Okemwa v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 5207 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E023 OF 2023

AB MWAMUYE, J

APRIL 8, 2025

BETWEEN

ROBERT AMOLLO OKEMWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. C.M. Njagi (PM) delivered on 16th November,2023 in S.O Case No. E112 of 2021)

JUDGMENT

1. The Appellant, Robert Amollo Okemwa, was charged with the offence of Sexual Assault Contrary to section 5(1) (a) (i) (2) of the *Sexual Offences Act*, 2006. The particulars of the offence as stated on the Charge Sheet were that on the 25th September, 2021 at around 1400 hrs at N-Market in Westlands Sub County within Nairobi County, the appellant unlawfully used his fingers to penetrate the vagina of AWM, a child aged 8 years. The appellant was also 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 alternative count are that on the 25th September, 2021 at around 1400 hrs at N-Market in Westlands Sub County within Nairobi County, the appellant intentionally touched the vagina of AWM, a child aged 8 years with his hands.

2. The Appellant pleaded not guilty. The prosecution called 4 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to serve 30 years imprisonment for the offence of sexual assault.

3. The appellant appeals against conviction and sentence in line with his petition of appeal dated 18th December, 2023. In his appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He argued that the ingredients of the offence charged were not established. In addition,

the trial court failed to consider his defence. He urged the court to quash his conviction and set aside the sentence.

4. In response, the state filed grounds of opposition dated 22nd May, 2024. The grounds are that the appeal is an abuse of the court process. The appellant was properly convicted as the prosecution discharged their burden beyond reasonable doubt. The appeal lacks merit and should be dismissed.

5. The appeal was canvassed by way of written submissions which I have duly considered.

6. This is the first appellate court and the duty of first appellate court was set out in the case Okeno Vs. Republic [1972] E.A 32 as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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."

7. While reanalyzing evidence adduced before the trial court, I am minded of the fact that unlike the trial court, I did not get the benefit of taking evidence from the witnesses first hand and observe their demeanor and for that reason I will give due allowance. In view of the above, I have perused and considered record of appeal together with submissions filed by parties herein and find that following as issues for consideration:-

   i. Whether ingredients for offence of sexual assault were proved beyond reasonable doubt.

   ii. Whether sentence imposed was harsh and excessive.

8. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller V. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice."

Whether the prosecution proved its case to the desired threshold

9. The offence of sexual assault is created by Section 5 of the *Sexual Offences Act* which provides that:

> " (1) Any person who unlawfully:
>
> a. penetrates the genital organs of another person with—
>
> i. any part of the body of another or that person; or

ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault."

10. In David Odanga Wanyama v R [2022] eKLR, the ingredients of sexual assault were set out in the following terms:

> " The essential elements of the offence of sexual assault are proof of penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose."

11. From the foregoing, it is clear that in order to establish the offence, the prosecution must prove that there was penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose.

12. It was thus incumbent upon the prosecution to prove the following ingredients in order to establish an offence:

a. Penetration.

b. Identification of the perpetrator.

Penetration

13. The Court of Appeal in the case of John Irungu v Republic, [2016] eKLR pronounced itself on the issue of penetration on the offence of sexual assault as follows:

> " .... Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

14. In the instant case, PW2, the complainant, testified that on the fateful day she was teaching her friend Tabby how to read English when the appellant told her to face the other side and started touching her. She stated that the appellant was touching her vagina, her anus and also her breast. It was her testimony that the appellant inserted his fingers in her vagina and her anus.

15. The complainant told the Trial Court that it was not the first time that the appellant had sexually assaulted her. That it all started when she was in Grade 1. She was scared of telling anyone because she was afraid the appellant would kill her.

16. PW1's testimony did not require corroboration in accordance with the provisions of Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya).That notwithstanding, PW1 testified that she heard the complainant scream while at the toilet. That she heard the house girl telling the complainant to go and inform her mother. That the complainant told her that she felt pain because Baba Tabby (the appellant) had touched her vagina.

17. In the circumstances, I find that penetration was proved to the required legal standard of proof.

Identification of the perpetrator

18. On the issue of identification, the Court of Appeal in the case of Peter Musau Mwanzia V. The Republic 2008 eKLR expressed itself as follows: -

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness , in seeing that the suspect at the time of the offence can recall very well having seen him earlier on before the incident"

19. In the case of Kariuki Njiru & 7 Others v Republic, Criminal Appeal No. 6 of 2001, (UR) the Court of Appeal also emphasized the need to highlight descriptive features to the police where these were used to identify the suspect and also adduce them in evidence:

> " The law on identification is well settled. ...the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered... Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuy & Another v Republic Criminal Appeal No. 22 of 1996 (unreported) held that:"If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

20. Further, in Anjooni and Others v The Republic [1980] KLR, the Madam J.A expressed the following in differentiation between identification and recognition:

> " ... This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

21. In the present case, the appellant was well known to complainant. He was the father to her friend. During cross-examination, the complainant stated that the appellant and his family had moved to their estate in January, 2021 and since then the complainant became friends with the appellant's daughter.

22. I am thus persuaded that under the circumstances, the complainant was well able to identify and recognize the appellant. The Appellant was therefore properly identified as the perpetrator of the offence.

23. I thus find that all the elements of the offence of sexual assault were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence was harsh and excessive under the circumstances

24. As regards the sentence, the Appellant urged this court to find that the sentence passed was excessive and prayed for the same to be set aside.

25. Section 5(2) of the *Sexual Offences Act* provides that a person who commits an offence of sexual assault is liable to imprisonment for a term of not less than ten (10) years which may be enhanced to life imprisonment.

26. This Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru v. Republic [2002] eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

27. The primary purpose of a sentence in a criminal case is to punish an offender for their wrongdoing, while also aiming to rehabilitate them and discourage future criminal behaviour, turning them into law-abiding citizens. Although the Trial Court's sentence in this case was lawful, being a first-time offender who still has a chance for rehabilitation and a full life ahead after being rehabilitated the Trial Court should have considered the same and tended towards the lower end of the scale.

28. Additionally, thirty years imprisonment is commonly the sentence imposed for murder in many cases, and it is the period that the Court of Appeal arrived at when giving a determinate sentence in place of indeterminate term of life imprisonment. The Trial Court's failure to examine those aspect and explain why thirty years was applicable in the present sexual offences case was an error that warrants interference.

29. Having considered the sentence meted out and circumstances of this case, I do find that the sentence of thirty (30) years handed down was manifestly harsh and excessive.

30. For the above reasons, I hereby set aside the sentence of thirty (30) years imposed and substitute it with a sentence of ten (10) years imprisonment; and to that sentence Section 333(2) of the *Criminal Procedure Code* shall apply.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS EIGHTH DAY OF APRIL, 2025.

BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellant – Mr. Nyarango

Prosecution – Absent

Court Assistant – Mr. Jared Agara