**Opawa v Republic (Criminal Appeal E037 of 2021)**
**[2022] KEHC 3093 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3093 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL E037 OF 2021**

**KW KIARIE, J**

**JUNE 22, 2022**

**BETWEEN**

**DENNIS ODIWUOR OPAWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***((From the original conviction and sentence in SOA case No. 22 of 2016 of the Chief Magistrate's Court at Homa Bay by Hon. R.B.N Maloba –Principal Magistrate))***

## JUDGMENT

1. Dennis Odiwuor Opawa the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) (3) [sic] of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on the 9th day of July, 2016 at [particulars withheld] Estate in Homa Bay District of Homa Bay County intentionally and unlawfully caused his penis to penetrate the vagina of M.A. O., a child aged 12 years.

3. He was charge alternatively with an offence of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No.3 of 2006. The particulars were that on the 9th day of August, 2016 at [particulars withheld] Estate in Homa Day District of Homa Bay County he intentionally touched the breasts and the vagina of M.A. O., a child aged 12 years with his penis.

4. The appellant was sentenced to imprisonment for 15 years for the offence of defilement and was discharged in the alternative charge. He has appealed against both conviction and sentence.

5. The appellant was in person. He raised 19 grounds of appeal which I have summarised as follows:

    a) The appellant was not accorded a fair trial as enshrined in article 50(2) of *the constitution*.

b) The trial magistrate failed to conduct a voir dire examination to the alleged minor to ascertain if she understood the nature of oath.

c) The learned trial magistrate failed to warn himself against the danger of convicting the appellant on uncorroborated evidence of the complainant.

d) The prosecution failed to call Emily to testify.

e) The learned trial magistrate failed to give a benefit to doubt to the appellant after the prosecution failed to produce exhibits mentioned by the complainant which were never escorted to government chemist for analysis on allegation that they were blood stained.

f) The learned trial magistrate erred by convicting the appellant when there was no government analysis's report confirming that the alleged blood stains on complainants pant belonged to the appellant or the complainant.

g) The learned trial magistrate erred by dismissing the defence.

6. The appeal was opposed by the state, through Ochengo Justus who raised the following grounds:

a) That there was overwhelming evidence against the appellant.

b) The appellant's actions of running away after committing the offence was inconsistent with his innocence.

c) The appellant's further action of absconding court and trying to escape to the neighbouring state of Uganda during trial was inconsistent to his innocence.

d) This was a case of recognition, the offence happened in broad day light, there was no mistaken identity.

e) The medical officer who examined the victim concluded that the degree of injury as grievous harm. He further testified that the injuries were permanent and affected the normal operation of the complainant.

7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.

8. Section 8 (1) (3) of the *Sexual Offences Act* does not exist. The charge to that extent was erroneously drafted. It ought to have read:

...contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* ...

9. Since the appellant fully participated in the trial, I find that he was not in any way prejudiced and the error is curable under section 382 of the *Criminal Procedure Code.*

10. When this matter came up for hearing on 26th September, 2016 before P. Mayova, SRM, the appellant informed the court that he had not been supplied with witness statements. The court ordered that the appellant be supplied with treatment notes of the girl and the case to proceed after 30 minutes. This was a breach of the appellant's right to fair trial for the prosecution was not to rely solely on the treatment notes but also the statement of the complainant and other witnesses. Even if he had been supplied with the statement together with the treatment notes, I wonder whether the 30 minutes would have been adequate to him. Article 50 (2) (c) & (j) provides:

Every accused person has the right to a fair trial, which includes the right—

c) ) to have adequate time and facilities to prepare a defence;

...

(j) j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

The court ought to have balanced the right of the child and that of the appellant and accord him sufficient time to prepare after the supply of all the statements. Preparation in my view is not meant to be piecemeal but wholly.

The appellant complained that the court did not conduct a voir dire examination in respect of the complainant whose age was given in the charge sheet as 12 years. According the Court of Appel in the case of *Kibangeny Arap Kolil vs. R* [1959] EA 92 for the purposes of section 19(1) of the *Oaths and Statutory Declaration Act* the expression 'child of tender years' in the absence of special circumstances, it took it to mean any child of any age, or apparent age, of under fourteen years. There was therefore need to conduct a voir dire.

11. The Court of Appeal in *John Wambua Mutunga v Republic* [2005] eKLR gave guidance on voir dire examination as follows:

> " There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness.
>
> Before the hearing of the evidence of the complainant commenced, this is what the record indicates:
>
> Child: I am a Christian. I am 12 years old. This is a Bible. I am in class five.
>
> Court: Child is competent to give sworn evidence.
>
> I therefore agree with the appellant that the trial magistrate (P. Mayova) did not conduct a voir dire examination.

12. The proviso to section 124 of the *Evidence Act* provides:

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.

This therefore took away the mandatory requirement for corroboration in sexual offences cases where the only witness is the victim, subject to the conditions prescribed therein.

13. Dr. Ngome James (PW2) adduced medical evidence for the prosecution. He informed the court that the complainant was presented to Homa Bay County Referral Hospital where she was examined by a clinical officer called Reuben on 10th July, 2016. Her genitalia was intact with no tears or bruises. The only finding was thick whitish discharge. He therefore concluded that there was no immediate penetration.

14. On her part the complainant testified that the appellant defiled her on 9th July, 2016. She told Emily who took her to hospital. Emily was not called and no explanation was given as to why she was not called. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549, (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

Failure to call Emily to adduce evidence on what the complainant allegedly told her, was fatal to the prosecution case.

15. There was contradiction in the evidence of the complainant and that of the doctor that she was defiled on 9th July, 2016. According to the doctor, upon her examination on 10th July, 2016 there were no telltale signs. It is trite that sexual congress even with a willing adult who is not adequately prepared for the congress, there are always signs of lacerations or abrasions. For a child of 12 years, there would be all obvious indications of defilement.

16. In opposing the appeal, the learned counsel asked the court to look at the conduct of the appellant of absconding while the case ws still in pendency. This cannot be taken as evidence against the appellant unless there was strong evidence against him. It is common knowledge that some innocent people may abscond for fear of the court and the court process.

17. I was urged convict on the lesser charge of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, should I conclude that the offence of defilement was not proved. The particulars in the alternative charge alleged that the appellant intentionally touched the breasts and the vagina of M.A. O., a child aged 12 years with his penis. Unfortunately nowhere did the complainant testify that the penis was used to touch her breasts and vagina. It is trite law that where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of *John Brown Shilenje v R.* High Court (NBI) Criminal Appeal No 181 of 1981 (unreported).

When the trial court convicts on the substantive charge, the correct procedure is to make no finding on the alternative charge. It was erroneous therefore for the learned magistrate to proceed to discharge the appellant on the alternative charge.

18. The upshot of the foregoing analysis of the evidence is that the conviction of the appellant was not supported by the evidence on record. It was unsafe. I therefore quash the conviction and set the sentence aside. The appellant is set at liberty unless if otherwise lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 22 ND DAY OF JUNE, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**