



**Omondi v Republic (Criminal Appeal E031 of 2021)
[2022] KEHC 13358 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E031 OF 2021
PJO OTIENO, J
SEPTEMBER 23, 2022**

BETWEEN

CHRISPIN ERICK OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence by Hon T. A. Odera, CM in Mumias CM's Court Criminal Case No. 41 of 2020 delivered on 14th July 2021)

JUDGMENT

1. Having been charged with the offence of defilement Contrary to section 8(1) and (2) of the [Sexual Offences Act](#), the appellant was convicted with the offence of attempted defilement Contrary to Section 9(2) of the Act. In so proceeding, the trial court invoked the provisions of Section 179 of the [Criminal Procedure Code](#) which stipulates:-

“S. 179 When offence proved is included in offence charged

1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 - (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”
2. I have had the benefit of reappraising and re-examining the evidence led before the trial court by 5 witnesses called by the prosecution and the unsworn statement by the appellant as is the mandate of



this court on first appeal I have equally read the judgment of the trial court and the sentence thereby meted.

3. My appraisal of the record reveals that there was the evidence of P.W.2 as the only eye witness to the incident. That raises the question of the care a court has to take before convicting on the evidence of a single witness under Section 124 of the *evidence Act*. The trial court being aware of the dangers involved did administer a caution to itself and took guidance from the decision of Gikonyo, J., in *Julius Mbarithia Vs Republic* and said;

“I have warned myself of the dangers of convicting on evidence of a two related identifying witnesses. The incident alleged to have occurred in broad day light and P.W.2 said she knew accused before as a neighbour by his face and that he lived with his parents. This is not denied and is supported by P.W.1. Nothing could have blocked her from seeing accused. I saw P.W.2 while testifying and she was firm and consistent that accused was the one who her inserted his dudu inside her vagina and returned her panty and then carried her to the road and then dropped her on seeing P.W.1. The evidence of P.W.1 was further corroborated by P.W.2 who said she saw him carry the child then dropped her on seeing her approach them. She impressed is a mere child of tender years and there is no reason as to why she could have fabricated this case. P.W.2 impressed me as truthful. There cannot be any other explanation to this other than that accused is the one who attempted to defile her. I proceed to dismiss defence as a mere denial”.

4. Whereas the trial court found the evidence of P.W.2 to have been corroborated by that of P.W.1, that corroboration was only additional. The law under Section 124 *Evidence Act* does permit a trial court to convict on the sole evidence of a victim provided the court is satisfied that the evidence is cogent and the witness is saying the truth. The Court of Appeal interpreted the provisions of section 124 of the *Evidence Act* in *Stephen Nguli Mulili Vs Republic* [2014] eKLR in the following words:-

“With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, Section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth”.

5. In the judgement appealed from, the court found the evidence of P.W.2 to be consistent with such finding this court finds that there has not been demonstrated error on the part of the trial court in its assessment of the evidence adduced and in applying the law applicable to such evidence when it convicted on the evidence on record.

6. Accordingly, I do find no merit on the appeal against conviction and order that it be dismissed.

However, the sentence meted upon the appellant appear to demonstrate that the trial court felt constrained impose nothing less than the minimum sentence set by statute. That is a practice the Kenya courts have now found to be an abdication of judicial discretion in sentencing. There is no explanation given why it had to be the threshold sentence prescribed by the Statute. No aggravating facts were alleged against the appellant and therefore the court ought to have retained its discretion to assess a sentence befitting in the circumstances of the case.

7. To the extent that the court appear to have felt hamstrung with the prescribed sentence under Section 9(2) of the Act, I find that there was an error. I deem it just to revisit the sentence by tinkering with it but upon receipt of a social inquiry report by the probation office which should include



possibilities of the appellant being assisted with a livelihood skill acquisition. Such a report should also recommend whether or not the appellant is suitable for an alternative mode of punishment away from imprisonment. I have in mind community service.

8. It is further directed that the prisons department files a report on the general conduct of the appellant while serving the sentence and if he has benefited from the programs offered by the correction services. Such reports but filed within 30 days from today.
9. Mention on 17/11/2022 to confirm if report shall have been filed.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 23RD DAY OF SEPTEMBER 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Appellant is in person

Court Assistant: Kulubi

