Korgoren v Republic (Criminal Appeal E010 of 2022)
[2025] KEHC 6195 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6195 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E010 OF 2022

JK NG'ARNG'AR, J

MAY 19, 2025

BETWEEN

DAVID KIPKEMOI KORGOREN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. M. Michuki, RM dated 9TH August at the Magistrate's Court at Bomet, Sexual Offence Case No.E046 of 2023)

JUDGMENT

Introduction and Background

1. The Appellant was charged in the lower court with *inter alia* the offence of Defilement contrary to section 8(1) and (3) of the *Sexual Offences Act*. The particulars were that on 15th June, 2023 at Bomet County he intentionally and unlawfully caused his male genital organ to penetrate into the vagina of B.C a girl aged 13 years old.

2. After hearing the case, the learned trial magistrate found that the Respondent ("the Prosecution") had proven its case beyond reasonable doubt and proceeded to convict and sentence the Appellant as per section 8(1) and (3) of the *Sexual Offences Act*. It is this decision that the Appellant has appealed against through grounds set out in his Petition of Appeal received on 28th August, 2024. The Appellant also relies on his written submissions received on 27th February, 2025. The Prosecution did not file any submissions in opposition to the Appeal

Analysis and Determination

3. This is the first appellate court and in *Okeno v. R* [1972] EA. 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking

the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions and there is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision(Also see *David Njuguna Wairimu v Republic* KSM CA CRA No. 28 of 2009 [2010] eKLR and *Pandya v Republic*(1957) EA 336)

4. With the above, I now proceed to determine the Appellant's appeal which is premised on Eight main grounds.

5. First, the appellant contends that the learned magistrate erred in law and fact by convicting and sentencing the appellant when the evidence on record did not meet the required standard of proof in accordance with the law. Before this court delves in deciding the said ground it must satisfy itself that there was manifestly insufficient, inconsistent, uncorroborated and had glaring gaps, hence incapable of sustaining a conviction.

6. The Court of Appeal held in *Erick Onyango Ondeng' v Republic*(CA No. 5 of 2013), The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honored devise for testing the truth or correctness of evidence.....), the alleged fact in this ground is not sufficiently proved.

7. On ground Three, Four, Five and Six the Appellant aver that the court did not consider the weight of evidence and relied on extrinsic evidence and that the charges were not tallying and favorable. He further contends the learned Magistrate relied on uncorroborated evidence. He states the learned Magistrate relied on evidence adduced by court by the prosecution side which were inconsistent, contradictory and full of irregularities.

8. In *Fappyton Mutuku Ngui v R* (CA. No. 296 of 2010) it was held that age, penile penetration and identity of the perpetrator must be proved.

9. On age, the trial court considered the age assessment by the clinical officer reflecting that BC age was estimated to be 32 years.

10. On identification, first, that the events took place at 5:00pm and secondly, that both the appellant and the victim lived in the same neighborhood and they live in the same homestead hence easy for her to identify him.

11. On Penetration, B.C in her testimony told court that the appellant removed his trouser and her's and caused his genitals to enter the genitals of BC. Further, a professional examination was done by the Medical Doctor whose report revealed that the Complainant's hymen broken. It is incontrovertible that there was penetration of the complainant's vagina. All these seen together leave no doubt that there was penetration of the Complainant's vagina. Hence, the second ingredient of the offence of defilement is easily satisfied.

12. In regards to ground Five, where the appellant's counsel avers that the trial magistrate failed to consider the appellants defense. It should be noted that the appellant was given sufficient audience and in fact testified on 23rd June, 2020 where counsel conducted the defense hearing. I fail to find any reason why the trial magistrate could ignore the defense.

13. On ground Seven and Eight the Appellant lays a claim that the learned Magistrate rejected his plausible defence without any explanation section 8 (3) of the *Sexual Offences Act* provides that A person who commits an offence of defilement with a child between the age of Twelve and Fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. In my view the leaned magistrate must have assessed the nature of the offence and the circumstance therein warranted the conviction and sentence given.

14. I have gone through the record and find that the evidence unerringly points at the Appellant as the perpetrator of the crime.

15. The trial court meted out the even less sentence and not even the prescribed minimum of 20 years imprisonment. I therefore find no reason for the court to interfere with the same.

Conclusion and Disposition

16. In the foregoing and for the reasons stated above, I find that the trial court's determination was sound, judicious and based on the evidence on record.

17. Consequently, and accordingly this court dismisses the Appellant's appeal and affirm the trial court's findings on both conviction and sentence.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF MAY, 2025.

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mr. Njeru for the Respondent. Siele/Susan (Court Assistant).