Republic v Odhiambo (Criminal Appeal E005 of 2024)
[2025] KEHC 5847 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5847 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E005 OF 2024

CM KARIUKI, J

MAY 8, 2025

BETWEEN

REPUBLIC ..... APPELLANT

AND

JOSEPH ODHIAMBO ..... RESPONDENT

((Being an appeal from the ruling of Hon. W.C. Waswa (S.R.M) in Kilgoris MCSO No. E013 of 2023 delivered on 22/02/2024))

JUDGMENT

1. The trial court acquitted the respondent on both counts.
2. Being dissatisfied with the said acquittal, the appellant preferred an appeal vide a petition of appeal dated 04/03/2024. The appellant filed grounds of appeal as follows.
3. Thatthe learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence thus reaching an erroneous decision.
4. Thatthe learned trial magistrate erred in law and in fact in failing to consider Thatthe victim, minor M.V., positively identified the accused and the scene in room 61.
5. Thatthe learned trial magistrate erred in law and fact in failing to consider Thatthe victim, M.V., confirmed the accused bathed her with cold water.
6. Thatthe learned trial magistrate erred in law by engaging into speculation as basis of acquittal at paragraph 71 of the ruling.
7. Thatthe learned trial magistrate erred in law and fact by failing to consider ThatPW3 confirmed spermatozoa were seen on the victim minor M.V. ‘s labia majora.

8. Thatthe learned trial magistrate erred in law and fact by failing to consider Thatthe accused's cross-examination did not shake the prosecution's evidence.

9. Thatthe learned trial magistrate erred in law and fact by failing to consider the age of the victim, minor M.V.

Brief facts

10. The respondent was charged with defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. No. 3 of 2006.

11. The particulars were Thaton 11/02/2023 at around 1800hrs at serena mara hotel of Trans Mara South Sub county within Narok County, the respondent intentionally attempted to cause his penis to penetrate the vagina of M.V. a girl aged 3 years.

12. The respondent was tried and acquitted.

Directions of the court.

13. The appeal was canvassed by way of written and oral submissions.

The Appellant's submissions.

14. The appellant submitted Thatthe age of the complainant was proved.

15. The appellant submitted Thatthe element of attempted defilement was proved by evidence of PW1, 2, 3, and 4. The appellant relied on Abdulsalim V Republic (Criminal Appeal E005 of 2023) [2023] KEHC 25863

16. The appellant submitted Thatthere was no error in the identification of the respondent, as he was well known to the complainant

17. The appellant submitted Thatthe court misinterpreted the complainant's testimony.

18. The appellant submitted Thatthe court erred in drawing an adverse inference on the state's failure to avail the complainant's aunt to conclude her testimony. The appellant relied on AHM V Republic (criminal appeal E043 of 2021[2022] KEHC 12773, MTG V Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189(KLR)

19. The appellant urged this court to find Thatthe finding of a no case to answer and subsequent acquittal were erroneous and in conflict with the legal threshold to be met in establishing a prima facie case by the appellant based on available overwhelming evidence.

The respondent's submissions.

20. The submissions by the respondent filed in the CTS are not clear. some part is cut off. it was not scanned properly.

Analysis And Determination.

The court's duty

21. A first appellate court is obligated to re-evaluate the evidence and make its own conclusions, bearing in mind Thatthe trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

22. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;

23. Whether the respondent ought to be placed on his defence.**

24. The appellant faced charges of Attempted Defilement contrary to section 9 (1) as read with section 9 (2) of the *Sexual Offences Act* No. 3 of 2006.

25. The particulars being Thaton 11th February, 2023 at around 1800 hours, at Serena Mara Hotel of Transmara South Sub County within Narok County, intentionally attempted to cause his penis to penetrate the vagina of M.V. a child aged 3 years and 6 months. And In the alternative count, the accused person is charged with the offence of Committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act* No. 3 of 2006.

26. The of charges and In the alternative count, the accused person is charged with the offence of Committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act* No. 3 of 2006.

27. The statement and particulars above were the ones which were to be established on prima facie basis to warrant the respondent to be put on his defense.

28. In Republic vs. Abdi Ibrahim Owl [2013] eKLR a prima facie case was defined as follows: -

> " Prima facie" is a Latin word defined by Black's Law Dictionary, 8th Edition as "Sufficient to establish a fact or raise a presumption unless disproved or rebutted". "Prima facie case" is defined by the same dictionary as "The establishment of a legally required rebuttable presumption". To digest this further, in simple terms, it means the establishment of a rebuttal presumption Thatan accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:
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> "Remembering Thatthe legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree Thata prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting Thatthe court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree Thatthe question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence...It is may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."

29. The prosecution called 5 witnesses, the star witness being PW1 V.M.who testified Thatshe had seen the accused person at his house. He stays at her home. When she saw him, he did not tell her anything. He did not call her. Her mother, Sylvia, called her and washed her. The accused person is not a bad man, he is a good person. She is 2 years old. She bathed while her mother was absent. She saw the accused person at his house. She goes to the accused person to seat with him.

30. The accused person stays with the person who washes their clothes. She ate oranges with Titus. She was promised an apple. He removed her clothes. He only removed his clothes. She did not sleep, he slept there while she watched. She was injured on her private part. She was not injured by anyone at all.

31. PW1 further testified Thatshe visited the doctor but not at night. The finger made her feel pain. Someone inserted his fingers in her. Her aunt inserted her fingers in her. Her mother washed her with cold water. The accused is a good person while the aunt is a bad person.

32. In cross – examination, PW1 testified Thather aunt did not bath her properly. The person who told her Thathe/she would bath her with cold water was another person not in court. His/her house is near by. The said person is not before court. Its another person. The accused person gave her an orange and apple. The accused person did not hurt her private parts. Her aunty hurt her private parts and beat her. The accused person did not hurt her.

33. PW1 further testified That"aunty hunifanyia tabia mbaya". "Mtu mbaya alinifanyia tabia mbaya". "Sijaenda kuona tv, sijui huyo ni mtu mbaya".

34. In re – examination, PW1 testified That"aunty hanifanyii tabia mbaya. Kuna mtu ananifanyia tambia mbaya (points to the accused person). Ule ni mwenye alinifanyia tabia mbaya. Alinifanyia tabia mbaya kwake".

35. The ingredients of the offence of attempted defilement were laid out in the case of Peter Ndoli Adisa v Republic [2018] eKLR as follows:

> " The prosecution in an offence of attempted defilement must prove the other ingredients of the offence of defilement except penetration; it must from the age of the complainant, the positive identification of the accused and then prove steps taken by the accused to execute the defilement which did not succeed. Attempted defilement is as if were a failed defilement, because there was no penetration."

36. At this stage of the proceedings, the prosecution is tasked with proving the aforementioned ingrddents in order to establish a prima facie case.

37. In sexual offence cases, and more so where no one witnessed the alleged commission of the offence, the evidence of the victim is extremely crucial with regards to the identification of the alleged perpetrator.

38. This a matter was heard by two court the trial court and its successor which noted Thatthe "victim testified before my predecessor. Therefore, I did not have the privilege of observing the demanour of the victim while she adduced evidence in this matter". This is the same situation of the High court in the instant appeal.

39. The prosecution counsel, counsel for the accused person and counsel watching brief for the victim did not help the victim in this case. They are the cause of her contradictory evidence. They basically confused her.

40. The said parties kept on recalling the victim for cross – examination and further examination in chief on different dates. This clearly confused the victim or made the victim change her testimony in court. Everytime she was recalled, she gave a different version of events. It must be remebered Thatthe victim was only three (3) years old at the time.

41. This mode of procedure applied in handling the minor victim confused even the court to the extent Thatit was unsure as to who the perpatrator was. Is it the accused person or the victim's aunty? The victim's aunty started adducing evidence as PW5 on 5th July, 2023. However, before she could delve

into the substance of the matter, the prosecution applied for her to be stood down and she was never recalled again.

42. Since the said aunty had been mentioned severally by the victim, it was critial for her to adduce evidence in order to shed light on the matter. However, the prosecution availed her to court but failed to allow her adduce evidence in this matter. This raises serious questions and doubts as to why the prosecution did not want this court to hear from her and be cross – examined by the accused person's counsel.

43. Thus trial court made a finding that,the contradiction herein pertains to the identity of the perpetrator which is one of the main ingredients in sexual offence cases. Hence, the contradiction herein goes to the root of the matter and cannot be cured even if this matter were to proceed to defence hearing.

44. This coourt finds no fault on the part of the lower court on the face of the material before the court. In Richard Munene v Republic [2018] eKLR, the Court of Appeal stated with regard to contradiction or inconsistency in the evidence of the prosecution witness:

> " Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit Thatwitness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
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> It is a settled principle of law however, Thatit is not every trifling contradiction or inconsistency in the evidence of the prosecution witness Thatwill be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court Thatan accused person will be entitled to benefit from it."

45. Similarly, in Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6, in which the Court of Appeal of Uganda stated:

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is Thatgrave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks Thatthey point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

46. In AHM v Republic (Criminal Appeal E043 of 2021) [2022] KEHC 12773 (KLR) (31 August 2022) (Judgment) the court held as follows:

> " In the above cited, it was held Thatcontradictions in evidence of a witness Thatwould be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness Thatis fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court Thatan accused is entitled to benefit there from."

47. In JMN v Republic (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR) (7 April 2022) (Judgment) the court held:

> " To me, the defence raised by the appellant and the complainant's attempt to dissociate herself from the charges, raises reasonable doubts on the prosecution case. Reasonable doubt is not mere possible doubt. It is Thatstate of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in Thatcondition Thatit cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[10]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 Thatthere 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."

48. I agree with the lower court finding that,the discrepacies with regards to the identity of the perpetrator shall not be resolved even if this matter was to proceed to defence hearing.

49. In the circumstances, this court finds Thatthe prosecution has failed to adduce enough evidence at the stage of the prosecution closed its case in order to warrant the accused person to be placed on his defence. Thus I make the orders that;

    i. The trial court verdict is upheld.

    ii. The appeal is dismissed.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025.

CHARLES KARIUKI

JUDGE