was still pregnant only 3.5 months, not DNA could have been carried out to establish the paternity. In addition, there is no mandatory requirement for corroboration in sexual offences.

41. Section 124 of the *Evidence Act* Laws of Kenya provides that:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where 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

> reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

42. In *J.W.A v Republic* (2014) eKLR the court held that corroboration in sexual offences is not mandatory. It is therefore clear from these authorities that medical evidence to connect an accused person to the offence of rape is not necessary for a conviction to be entered. The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused. The Court of Appeal in *Chila v Republic* (1967) E.A 722 articulated this position and held that:

> " The Judge should warn … himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

43. In the premises, the argument by the appellant that the evidence was uncorroborated was not sustainable in law if there was some other evidence to support the charge even in the absence of medical evidence.

44. In the instant case, apart from the provisions of section 124 of the *Evidence Act*, the complainant's testimony remained unchallenged and was corroborated by PW3 as well as the medical evidence adduced by PW2. Further and contrary to the appellant's claim there were no inconsistencies or contradictions in the evidence presented by the prosecution witnesses as alleged by the appellant and no such contradictions were pointed out to this court.

45. It bears repeating that the Appellant was a person known to the complainant. I do not find any element of mistaken identity of the Appellant as the person who penetrated her genitalia. She was categorical it was Bob- she knew the accused as such and pointed him out in court.

46. On alibi defence that he was in Ugunja for prayers, although the appellant is under no duty to prove that defence, however, that defence was never raised during investigations for the prosecution to investigate further and exonerate him. The appellant waited until the tail end then he raised the defence of alibi. That notwithstanding, the evidence as adduced by the minor that the appellant defiled her twice and told her not to tell anyone, and evidence by the complainant's father that during the said dates, the appellant lived with the said complainant's father in the same house as they were friends and worked together, in my view, displaces the defence of alibi raised by the appellant.

47. In sum, I find that the prosecution proved beyond reasonable doubt that the appellant penetrated PW1, a child aged 13 years.

48. The appellant herein faulted the trial court's decision to convict and sentence him on among other grounds that he was not properly identified and that the trial court failed to warn itself before relying on the sole evidence of the complainant. It is well settled that evidence on identification should be treated with a lot of care so as for the court to satisfy itself that it is safe to act on the evidence and to ensure that it is free from the possibility of error. The Court of Appeal in *Wamunga v Republic* (1989) KLR 424 had this to say on the issue:

> " Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the

circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

49. Taking all the above into consideration and my assessment of the evidence adduced against the appellant, Iam satisfied that the appellant was positively identified by the complainant as the person who defiled her. She knew him by name and called him Bob, the person who lived with her father in the same house. I therefore find that the appellant's conviction was sound and safe.

50. As regards the sentence, the appellant pleaded that the mandatory nature of the sentence under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* was unconstitutional and not warranted.

51. The Appellant was sentenced to fifteen years' imprisonment. Indeed, the sentence possible in law under section 8(1) as read with section 8(3) upon conviction is not less than twenty (20) years' imprisonment. The complainant herein was found to be aged thirteen (13) years old and hence the sentence fell below the prescribed age bracket. I find no ground upon which I can interfere with the same.

52. In *Wanjema v Republic* [1971] EA 493, the predecessor of this court stated that: -

> " [The] Appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case."

53. In *Dismas Wafula Kilwake v Republic* [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act*. It observed as follows: -

> " We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

54. Prior to the Supreme Court's decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, the courts construed mandatory sentences literally.

55. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of murder, was declared as unconstitutional because it took away the court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.

56. I am alive to the fact that the Supreme Court did issue directions, after its judgment in the "Muruatetu Case", clarifying that that decision was only about murder cases.

57. Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006 clearly prescribes a mandatory minimum sentence of 20 years for anyone who defiles a child between the age of 12 and 15 years.

58. The Judiciary *Sentencing Guidelines* passed on the September 1, 2023 *vide* the Kenya Gazette No. 11586

> Mandatory Minimum Sentences
>
> 2.3.16 Where the law provides mandatory minimum sentences, the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine shall not substitute a term of imprisonment where a minimum term of imprisonment is the only option provided. Courts must however remain cognisant of any changes made to the applicability of mandatory minimum sentences with respect to specific offences given the clear concerns that have been raised in a number of cases about the constitutionality of such sentences.
>
> 2.3.17 Until the Supreme Court decides on the matters, Judicial Officers and Judges must adhere to the prevailing legislative frameworks, jurisprudence from courts and the SPGs 2022 during sentencing on the issue of the applicability of mandatory minimum sentences.

59. That being said I find that there is no illegality emerging in the trial court's exercise of its discretion in handing out the sentence of 15 years which is not minimum mandatory.

60. Taking into consideration the serious nature of the offence and the impact that it will have on the complainant, I find no reason to interfere with the sentence passed by the trial court.

61. The upshot of the above is that the instant appeal against conviction and sentence lacks merit and is hereby dismissed. However, as the appellant was not on bond during the trial, hereby invoke section 333(2) of the *Criminal Procedure Code* and order that the sentence imposed shall be calculated taking into account the period that the appellant was in custody from June 22, 2022.

62. This file is closed.

Dated, Signed and Delivered at Kisumu this 26th day of September, 2023

R.E. ABURILI

JUDGE