Otieno v Republic (Criminal Appeal E107 of 2022) [2024] KEHC 2304 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E107 OF 2022

RPV WENDOH, J

MARCH 1, 2024

BETWEEN

ROGERS ODHIAMBO OTIENO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. R. K. Langat – Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court S.O. NO. 19 OF 2020 delivered on 23/03/2019)

JUDGMENT

1. Rodgers Odhiambo Otieno has filed this appeal against the judgment of the Senior Principal Magistrate Rongo, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.

2. The particulars of the charge are that between 1st and 4th June 2020 at Rongo, intentionally and unlawfully caused his penis to penetrate the vagina of TAO a child aged 14 years or that he caused his penis to touch the vagina of TAO. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses in support of their case namely PW1 LiLian Nyaboke, a clinical officer at Rongo Sub County Hospital; PW2 TAO the complainant; PW3 MOO, the complainant's father and lastly PW4, PC Eric Kandie the investigating officer.

3. When called upon to defend himself, the appellant gave a sworn statement but did not call any other witness.

4. Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 31/10/2023 are as follows: -

1. That the offence was not proved to the required standard;
2. That the birth certificate and age assessment report tendered in evidence were contradictory;
3. That the complainant was an adult;
4. That the appellant's defence was not considered.

5. The appellant therefore prays that the conviction be quashed, sentence set aside and the appellant be set at liberty. The appellant also filed written submissions in support of the appeal. The prosecution counsel Mr. Kaino opposed the appeal through his submissions.

6. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of Okeno v Republic (1972) EA 32 where the Court of Appeal said:-

> " 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 v R*., [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. Ruwala v R*., [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, see *Peters v Sunday Post*, [1958] E. A. 424."

7. PW1 examined the complainant and found the hymen to be absent, with no injuries to the genitalia. PW1 filled the P3 Form on 6/6/2020, and observed that though there was penetration and an infection, that was not the first time that PW2 was involved in sexual activity. PW1 also produced the PCR and Age assessment report in respect of the appellant.

8. PW2 the complainant told the court that she is nineteen (19) years old though she noted that her birth certificate indicated that she was born on 23/5/2005. She referred to the appellant as her husband; that she went to the appellant's home on 1/6/2020 where she stayed till 3/6/2020; that during that time, they had sexual intercourse; that on 6/6/2020 her father went to the appellant's house with police officers, found her with the appellant and both were taken to Rongo Police Station. She stated that she had agreed to marry the appellant after she finished school.

9. PW3 recalled that his daughter PW2 secretly left their home on the night of 1/6/2020. Her siblings told PW3 that Rodgers Otieno, the appellant, knew where the complainant was and he proceeded there but the door was not opened. He continued to look for the complainant till 5/6/2020 when he found that the appellant lived in Kodero Bara and was shown his house. PW3 was given youths by the Assistant Chief, went to the house and found the two, the appellant and complainant. They were taken to the police station after which the complainant was examined.

10. The investigating officer (PW4) recalled 6the /6/2020 when he found the appellant and complainant having been arrested and were later charged.

11. The appellant's defence was a genera denial that he does not know why he was arrested.

12. In support of the appeal, the appellant submitted that the complainant had the capacity to consent to sexual intercourse which she did. He invoked Section 8 (5) Sexual Offences Act that PW1 had agreed to marry him after completion of school. He relied on the decision of *Eliud Waweru Wambua v Republic* (2019) eKLR and *Peter Mamina Njeri v Republic* (2016) eKLR. The appellant also submitted that the complainant stated that she was nineteen (19) years old having been born in 2000; that the evidence of PW2 was not conclusive as to penetration because PW1 was said to be in her menstrual period.

13. As to age, the appellant submitted that the evidence was contradictory since the complainant said she was nineteen (19) years, the charge indicates that she was 14 years old and PW4 said she was 17 years just like the age assessment report. He urged the court to find that the birth certificate was not authentic. He relied on the decision of Hanson Ali Mwachongo v Republic Criminal Case No. 203 of 2009 which case underscored the need to prove the victim age. He submitted that 20 years imprisonment was on the higher side in light of the evidence on age.

14. In his submissions, Mr. Kaino submitted that the complainant's age was proved by production of the birth certificate (PEX NO. 6) in light of the decision of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR .

15. As to penetration, the complainant gave graphic account on what happened to her and that the appellant was her husband and they had taken part in sexual activity for all the days she stayed with him; that the clinical officer confirmed there having been penetration; that the appellant was known to the complainant having lived together and was properly identified. Counsel urged the court to dismiss the appeal.

16. Having considered the evidence tendered in the trial court, the grounds of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following:-

    1. Proof that the complainant was a minor;

    2. Proof of penetration;

    3. Proof of identification of the perpetrator.

Proof of age:

17. In the case of Mwalango (supra) the Court of Appeal laid down some of the ways in which age can be proved under the Sexual Offences Act. The court said:

    > ... The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof.

18. Though the charge sheet stated that the complainant was fourteen (14) years old, the complainant's father said that she is seventeen (17) years old having been born in 2005. An age assessment report was produced in evidence by PW1 while the birth certificate was produced as PEX6. Though PW1 claimed to be nineteen (19) years old, yet when she saw the birth certificate, she did not deny the contents. It was the complainant's position that she was married or was going to marry the appellant. I believe she intentionally raised her age. I am satisfied that eth complainant's age was properly established to be seventeen (17) years and hence the appellant should have been charged under Section 8(1) as read with Section 8 (4) of the Sexual Offences Act. The fact that the appellant was charged under Section 8 (3)

Sexual Offences Act is not instead of Section 8 (4) *Sexual Offences Act* is not prejudice to the appellant because in any event the sentence under Section 8 (4) is less seven than under Section 8 (3) *Sexual Offences Act*.

Proof of penetration

19. Penetration is defined under Section 2 of the *Sexual Offences Act* as :-

> "The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

20. In this case, the complainant narrated what transpired between them at "page 6 of the Record of Appeal" we had sex on 1/6/2020 that night on 2/6/2020. I slept with him from 3/6/20200 to 6/6/2020. We had sex on those night". At no time did PW2 explain exactly what they did or what sex means. She should have told the court whether there was penetration as defined in Section 2 of the *Sexual Offences Act*. There are other forms of sex that do not involve of penetration as envisaged under Section 2 of *Sexual Offences Act*.

21. The prosecution had the duty to lead evidence to prove penetration which it did not. The evidence of the PW1 who examined PW2 is not sufficient to determine whether there was penetration. PW1 said that PW2 was on her periods and this was not her first time to be involved in sexual activity. PW1 being the only witness to the incident should have told the court the exact acts done to her. In the end I find that penetration was not proved.

Identity of the perpetrator

22. There is overwhelming evidence that PW1 was found in the appellant's house where she had been staying for three days. According to her she was married or to be married to the appellant. The appellant did not deny that fact. However, since the court cannot find with certainty that they took part in a sexual activity as defined in Section 2 of the *Sexual Offences Act*, I find that the offence of defilement was not proved to the required standard.

23. For the above reasons, I find the conviction to be unsafe. I therefore quash the conviction, set aside the sentence. The appeal is merited and I allow it. The appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 1ST DAY OF MARCH, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Wainaina for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant