Okoth v Republic (Criminal Appeal 12 of 2017)
[2022] KEHC 13037 (KLR) (Crim) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 12 OF 2017

JM BWONWONG'A, J

SEPTEMBER 22, 2022

BETWEEN

KELVIN OKOTH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Njagi (CM) delivered on 27th January 2017 in Milimani Chief Magistrates Court Criminal Case No. 590 of 2016 Republic vs Kelvin Okoth)

JUDGMENT

1. The appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on April 9, 2016 at Kilimani in Westlands District within Nairobi County, he intentionally and unlawfully touched the penis of KMT with his hands, a child aged three and half years. The appellant pleaded not guilty and was tried for the offence charged. The trial court found him culpable and convicted him.

2. He was sentenced to serve ten years imprisonment.

3. Being dissatisfied with the conviction and sentence he filed five grounds of appeal in his petition of appeal which he later amended and filed together with his written submission. The main grounds raised are as follows. The learned magistrate erred in law and fact in convicting the appellant when he was not properly identified as the perpetrator. The prosecution did not prove their case beyond reasonable doubt with their evidence being contradictory and uncorroborated. The prosecution failed to call crucial witnesses leading to a wrongful conviction. The trial magistrate failed to give due regard to the appellant's defence, in that the trial magistrate did not consider section 333(2) of the *Criminal*

Procedure Code (Cap 75) Laws of Kenya and that the sentence was manifestly harsh and excessively in the circumstances.

4. In response, the respondent filed grounds of opposition dated June 15, 2022. The grounds raised are that the appeal lacks merit, and is misconceived and unsubstantiated. Secondly, the appeal is an abuse of the court process since the appellant was properly convicted and the prosecution discharged their burden of proof beyond reasonable doubt. Finally, the appellant has not demonstrated any special or unusual circumstances to warrant the appeal to be allowed.

5. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno v R [1977] EA 32* and further in *Mark Oiruri Mose v R* [2013] eKLR, that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusions 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 give allowance for that.

6. PW1 was the victim who was a minor aged three and half years old. He made an unsworn statement after the court conducted a *voire dire*. He stated that the appellant touched him his *'chuchu'*(penis) while he was outside playing. He identified the appellant indicating that the same took place near an ambulance whose safety belt the appellant was fixing.

7. EK (PW 2), the grandmother of the complainant testified that on the material day, she had gone to check on his grandson who was playing outside but could not find him. That the caretaker who was present directed her to where he had seen PW1 playing. When she called out his name, the appellant appeared with his overall halfway done which he was trying to adjust. The complainant also emerged with his trousers unzipped. That the complainant refused to talk and be washed which was unusual and the next day informed her that the appellant had pulled his '*chuchu*' referring to the penis and he was experiencing pain. That she took her grandson to the hospital for examination and later reported the matter to the police station.

8. Victor Macharia (PW 3), a psychologist examined the complainant and filled a report which was produced in court dated August 18, 2016. It was his finding that the complainant had experienced sexual abuse from his conduct which was aggressive.

9. Cpl Female Tunde No. 97782 (PW 4), the investigating officer testified that the incident was reported on April 11, 2016 by the complainant and his mother. That she visited the scene of crime but the ambulance in issue had been moved. She conducted her investigations but did not get the clothes the minor was wearing on the material day as they had been washed. In court, she produced the birth certificate of the complainant and the treatment chits.

10. Dr. Kizie Shako (PW 5), of Nairobi police surgery gave evidence that she examined the complainant and filled out the p3 form which was produced in court. It was her finding that the penile shaft of the complainant had blunt force trauma which was not normal for children. It was also not clear as regards the cause of the tenderness on the victim's penile shaft. The external genitalia and the anus were normal.

11. Simon Nzambu (PW 6), a doctor from Nairobi Women's Hospital testified that the complainant was received at their gender desk on allegations that someone had rubbed his penis and he was in pain. On examination, the penis was sensitive to the touch. The report produced found that the medical tests were normal but he was in pain and the penile shaft was swollen.

12. Upon being put in his defence, the appellant stated that on the material day, he arrived at around 8 a.m when his boss sent him to the Makina area to assist a fundi there. That he took his tools and went there and worked till 2 pm when he went for lunch. That he went back to his workplace and finished

work and went home. That the following Monday when he came to work, he was questioned about what he had done to a child in the area he did not know. He was later arrested and booked at Kilimani Police Station. He maintained that although he knew the complainant, he was never with him in the ambulance. He asserted that he never saw the complainant on the material day and did not talk to him.

13. In ground 1, the appellant stated that the learned magistrate erred in law and fact by failing to find that the appellant was not properly identified as the preparator of the offence. He contended that the failure by PW 2 to give any description of the suspect at the earliest opportunity weakened the prosecution's case. Further, the incident was not reported on the material day (April 9, 2016) but on April 11, 2016 and no identification parade was conducted.

14. The respondent submitted that the victim in his testimony narrated to the court how the appellant who was known to him was the one who committed the offence. Further, PW 2 also identified the appellant as the man coming out of the ambulance after the complainant's mother called out the minor's name trying to adjust his overalls while the minor's zip was open. Learned prosecution counsel maintains that there was no inconsistency as to the identification of the appellant as the perpetrator of the offence.

15. As a first appeal court I have re-assessed the entire evidence. As a result, I find that the appellant was positively identified by the complainant (PW 1) and his grandmother (PW 2). The complainant indicated that it was the appellant who pulled his '*chuchu*' referring to his penis and hurt him. Further, the appellant was well known to him. Secondly, the complainant's grandmother also identified the appellant as the perpetrator having seen him come out of the ambulance at the same place the complainant came out of, after the incident. She gave evidence that the complainant's trousers were unzipped yet he knew how to zip them and was abnormally quiet and refused to bathe. He also stated that he knew the appellant who was a mechanic in the area. It is clear therefore that this is a case of recognition and not identification.

16. Cpl Female Tunde No. 97782 (PW 4) testified that she arrested the appellant after being identified by the complainant and his mother and grandmother. I find as credible the identification of the appellant by the complainant and his grandmother. In other words, the appellant was positively recognized by the two witnesses. The contention by the appellant that his identification was not sufficient is lacking in merit and is hereby dismissed.

17. In ground 2, the appellant contends that the trial magistrate erred in law and fact that the prosecution had proved their case beyond reasonable doubt. He has stated that the prosecution's case was marred by contradictions and was uncorroborated. The appellant submitted that from the testimony of PW 1, he was playing alone when he got hurt. Further, that the he was a mechanic, and if indeed he was the perpetrator of the offence, the victim's clothes would have been greasy. Further, the victim would have told PW 2 on the material day of the incident. In addition, the medical report tendered was inconclusive on the cause of the injuries on the victim.

18. The appellant argued that the evidence of Dr. Nzambu (PW 6) was inconclusive as to the cause of the injuries. Further, PW 6 examined the victim on April 17, 2016, eight (8 days) after the alleged assault.

19. For the respondent, learned prosecution counsel submitted that the testimony of the victim is corroborated by PW 2, PW 3, PW 5, and PW 6, who carried out the examination on the victim and also had a chance to interrogate and counsel the minor, filled the P3 form and medical reports. It was argued that the testimony of the witness was clear and precise being a minor of tender years. His testimony was also corroborated by three officers who examined him.

20. Learned prosecution counsel asserted that there were no inconsistencies in the medical records of the three witnesses. That the prosecution proved the charge of committing an indecent act with a child beyond reasonable doubt and there were no evidential gaps to raise doubts in the prosecution's case.

21. I have re-assessed the entire evidence as a first appellate court. As a result, I find the prosecution evidence to be credible that the appellant intentionally and unlawfully touched the penis of the complainant. When the complainant gave unsworn evidence after the court conducted *voire dire*, he was very categorical that it was the appellant who had pulled his penis which caused him pain. The appellant was well known to him and he had no reason not to tell the truth. The evidence of his grandmother (PW 2) of his state of mind after the incident indicated that he had undergone an experience that had hurt him. The medical reports produced by the psychologist (PW 3), PW 5, and PW 6 showed that indeed the complainant had been sexually assaulted. The perpetrator of that sexual assault was also positively identified. That being the case, the prosecution proved their case beyond reasonable doubt to warrant a conviction by the trial court.

22. In ground 3, the appellant contended that the prosecution failed to call crucial witnesses leading to a wrongful conviction. The appellant submitted that the prosecution failed to call vital witnesses who allegedly witnessed the incident. The appellant argued that the failure to call Wilfred, the caretaker who allegedly saw the victim go into the ambulance in the garage and Mr. Mohammed the owner of the garage raised serious credibility on the prosecution's case. He relied on the case of *Bukenya & Others vs Uganda [1972] EA 549*.

23. The respondent submitted that the vital witnesses referred to by the appellant were not vital to the prosecution's case as PW 2 testified and confirmed that it was the appellant who had committed the offence. From her testimony, when she called out for the minor, he came from the ambulance where he was with the appellant who had his overall halfway done and was trying to adjust it. The minor's trousers were also unzipped and when she took him home, he was abnormally quiet.

24. This court is alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. In this regard, section 143 of *Evidence Act* (Cap 80) Laws of Kenya provides that: -

> "
>
> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"
>
> In the case of *Bukenya & Others V Uganda* [1972] EA 549 the court addressed itself in that regard as follows: -
>
> (i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
>
> (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

25. The evidence proved the ingredients of the offence with which the appellant was convicted. This ground therefore fails and is hereby dismissed.

26. In ground 4, the appellant argued that the trial magistrate erred by failing to consider the defence case. He submitted that the alibi defence was raised and rejected by the trial court. That his defence was sworn and consistent from the material day, and the chain of events given was unbroken even by the prosecution in cross-examination. He maintained that the learned magistrate erred in law in shifting the burden of proof to him.

27. On this ground, the respondent submitted the trial court was not partisan as illustrated since she raised the issue of the appellant not producing an alibi defence earlier during the trial. That raising the alibi defence at the defence stage which was uncorroborated was considered a mere afterthought.

28. In his defence, the appellant denied seeing the complainant on the material day or even talking to him. He stated that his boss had sent him to work in the Makina area. The trial court considered this defence as an afterthought and disbelieved the evidence entirely because it was incredible. This was the justification for the rejection of the defence evidence. I therefore reject the appellant's ground in that regard.

29. In ground 5 the appellant submitted that the trial court failed to apply the provisions of section 333(2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya. He urged the court to make an order for his sentence to commence on April 12, 2016, when he was first admitted to custody.

30. The respondent submitted that the sentence by the trial court clearly shows that the trial magistrate duly considered the appellant's mitigation and the time spent in custody by the appellant.

31. Section 333(2) of the *Criminal Procedure Code* (Cap 75) Laws of Kenya provides that: -

> Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

33. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody"

34. The duty to take into account the period an accused person has been in custody in sentencing under section 333(2) of the *Criminal Procedure Code* was approved by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR. It is therefore clear that it is mandatory that the period during which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence.

34. I have perused the trial court's records and it is clear that the applicant herein was initially convicted of the offence of committing an indecent act with a child and subsequently sentenced to serve 10 years imprisonment. In its sentencing, the court noted that the appellant had been in custody from April 12, 2016. This was considered when the court sentenced the appellant to serve 10 years imprisonment. However, the court was not clear when the time should start running. I make a finding that time should start running from the date of his incarceration on April 12, 2016.

35. In ground 6 the appellant stated that the sentence imposed by the trial court was excessive. The respondent has submitted that the sentence is legal being prescribed by law under section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. She has urged the court to uphold the same.

36. In the *Sexual Offences Act*, "an indecent act" is defined as follows: -

> indecent act" means an unlawful intentional act which causes-

(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) Exposure or display of any pornographic material to any person against his or her will."

37. Section 11(1) of the *Sexual Offence Act* provides as follows: -

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

38 It is clear from these statutory provisions on sentence that they provide for a prescribed minimum mandatory sentence of 10 years. In sentencing the appellant, the court sentenced the appellant to the prescribed minimum sentence of 10 years. The trial court did so after finding that the appellant had been in custody since 12/04/2016. In doing so the court ignored the mandatory provisions of 333 (2) of the *Criminal Procedure Code*, which mandatorily required the court to take into account the period the appellant had spent in custody. I therefore find that the trial court erred in law in ignoring those mandatory sentencing provisions. The law in this regard is that even where a prescribed minimum sentence is provided for, the court has to take into account the period the appellant has been in custody; failure to do so amounts to double punishment being inflicted upon the appellant. Double punishment is prohibited by law.

39 In view of the foregoing, I find that the appellant has been in custody for about four years. I therefore subtract the four years from the ten years which leaves a balance of six years; which will begin to run from the date of sentence on January 27, 2017.

40. The upshot of the foregoing analysis is that I confirm the appeal against conviction which I hereby dismiss. The appeal against sentence succeeds and the sentence of six years is to run from the date of judgement on January 27, 2017.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

Ms Muigai for the applicant

Ms Edna Ntabo for the Respondent