Oruko v Republic (Criminal Appeal E001 of 2022)
[2025] KEHC 2593 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2593 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E001 OF 2022

DK KEMEI, J

MARCH 14, 2025

BETWEEN

CHARLES ZADOCK ORIWA ORUKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. Mathenge (RM) in Bondo Principal Magistrate's Court Sexual Offence Case No. E009 of 2021 delivered on 26Th August 2021)

JUDGMENT

1. The Appellant herein Charles Zadock Oriwa Oruko was charged before the trial court at Bondo with the offense of committing 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 19/9/2020 at around 1630hrs at Rarieda Sub County within Siaya County, intentionally touched the vagina of RAG a child aged 12 years with his fingers.
2. After a full trial, the Appellant was convicted and sentenced to three years under probation.
3. The prosecution applied for a Revision of the sentence and that this court set aside the sentence and replaced it with a sentence of 10 years' imprisonment.
4. Aggrieved, the Appellant has since appealed to this court against both the conviction and sentence on the following grounds of appeal:
    i. That the trial magistrate erred in law and fact in relying on the incredible evidence adduced by the prosecution witnesses yet the elements of the offence were not proved beyond reasonable doubt.
    ii. That the trial magistrate erred in law and fact as no evidence was adduced linking the appellant to the offense.

iii. That the trial magistrate erred in law and in fact in relying on the inconsistent evidence of the prosecution and ignoring the evidence of the appellant adduced during trial

iv. The trial magistrate erred in law and fact in relying on the uncorroborated evidence of the minor to make a conviction.

v. The trial magistrate erred in law and fact in failing to exercise her power within the law to summon in order to find out for herself if Tyrel was indeed a child who could not speak.

vi. The learned trial magistrate erred in law and in fact in finding the appellant guilty and sentencing him to three years' probation while knowing that the minimum sentence for the offence is ten years' imprisonment without disclosing reasons for the abnormally.

vii. That the learned magistrate erred in law and in fact in not discussing the elements of the offence in question and satisfying herself indeed that the evidence adduced by the prosecution was enough to sustain a conviction.

viii. That the trial magistrate erred in law and fact in failing to consider the undeniable truth that the complainant and the appellant are family members who have had internal wrangles and the criminal proceedings against the appellant could have played a big role in settling of scores between the parties.

For the foregoing reasons he prayed that the appeal be allowed, the conviction be quashed and the sentence set aside.

5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court in order to arrive at its own independent finding and conclusion. (See Okeno vs. Republic [1974] EA 32) In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

6. The prosecution called three witnesses in support of its case.

7. PW1 RA testified on oath that she's a 12-year-old pupil at [Particulars Withheld] primary school in grade four. That on 19/9/2020 at about 4.30 pm she was at her grandmother's kitchen together with T when the Apellant who was seated at her grandfather's door step drinking alcohol, went to the kitchen where she was. That he got hold of her, put her on his front, lifted her skirt and put his hand in her private parts. He then held her shoulder and stated that he would go for it another day. She then left her grandmother's place and went to her home to tell her mother what the Appellant had done. That her mother later confronted the Appellant who denied the allegation.

   On cross-examination, she stated that there was Tyrel and herself when he touched her.

8. PW2 EU stated that she is the mother to PW1. That PW1 was born in August 2008 and that she is her 3rd born child. She identified the birth certificate which was marked as PMFI 1. She recalled on 19/9/2020 at about 4.30pm she returned from a burial and found PW1 outside her house washing her feet while crying. She inquired as to why she was crying. She informed the child that she would like to send her to the shop but the child claimed she would not go while still crying. PW1 followed her into the house crying loudly, she told her that she did not want to go and see the bad man. She asked her to reveal the identity of the bad man and that the minor blurted out the name" Baba Kofi" (the appellant herein). She informed her that the appellant had found Tyrel and her in the kitchen and that he went and touched her private parts with his fingers.

That she went and confronted him about it and that he was still drinking alcohol but he denied and claimed that he had not seen any of her children that day. She called out PW1 who came, while still crying and who repeated what the appellant had done to her and that's when the appellant admitted to touching R's private parts while claiming that he had only touched her private parts and nothing else. That the appellant requested her to forgive him.

She informed the clan elder who arrived immediately and that PW1 was still crying and when the clan elder arrived. That Pw1 informed the clan elder about what the appellant had done and that the appellant confessed and apologized. She then reported to Aram police station. She further stated that her house is about 100 meters from her grandmother's kitchen and that the appellant is her distant brother-in-law. That there were no grudges between them. That George Owuor, the clan elder, was present when the appellant confessed.

On cross-examination, she reiterated that he is her distant in-law and that R (PW1) was only with T aged three years when the incident happened.

9. PW3 No.246687PC Tabitha Ojwang of Aram police station stated that she is the investigation officer in the case. That on 21/9/2020 at 7.00am the complainant together with her mother (PW2) reported a case of indecent act. That one Zadock Charles Oriwo indecently assaulted PW1 while in her grandmother's kitchen with one T who could not talk. She identified the appellant in court. She together with other officers and the area chief arrested him. She stated that PW2 had initially reported to the clan elder who advised her to report to the police. She produced the birth certificate as P exhibit 1.

On cross examination, she stated that she requested that Tyrel be availed to record a statement but the complainant informed her that Tyrel was too young to speak.

10. That marked the close of the prosecution's case.

11. The trial court later ruled that a prima facie case had been established and placed the appellant on his defense. He opted to tender a sworn testimony.

12. DW1 Charles Oriwo Oruko stated that he is a farmer from Asembo. That the charge is a fabrication. That day at 4.00 PM he went to the said place to buy cigarettes at the [Particulars withheld] shop. That he saw PW1. That the shopkeeper was not in and had to wait. He sat where people take alcohol during the day. The houses there are five meters apart thus had he touched the child he would have been seen. That the grudge between him and PW2 is because PW2 was a friend to his second wife and that he had stopped her from being her friend.

On cross examination, he stated that he bought the cigarettes at [Particulars withheld]. That he saw PW1 about five meters from the shop. That after he bought the cigarettes, he went into the changaa den with his brother Otieno Olali for about 30 minutes, and as he left, PW1 was playing at the door step. He did not call his brother as a witness. That he did not ask PW2 about the grudge in cross examination.

13. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.

14. The appellant submitted that the age of the minor being 12 years was confirmed by her birth certificate. The identity of the suspect is also not in dispute as the complainant and the suspect live in the same area and that the complainant referred to him as "Baba Kofi". It was submitted that the only contentious issue is whether the appellant committed the alleged act.

15. It was submitted further that three prosecution witnesses were called but only PW1 was an eye witness. There was no corroboration by any witness that he had caught the appellant in the act. Further, that the other three year old T was present but could not talk. That the trial court relied on the testimony

of the victim to conclude that the appellant committed the offence. Invoking the proviso of section 124 of the *Evidence Act* cap 80 Laws of Kenya, the court found PW1's testimony credible, noting her consistent account given to PW2, the village elder and the investigating officer. The court also assessed her demeanor during the testimony. That based on the evidence of a single identifying witness, the appellant was convicted and sentenced to three years' probation. While the sentence outcome has since been addressed, its relevance to this appeal remains significant.

16. Learned counsel for the Appellant placed reliance in the case of Ngacha vs. Republic (Criminal Appeal No. E046 of 2022) [2023] KEHC 17685(KLR)(24th May 2023)(Judgment), where the court held that the procedure to be adopted by a trial court before relying on the proviso of section 124 of the *Evidence Act* includes warning itself of the dangers of convicting on uncorroborated evidence, establishing the credibility of the single eye witness and recording reasons why it is satisfied that the alleged victim is telling the truth.

17. It was further submitted that in the present appeal, the trial court found PW1 a truthful witness, citing her coherent account to her mother, village elder and the investigating officer. It was submitted that the court failed to first warn itself on the dangers of convicting on uncorroborated evidence as a rule of practice. Reliance was placed in the case of Rashid Maro Ramadhan vs. Republic [2021] eKLR where the court held "it is mandatory that the courts to give non-corroborative warning in cases involving a single identifying witness as evidence of proof of fact or facts in issue. There should be no misconception that the rule on a single identifying witness did away with the need for corroboration evidence in sexual offences"

    It was submitted that where the evidence suggests the presence of corroborating witnesses, the court can summon any person even those not called by the prosecution, by exercising its power under section 150 of the Criminal Procedure code if such evidence appears essential to the just decision of the case.

18. It was further submitted that the proviso to section 124 of the *Evidence Act* is not intended to seal gaps in the prosecution's case or assist the prosecution in meeting the required standard of proof. Instead, it serves to uphold justice in cases where the evidence of a single witness is credible, compelling and thoroughly scrutinized in accordance with the law.

    That the evidence of the village elder should not have been assumed as the same would have corroborated both the complainant's account and the alleged confession.

19. In conclusion learned counsel prayed that the appeal be allowed, conviction quashed, the sentence set aside and appellant set at liberty.

20. On the other hand, the Respondent submitted that it had proved all the elements of the offence of committing an indecent act. Further, it submitted that on the issue of giving a sentence lesser than ten years by the trial court, it relied on the Court of Appeal decision in Daniel Kyalo Muema Vs. Republic [2009] eKLR where the Court of Appeal stated that the words "shall be liable" did not in their ordinary meaning require the imposition of the stated penalty but merely expressed the stated penalty which could be imposed at the discretion of the court. Whereas the ten years' imprisonment was not imposed by the trial magistrate, the same was later enhanced by the High court.

21. In conclusion it submitted that the appeal lacks merit and that the same should be dismissed.

22. I have given due consideration to the lower court proceedings and the rival submissions by the parties. I find that the issue for determination is whether the offence was proved beyond reasonable doubt against the Appellant.

23. Section 2 of the *Sexual Offences Act* defines 'Indecent act' as- "indecent act" means any 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.

24. In the case of Robert Mutungi Mumbi v. Republic (Criminal Appeal No. 5 of 2013) [2015] KECA 584 (KLR) the court noted that the offence of committing an indecent act with a child shares similar elements with the offence of defilement, except for the requirement of penetration. The prosecution must establish the age of the complainant, perpetrator's identity and unlawful touch prohibited by the law.

25. In the instant case, the age of the minor is not in doubt as the birth certificate was produced as Exbibit 1 confirming that she was 12 years old. The identity of the perpetrator is also not in issue as the Appellant by his own evidence placed himself at the scene of the crime. He confirmed that he was at [Particulars withheld] shop to buy a cigarette and that he found the complainant playing. The bone of contention is whether indeed the Appellant committed the said offence.

26. From the victim/complainant's evidence, she stated that on 19/9/2020 at about 4.30 pm she was at her grandmother's kitchen together with T when the appellant who was seated at her grandfather's door step drinking alcohol, went to the kitchen where she was and got hold of her, put her on his front, lifted her skirt and put his hand in her private parts. He then held her shoulder and informed her that he would go for it another day.

27. PW2's evidence was that she recalled on 19/9/2020 at about 4.30pm she returned from a burial and found PW1 outside the house washing her feet while crying. She inquired why she was crying but she did not tell her. She informed the child that she would like to send her to the shop but the child claimed that she would not go while still crying. That the child followed her into the house while crying loudly. That she told her that she does not want to go and see the bad man. PW2 then enquired about who the bad man was and she stated ''Baba Kofi'' (the Appellant herein). She informed her that the appellant had found T and her in the kitchen and that he went and touched her private parts with his fingers. That she went and confronted him about it while he was still drinking alcohol but he denied the allegation and claimed that he had not seen any of her children that day. PW2 called out PW1 who came, while still crying and who repeated what the appellant had done to her and that's when the Appellant admitted to touching R's private parts while claiming that he had only touched her private parts and nothing else. That the Appellant requested her to forgive him. She informed the clan elder who arrived immediately while PW1 was still crying and when the clan elder arrived, Pw1 briefed the clan elder on what the Appellant had done and that the Appellant confessed and apologized. PW2 then reported to Aram police station.

28. It is noted that the Appellant's counsel has submitted that the clan elder should have been called by the Respondent so as to bolster their case as it could corroborate that of the complainant and her mother. Learned counsel has opined that the trial court could have called the said clan elder under the provisions of section 150 of the *Criminal Procedure Code* if such evidence appears essential to the just determination of the case. The trial court in convicting the appellant while invoking the proviso of section 124 of the *Evidence Act* cap 80 Laws of Kenya, stated that PW1's testimony was credible, owing to her consistent account given to PW2, the village elder and the investigating officer. Indeed, learned counsel for the Appellant has submitted that the proviso to section 124 of the *Evidence Act* is not intended to seal gaps in the prosecution case or assist the prosecution in meeting the required

standard of proof. Instead, it serves to uphold justice in cases where the evidence of a single witness is credible, compelling and thoroughly scrutinized in accordance with the law. Even though the clan elder was not called to testify, iam satisfied that the trial magistrate did comply with the provisions of section 124 of the *Evidence Act* and warned herself accordingly. It did not at all transpire that there were any grudges between the Appellant and the complainant's family so as to suggest a frame up against him. In the Appellant's defence, he claimed that he had been framed because he had dissuaded his wife from continuing her friendship with the mother of the complainant. I find that it is highly unlikely that the mother of the complainant could use her young and vulnerable daughter as a victim of sexual assault so as to settle scores with the Appellant. Iam satisfied by the evidence of the Respondent that the Appellant committed the offence herein. The evidence of the complainant was corroborated by that of her mother (PW2). Consequently, the finding on conviction was properly arrived at by the learned trial magistrate and thus the same must be upheld.

29. As regards sentence, it is noted that the minimum sentence provided for under section 11(1) of the *Sexual Offences Act* No. 3 of 2006, is ten years' imprisonment. The same 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.''

The Appellant was ordered to serve ten years' imprisonment. I find that the said sentence is neither harsh nor excessive as it is the minimum possible in law. The Supreme Court of Kenya in Petition No. 18 of 2023 R Vs Stephen Gichuki and Others [2023] EKLR held that all minimum sentences provided in the *Sexual Offences Act* No. 3 of 2006 remain lawful until the Act is amended and or declared unconstitutional. Further, it is noted that the conduct of the Appellant who is an adult in assaulting the minor was in bad taste and abhorrent as he is expected to protect young children but not to molest them. It seems the Appellant after getting tipsy leered at the minor and saw her as an object of his lustful and carnal desires. The Appellant deserves a deterrent sentence so as to deter any other sex pests in the society. It is noted that the Appellant posted bail as soon as he took the plea and thus did not remain in custody during the trial. It is noted that the Appellant had served a short period under probation before the same was set aside by this court and substituted with a sentence of ten years' imprisonment. As the said period was barely a month from the date of conviction, I find that the sentence ought to commence from the date of conviction namely 26/8/2021.

30. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 14TH DAY OF MARCH, 2025.

D. KEMEI

JUDGE

In the presence of:

Charles Zadock Oriwa.....Appellant

Jeji for Chepkemboi.....for Appellant

Mocha.....for Respondent

Ogendo.....Court Assistant