Onsumu v Republic (Criminal Appeal E186 of 2022)
[2024] KEHC 8039 (KLR) (Appeals) (1 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CRIMINAL APPEAL E186 OF 2022

LN MUTENDE, J

JULY 1, 2024

BETWEEN

LEWIS BOUNDI ONSUMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No. S.O 267 of 2018 at the Chief Magistrates' Court Makadara, by Hon. H. Onkwani (PM))

JUDGMENT

1. Lewis Boundi Onsumu, the appellant, was charged with Sexual Assault contrary to Section 5(1)(a) and (2) of the *Sexual Offences Act*. The particulars of the offence were that on 18th November, 2018 at Utawala within Nairobi County, he unlawfully used his tongue to lick the vagina of SJW a child aged 10 years.

2. Upon being taken through full trial, the appellant was found guilty, convicted and sentenced to serve fifty (50) years imprisonment.

3. Aggrieved, the appellant proffered this appeal against the conviction and sentence on grounds that: the conviction was on the offence of defilement that he was never charged with and not considering the offence preferred of sexual assault; the trial magistrate relied on information that was not in witness testimony and made gross assumptions; the court ignored the evidence of PW4, the P3 and PRC form; the P3, PRC Form, the sketch map and photos of the scene produced and relied on by the court were not adduced by competent witnesses; and, that the medical report was not corroborated by another doctor.

4. That: the court misdirected itself by ignoring that a vaginal swab was done yet there was no finding of any DNA or saliva despite the victim having not taken a bath; the house help was not called as a prosecution witness; the defence was not considered and the appellant was not given a chance to make submissions.

5. Briefly, facts were that PW1, the victim, went to her friend S's house, where she found E their house help and SS's cousin. As they listened to music at the sitting room, the appellant walked in, changed channels and switched to a Christmas movie which they watched. S and E went out while the victim went to the kitchen where she found the appellant cooking. The appellant carried her and placed her on the kitchen granite top. S and E opened the gate and the appellant told her to alight. The appellant called her outside and told her to go to the parking lot without the others seeing her.

6. The victim went to the backyard and found the appellant outside his house, he placed her on his lap and licked her neck and face using his tongue. He took her behind the Chicken coop and there he kissed her lips, then took her to his house and put her on his bed, then removed her clothes, in particular her panty and licked her private parts (vaginal area) using his tongue. He peeped outside and opened the door, she dressed up and he told her to leave. She went behind the chicken coop and heard S calling the appellant but he refused to go and assisted her to escape.

7. She went to where S and E were, but, she was afraid of telling them what happened. However, when she saw her sister PW2 HS, in the kitchen, she told her what happened and asked her to take her home. Her sister told their househelp, R who later called her mother, PW3 JWK. The matter was reported to Embakasi Police Post.

8. The complainant was examined at Getrude's children hospital and subsequently a P3 was filled. PW5 No. xxxxx Corporal Daniel Sakina visited the scene, drew a sketch plan, took photographs and effected arrest of the appellant. Investigations carried out culminated into the appellant being charged.

9. Upon being placed on his defence the appellant stated that he came to look for work in Nairobi and was accommodated by his cousin who later gave him a job as a caretaker; and, he also assisted in running his shop. That following instructions by his cousin the children who were neighbors were not allowed to play with his cousin's children as they were teaching them bad manners. That he would chase them away but on the date of the offence, 18/11/2018, S allowed them in; there were no children around and it was not true that she played with the children as they had gone to Amboseli with his cousin.

10. That the child 's mother stated that she was called on 19th but the incident occurred on 18th.Further that the mother was at work and she did not have time to parent her children. That Stacy and his cousin's children used to practice lesbianism, but, they could not tell her mother since she was harsh. However, his cousin's children were punished .

11. He contended that the house help did not testify and that he should have been taken to hospital for a DNA test but the investigating officer said it was not necessary.

12. The appeal was disposed through written submissions. It was urged that the appellant was charged with sexual assault, a defective charge but convicted for defilement. and that Section 5 (1) (a) and (2) does not exist in the Statute.

13. That the prosecution failed to call crucial witnesses. He referred to N who was the house girl who allegedly called PW3 and informed her of what happened and the Doctor, the maker of medical documents produced in evidence. That the court ignored the evidence of PW4 and the evidence on the P3 and the PRC form where no injuries were noted.

14. That the sketch map, scene photos and P3 relied on were not produced by competent personnel. That the court relied on information that was not tendered in evidence therefore made gross assumptions.

15. The State/Respondent opposed the appeal. It is submitted that one of the ingredients of Sexual Assault is penetration as actus reus created by Section 5 is penetration by the penis of the vagina, anus, or mouth of the complainant and that mens rea as to the age of the complainant is not required. Reliance was placed on the case of *John Irungu -vs- R* (2016) eKLR and Section 2 (1) of the *Sexual Offences Act*.

16. That the appellant committed a non-penetrative sexual activity on the minor as prescribed under Section 11 (1) and that the offence created is a strict liability offence. The court is called upon to substitute the offence of sexual assault with that of indecent act, hence affirming the conviction, but, set aside the sentence and substitutes it with 10 years' imprisonment.

17. This being a first appellate court, its duty bound to reassess and reevaluate the evidence tendered at trial and come up with independent conclusions. The court must note that it neither saw nor heard the witnesses and give the necessary allowance. The court can only interfere with discretion where the findings are misdirected, misapprehended and based on the wrong law. (See the case of *Nguru -vs- Republic* (1953) KLR 412)

18. It is argued that the charge sheet was defective. Section 134 of the *Criminal Procedure Code* provides that:

> Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

19. The charges were brought under Section 5 of the *Sexual Offences Act* which provides that:

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body,is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

20. The appellant was alleged to have contravened Section 5(1) (a) (2) of the *Act*. Sub-Section(1) creates the illegal act stated to have been committed in breach of the law. While Sub-Section (2) provides for the punishment to be imposed for breaking the law in question. The appellant who had legal representation was charged with an offence known in law which was disclosed to him in a manner that made him follow proceedings and defend himself. The charge he answered does exist in law. The argument raised is therefore erroneous.

21. The trial court is faulted for reference to defilement in it's judgment. In the stated judgment the court delivered itself thus:

> " ...The accused person is as guilty as charged for the offence of defilement contrary to section 5(1)(a) (1)(2) of the *sexual Offences Act*..."

22. Section 382 of the *Criminal Procedure Code* provides that:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

23. It is apparent that what transpired was an error. The duty of this court is to reassess and reach a conclusion. It has the power to reconsider findings of the trial court which include considering whether the mistake alluded to was prejudicial to the appellant. On the face of it, the error did not affect the conviction as the appellant had adequate notice of the offence he was charged with and the evidence adduced by the prosecution referred to the offence under Section 5 of the *Sexual Offences Act* hence it was not prejudicial to the appellant.

24. It is contended that the case was not proved beyond reasonable doubt. In the case of *Shadrack Mutie Ndaka -vs- Republic* (2017) eKLR, which is persuasive, the court held that the offence under Section 5 of the *Sexual Offences Act* is committed by the doing of an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Penetration need not be limited to penetration of genitals but the penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for the purpose.

25. The complainant was subjected to medical examination in an endeavor to establish whether there was penetration. The appellant complains that themaker of medical documents produced in evidence was not called to testify. Section 77 of the *Evidence Act* provides:

> (1) In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

26. Section 33 (b) of the *Evidence Act* provides:

> Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense

which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—

(b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;

27. Documents in issue were authored by a Doctor who was not available to adduce them in evidence. It was established that the documents were made in discharge of professional duty and in custody of the hospital. It was not possible to procure attendance of the witness because she was away in Canada. The State introduced PW4 as the Doctor who had worked with the maker of the documents and explained circumstances under which the maker could not be availed to testify. His application to have him testify was not objected to by the appellant. The documents were admissible in evidence and the appellant cannot turn around to question the process at this stage.

28. Following examination done, on the genetalia, there was no bruising or inflammation seen. There was also no discharge or bleeding vaginally. What was found was a urinary tract infection.

29. The minor testified that the appellant licked her private parts using his tongue. She was not specific as to whether he inserted his tongue into the vagina, which rules the question of penetration. Ostensibly, the trial court did not reach a determination of penetration having occurred. It simply found that the appellant licked the complainant as alleged.

30. The appellant also complains that a crucial witness Nafula, the househelp was not called to testify. Section 143 of the *Evidence Act* provides:

> " 143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

31. In the case of *Keter -vs- Republic* (2007) 1 EA 135 the court held *inter alia*:

> The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.

32. Nafula was stated to have been the person the complainant opened up to at the outset, the one who rang her mother. Since she was not an eye witness to what transpired, failure to call her was not fatal to the prosecution's case.

33. On the contention of not being granted an opportunity to submit, notably the appellant closed his case and sought a date for judgment. That notwithstanding it has been held that submissions are not evidence and it is not mandatory that a party must submit. In the case of *Erastus Wade Opande -vs- Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007 Mwera, J (as he then was) stated that:

> " Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided..."

34. The defence was that the complainant used to practice lesbianism with the appellant cousin's children. That he would send them away but the house help let her in that day. That the children were not around and she had not come to play. Having in mind the duty bestowed upon the prosecution to prove the case beyond reasonable doubt; a detailed examination of the defence put forth does not dispute that the appellant was within the compound that day , he also admits that the child had been to the house that day. PW2 confirmed having seen the appellant emerge from his house and having directed her to enter the house and stay there. Soon thereafter she saw the victim come, holding back her tears and she wanted to leave the place. They did and she later divulged what happened.

35. Evidence to what the appellant did was of a single witness. Section 124 of the *Evidence Act* enacts:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

36. The victim was a child of tender years, ten years. At the point of testifying she was eleven (11) years old. Through voire dire examination she was found to be intelligent, a child who understood what entailed telling the truth. When she testified it was not suggested that she may have had an ulterior motive to lie. This was therefore a truthful witness who could be believed.

37. Penetration having not been proved as provided in law, the court should have reverted to Section 11(1) of the *Sexual Offences Act* provides as follows:

> (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

38. Indecent act is defined under the *Sexual Offences Act* as:

> " indecent act" means an unlawful intentional act which causes-
>
> a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

39. Section 2 of the *SOAct* provides that:

> " "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;

40. The victim referred to private parts and demonstrated by touching her private parts, therefore the prosecution proved that the appellant unlawfully and intentionally caused his tongue, part of his body to come into contact with the complainant's genital organs. Therefore, I quash the conviction for the offence of sexual assault and set aside the sentence meted out; which I substitute with a conviction for the offence of committing an indecent act with a child.

41. The punishment provided for the offence is up to life imprisonment. In mitigation the appellant stated that he had paid a price for the offence committed. He alluded to having been left by the first wife with whom they had two children. Then the second wife had one child with him. He did not express remorse. However, I note that he was a first offender. He was in custody for 9 months prior to being released on bond, time that I do take into consideration.

42. In the result, I sentence the appellant to serve 10 years imprisonment less the period spent in remand custody. Therefore, the appellant will serve 9 years and 3 months imprisonment effective from the date of sentence, 25/8/2022.

43. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 1ST DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE