Opiyo alias Tom v Republic (Criminal Appeal E009 of 2022) [2024] KEHC 17061 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 17061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E009 OF 2022

RPV WENDOH, J

JULY 5, 2024

BETWEEN

JOHN TOMNO OPIYO ALIAS TOM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon. H. Maritim – Resident Magistrate in Migori Chief Magistrate's Court S.O. No. E028 of 2021 delivered on 26/11/2021)

JUDGMENT

1. John Tomno Opiyo alias Tom has filed this appeal against the judgment of the Resident Magistrate, Migori, 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 on diverse dates in the month of April 2021, at [Particulars withheld] Village, [Particulars withheld]Location, Uriri Sub County within Migori County in the Republic of Kenya, intentionally caused his penis to penetrate the vagina of R.A. a child aged 14 years old and in the alternative; intentionally and unlawfully caused contact with his hands to the breasts, buttocks and vagina of R.A. a girl aged 14years.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of five witnesses in support of their case namely; PW1, the complainant child R.A., PW2 MM, the Complainant's mother, PW3, PC Luciana Akoth Moses the investigating officer attached to Uriri Police Station and lastly PW4 Kasni Dola a clinical officer at Uriri Sub-County Hospital.
4. When placed on his defence, the appellant gave a sworn statement and called one witness in support of his case (DW2).

5. 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 03/03/2022 are as follows that: -

    1. The trial court erred in both law and facts by failing to comply with Article 50 (2) (g) and (h) of the Constitution

    2. The trial court erred in both law and facts by not observing that the ingredients of the offence herein were not proved as required in law.

6. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside.

7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions dated 30/03/2023 while the Prosecution counsel Mr. Mulama opposed the appeal through their submissions dated 06/01/2023.

8. 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 at 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 vs. 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."

9. PW1, gave her testimony on oath even though voire dire was not conducted. She told the court that she is 14 years old born on 5.2.2007, a student at [Particulars withheld] Primary School and had just sat for her KCPE examination. She confirmed that she knew the appellant as her neighbour as they lived in the same plot; that in April, 2021 at about 6:00pm she was headed to the bathroom to take a bath; that the appellant passed her and when she had gone to fetch water and was heading in the direction of the toilet; she went into the bathroom and found the appellant inside;that he grabbed her hand and closed the bathroom door, placed her on the floor by tripping her using his leg. He removed her panty and his trouser, he removed his penis and put it in her vagina. The incident happened at around 6.00pm and there was daylight and she clearly saw him; that the bathroom was big and she was able to lie across; that after the appellant finished, he threatened to kill her if she told anyone and ran away. She bled and took a bath and went back to the house. She did not tell anyone what had happened and only told her mother after a week. She was later taken to Uriri Hospital where she was examined and thereafter went to report the matter to the Police Station. She denied that the appellant was her boyfriend or having any sexual relations with him and stated that they had never had sex on any other occasion. She admitted that no one saw the appellant pulling her into the bathroom neither did she scream since the appellant had threatened her.

10. PW2, the complainant's mother told the court that the victim is 14 years old, born on 05/02/2007. She confirmed that she knew the appellant well since they lived in the same plot, as he occupied a house opposite hers. She denied having any differences with the appellant; that on 29/04/2021 she found the victim in the appellant's house, she was standing while the appellant was seated while oiling himself, the victim did not return to the house and was found after 4 days at [Particulars withheld] with her friends; that at the time PW2 had reported to the police station that she was missing and PW1 was last seen with the appellant; the PW1 later informed her that the appellant had defiled her in the bathroom. PW2 reported the incident to the police station and took PW1 to the hospital. The appellant was later arrested and charged with the offence. She only learnt that the victim had been defiled after she had reported that she was missing.

11. The investigating officer (PW3) from Uriri Police Station stated that on 1.5.2021 at around 7:00am, PW2 went to station and reported that her daughter aged 14 years was missing from the 29/04/2021 and was last seen in the house of the appellant. The report was booked in the OB. They looked for the girl and she was found on 03/05/2021 at one of her friend's home, Belinda's. She interrogated the girl and she told her that the appellant had defiled her before and had threatened her not to tell anyone. She produced PW1's Birth Certificate of Serial No. 419xxxx as Exhibit 1. She stated that the appellant was arrested by police from Stella Police Station. PW3 also accompanied the victim to the hospital where she was examined.

12. PW4 stated that he examined the victim and noted that the hymen was broken though not fresh. Nothing was noted on the labias, no bruise or tears on the vagina, all the other tests were negative. He produced the treatment notes from Uriri Sub-County Hospital, the PRC Form and the P3 Form as Pexh. 2, 3 and 4 respectively. He further stated that the victim was examined much later after the date of the alleged incident though he made a conclusion of defilement.

13. The appellant denied committing the offence and stated that on the day of the incident, he arrived home at around 6:40pm in the company of one Wycliffe Ojuando. He found the victim cooking in their house. He took water and went to take a bath, he thereafter showed Wycliffe the hoofer and saw him off. It was his claim that the mother of the victim made a report that her daughter was missing and not of defilement and he was shocked to be charged with the offence of defilement. He confirmed that he had no relationship with the victim and they were just neighbours. He had no differences with either the victim or her mother.

14. DW2, Wycliffe Jalubo, stated that on 29/04/2021, he was with the appellant until about 6:30pm to 7:00pm. He accompanied him to the house since the appellant was going to sell to him his 'hoofer'. He remained on the verandah while the appellant went to take a bath and he admitted that he may not be aware of what happened while the appellant was in the bathroom.

15. In support of the appeal, the appellant submitted that there was a gross violation of his constitutional rights as guaranteed under Article 49 (1) (f)(i), (ii) and (g) of the Constitution for the reason that he was arrested on 01/05/21 but was presented to court on 04/05/2021.

16. He further submitted that the trial court refused to consider the importance of a voire dire examination of the complainant. He relied on the decision in Johnson Muiruri vs Republic (1983) KLR 445.

17. On penetration, it was his submission that the evidence on the P3 Form indicates that the complainant was diagnosed with STI. However, there was no link connecting him to the offence and further that the hymen was not freshly broken. He urged the court to allow the appeal.

18. In his submissions, Mr. Mulama the Prosecution Counsel submitted that PW1 in her testimony stated that she was 14 years old; that her date of birth is 5th February, 2007 and identified her Birth Certificate

which was produced as an exhibit ; that . PW2, the complainant's mother also reiterated that the minor was born on 05/02/2007 as indicated in the Birth Certificate and she was thus 14 years at the time offence. PW3 also reiterated the said sentiments and produced the Birth Certificate into evidence. He relied on the decision in Mwalango Chichoro Mwanjembe vs Republic [2016] to support his position that the Birth Certificate is sufficient proof of age alongside the oral evidence of the minor and her mother.

19. On penetration; Counsel relied on the Court of Appeal case in Mark Oiruri vs Republic [2013] eKLR. It was his submission that the complainant testified that she went to take a bath in the bathroom only to find that the appellant had sneaked into the bathroom; the appellant tripped her and proceeded to do "tabia mbaya", he put his penis into his vagina and threatened that he would kill her if she told anyone. She was later examined by PW4 and he confirmed that the hymen was not freshly broken and that she had indeed been defiled. He maintained that the penetration was sufficiently proved by the medical documents and by the minor herself.

20. Lastly, on the identification of the appellant; it was submitted that the appellant was well known to the victim as a next-door neighbour. On whether there was non-compliance with Article 50 (2) (g) and (h) of the Constitution; it was submitted that the entitlement to legal representation at the expense of the State is not automatic but qualified, that the appellant ought to demonstrate that unless he is assigned legal representation then substantial injustice would occur. That the appellant was duly informed of the said rights but he elected to proceed without an advocate. He relied on the Supreme Court decision in Republic vs Karisa Chengo & 2 Others [2017] on factors to be considered in appointing legal representation at the State's expense. He maintained that the appellant had not persuaded the court and demonstrated that that substantial injustice was occasioned to him for being unrepresented.

21. The final issue was on failure to conduct voire dire; it was acknowledged that the same was not conducted on the minor when she took the stand as per the law provided. It was however submitted that such examination is to be administered by the trial court on children of tender years; which he interpreted to mean any child of fourteen (14) years. He however maintained that failure to conduct such examination may not be in itself a ground to vitiate a good case nor is it fatal and relied on the decision in the Court of Appeal case in Maripett Loonkomok vs Republic [2016]. He added that there were other independent witnesses and evidence which was well corroborated.

22. On the sentence meted; it was submitted that the same is not excessive since the trial court exercised its discretion judiciously, taking into account the circumstances of the case. Further, that there has not been any demonstration by the appellant that the trial court acted in excess of its powers or that the sentence was manifestly excessive in the circumstances or the existence of exceptional extenuating circumstances.

23. I have carefully read and understood the amended grounds of appeal, record 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.

    See the case of Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013

Proof that the Complainant is a minor.

24. Age is a critical aspect in Sexual Offences and must be proved conclusively. PW2 and PW3 both testified that the victim was 14 years old and was therefore still a minor at the time of the offence. Further, PW3 produced a copy of the Birth Certificate as Exh. 1 and which showed that the victim was born on 5/2/2007, thus below the statutory age limit as provided in the Act.

25. Rule 4 of the Sexual Offences Rules, 2014 provides that:-

> "When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents."

26. This position was further buttressed by the Court of Appeal in the case of Mwalango Chichoro Mwanjembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015 [2016] eKLR held as follows: -

> "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..... "

27. I therefore find that the birth certificate produced as Exh. 1 is prima facie proof of the age of the victim to the required standard. She was 14 years old at the time of the incident and hence a minor.

Proof of penetration.

28. Penetration has been defined under section 2 of the Sexual Offences Act as

> " "partial or complete insertion of the genital organs of a person into the genital organ of another person."

29. PW1 in her testimony gave an account of what the appellant did to her on the day of the incident; that she found the appellant inside the bathroom, he grabbed her and closed the door, he tripped her using his leg and caused her to lay down, he then removed her panty and his trouser, removed his penis and put it in her vagina.

30. The Court of Appeal in the case of Mark Ouiruri v Republic (2013) eKLR, expressed itself on what amounts to penetration as follows: -

> "...... 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...."

31. From the above caselaw, it is clear that penetration does not necessarily end in the release of sperms into the victim and thus the evidence of spermatozoa or absence thereof cannot rule out the fact that there was penetration. In this case, I note that the victim took a bath immediately after the incident and further that she was taken to the hospital for examination much later after the incident. This is a

possibility that some of the crucial evidence may have disappeared, this does not however automatically mean that there was no penetration.

32. Though the P3 form indicated that PW1 was found to be suffering from an STI, the appellant never raised the issue with the trial court in cross examination. Unfortunately, the appellant was not medically examined to ascertain whether or not he had the STI. He cannot use that as a defence. The trial court believed PW1's testimony.

33. There is no reason why the complainant and her mother could frame the appellant. His defense did not however create a reasonable doubt in the testimony of PW1 of the medical officer PW4. It is therefore my finding that penetration was sufficiently proved to the required threshold.

Proof of Identification of the Perpetrator of the offence.

34. There is no dispute that the appellant is well known to the victim. This fact was confirmed by PW1 and PW2 and by the appellant in his defence. They were neighbors at the time of the incident. Further, it was the testimony of PW1 that the incident took place at around 6:00pm when there was daylight and she could clearly identify the appellant as her assailant.

35. The appellant stated that on the alleged date of the incident, he was in the company of one Wycliffe Ojuando (DW2). DW2 on the other hand confirmed to have accompanied the appellant to his house on the said day of the incident but stated that the appellant left to go to the bathroom to take a bath and left him in the house. He conceded that he is not aware of what happened while the appellant was in the bathroom.

36. Whereas PW1 did not recall the actual date in April, DW1 and DW2 both alluded to what occurred on 29/4/2021. What appears clear is that the appellant was at some point in the bathroom. The witness who testified on behalf of the appellant confirmed that when they got to the appellant's house, the appellant went to take a bath and that he may not be aware of what happened while he was in the bathroom. I do not believe that it is a coincidence that PW1 talked of the incident happening in the bathroom at the same time the appellant was there. It is my considered opinion that the PW1 was a truthful witness and the incident actually happened.

37. Whether the failure to conduct voire dire by the trial court before PW1 could give a sworn testimony was fatal. I have looked at the record of appeal and indeed note that voire dire was not conducted on the victim who was 14 years old at the time and hence of tender years. The question that therefore follows is whether the failure to conduct voire dire was fatal.

38. Section 125(1) of the Evidence Act provides that: -

> "All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause".

39. The Court of Appeal in Maripett Loonkomok v Republic (2016) eKLR where it was held that: -

> "We turn to consider the effect of failure by the trial court to administer voir dire on the complainant. It is firmly settled that not in all cases that voir dire is not administered or is not administered properly the entire trial would be vitiated. This Court sitting at Nyeri has recently reiterated what has been said many times before that that question will depend on the peculiar circumstances and particular facts of each case".

40. This position was reiterated by the Court of Appeal in Athumani Ali Mwinyi v Republic, Criminal Appeal No. 11 of 2015 where it was held that: -

> "In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction."

41. It is therefore clear that the absence of voir dire examination is not automatically fatal to the evidence of a witness. This court however needs to establish whether the evidence of PW1 was sufficiently corroborated and whether there was independent evidence which is sufficient to support the charge. I have carefully considered the evidence produced as Pexh. 2, 3 and 4 and it is the finding of this court that the same is sufficient to prove that there was penetration. The appellant in his defense and DW2 both confirmed that at some point on the day of the alleged incident the appellant had gone to the bathroom, this places the appellant at the scene where PW1 stated the incident happened. I therefore find that the testimony of the victim was corroborated and the fact that voire dire was not conducted is not fatal to warrant the setting aside of the conviction by the trial court.

42. The appellant also alleged that there was non-compliance with the provisions of Article 50(2) (g) and (h) of the Constitution. The said Article provides 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 this right promptly;
>
> Article 50(2) (g) requires that an accused to be informed of his right to legal representation promptly.

43. I have looked at the record of appeal at page 3; the trial court duly informed the appellant of his right under Article 50 (2) (g) to choose to be presented by an Advocate of his choice and was encouraged to exercise the said right. He was also informed of the right under Article 50 (2) (h) that he is entitled to apply to the Legal Aid Board for assistance if he desired. The appellant’s response was that he is ‘informed’. I find that the appellant as duly informed of the said rights and encouraged to exercise either. Failure to exercise the same cannot therefore be construed to mean non-compliance. This ground of appeal lacks merit.

44. In view of the foregoing, I find that the conviction is well founded merited. The conviction safe and I affirm it.

45. On the sentence of 20 years meted by the trial court, in light of courts moving away from mandatory minimum sentences and in exercise of this court’s discretion, the same is hereby reduced to fifteen (15) years’ imprisonment to commence on 4th May 2021. The Appeal succeeds to this extent.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 5TH DAY OF JULY, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Kogos for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants