Otiso v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 6531 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6531 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E027 OF 2023

WA OKWANY, J

JUNE 6, 2024

BETWEEN

MARK ANYONI OTISO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Chief Magistrate's Court at Nyamira in Criminal (SO) Case No. E067 of 2022 by Hon. C.W. Waswa, Senior Resident Magistrate on 7th March 2023)

JUDGMENT

1. 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* No. 3 of 2006. The particulars of the charge were that on 29th October 2022, at Bosamaro Chache location, Nyamira South sub-county within Nyamira County, intentionally and unlawfully caused his penis to penetrate the vagina of S.N. (particulars withheld) a child aged 8 years old.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 29th October 2022, at Bosamaro Chache location, Nyamira South sub-county within Nyamira County, unlawfully and intentionally touched the genital organ, the vagina of S.N. (particulars withheld) a child aged 8 years old with his penis.

3. The Appellant pleaded not guilty to both charges and a trial ensued in which the prosecution called a total of 4 witnesses as follows: -

4. PW1, E.B. (particulars withheld), the victim's mother, testified that the victim came home crying on 29th October 2022 and informed her that the Appellant had defiled her. She examined the victim's

private parts and noted that she had injuries. She escorted the victim to the hospital for treatment and later reported the matter to the police.

5. PW2, S.N. (particulars withheld), the victim, testified that she was on 29th October 2022 at 6.00. p.m., on her way home after fetching firewood when the Appellant called her but she ran away. The Appellant chased her, caught up with her and took her to his house where he defiled her. She stated that the Appellant slapped her and closed her mouth when she attempted to scream. She later ran back home and informed her mother (PW1) of what had transpired.

6. PW3. No. 2393967 Inspector Nasimiyu Misiko, investigated the matter, recorded witness statements. She escorted the victim and her mother to Nyamira County Hospital where the victim was examined and treated. She produced the Age Assessment Reports for the Appellant and the victim (P.Exh 3[a] and [b]) respectively.

7. PW4, Rodgers Onganga, the Clinical Officer, examined the victim on 31st October 2022 and noted that she had fresh bruises and lacerations on her labia minora and that her hymen was freshly broken. He concluded that there was penetration. He produced the P3 Form (P.Exh1), Treatment Notes (P.Exh2), and Laboratory Results (P.Exh4).

8. At the close of the Prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant who was consequently placed on his defence. The Appellant elected to give a sworn testimony and did not call any witness.

The Defence Case

9. DW1, the Appellant maintained his innocence and testified that he did not know the victim. He claimed that his father died in 2021 after which he was told to go back home since he had gone there with his mother.

Judgment and Sentence

10. At the close of the case, thee trial Court found the prosecution had proved its case against the Appellant beyond reasonable doubt. The Appellant was consequently convicted on the main count of defilement and sentenced to serve life imprisonment.

The Appeal

11. Aggrieved by the judgment of the trial court, the Appellant filed the instant appeal and listed the following grounds of appeal in his Petition of Appeal: -

    1. Thatthe Learned Trial Magistrate faulted in both law and fact in that, the Appellant was never informed of the gravity and weight of the charge facing him and the consequences thereof in case of being found guilty.

    2. Thatthe Learned Trial Magistrate faulted in both law and fact on principles of sentencing occasioning a gross miscarriage of justice since the Appellant was a minor aged 17 years during the commission of the alleged offense and since the appellant was accused on false allegations.

    3. Thatthe Learned Trial Magistrate faulted in both law and fact by failing to advise the Appellant to hire services of an advocate due to the seriousness of the charge facing him.

4. Thatthe Learned Trial Magistrate faulted in both law and fact where the Appellant was not represented by an advocate which was his constitutional right in a serious offence such as the one which he was charged with and being a minor, the State discriminated the Appellant based on his age since he equally ought to have been protected by the law/Constitution.

5. Thatthe Learned Trial Magistrate faulted in both law and fact in failing to consider that the Prosecution's case was never proved to the required standard to arrive at a sentence of life imprisonment.

6. Thatthe Learned Trial Magistrate further failed to consider the current judgment of sexual offences cases regarding Sentencing Policy which gave the courts discretion for sentencing.

7. Thatthe Learned Trial Magistrate faulted in both law and fact by not ordering the presentencing report to affirm the conduct of the Appellant.

8. Thatthe Learned Trial Magistrate faulted in both law and fact by failing to note that both children (Appellant and Complainant) were to be charged or be subjected to a children's officer for counseling and punishment.

9. Thatthe Learned Trial Magistrate faulted in both law and fact by relying on the medical report which was conducted after 3 days of the alleged crime.

10. Thatthe Learned Trial Magistrate further misdirected himself by convicting the Appellant without noticing that there was no investigation done on the matter by the investigating officer to find out whether the crime was committed or not.

11. Thatthe Learned Trial Magistrate erred in law and fact by giving out a punitive and harsh sentence without scrutinizing the Prosecution case as required by the law.

12. The Appeal was canvassed by way of written submissions which I have considered.

13. The duty of the first Appellate court was outlined in Njoroge vs. Republic (1987) KLR 19 at P. 22 as follows: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that ****the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R(1957) EA 336, Ruwalla V. R (1957)EA 570)"

Issues for Determination

14. I have considered the Record of Appeal and the parties' respective submissions. I find that the main issues for determination are: -

    i. Whether the Appellant's constitutional rights were violated.

ii. Whether the charge of defilement was proved to the required standard.

iii. Whether the Sentence was just and legal.

i. Whether the Appellant's Constitutional Rights were Violated.

15. Article 50 of *the Constitution* stipulates as follows on the right of an accused person to legal representation: -

(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 this right promptly;

16. The Supreme Court of Kenya pronounced itself on the subject of legal representation in Charles Maina Gitonga vs. Republic [2018] eKLR as follows: -

"

"(9) (a) It is manifestly clear to this Court that, while the Applicant was tried and convicted in the trial Court, the question of Legal representation did not arise at all. Similarly, that at the High Court during the hearing of his first appeal, the issue was never raised but was only raised in the Court of Appeal in Criminal Appeal No.78 of 2014 and the matter properly addressed by that Court within its jurisdiction, and;

(b) Noting that legal representation is not an inherent right available to an accused person under Article 50 of *the Constitution* or any provisions of the Repealed Constitution and that under Section 36(3) of the *Legal Aid Act* No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial;

(c).....

(d) Applying the above principles to the instant Application, we are unconvinced that the Applicant was not accorded an opportunity to obtain legal representation within the law as then in place during his trial and appeals or as later enacted through the *Legal Aid Act*, 2016. We cannot also fault the trial Court and the Appellate Court of first instance for alleged violation of Article 50(2) (g) & (h) of *the Constitution* of Kenya.

(e) .....;

(f).....”

17. The Appellant's contention was that the trial court violated his constitutional right as it did not inform him of his right to legal representation despite the fact that he was facing a serious charge. He also argued that the trial court did not observe that he was not able to defend himself properly as he stammers.

18. A perusal of the lower court record reveals that the Appellant pleaded not guilty to both the charges and that he competently cross-examined all the Prosecution witnesses. I further note that the Appellant was able to give a sworn testimony in his defence and further, that he ably presented his mitigation before sentence. I also note that even though the Appellant claimed that he was a minor aged 17 years at the time of the offence, the Age Assessment report that was produced as PExhibit 3(a) reveals that he was above 18 years at the time in question.

19. I am satisfied that the trial was simple and straightforward as it did not involve technical or complicated legal issues that would have necessitated an interpretation by legal counsel. I am also satisfied that the Appellant understood the nature of the charges he was facing. I further note that at no time did the Appellant inform the trial court that he had any difficulty in understanding the proceedings. I am unable to find that the Appellant was prejudiced in any way by the manner in which the trial court conducted the proceedings.

20. Courts have taken the position that the right to legal representation, at the state's expense, is not an absolute right of an accused person, but is a qualified right that is available only in instances where a substantial injustice may occur. In Joseph Ndungu Kagiri vs. Republic [2016] eKLR the Court stated that: -

> "A reading to the provisions of *the constitution* on the right to legal representation at the expense of the state is not automatic but qualified. In other words, an accused person must prove that unless he or she is assigned an advocate by the State, substantial injustice would occur. *The Constitution* does not give the meaning of "substantial injustice." Similarly, it fails to enumerate circumstances under which an accused person is entitled to a state funded counsel. In order to define what substantial injustice is the courts have suggested some factors whose presence in a given circumstance may make one conclude that substantive injustice would occur should the trial proceed with the accused being unrepresented.
>
> In Dominic Kamau Macharia vs R the court explained that substantive injustice would occur in cases such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided. Substantial injustice may be said to be subject to three tests, first, the complexity of the case. This is discernible from the issues of fact and law which may not be comprehended by the accused. The second test relates to the seriousness or nature of the offence in question. A serious offence may attract public interest to the extent that the public may require that some form of representation to be accorded to the accused owing to the nature of the offence. The third and final test relates to the ability of the accused person to conduct his own defence. Language difficulties experienced during the trial may be a perfect indicator of an accused person's inability to conduct a defence.

21. It is my finding that the appellant did not demonstrate or prove that he suffered from any challenge that could have prevented him from understanding the proceedings or expressing himself.

ii. Whether the Prosecution Proved the Charge to the Required Standard.

22. Section 8 (1) and (2) of the *Sexual Offences Act* (the Act) stipulates as follows on the offence of Defilement: -

8. Defilement

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

23. The prosecution was required to prove that the victim was a minor, that there was penetration and that there was positive identification of the perpetrator. (See Charles Wamukoya vs. Republic [2015] eKLR)

24. In this case, PW1 testified that the victim was 8 years old. PW2 stated that she was 8 years old and in grade 1. The evidence of PW1 and PW2 was corroborated by the testimony of PW3 who produced the victim's age assessment which also showed that she was 8 years old.

25. The Court of Appeal stated as follows in Richard Wahome Chege vs. R, Criminal Appeal No. 61 of 2014 regarding the manner in which the age of a victims in sexual offences can be proved: -

> " On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant and the complainant herself."

26. I find that the Prosecution established the victim's age, beyond reasonable doubt.

27. On penetration, Section 2 of the Act defines it as:-

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. The victim narrated how the Appellant chased and caught up with her before defiling her on the fateful evening. She testified as follows:-

> " ....I was looking for firewood when the Accused Otiso called me as I was going home. I ran away and he chased after me and got hold of me. He then took me to his house. Inside the house, the Accused removed my clothes and he removed his clothes and placed me on the bed. I was in a dress and I had worn my inner pant. The accused removed all my clothes and all his clothes as well. The Accused placed me on the bed 'akanifanyia tabia mbaya' (did bad manners to me). He slept on top of me. I felt pain...I screamed and the Accused slapped me and closed my mouth..."

29. From the above narration, by the victim, this Court finds that she was penetrated by the Appellant as she used euphemism 'bad manners' to describe the Appellant's against her. The use of Euphemism has generally been accepted by the courts to refer to penetration. (See Daniel Arasa vs. Republic, HCCRA 1035 of 2013 [2014] eKLR).

30. The victim's testimony was corroborated by the testimony of PW4, the Clinical Officer, who on examination, found that the victim's hymen was freshly broken and that there were fresh bruises and lacerations on her labia. I have perused the P3 Form (P.Exh1) and Treatment Notes (P.Exh2) and noted that the following findings were recorded: Hymen broken new, fresh bruises and lacerations of labia minora, yellowish PV discharge seen. PW4 concluded that the victim had been sexually penetrated.

31. The trial court believed the victim's testimony and noted that she was calm and collected. I find no reason to discredit her evidence as she was candid and consistent throughout her testimony. The

victim's testimony was not shaken on cross-examination. I find that the ingredient of penetration was proved to the required standard.

32. Turning to the identification of the Appellant as the victim's assailant, I note that it was not disputed that the Appellant and the victim are relatives even though the Appellant denied their kinship. The victim referred to the Appellant by his name 'Otiso' and stated that he was her uncle. PW1, on her part, testified that the Appellant was her husband's cousin. On cross-examination, she was able to describe the clothes that the Appellant was wearing on the day in question. She also stated that the offence was committed when it was not dark as there was sunlight.

33. Testing the above evidence against the principles set in Turnbull vs. Turnbull & Others (1979)3 AR ER 549, I find that the Appellant was well-known to the victim and therefore the identification evidence was that of recognition and not mere identification. It is trite that evidence of recognition is more reliable than the identification of a stranger.

34. I have further considered the victim's vivid account of the events of the fateful evening. She stated that the Appellant called her while she was on her way home, literally chased her, caught up with her and defiled her in his house. She also stated that the Appellant slapped her and closed her mouth. I find that the circumstances of this case are such that the Appellant could not have been a victim of mistaken identity as he interacted with the victim for quite some time. I find that she positively identified the Appellant.

35. In conclusion, I find that the Prosecution discharged its burden of proving the offence of defilement to the required standard.

36. I have considered the Appellant's defence and I note that it consisted of mere denials which did not impeach the evidence presented by the prosecution. I uphold the conviction by the trial court.

iii. Whether the Sentence was Legal and Just

37. The offence of defilement under Section 8(2) of the *Sexual Offences Act* attracts a sentence of life imprisonment.

38. The Appellant took issue with the mandatory nature of the sentence prescribed in the Act and argued that the same was declared unconstitutional in the case of Julius Kitsao *Manyeso vs. R, Criminal Appeal No. 12 of 2021*. He submitted that the sentence was manifestly harsh and excessive. He cited the decision in ES vs. Republic [2017] eKLR where an Appellant, who had defiled his 10 years old niece, had his sentence reduced, on appeal, from life imprisonment to 10 years imprisonment. He also cited GM vs. Republic (2017) eKLR where an Appellant who had been sentenced to life imprisonment for defiling his 9-year-old child had the sentence reduced to 15 years imprisonment, on appeal.

39. It is trite that an appellate court will not ordinarily disturb the trial court's decision on sentence except where the trial court acted on some wrong principles or overlooked some material factors. This is the position that was taken in Ogolla s/o Owuor vs. R {1954} EACA 270 where the Court stated inter alia that:-

> " The Court does not alter sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

40. I note that the trial court called for a pre-sentence report which report was not favorable to the Appellant.

41. I have considered the legality of the sentence and the decision in Julius Kitsao Manyeso vs. R, (supra) where it was held thus: -

> " 21. .....This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & Another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.....
>
> 26. We are equally guided by this holding by the Supreme Court of Kenya, and in the instant appeal, we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence...."

42. Guided by the holding in the above decision and doctrine of precedents, I find that the indefinite nature of the sentence imposed by the trial court was unconstitutional. Section 354 (3)(a) and (b) of the Criminal Procedure Code grants this court the mandate to correct any illegality in sentencing. The Section provides for the powers of the High Court in an appeal thus: -

> (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-
>
> (a) in an appeal from a conviction-
>
> (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
>
> (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
>
> (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
>
> (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

43. Having found that the life sentence imposed by the trial court was unconstitutional, and owing to the nature of the offence and the age of the victim in this case, this Court finds that a deterrent sentence is most suitable. Consequently, I set aside the life imprisonment sentence passed by the trial court and

substitute it with a sentence of 25 years imprisonment. The period that the Appellant spent in custody, while awaiting his trial, if any, shall be considered and deducted from his sentence period.

44. In the upshot, I find that the instant appeal is merited albeit only with respect to the sentence. I however uphold the trial court's conviction.

45. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 6TH DAY OF JUNE 2024.

W.A. OKWANY

JUDGE