Oteba v Republic (Criminal Appeal 54 of 2019)
[2022] KEHC 12143 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12143 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 54 OF 2019

LK KIMARU, J

JULY 25, 2022

BETWEEN

PETER OCHOMO OTEBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Sexual Offence No. 132 of 2018 of Kitale Chief Magistrate's Court delivered on 22nd May 2019 by Hon. M.I.G. Moranga - SPM)

JUDGMENT

1. The appellant Peter Ochomo Otebo was charged with attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. The particulars of the offence were that on August 3, 2018 at [Particulars Withheld] village, Trans Nzoia County, the appellant intentionally attempted to cause his penis to penetrate the vagina of SN a child aged 5 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*. The particulars of the offence were that on the same day and in the same place, the appellant intentional touched the vagina of SN a child aged 5 years. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, he was convicted of the main charge and sentenced to serve ten (10) years imprisonment.

2. Aggrieved by his conviction and sentence, the appellant filed an appeal to this court. In his petition of appeal, the appeal raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of prosecution's evidence that was full of contradictions. He faulted the trial court for relying on circumstantial evidence to convict him yet the same did not establish his guilt to the required standard of proof. He faulted the trial court for relying on inadequate evidence of the prosecution's witnesses to convict him. He pointed out that the trial court had shifted the burden of proof from the prosecution to the defence to reach the impugned verdict.

3. In further grounds of appeal presented before court, the appellant contended that the testimony of the complainant was irregularly admitted into evidence yet complainant lacked the requisite intelligence to testify in the case. He questioned the manner in which voire dire was conducted which he expressed was below the standard expected in law. The appellant faulted the trial court for failing to properly evaluate the evidence, which in his view was riddled with inconsistencies and contradictions that it could not sustain a conviction. He challenged the charge sheet noting that the same was defective and could not form a basis for a conviction. In the premises therefore, the appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed on him.

4. During the hearing of the appeal, both the appellant and the prosecution presented to court written submission in support of their opposing positions. Whereas the appellant insisted that the evidence adduced by the prosecution failed to meet the legal threshold to convict him, the prosecution on its part asserted that it had established the requisite ingredients of defilement to enable the court reach the verdict that it did. The appellant urged the court to allow his appeal whereas the prosecution argued that the appeal should be dismissed. The court should shall revert to the submission made in the course of this judgment.

5. Being a first appeal, this court's mandate is clear. The court is required to re-consider and to re-evaluate the evidence adduced before the trial court in light of the submission made in this appeal and reach its own independent determination whether or not to uphold the conviction. In doing so, this court is required to be cognizant of the fact that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses. (See *Njoroge v Republic* [1987] KLR 19). In the present appeal, the issue for determination is whether the prosecution established the charge facing the appellant of attempted defilement to the required standard of proof beyond any reasonable doubt.

6. The evidence adduced by the prosecution witnesses raises disturbing issues which relate to the manner in which the trial court treated the prosecution's evidence and later evaluated the same. The complainant in this case was at the material time a child aged five (5) years. She told the court that she was in Baby class. Her mother PW2 EN confirmed that indeed the complainant was a pupil at baby class. She gave her date of birth as February 22, 2013 as per the child health booklet produced as prosecution's exhibit No 1. It was clear from the voire dire conducted by the trial court that the complainant lacked the requisite intelligence even to comprehend what she was telling the court. It was evident that the complainant not only did not understand the meaning of the oath but did not entirely understand why she was in court in the first place.

7. This court has noted with concern that whereas the complainant was the only witness who said that she had identified the appellant as the perpetrator of the sexual assault, the trial court did not properly evaluate the fact that a child of five (5) years lacked the comprehension to narrate what had happened to her without sufficient corroboration. In the present appeal, the complainant's mother told the court that when she returned home on 3rd August 2018, she observed that her daughter was walking with an ungainly gait. She was walking with difficulty. She tried to inquire from her what could be the problem. The complainant refused to answer. It was after she had caned her and threatened her that the complainant disclosed that it was the appellant who had done it.

8. It should be noted that the appellant lived some distance from the home of PW2. In fact he lived in a church compound. PW2 testified that when she examined the complainant;

> " her inner clothes were socked in some wet substance. There was a whitish fluid or substance on her thighs and underpant. Her private parts vagina was inflammed and red."

9. PW2 told the court that she went to report the incident to the police and later took the complainant to be seen by the doctor.

10. It would have been assumed that PW2 would have reported the incident to the police on the same day and taken the evidence of the pant with the wet substance to be examined at the hospital to determine if it was indeed spermatozoa. Such was not the case. According to PW4 Sgt Titus Munyekenye then based at Kobolet police post, PW2 made the report at the police post on August 5, 2018, two days after the alleged sexual assault is said to have occurred. The complainant was taken to the hospital on the following day *ie* August 4, 2018. A P3 form written on the basis of the medical treatment notes and further examination by PW3 Dr Charles Ndung'u Macharia then based at Kapsara Sub-County Hospital contradicted the claim by PW2 that the complainant had been defiled. This is what the doctor said of the complainant:

> " her general condition was fair oriented and did not have any bodily injuries. On examination of her private parts, I noted superficial abrasions on both labia majora and hymen was intact. There was a yellowish discharge but no venereal infection. Lab test high vaginal swab revealed no spermatozoa hepatitis B and HIV were negative. I concluded no signs of penetration."

11. The medical evidence put in sharp focus the assertion by PW2 that her daughter had been sexually assaulted by the appellant. It also brought out the manner in which the evidence of the complainant was treated by the trial court. It appeared the trial court did not benefit from the direction given in *Fappyton Mutuku Ngui v Republic* [2012] eKLR where the court held thus:

> " 32 .... First a child's power of observation and memory are less reliable than an adult. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their world are quickly forgotten by them. Fourthly, because of their immaturity, they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths."

12. In the present appeal, it was clear to this court, on re-evaluation of the evidence adduced by the prosecution witnesses, that the testimony of a child of such young and tender years should not have been considered as constituting sufficient evidence of identification. Unless it was corroborated. PW2 testified that the complainant was playing with other children at the time. Why didn't the investigating officer's interview the said children to establish the veracity of the complainant's story? Why did the prosecution decide to charge the appellant when medical evidence did not support the claim by PW2 that her daughter had been penetrated? The above questions, were they to be considered objectively, would have led to the acquittal of the appellant because the gaps in the prosecution case are so glaring that they raise reasonable doubt as to the appellant's guilt.

13. In the premises therefore this court finds merit with the appellant's appeal and proceeds to allow the same. He is acquitted of the charge of attempted defilement. The custodial sentence imposed on him is quashed. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held.

It is so ordered.

DATED AT KITALE THIS 25TH DAY OF JULY 2022.

L KIMARU

JUDGE