Osman v Republic (Criminal Appeal E030 of 2024)
[2025] KEHC 6477 (KLR) (23 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E030 OF 2024

JN ONYIEGO, J

MAY 23, 2025

BETWEEN

NOOR MOHAMED OSMAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Baraka Xavier F. (R.M.) delivered on 12.07.2024 in wajir S.O case No. E009 of 2024)

JUDGMENT

1. On Count I, the appellant was charged with the offence of sexual assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 14.05.2024 at [Particulars withhelin Wajir East Sub County within Wajir County unlawfully used his fingers to penetrate the vagina of I.A.M., a girl aged 7 years.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* 3 of 2006. The particulars of the offence were that on 14.05.2024 at [Particulars withhelin Wajir East Sub County within Wajir County, he intentionally touched the vagina of I.A.M., using his fingers against her will.

3. After a full trial, the appellant was convicted of the alternative count and consequently sentenced to serve 8 years in prison.

4. Being dissatisfied with the determination of the trial court, he appealed against his conviction and sentence in line with his undated amended petition of appeal summarized on the following grounds hereunder:

    i. That the learned trial magistrate erred in law and facts by finding and convicting the appellant notwithstanding that the prosecution's case was marred with inconsistencies.

ii. That the learned trial magistrate erred in law and facts by finding and convicting him notwithstanding the fact that the prosecution did not prove its case.

iii. That the learned magistrate erred in law and facts by finding by convicting him without considering his defence.

5. The appeal was canvassed by way of written submissions.

6. The appellant filed his undated submissions arguing that the prosecution did not prove its case to the required standards. That the evidence adduced by the prosecution was marred with inconsistencies and contradictions and therefore, the trial magistrate erred by relying on the same in convicting him. Equally, it was urged that the prosecution did not avail the important witnesses in proving its case. That the lady who allegedly witnessed the complainant's genitalia was not presented as a witness much to the detriment of the prosecution's case.

7. The appellant wondered how possible it was for him to touch the breasts and genitalia of the minor during class sessions right before other students as alleged. He reiterated the testimony of DW2 who stated that, at the material time, there were two teachers in the same class and that there were no barrier(s) in the class and therefore, it was easy to see what happens in the whole of the class room without any hindrance. He thus urged this court to consider his appeal, quash his conviction and then set him at liberty.

8. The respondent filed submissions dated 24.09.2024 stating that the evidence tendered by the prosecution witnesses was cogent, reliable and admissible. That the same clearly demonstrated that indeed the appellant committed the offence as charged. It was urged that the trial magistrate considered the evidence of all the prosecution witnesses and correctly found that all elements establishing the offence of committing an indecent act with a child had been sufficiently proved by the prosecution. The prosecution counsel urged that the allegation that the appellant's defence was not considered is unfounded as the prosecution's case displaced the same. That the sentence meted out on the appellant was equally legal and just. To that end, this court was urged to uphold the finding by the trial court and dismiss the appeal herein.

9. This is the first appellate court and therefore duty bound to re-evaluate and re-assess afresh the evidence tendered before the trial court and arrive at an independent decision. See Okeno vs R [1972] EA 32, where the Court of Appeal for East Africa stated that the mandate of the first appellate court is to analyze and re-evaluate the evidence that was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw nor heard the witnesses testify to be able to assess their general demeanour.

10. PW1, Fas, testified that the complainant, a 7-year-old girl is her daughter and a student at [Particulars withheld] Islamic Centre. That on 14.05.2024 unlike the other days, the complainant returned home but was not happy and lively. She stated that she enquired on what was wrong and then offered to bath her. In the process, the minor refused to sit as she squatted instead. That observing her genitalia, she noticed a laceration on her private part and upon touching the same, the minor screamed. She went further to state that upon enquiring from the complainant, she told her that she was beaten by her teacher who was in the habit of touching her private parts daily.

11. That she was unable to urinate properly as she experienced pain. Consequently, she informed the father of the minor who thereafter called Mahat, the owner of the dugsi in question. As a consequence, the father requested the school owner to visit his home alongside a female. Upon the female, Zeinab arriving at PW1's house in company of Mahat, PW1 undressed the complainant and Zeinab upon checking the complainant's genitals, she confirmed to Mahat that indeed, the minor had lacerations

in her genitalia. That they reported the matter to the police and thereafter, they were referred to the hospital.

12. It was her testimony that the complainant further told her that while at the dugsi, boys and girls don't mix in as much as the girls sit next to the teacher. That incase, any child looked at the teacher, the child responsible would be beaten. It was her evidence that the appellant would press the complainant's body and place his hands in her genitals even when she was having her pants on. On cross examination, she stated that the complainant mentioned the appellant as responsible for her harm.

13. PW2, I.A.M., a minor who gave unsworn testimony testified that on the material day, the appellant inserted his fingers in her genitals. That during that time, she had her clothes on and other students were equally in class and so, he called students one by one as he touched her. That upon the teacher calling her another time, she declined to go as the appellant had previously touched her, but the latest case was when he inserted his finger into her genitalia. On cross examination, she stated that the appellant caned her and further touched her body.

14. PW3, Ahmed Mahat testified that he was a dugsii teacher at the said institution and that on 14.04.2024, the complainant's father called and informed him of the incident herein. That together with Zeinab, they visited PW1's home and upon PW1 undressing the complainant, Zeinab confirmed the allegation. It was his evidence that the complainant stated that the appellant was responsible for her injuries. He confirmed that the classes are undertaken inside a mosque but in different corners.

15. PW4, Siyad Hassan Sanei, a medical officer based at Wajir Hospital stated that he examined the complainant upon being presented at the said hospital. According to him, the following were his findings: there was a visible laceration on the labia majora in as much as the complainant did not bleed. He thus recommended a psychosocial counselling to the minor and the mother. On cross examination, he stated that he did not see any cane injuries in the complainant's body and that the injury on the labia measured as 0.3 x 1.3 cm. He further stated that the injury looked more of a finger nail and that there was no penetration.

16. PW5, No. 1000912 PC Roble, the investigating officer stated that after the matter was assigned to him, he started his investigations by recording the statements of the witnesses and thereafter accompanying the minor and PW1 to the hospital. It was his evidence that the appellant harmed the minor while other students were out during games time. That the appellant called the complainant into the classroom and then proceeded to touch her genitalia and breasts. Upon the complainant declining the appellant's moves, the appellant started punishing her. It was his evidence that upon completing his investigations, he charged the appellant with the offence herein. On cross examination, he stated that he did not visit the scene but from the interview with the complainant, he learnt that when the complainant resisted the appellant's moves, he pinched her. That the same used to happen during break hours.

17. DW1, Noor Mohamed Osman in his sworn testimony stated that he is a dugsi teacher and that in the said class, there were two teachers at any given time. That this was so since the two classes are positioned 9 meters away from the other and are conducted concurrently. It was his evidence that at break hours, the children gather together in taking their tea and the same applies to the teachers who take their tea together. He confirmed that indeed the complainant was his student but denied ever assaulting her sexually.

18. DW2, Abdi Mohamed Elmi stated that he was a colleague to DW1 at the material time and that they shared a class in the same institution. That there was no wall between their respective classes and that they could see each other well. It was his evidence that whenever they left for break, they could go together and so to the students and that he did not see anything unusual.

19. Having considered the record and the written submissions by both parties, I find that the issues that arise for determination in this appeal are;

    i. Whether the prosecution proved its case to the required standard of beyond reasonable doubt;

    ii. Whether the prosecution evidence was contradictory or inconsistent.

    iii. Whether the sentence meted upon the appellant was excessive, unreasonable or harsh.

20. From the record, the trial court found the appellant guilty of the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

21. Section 11(1) of the *Sexual Offences Act* stipulates that:

> " 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."

22. Section 2 of the *Sexual Offences Act* provides that, "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."

23. The appellant urged that the discrepancies in the prosecution's evidence were too loud to go unnoticed. That the same went straight to the core of the charges herein and as such, this court ought to review the same.

24. With the above in mind, I will proceed to determine whether the offence of indecent act with a child was proved.

25. From the evidence of the complainant, it was alleged that the teacher inserted his fingers in her vagina, caned her and further touched her. Of importance to note is the fact that all these happened during an active class session in the presence of other students. A consideration of the evidence of the medical officer on the other hand showed that from the examination carried out, there was no evidence of penetration and neither that of caning save for the laceration on the complainant's labia. The investigating officer on the other hand, stated that the teacher, the appellant herein touched the complainant's breasts and further, caused the laceration on her vagina in the absence of other pupils. That the complainant had a mark on her right breast most likely caused by a finger nail. Additionally, that the incident happened during break time and when the complainant resisted the said moves, the appellant instead caned her. In the same breadth, PW1 stated that the complainant informed her that the appellant used to touch her daughter on her genitalia but on the very day, the teacher inserted his finger in her vagina. The investigating officer stated that the victim was a lone with the teacher when the incident took place contrary to the complainant's testimony that it was done in class.

26. DW1, the appellant denied the said allegation and further wondered how possible would that be noting that he shared the class with another teacher, DW2.

27. It is apparent that the only direct evidence available is that of the victim a minor who made unsworn testimony as she did not understand the nature of an oath. The trial magistrate basically relied on Section 124 of the *Evidence Act* to convict the appellant. The relevant proviso under Section 124 provides that;

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. Having considered the above section together with the evidence by both sides, I find that the charge was not supported as the discrepancies were not only glaring but also created a doubt. I say so for the reason that the investigating officer who could have helped this court reach a conclusive determination clearly was not even aware of the whole facts of the case he was tasked to investigate. It thus remained unknown why the investigating officer imported facts that were not raised by the complainant in this matter.

29. It is not lost to this court that the complainant was a minor of 7 years but the allegations fronted by the said minor, majority were not convincing and therefore, the same places the mind of this court into wondering whether she was truthful in her testimony. If indeed the act complained of was committed in the presence of other pupils, how come none of the pupils was called to testify. This evidence is contrary to the testimony of the investigating officer who stated it was committed during breakdown in the absence of other children.

30. From the evidence on record, it would appear like the victim was not happy with the alleged beatings by the teacher. She was therefore prejudiced against the teacher hence her evidence may be biased thus requiring independent evidence to corroborate her testimony. I am out of curiosity surprised that a seven-year old baby could have breasts to be touched as alleged by the investigating officer. This allegation was not made by the complainant herself.

31. Although Section 124 of the *evidence Act* allows reliance of the evidence of a single witness in sexual offence to convict, it does not absolutely discard rules of evidence especially touching on corroboration especially where there are glaring contradictions between the victim's evidence and that of the rest of the witnesses and where the victim has given unsworn testimony. In this case the evidence of the victim and that of the mother and the investigating officer is in material facts at variance. In law, that discrepancy must go to the benefit of the accused person See Philip Nzaka Watu v Republic (2016) e KLR where the court held that;

> " it is incumbent upon the prosecution to prove its case beyond reasonable doubt. Article 50(1) of *the constitution* provides for the right to remain silent and not to testify during the proceedings"

32. Similarly, Lord Denning in Miller vs Ministry of Pensions, [1947] 2 ALL ER 372 had this to say on the burden of proof by the prosecution: -

> " 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 proved beyond reasonable doubt, but nothing short of that will suffice."

33. Mativo, J. (as he was then) in the case of Elizabeth Waithiegeni Gatimu v Republic [2015] eKLR expressed himself as hereunder:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...
>
> Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient.
>
> The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

34. On the ground that the court did not consider his defence, the same is not true as the record is clear that the considered the same under its own sub-heading. On the question that some witnesses were not call, that is within the discretion of the prosecution.

35. The upshot of the above analysis is that the evidence of the evidence tendered by the prosecution was not consistent hence the benefit of doubt must go to the benefit of the appellant.

36. Accordingly, it is my holding that the appeal is found to have merit and is thus allowed. The determination by the trial court is hereby set aside and replaced by one quashing the conviction and setting aside the sentence. The appellant is thus set free unless lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MAY 2025

J. N. ONYIEGO

JUDGE