Odera v Republic (Criminal Appeal E038 of 2023) [2024] KEHC 2635 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2635 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E038 OF 2023

KW KIARIE, J

MARCH 12, 2024

BETWEEN

EVANS OMONDI ODERA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence in S.O. case NO. E016 of 2022 of the Chief Magistrate's Court at Homa Bay by Hon. Joy Wesonga–Principal Magistrate)

JUDGMENT

1. Evans Omondi Odera, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 0f 2006.
2. The particulars of the offence are that on the 4th day of April 2022 at [Particulars Withheld] village in Homa Bay sub-county within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of L.K.A., a child aged Sixteen years.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.
4. Ammon Oluoch, Advocate, represented the appellant. He raised grounds of appeal as follows:
    a. The learned trial magistrate erred in law and fact by not appreciating the evidence of PW2, which, apart from materially contradicting that of the complainant, established a prior relationship between the complainant and the appellant.
    b. The learned trial magistrate erred in law and fact when she relied on the medical examination report's exculpatory contents.

c. The provisions of section 124 of the *Evidence Act* were not applicable regarding the believability of her evidence.

d. The learned trial magistrate erred in law and fact and ignored the emerging jurisprudence on sentencing in the so-called "mandatory minimum sentences" by imposing a sentence of 15 years imprisonment.

e. The learned trial magistrate erred in law and, in fact, in ignoring the totality of the evidence, which pointed to the fact that the complainant held herself out at 18 years and above.

5. The state opposed the appeal and contended that the case was proved to the required standards and that the sentence was proper.

6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

   a. That there was penetration of the complainant's genitalia;

   b. That the accused was the perpetrator and

   c. The victim must be below eighteen years old.

   This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR.

8. Section 8 (4) of the *Sexual Offences Act* provides:

   > A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

9. Until the law is amended to reflect the current reasoning on sentencing regarding sexual offences, the sentence as provided will remain the legal sentence. Otherwise, holding will lead to anarchy and uncertainty in sentencing.

10. The prosecution produced a copy of the Certificate of Birth (exhibit 1) for the complainant. The certificate indicates that the complainant was born on the 29th day of January 2006. This supported the complainant's evidence of her age. This means that at the time of the complained offence, the complainant was sixteen years and two months old. Her age was established to the required standards.

11. Though the appellant contendedthat the complainant held herself out at 18 years and above, this was not borne out by the evidence on record. Nowhere was it even remotely suggested that the appellant was made to believe the complainant was an adult. This ground cannot stand.

12. L.K.A. (PW1) testified that when they went to a lodging with the appellant, they had sexual intercourse. She, however, made it appear that she was an unwilling participant. The evidence of PW2 contradicted this evidence and indicated that the complainant and the appellant were in a relationship. On the material day, they used her phone to communicate. The appellant met the complainant in her presence and went away together on a motorcycle.

13. It was contended that the complainant was not believable, for she lied about her relationship with the appellant. Not every untruth from a witness can affect her credibility. The court must take judicial

notice that girls have been socialized not to hold themselves out as willing participants. In the instant case, the complainant was a willing participant and went out to meet the appellant willingly. We must, however, look for other material evidence to corroborate the complainant's evidence.

14. PW2 is a friend of the complainant. Her evidence was that on the 4th day of April 2022, she had gone to wash clothes at the complainant's company. The latter asked her to text her boyfriend and ask him to call. When the complainant's boyfriend called, she took the phone, went to some bush, and spent a lot of time on the phone. She said her boyfriend had asked her to meet him in town. When the two later went to the market, they met the appellant on a motorcycle. He carried the two. She (PW2) alighted, and the complainant and the appellant rode on.

15. This evidence displaced the appellant's alibi defence and corroborated the complainant's contention that the two met on the material day.

16. Abonyo Onyango Godfrey (PW6) adduced medical evidence. His evidence was that when he examined her on the 5th day of April 2022, he found that the hymen was torn and healing. He said that the injuries were not sustained on the alleged day. During cross-examination, he said that if she had been defiled, she could have been bleeding profusely. He was categorical that the injuries were not sustained on the date of the alleged defilement.

17. Though there is no doubt that the complainant and the appellant were together on April 4, 2022, the prosecution did not prove penetration.

18. The upshot of the foregoing analysis of the evidence on record is that the appellant's conviction was unsafe. It is hereby quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE