



REPUBLIC OF KENYA



**Ouma v Republic (Criminal Appeal 66 of 2019)
[2024] KEHC 3917 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 66 OF 2019
DO OGEMBO, J
APRIL 18, 2024**

BETWEEN

JOSEPH OBIERO OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal the judgment, conviction and sentence in Ukwala PM's Court, S.O. No. 45 of 2018, Hon. C.I. Agutu, RM delivered on 21/8/2019)

JUDGMENT

1. The Appellant herein, Joseph Obiero Ouma was charged before the trial court with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on 23/10/2018 within Siaya County, he intentionally caused his penis to penetrate the vagina of JAO a child aged 9 years old.
2. The appellant faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, No. 3 of 2006. That on 23/10/2018 within Siaya County, he intentionally touched the buttocks, breasts and vagina of JAO a child aged 9 years.
3. Upon entering pleas of not guilty to both the main charge and the alternative charge, the case of the appellant proceeded to hearing. The appellant was eventually convicted on the main count, and sentenced to serve life imprisonment. He has appealed to this court against the same.
4. The Appellant has moved this court in its appellate jurisdiction by way of a document entitled "courteous address" which in its contents contain issues which in first form grounds of appeal. Barring this procedural defect, I shall proceed and treat this document as properly filed petition of appeal and consider the grounds raised therein. The said grounds are:-



1. “that the trial magistrate erred in law and facts by convicting the appellant for the offence of Defilement regardless of the opinion of medical officer testifying that there was no penetration.
2. That it was unconstitutional for the learned trial magistrate to convict the appellant to life imprisonment after ignoring his mitigation which is a requirement for fair trial under Section 329 of the Criminal Procedure Code.
3. That there was no corroboration of evidence adduced before court between the medical officer and the accused.
4. That at the time of the ordeal, the victim testified that they were two when they were playing and the other one testified that she did not enter inside the posho mill. That this is the defence which the trial magistrate ignored.
5. The Appellant leads that his appeal be allowed, conviction be quashed , sentence set aside and he be set at liberty. The state opposes this appeal. This court is seized of this matter as a 1st appellate court. The duty and jurisdiction of a first appellate court are well settled. In the case of *Okeno v R* [1972] EA 32, at 336, the Court of Appeal of East Africa, held that it is to re-evaluate the evidence tendered before the trial court and to come to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence or demeanor. It is therefore imperative to carefully consider the evidence on record, re-evaluate the same and for this court to come to its conclusion on the same.
6. From the record of the proceedings of the trial court, the case of the appellant commenced with the evidence of PW1 JAO, a girl in class 3, and aged 9 years, that she was born on 25/6/2009 (MFI – 1). That on 23/10/2018, she went to the posho mill nearby where she found the appellant. That appellant had a small boy. That appellant told her that she was the second in the line. That Marion and two other girls came in. Accused then hid her bucket of maize and she was the only one he did not mill for. That appellant told her he would not tell her where her bucket was till he did something to her. That appellant closed the door using a hatch before removing his trouser and underpants. He then proceeded to remove her skirt and pant before holding onto her throat. He put his lips on hers and put her down. He held onto her throat when she tried to scream. He then put his urinating organ in her organ, and later said he wanted to wipe her organ.
7. That one A, in class 4, was watching through holes. That on opening the door the appellant told A that she was not as smart as the witness. he did not however wipe her. She was in pain and blood and whitish substance was in her urinating organ. He then told her that is what he wanted and he could now mill for her. Her sister N came and found her crouching on the floor. At about 6.00 pm, she told her elder sister Phylis that accused/appellant had defiled her. She was then taken to hospital and also to the police station. The witness confirmed that she knows accused.
8. The appellant cross examined this witness and she stated that she had found appellant with a boy in the mill. That Marion was pulling her out but accused/appellant closed the door. That Adiso found them and looked through holes.
9. NAO , 6 years, testified that she is younger sister to PW1. Her testimony was that she had found the appellant with PW1. She saw PW1 crouching and crying softly. She later told their mother that appellant had put his dudu into JAO’s dudu. The witness confirmed seeing the appellant well and that she knows him.
10. And PW3 GO, is the mother of PW1. She produced her birth certificate showing PW1 was born on 25/6/2009 was 9 years old. Her testimony was that on the material date on 23/10/2018 she had gone to



- a Women's meeting. She told PW1 to go to the mill. That when she came back, she was walking slowly. Josephine and Susan viewed PW1. That PW1 had water substance and dirt continued emerging and she was in pain while urinating and she complained about pain in the stock. She took her to hospital and to the police station. She confirmed that her children know the appellant well.
11. The clinical officer, Victor Gochia was PW4. His testimony was that on 23/10/2018, PW1 was brought to Sigomere hospital where he examined her. He noted that on examination, her cream underpant was blood stained and had brownish deposits. Her vagina walls were bruised and hymen freshly broken and bleeding. He formed the opinion that there was evidence of recent vaginal penetration. He produced the P3 form as exhibit.
 12. The last prosecution witness was PC Lena Ngeму of Sigomere Police Station. She received the complainant and issued her with P3 form. She was the investigating officer in the case.
 13. When the appellant was put to his own defence, he gave shown defence, that he worked at the mill and on the date of 23/10/2018, worked at the mill of Nyalodo. That PW1 came to the mill at 5.00 pm. He denied the charges nor torching her.
 14. Appellant called MO alias A (DW2) whose evidence was that the complainant is not her friend. That complainant started chasing her and hurt her toe.
 15. That basically is the evidence on record. It is worth noting certain irregularities that appear on the face of the record of the trial court. It is clear that PW1 and PW2 are minors. That court however took their evidence without subjecting them to any voire dire examination to confirm if they really understood the import of giving evidence on oath. They both gave sworn testimonies and were cross examined by the appellant. Their evidence was therefore tested by the accused during trial and is proper.
 16. Secondly, it is also noted that PW1, PW2 and PW3 all gave evidence on 20/11/2018 and were all cross examined by the accused. The record however shows that the same witnesses again gave evidence on 28/5/2019. There is nothing on record or any indication to show how they were recalled or made to testify again or who applied for their recall.
 17. Moreso, and worse, when the 3 witnesses testified on 28/5/2019, the accused (appellant) was never given any opportunity to cross examine the witnesses, a fundamental right available to every accused person.
 18. The court of Appeal in the case of *R v Edward Kirui* [2014] KLR, while dealing with the issue of mistrial, cited the definition of mistrial in *Blacks Law Dictionary* (9th Edition) as;

.....a trial that the Judge brings to an end without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.
 19. The court of Appeal further in the case of *Pius Olima & Another v R* [1993] eKLR, further gives directions on what to consider in case of a retrial. It directs:

Our attention was drawn to the authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These case; *Abmed Sumar v R* [1964] EA, 481, *Manji v R*, [1966] W, 481, *Mujimba v Uganda* [1969] and *Merali & Others v R* [1971] 222
 20. The principles that emerge are that a retrial may be ordered where the original trial was found by the High Court....defective. If the interest of justice require and if no prejudice is caused to the



accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

21. These are the principles that the Hon. Lady Justice C. Cheoli adopted in the persuasive authority in the case of *Robert San Kimeto v R*, [2016] eKLR.
22. In our instant case, it is clear that the 3 witnesses, PW1, 2 and 3 were recalled and on giving their evidence the 2nd time, the appellant, (accused) was not given the opportunity to cross examine the said witnesses. The court ought to have given the accused (appellant) the chance to cross examine the witnesses when they gave evidence for the second time.
23. Failure to have these three (3) witnesses cross examined by the accused, had the effect of the trial court relying on evidence not subjected to cross examined by the accused to convict the accuse. This, to me, was a procedural error which, applying the standards set out by the court of Appeal in the above cases would render the whole trial incompetent.
24. I am convinced in the circumstances that in the interest of justice, this court must order, as I hereby do, a retrial of the appellant's case.
25. In the circumstances, I quash the conviction of the appellant, set aside his sentence and order that the appellant be retried for the offence at Ukwala PM's court before a different magistrate of competent jurisdiction. It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 18TH DAY OF APRIL, 2024

D.O. OGEMBO

JUDGE

18/4/2024

Court

Read out in Open Court in presence of Appellant (Kisumu Maximum Prison) and Mr. Baraza for State.

D.O. OGEMBO

JUDGE

18/4/2024

Court

I order that the original trial file be taken back to Ukwala Law Courts for fresh trial.

Matter fixed for mention at Ukwala Law Courts for further orders.

Mention on 23/4/2024.

D.O. OGEMBO

JUDGE

18/4/2024

