MOO v Republic (Criminal Appeal 112 of 2015)
[2016] KEHC 1945 (KLR) (13 October 2016) (Judgment)

M O O v Republic [2016] eKLR

Neutral citation: [2016] KEHC 1945 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL 112 OF 2015

JA MAKAU, J

OCTOBER 13, 2016

BETWEEN

MOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both the conviction and the sentence dated 2nd December, 2015, in Criminal Case No. 278 of 2013 in Ukwala Law Court before Hon. R.M. Oanda – S.R.M.)

A child convicted of the offence of defilement ought to be sentenced under section 8 (7) of the Sexual Offences Act, No 3 of 2006

The decision emphasizes that courts were to observe the provisions of the Children Act, 2001 when sentencing a child offender to avoid miscarriage of justice.

Reported by Moses Rotich

Constitutional Law *- Bill of Rights - rights of a child - where the appellant who was a minor, was sentenced to 10 years imprisonment for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act -where the appellant was detained for more than 24 hours at the police cells after he was arrested - whether the prosecution ought to have charged the appellant with the offence of defilement or incest given they were cousins with the complainant - whether the appellant's constitutional right not to be held in police custody for more than 24 hours, was violated - Constitution of Kenya, 2010, articles 49 and 53(1)(f); Sexual Offences Act, No 3 of 2006 section 11(1).*

Brief facts

The appellant who was a minor, lodged an appeal against the judgment of the trial court which after full trial found him guilty, convicted and sentenced him to 10 years' imprisonment for the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act).

The appellant contended that the trial court erred in law and fact in convicting and sentencing him on a defective charge. He claimed that he had been detained for more than 24 hours at the police cells before he was taken to court for trial. It was the appellant's contention that he was wrongly convicted and sentenced given that he was a minor at the time of commission of the offence

Issues

i. Whether the prosecution ought to have charged the appellant with the offence of defilement or incest given they were cousins with the complainant.

ii. Whether the appellant's constitutional right not to be held at the police cells for more than 24 hours after he was arrested, was violated.

Held

1. Under section 20 (1) of the Sexual Offences Act which relied upon to charge the appellant, a cousin did not fall in the list of forbidden relations. Section 22 of the Sexual Offences did not recognize the relationship of cousins as brother and sister. The particulars given in support of the charge sheet were at variance with the prosecution witnesses' evidence. The evidence did not support the charge of incest and the same was defective. The appellant should not have been charged with an offence of incest but with an offence of defilement, if the prosecution had evidence that the complainant was defiled by a person who was known or identifiable.
2. The appellant ought to have been convicted for the offence of defilement contrary to section 8(2) of the sexual Offences Act, No 3 of 2006 (Sexual Offences Act) and not for an offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act.
3. The appellant had a fair trial before the trial court. However, the trial court failed to note that the appellant was a minor who needed the protection of the court and a speedy trial. The trial court on convicting the appellant ought to have given him a sentence as provided for under section 8(7) of the Sexual Offences Act. Since the appellant was a minor at the time of commission of the alleged offence of defilement, he ought not to have been sentenced to 10 years' imprisonment under section 11(1) of the Sexual Offences Act but ought to have been sentenced as provided for under section 191 of the Children Act, 2001.
4. The sentence of 10 years' imprisonment was illegal. In the period the appellant was held in police custody from July 12, 2013 to July 17, 2013, he was held contrary to the provisions of the Constitution of Kenya, 2010 (the Constitution) he ought not to have been held at the police cells for more than 24 hours.
5. If the appellant was aggrieved by the breach of his constitutional rights, he was at liberty to seek redress at a constitutional court for appropriate orders. Since the court was sitting in a criminal matter it could not deal with the constitutional issues raised in a criminal matter.
6. In cases where a defence of *alibi* (absence at scene of crime) was raised, the accused did not in law assume any burden of proving the *alibi*. It was sufficient if the *alibi* introduced into the mind of the court a doubt that was not unreasonable. The appellant did not raise his defence of *alibi* early enough through cross-examination for the prosecution to disapprove the *alibi* defence. The defence of *alibi* could not be sustained as it was raised at the time of defence and as such did not give the prosecution room to check it out and disapprove it.
7. If the trial court properly directed itself, it could have found the appellant guilty of defilement contrary to section 8 (2) of the Sexual Offences Act and not of committing an indecent act with a child.

Appeal partly allowed.

Orders

i. The conviction of committing an indecent act with a child was quashed and the sentence of 10 years set aside.
ii. The appellant was guilty of defilement contrary to section 8 (2) of the Sexual Offences Act.

iii. The appellant was sentenced to 3 years non-custodial sentence to be supervised by the probation officer Siaya County.

Citations

Cases

1. *Kiilu and another v Republic* [2005] 1 KLR 174 — Explained
2. Njuki and 4 others v Republic [2002] 1 KLR 771 — Mentioned

Statutes

1. Children Act (cap 141) section 191 — Interpreted
2. Sexual Offences Act (cap 63A) sections 8(2)(7); 11(1); 20(1); 22 — Interpreted

Advocates *M/s M Odumba* for State

JUDGMENT

1. The appellant MOO, faced an offence of incest contrary to section 20(1) of the *Sexual offences Act* No 3 of 2006. The particulars of the offence are that on the July 9, 2013 at around 4.30 pm in Ugenya District within Siaya County, being a male person, caused his penis to penetrate the vagina of EA a female person who was to his knowledge his sister.

   The appellant faced an alternative charge of committing an incident act with a child contrary to section II(1) of The *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that on the July 9, 2013 in Ugenya District within Siaya County intentionally touched the vagina of EA a child aged 3 ½ years with his penis.

2. After full trial the appellant was found guilty, convicted and sentenced ten (10) years imprisonment.

3. Aggrieved by the conviction and sentence, the appellant preferred this appeal setting out five (5) grounds of appeal as per supplementary grounds of appeal, being as follows:-

   (i) That the trial magistrate erred in law and fact in convicting and sentencing the appellant on a defaulted charge sheet.

   (ii) That the trial court failed to find that the appellant was over detained before he I was taken to court for trial.

   (iii) That the appellant was a minor by the time of trial hence wrongly convicted and sentenced.

   (iv) That the learned trial magistrate relied on hearsays to convict him.

   (v) That the learned trial magistrate erred in law and fact by not complying with section 124 of the *Evidence Act*.

4. At the hearing of the appeal the Appellant appeared in person and the state was represented by M/s M Odumba learned state counsel.

5. I am first appellate court and I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I had no opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due

allowance. I am guided by the case of *Kiilu & another v R* (2005) 1 KLR 174 where the court of appeal held thus:

> " an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions."
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

6. The facts of the prosecution's case form part of the record of appeal, and I need not reproduce the same, however I shall proceed to summarize the prosecution's case and the defence.

7. The prosecution's case is that on July 9, 2013 at around 5.00 pm PW1, PAO arrived at her home from the market and she heard somebody trying to run away from the rear door. She enquired who it was and immediately entered her house and found her child tiddening herself and she told her she was with M and she told her that M has run away through the rear door. She told her, M had defiled her in the grandfather's bed. She examined the private parts of the child and found it to be reddish in colour with a foul smell. PW1 waited for father of the child and the accused, as the two are cousins. PW1's husband, told father to the appellant to beat him, as he had agreed he had done the act, that after 3 days the child was taken to Police. P3 form was issued and later filled. PW1 testified the child is EA, being aged 3 ½ years, having been born on 20.6.2009. The appellant was arrested by PW4, Pius Onyango, Assistant Chief of Masat West Sub-Location and taken to Ukwala Police Station whereby the Police re-arrested the appellant and thereafter charged him with the offence.

8. The appellant denied the offence. He put forward a defence of *alibi*, narrating how he spent the date of the alleged offence. He called two defence witnesses to support his defence of alibi.

9. The appellant in support of his appeal produced written submissions and urged that his constitutional rights were violated as he was arrested on July 12, 2013 and kept in custody till July 17, 2013 when he was taken to court, that when the alleged offence, was allegedly committed he was a minor aged 15 years and when he was convicted in 2015, he was still a minor and the sentence meted against him was illegal, that the prosecution did not prove to the charge against him and lastly his defence was not considered.

10. M/s M Odumba, learned state counsel did not support the charge as the relationship between the appellant and the complainant was that of cousins which do not fall under the forbidden relationship under section 22 of the *Sexual Offences Act*, that particulars of the charge is in variance with the evidence, however the learned state counsel submitted the child had been defiled as there was absence of hymen as the appellant had got used to defiling the child who fell under vulnerable group. That if the appellant's constitutional rights were violated he is at liberty to file suit before a constitutional court for compensation and that the appellant never raised the issue of being a minor, that the state counsel submitted she did not support the sentence and urged that the appellant, should have been found guilty of the alternative charge of committing an indecent act with a child.

11. Whether the prosecution proved the offence of incest against the appellant? The particulars in support of the charge states that the complainant EA a female person was to the appellant's knowledge his sister.

Section 20(1) of the *Sexual Offences Act* provides:-

> "Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:"

12. In the offence of incest brother and sister includes half brother and adoptive brother and adoptive sister. In the instant case the plaintiff in support of the charges indicates the appellant to be brother to the complainant, herein, the evidence on record is incomplete variance with the particulars in support of the charge. PW1's mother to the complainant testified that the appellant was the complainant's cousin. PW2's father to the complainant confirmed also the appellant is cousin to the victim. The appellant similarly testified the complainant is his cousin. I am therefore satisfied from the prosecution's Evidence that the appellant and the complainant are cousins and not sisters. Under section 20(1) of the *Sexual Offences Act* relied upon to charge the appellant, cousin do not fall in the list of forbidden relations. Section 22 of the *Sexual Offences* do not recognize the relationship of cousins as brother and sister. I therefore find that particular's given in support of the charge sheet are at variance with the prosecution witnesses Evidence. The evidence do not support the charge of incest and the same is defective. The appellant should not have been charged with an offence of incest but with an offence of defilement, if the prosecution had evidence that the complainant was defiled by a person known or identifiable.

13. What offence if any was committed against the victim herein? I have carefully perused the proceedings in support of the charge of incest. The evidence from PW1 is that the complainant told PW1 the person who was within at the time of the offence was M, who ran away through the rear door. She told PW1 M had defiled her. On examination of her private parts it was reddish and had a foul smell. The victim was taken to the Hospital after 3 days. PW2, the victim in her evidence told court she knew the accused as M PW6, Clinical Officer Ukwala sub-county Hospital testified that he examined the child with history of sexual assault several times by a known person. That nothing was seen in the vagina save foul smelling vaginal discharge. The P3 form exhibit P1 indicted hymen was absent and bleeding noted. From evidence of PW1, PW2 and PW6, I find that the appellant was identified by the complainant, that penetration was proved and the age of the victim to be 3 ½ years. I am therefore satisfied that the offence of defilement was proved against the appellant. The appellant should have been convicted for the offence of defilement contrary to 8(2) of the *Sexual Offences Act* No 3 of 2006 and not for an offence of committing an indecent act with a child contrary to section 11(1) of The *Sexual offences* No 3 of 2006.

14. Whether the appellant had fair trial and whether the sentence is illegal? The appellant urge that he was arrested on July 12, 2013 and taken to court on July 17, 2013. That at the said time he claimed he was 15 years old, however no medical assessment was ordered nor Birth Certificate produced at the trial. The charge sheet strangely enough under apparent age of the accused is recorded "J" meaning a juvenile which the state counsel concedes to. The trial court did not observe that it was dealing with a minor. The case started on July 17, 2013 and was not determined until 2.12.2015. I have perused the court proceedings and I have found that the appellant had a fair trial, however the trial court failed to note that the appellant was minor who needed the protection of the court and speedy trial. The trial court on convicting the appellant should have given him a sentence as provided for under section 8(7) as the Sex Offenders Act, which provides:-

> " 8.

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement

(7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children' s Act.-"

15. I therefore find as of time of the alleged commission of the offence as the appellant was a minor he ought not to have been sentenced to ten (10) years imprisonment under section 11(1) of *Sexual Offences Act* No 3 of 2006 but ought to have been sentenced as provided for under section 191 of the *Children Act*. The sentence of Ten (10) years imprisonment was illegal. On the period the appellant was held at police custody from July 12, 2013 and to July 17, 2013 he was held contrary to the provisions of the Constitution. He should not have been held at Police cells for more than 24 hours, however that breach did affect the proceedings of the criminal case. That if the Appellant is aggrieved by such breach he is at liberty to seek redress in a constitutional court for appropriate orders. This court as it is sitting in a criminal matter cannot in this case deal with the constitutional issues raised in a criminal matter.

16. The appellant put up a defence of *alibi*. He denied having been at the scene of crime, stating that at the time of the alleged commission of the offence he was playing football with his mates upto 6.30 pm He called DW1 and DW2 to corroborate his evidence. DW1 and DW2 testified the appellant at the time of the alleged offence was watching football between Nyaranga Club and Bar football club and returned home at 7.00 pm DW3 testified that from 1 pm upto 6.00 pm he was with the appellant, during which time, they took cows to river, after which they tethered the animals and started playing as they watched football between Nyaranga Club and Bar Club.

17. In cases where a defence of alibi is raised the accused person does not in law thereby assume any burden of proving that the answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable (See case of Charles Anjare Mwamusi CA CRA No 226 of 2002). The appellant's defence was rejected by the trial court on the ground that the witnesses contradicted one another on several issues as DW2 talked of the incident in August 2013 whereas the incident was in July 2013. DW3 stated the appellant was a standard 8 pupil at [particulars withheld] School whereas appellant stated he was a student at [particulars withheld] Secondary School at Form II. I have carefully considered the defence of alibi and note that the appellant did not raise his defence early enough through cross-examination for the prosecution to disapprove the alibi defence. I find the defence of alibi cannot be sustained as it was raised at the time of defence and as such did not give the prosecution room to check it out and disapprove it (see the case of *Njuki and 4 others v R* (2002) 1KLR 771)

18. I am therefore of considered view that the trial courts properly directed itself, it would have found the appellant guilty of defilement contrary to section 8(2) of the *Sexual Offences Act* No 3 of 2006 and not of committing indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. Accordingly I quash the conviction of committing an indecent act with a child and set aside the sentence of 10 years and instead, I find the appellant guilty of defilement contrary to section 8(2) of the *Sexual Offences Act* No 3 of 2006. That as of the time of commission of the offence the appellant was a minor aged 15 years. I will sentence the appellant herein to three (3) years non-custodial sentence during which period he will be supervised by the Probation Officer Siaya County.

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF OCTOBER, 2016.

J. A. MAKAU

JUDGE

DELIVERED THIS 13TH DAY OF OCTOBER, 2016

In the presence of

Appellant In Person Present

M/s. M. Odumba For State

C.C.

K. Odhiambo

L. Atika

J. A. MAKAU

JUDGE