Okello v Republic (Criminal Appeal 30 of 2022)
[2024] KEHC 5100 (KLR) (9 May 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL 30 OF 2022

DO OGEMBO, J

MAY 9, 2024

BETWEEN

GEORGE OWINO OKELLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence in Sexual Offence No. 13 of 2021 in the PM's Court, Ukwala, delivered by the Hon. L.N. Sarapai on 6/7/2022 and 29/7/2022)

JUDGMENT

1. The Appellant, George Owino Okello, was charged before the lower court with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the charge were that on diverse dates between the year 2019 and 25/3/2021 in Ugunja Sub-county of Siaya County, he intentionally caused his penis to penetrate the vagina of BA a child aged 14 years.

2. He 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 diverse dates between 2019 and 25/3/2021 in Ugunja sub-county within Siaya County, he intentionally touched the vagina of BA a child aged 14 years.

3. After a full hearing, the Appellant was convicted on the main charge on 6/7/2022. He was sentenced to serve 25 years imprisonment on 29/7/2022. He has now appealed to this court. In the memorandum of Appeal filed herein on 11/10/2022, the Appellant has listed the following grounds of appeal:-

    1. That the Honourable magistrate failed to note that the prosecution did not establish this case to the required standard of proof, that is beyond reasonable doubt to warrant a conviction.

    2. That the Honourable magistrate erred in law and in fact by failing to evaluate, scrutinize and analyze the evidence before her thus arriving at the wrong conclusions.

3. That the Honourable magistrate erred in law and in fact by failing to note that the prosecution satisfied all the ingredients necessary to warrant a conviction in the offence of defilement as provided by statute.

4. That the Honourable magistrate erred in law and fact by disregarding the fact that the prosecution had failed in its duty to call crucial witnesses well versed with the facts of the case particularly the investigating officer and the Grandmother to the complainant, hence arriving at a wrong decision.

5. That the Honourable magistrate erred in law and in fact by disregarding facts that the evidence of the prosecution witnesses was full of inconsistencies and contradictions thus not warranting a conviction.

4. The Appellant has prayed that his appeal be allowed, the conviction and sentence set aside and he be acquitted.

5. This appeal is opposed by the prosecution side.

6. This court is sitting on this matter as a first Appellate Court. The jurisdiction of the first Appellate Court is well settled. In the widely quoted case of *Okeno – v. R* (1972) EA 32 it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to itself come to its own conclusio]ns of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. It is therefore imperative that this court fairly considers the evidence on record and to reach own determination.

7. From the record of proceedings the case of the prosecution commenced with the evidence of PW1, BA , 14 years, and born on 8/8/2006, that she knows the Appellant (Accused) who is a neighbour. That between 2019 upto 2021, she met the Appellant severally while going to fetch water. That on undisclosed date, Appellant called her as she was going to fetch water leading her to the forest at (Particulars Withheld) . Time was between 4.00 pm and 5.00 pm. That in the forest, Appellant removed her clothes slept on top of her and put his thing inside her thing before giving her Ksh50/=. That Appellant then threatened he would kill her and her grandmother if she told anyone and that if she didn't say anything, he would put up a house and stay with her. That the Appellant slept with her several times. A total of 9 times and gave her money each time.

8. That this went on until the day the two were sighted going into the forest, one neighbour called Nyagero. It is the neighbour who told her mother. She was taken to hospital. This witness was categorical that Appellant slept with her during the day and never used any condoms.

9. On cross examination, the witness confirmed that they also slept in the house of Appellant at least two times.

10. PW2 was AM, the grandmother of PW1. She confirmed that Appellant is a neighbour. That on 25/3/2021, she had been to church. PW1 had also been in church but went back home early. When she asked her why, PW1 told her that she had pains in her thighs and started crying. That she was informed of the incident and she asked PW1 who started crying. PW1 then told her the Appellant had threatened to kill her if she said anything. PW1 took her to where she used to sleep with the Appellant in the forest and also to the house. She proceeded to take her to hospital. Her testimony was that PW1 told her that the Appellant had been sleeping with her and even led them to his house in Ugunja.

11. Calvin Oduor PW3, a clinical officer at Ambira sub-county hospital gave evidence that PW1 was examined at the hospital on 30/3/2021, with a report of having been defiled several times by a person

known to her. On examination, it was noted she had lacerations at the labia minora and she had no hymen.

12. She also had a discharge. His opinion was that the examination suggested vaginal penetration. He produced the P3 form (EXH – 2A), PCR form EXH-1, and the Treatment sheet, EXH – 2A.

13. The prosecution closed its case after the testimonies of the three witnesses. Upon the close of the prosecution case, the court made a finding that Appellant had a case to answer and put him to his own defence.

14. The Appellant gave a sworn evidence in defence in which he acknowledged knowing the c complainant. He denied defiling the complainant and that he had a grudge with Lucy, the complainant's grandmother over the scrap metal business. That this is after she found him with a wheelbarrow she claimed to be hers and that Lucy had sworn to have him jailed at one time.

15. He called no witness.

16. I have considered the two sets of submissions filed by the parties in this appeal.

17. On the Appellant's side, it was submitted that there are three ingredients subject of proof in a defilement case, being proof of age of the complainant, proof of penetration and identification of the perpetrator ie *GOA – v- R* (2018) that the 1st and 2nd ingredients were proved by the prosecution regarding identification of the perpetrator, there was need for an identification parade *Wamunga – v- R* (1989) KLR 424 and that dock identification is worthless (*Ajode – v- R* (2004) eKLR,

18. It was submitted that the case of the prosecution was not proved beyond reasonable doubt as even some crucial witnesses were never called to testify (*Bukenya & Others – v- Uganda* (1972) EA 549). He gave the example of one Lucy and the investigating officer. Also one Nyagero, who allegedly saw the Appellant and complainant enter the forest. The court was urged to allow the appeal.

19. The prosecution on the other hand, submitted based on the case of Daniel *Wambugu Maina – v- R* (2018) eKLR that all the three elements of the offence were proved ie age, penetration and identification of the perpetrator.

20. Counsel referred to the Court of Appeal case of *Kassim Ali – v- R*, Criminal Appeal No. 84 Of 2005 where it was held that the absence of evidence to support the fact of rape or defilement is not decisive as rape can be proved by oral evidence of a victim or by circumstantial evidence.

21. And that the identification of the Appellant was proved, a fact acknowledged by the Appellant also. The court was urged to uphold the findings of the trial court.

22. I have considered the evidence on record, the submissions made and the authorities cited.

The offence of defilement is defined under Section 8 (1) as;

> A person who commits an act which caused penetration with a child is guilty of an offence termed defilement."

23. And therein lies the three elements that the prosecution is under a duty to prove for an offence of defilement. The two sides have referred the court to the cases of *G.O.A – v- R*, (2018) and *Daniel Wambugu Maina – v- R* (2018) eKLR, and have both agreed that the three essential element are :-

a. Age of the victim

b. Proof of penetration

c. Identification of the perpetrator

24. Regarding the first element, it is on record that PW1 was born on 8/8/2006 and so was 14 years at the time of this incident. A certificate of birth was accordingly produced in court (EXH- 1) . Even in the submissions of the Appellant, it is conceded that this element of the offence was proved. I am in the circumstances convinced that the prosecution indeed proved this first element of the offence.

25. The prosecution was also under a duty to prove the second element of the offence, being proof of the act of penetration. Section 2 of the *Sexual Offences Act*, defines penetration thus;

Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

26. It was the evidence of the Complainant, PW1, that the Appellant had sexual intercourse with her many times in the forest and in the house of the Appellant. She gave detailed accounts of how the Appellant would undress her, lie on top of her and have sexual intercourse with her and that he would not use any condoms. In her evidence, this took place at least 9 times, and on two of this occasions at the house of the Appellant. She was able to confess the same to her grandmother, (PW2).

27. The evidence of PW3, who examined the Complainant is also very material. In his evidence, on examination, she had lacerations in her labia minora, she also had a discharge in her private parts. The witness had formed an opinion that there was evidence of penetration. Her hymen was also nonexistent.

28. Of course, the witness testified on cross examination that the injuries on the private parts could be caused by other factors. On record, however, no other factors were singled out as the possible alternative causes of the injuries noted in the private parts of the complainant. In the circumstances, this court is convinced that the injuries noted on the complainant were proof of penal penetration as testified and confirmed by PW1.

29. The last element subject of proof herein is the identification of the perpetrator. It was the evidence of both PW1 and PW2 that they both know the Appellant well as he is a neighbour. The Appellant has admitted as much in his defence. Further, it was the evidence of PW1 that the Appellant defiled her severally during the day. He had continuously approached her between 2019 and 2021. And when their relationship became known, the Complainant did not hesitate to identify the Appellant. She even led her family members to the house of the Appellant, and even to the spot on the forest where he had been defiling her. I am in the circumstances convinced that the identification of the Appellant by the Complainant as the perpetrator was accurate and there is no doubt whatsoever that it is the Appellant who defiled the Complainant.

30. I am therefore not persuaded that the lack of conduct of any identification parade in this matter would derail the clear case of the prosecution based on a relationship between the Complainant and the Appellant who were neighbours and who know each other just too well.

31. It is true that the prosecution only called three witnesses to testify herein. Both the arresting and investigating officer never testified. Other witnesses referred to in the evidence of PW1 were also not summoned, including the mother of the Complainant and one Nyagero who allegedly saw Appellant and Complainant as they entered the forest. The issue is whether the failure to call those witnesses would be fatal to the prosecution's case. I have noted that the evidence of the prosecution witnesses who testified in court proved all the three elements required of proof in this offence. Whereas the evidence of the witnesses who never testified would have assisted the court one way or the other, I am

not convinced that in the circumstances, failure to call the said persons as witnesses herein would be fatal to the case of the prosecution.

32. Section 8 (3) of the *Sexual Offences Act*, under which the Appellant was charged, states;

> A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment for a term of not less than 20 years."

33. In this case, the Appellant was sentenced to serve 25 years imprisonment. The sentence of the Appellant was substantially above the minimum sentence provided in law as seen above. Considering the circumstances of the case of the mitigation raised by the Appellant, I find the sentence meted out by the trial court against the Appellant to be rather excessive. This in view of the recent jurisprudence that mandatory minimum sentences are unconstitutional.

34. In all, I am convinced that the prosecution herein discharged its burden and proved its case against the Appellant beyond any reasonable doubt as required by the law (*Woolmington – v- DPP* 1935 ALLER). The appeal of the Appellant on conviction lacks any merit and must fail. I dismiss it.

35. However, on sentence, I find merit in the appeal of the Appellant. I accordingly set aside the sentence of the Appellant of 25 years imprisonment by the trial court. I order that the Appellant shall serve 20 years imprisonment. This sentence shall run from 29/7/2022, the date the sentence of the trail court as the Appellant had been out on bond during his trial. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2024.

D. O. OGEMBO

JUDGE

9/5/2024

Court

Judgment read out in Open Court in presence of the Appellant, Ms. Odera for the Appellant and Ms. Kerubo for State.

D. O. OGEMBO

JUDGE

9/5/2024