Obunge v Republic (Criminal Appeal E094 of 2022) [2024] KEHC 17063 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KEHC 17063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E094 OF 2022

RPV WENDOH, J

MAY 23, 2024

BETWEEN

DAVID ODIRA OBUNGE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. R. K. Langat – Principal Magistrate in Rongo Senior Principal Magistrate's Court S.O. NO. 24 OF 2020 delivered on 24/08/2022)

JUDGMENT

1. David Odira Obunge alias Onjulu has appealed against the judgment of R. K. Langat, Principal Magistrate Rongo Court. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*.
2. In the alternative the appellant faced a charge of committing an indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.
3. The particulars of the charge were that 5th July 2020 at West Sakwa in Awendo Sub County, unlawfully and intentionally caused his penis to penetrate the vagina of G. R. O. a girl aged 8 years.
4. The appellant was convicted on the main charge and sentenced to serve life imprisonment. The appellant is dissatisfied with both the conviction and sentence. He preferred this appeal based on the following grounds as per the amended grounds of appeal filed in court on 30/10/2023
    1. That the trial court violated his Constitutional right under Articles 50 (2) (g) and (h) of *the Constitution*;
    2. That the ingredients of the offence were not proved;

3. That the court failed to find that h e was framed following a land dispute which is pending before CM's Court in ELC NO. E12 of 2021.

5. The appellant therefore prays that the conviction be quashed, sentence set aside and that the court do order a retrial. The appellant filed submissions in support of the appeal. The appeal was opposed and the Respondent also filed written submissions.

6. This being a first appeal, it is required of this court to re - examine and re-evaluate all the evidence tendered by both sides and arrive at its own findings. In doing so, the court has to make allowance for the fact that it neither saw nor heard the witnesses testify. The court is guided by the decision of Okeno v Republic [1972] EA 32. I will first review the evidence, tendered in court.

7. The prosecution called a total of seven witnesses namely; PW1 Rose Adhiambo Otieno who was G. R. O's. guardian; PW2 a minor S. O. O. cousin to PW6; PW3 Caroline Anyango, a clinical officer at Uriri Sub County Hospital; PW4 PC Paul Simiyu of Awendo Police Station; PW5 PC Violet Kerubo of Awendo police station, and PW6 GRO, the complainant and lastly, PW7 Emily Mbaka, a clinical officer based at Awendo Sub County Hospital.

8. PW1 stated that she was a guardian to PW6 after her parents abandoned her. She recalled that on 7/7/2020 at 7:00 p.m , she was cooking super when her son, PW2 informed her to take GRO to hospital because she had been defiled. PW1 enquired from GRO who explained, that Baba Ben who is the appellant, and PW1's brother in law, found GRO playing with others, took her away to his bed where he defiled her. PW1 went to the appellant's house to ask him about the allegation but he got angry and she decided to take the child to hospital, found it closed and took her to the next day where she was examined, treated and referred to Awendo Police Station where the complainant was issued with a P3 form PW1 said the complainant was 8 years old at the time .

9. PW2 SOO, 13 years old who was sworn after undergoing a voire dire examination. He told the court that GRO, his cousin had been staying with them. He identified the appellant as an uncle and neighbour and that on 16/7/2020, he was at home alone in the evening when GRO came home walking legs apart and even next morning, GRO was still walking the same and he asked GRO what had happened and she narrated how when playing outside, Baba Ben called her to his house purporting to give her a banana and he had sex with GRO. When his mother returned in the evening, he told her what GRO had told him.

10. PW3, then of Dede Health Clinic identified notes made by her in respect of the complainant GRO on 8/7/2020 and found that the hymen was slightly broken and there were bruises on the virginal wall from which she formed the opinion that there was penetration and the age of the injury was about 3 days.

11. PW4 recalled that he was instructed by the Officer Commanding Police Dede police post to go and arrest one David Odira. They proceeded and found the said person at a baraza (Chiefs meeting) and arrested him.

12. PW6 GRO gave unsworn evidence after the court conducted a voire dire examination and found that though she was intelligent, she did not understand the meaning of the oath. PW6 identified the appellant as David Odira Obunge who is commonly referred to as Onjulu. She recalled that she was playing with other children when the appellant got hold of her hand, dragged her into his house, then bedroom, removed her clothes, then his and lay on her and inserted his thing for urinating into hers. She informed her brother (PW2) about the ordeal.

13. PW7 examined the appellant and found him to be in fair condition.

14. When called upon to defend himself, the appellant testified on Oath recalling that on 2/7/2020, at 8:00p.m a minor was taken to his house by a sister in law; that they had a land dispute which he reported to the Chief who resolved it his favour. He denied defiling the minor but that he was framed. The appellant called one witness DW2 Rose Akoth his daughter. She told the court that on the date the father is alleged to have defiled the girl, he was sick and was taken to hospital; that he was taking super with the appellant when two women came to their home with a child alleging that the father had defiled the girl.

15. Mr. Awino Advocate filed submissions on behalf of the Appellant. In his submissions, the appellant only addressed two grounds, that the ingredients of the offence were not proved and the fact that the court did not consider his defence that the appellant was framed over a land dispute. He submitted that whereas the clinical officer stated that there is partial penetration, the complainant claimed to have been raped many times. The appellant contends that the evidence of the two cannot be reconciled and that is why he wants a retrial; that he was framed because of a pending land case ELC E12 of 2021 and that that is the reason why PW6 was asking for forgiveness; that the appellant raised the defence of a frame up in his defence and in cross examination of PW5.

16. In opposing the appeal, the prosecution counsel also filed submissions on 28/9/2023. Counsel submitted on the three ingredients that need to be proved in a charge of defilement namely, that the victim is a minor, penetration and identity of the perpetrator.

17. On the issue of penetration, counsel relied on the decision of Kyalo Kioko v Republic [2016] eKLR and Charles Wamukoya Karani v Republic where the court named the three ingredients that have to be established in a defilement case.

18. On proof of age; the court relied on Mwalango Chichoro Mwanjembe v Republic [2016] eKLR. Daniel Karman v Republic [2018] eKLR and F Fappyton Mutuku Ngui v Republic [2014] eKLR. Counsel submitted that the age assessment report and the voire dire examination of the complainant was proof that she was a child of tender age. In the Mwalango case (supra) the court held that not only a Birth Certificate is necessary to prove the age of a victim. There are other means.

19. On penetration counsel relied on the decision of Mark Oiruri v Republic (2013) eKLR where the court held that penetration need not be complete and that the testimonies of the complainant PW6 and PW3 confirmed that there was penetration.

20. On identity of the perpetrator, counsel urged that the appellant was a person well known to the complainant and the court observed that the complainant was bold in her responses and the court believed her testimony.

21. On breach of the rights under Article 50(2)(g) and (h) of *the Constitution* it was argued that the appellant was informed of his rights to counsel and the fact that he could apply for legal representation if unable to proceed in person. As for the sentence, it was the prosecution submission that it was a lawful sentence, under Section 8 (2) of the *Sexual Offences Act*.

22. I have duly considered the grounds of appeal, the evidence on record and the rival submissions. I will start with the allegations that the applicants' rights under Article 50 (2) (g) and (h) were breached. Article 50 (2) (g)and (h)provide as follows: -

> " 50(2) Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would Otherwise result, and to be informed of his right promptly.

23. I have duly perused the court file and the record of appeal clearly indicates at page 3 lines 15 – 12, the trial court clearly explained to the appellant her right to counsel and if he wished, he could seek legal aid. He replied that he would act in person and the plea was taken.

24. As regards Article 50 (2) (h) unlike the right under Sub Article (2) (g), the rights to legal representation at the State expense is not absolute because there are instances where the same can be limited. It must be demonstrated that substantive injustice may result if counsel is not provided.

25. The supreme Court in Petition No. 5 of 2015 Karisa Chengo & Others v Republic in considering Sub Article 50 (2) (h)of *the Constitution*, set out the circumstances when substantive injustice may be suffered and the court should consider. At paragraph 94 pf the said case the court said:-

" the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused;"

26. The Court find that the appellant has not attempted to demonstrate that any substantial injustice was suffered by him.

27. To establish a charge of defilement, the prosecution has to prove beyond reasonable doubt the existence of the following ingredients:-

1. That the complainant was a minor;

2. Proof of penetration;

3. Proof of the identity of the perpetrator.

28. In the case of Charles Wamukoya Karani v Republic Crminal Appeal 72 of 2013, the court held as follows:-

29. The critical ingredients forming the charge of defilement are: age of the complainant, proof of penetration and positive identification of the assailant."

30. In the Children's Act Section 2, a child is one aged under 18 years. In the case of Mwalango Chichoro Mwanjembe v Republic [2016] eKLR the Court of appeal held as follows in respect of proof of age.

31. The question of proof of age has finally been settled by recent decisions 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. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense..."

32. Again in Fappyton Mutuku Ngui v Republic eKLR, the Court of Appeal stated this:

that ‘conclusive’ proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other.”

See also the Ugandan case of Francis Omuroni v Uganda 2 of 2000 UG.

32. The courts have held that age can be proved in many ways other than birth certificate but may be proved by evidence of parents / guardians, birth notification or even common sense. The complainant (PW6) told the court that she was 8 years old. After a voire dire examination, the Court found that though intelligent, she did not understand the meaning of the Oath. By subjecting PW6 to voire dire examination, the court recognised that the complainant was a child of tender age. The complainant was subjected to age assessment and the report was produced in evidence, as PEX 1(d) and it confirmed that PW6 was aged between 6 to 8 years old. PW6’s guardian, PW1 also confirmed that the complainant was 8 years old. I have no doubt that the complainants age was proved. She was a minor of tender age.

Whether penetration was proved:

33. Penetration is defined in Section 2 of the *Sexual offences Act*:-

> “ Partial or complete insertion of the genital organs of a person into the genital organ of another person.”

34. Penetration was defined by the Court of Appeal in Mark Oiruri Mose v Republic [2013] eKLR when it said:-

> “ ...... In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”

35. PW6 told the court that the appellant dragged her to his bedroom, removed her skirt and panty, slept on her and inserted his thing for urinating into the thing she uses to urinate. PW3, examined the complainant (PW6) on 8/7/2020, two days after the incident. He found that her hymen was partially broken with bruises on the virginal wall which injuries were about 3 days old. The clinical officer was of the view that there was penetration. The medical evidence corroborated PW6’s testimony. The trial court arrived at the correct finding that penetration was proved beyond reasonable doubt.

Proof of identity of the assailant

36. PW6 told the Court that she was playing with other children when the appellant dragged her to his house.. Though she did not state it, it must have been during the daytime. PW6 knew the appellant’s full names plus the alias name of Onjulu. Even when cross examined, PW6 was unwavering and stood her ground and insisted that the appellant did tabia mbaya to her. The appellant was not a strange to PW6. The appellant’s defence is that he was framed because of a land dispute. However, that allegation was an afterthought. The appellant did not reveal the nature of the dispute. He never raised the issue during cross examination of the prosecution witnesses. He did not even expound on the nature of the dispute and with whom he had the dispute.

37. DW2, the appellant’s daughter brought another angle to the defence, that the father was not at home on the alleged day because he was in hospital. She could not even recall the date. That was trying to raise

an alibi defence. However, the appellant never raised an alibi defence. The defence was an afterthought and contradictory. I find that the trial court properly found that the appellant was well known to the complainant (PW6) as an uncle and neighbour. After the incident she informed PW2 her cousin what the appellant had done to her.

38. I find that the three ingredients required to prove an offence of defilement were established beyond reasonable doubt. The conviction is sound and I affirm it. The appellant was sentenced to life imprisonment. Under Section 8(2) *Sexual offences Act*, one is liable to life imprisonment upon conviction. The sentence was therefore lawful. The courts are however, moving away from mandatory minimum sentences because such sentences tend to take away the court's discretion in sentencing. In that regard, this court exercises its discretion and sets aside the life sentence and substitutes it with a sentence of thirty (30) years imprisonment. The prison sentence will commence on 4/7/2020 when the appellant was arraigned in court for plea. It is so ordered. Right of Appeal.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 23RD DAY OF MAY, 2024.

R. WENDOH

JUDGE

In presence of; -

Mr. Oimbo for the state

Appellant Present

Phelix –Court Assistant