Odabo v Republic (Criminal Appeal E025 of 2022)
[2024] KEHC 10782 (KLR) (Crim) (19 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10782 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E025 OF 2022

K KIMONDO, J

SEPTEMBER 19, 2024

BETWEEN

VINCENT ODABO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the decision by L. K. Gatheru, Senior Resident Magistrate in Makadara S.O. Case No. 207 of 2019 dated 21st December 2021)

JUDGMENT

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act* (hereafter the Act). He was imprisoned for twenty years.

2. The particulars were that on 27th July 2019 at [particulars withheld] in Embakasi South Sub-county, Nairobi County he intentionally caused his penis to penetrate the vagina of F.N. [particulars withheld], a girl aged 13 years.

3. The petition of appeal was lodged with leave of court on 28th February 2022 raising five grounds but which can be compressed into three: Firstly, that the evidence was riddled with contradictions, discrepancies and was insufficient to prove any of the key elements of the charge. Secondly, that his defence was disregarded; and, thirdly, that the sentence meted out was draconian.

4. In a synopsis, the appellant contends that the Republic failed to discharge its legal and evidential burden; and, that consequently, the conviction and sentence should be set aside.

5. At the hearing of the appeal, the appellant relied entirely on the written submissions filed on 19th February 2024 as well as further submissions in reply lodged on 3rd April 2024. He prayed further that the sentence be reviewed taking into consideration the period he has spent in prison.

6. The appeal is contested by the State through submissions dated 19th March 2024. Learned Prosecution Counsel, Ms. Wafula, argued that the offence was proved beyond reasonable doubt; and, that the sentence handed down was well within the law. She implored the court to dismiss the appeal.

7. This is a first appeal to the High Court. I have examined the record; re-evaluated the facts and drawn independent conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA. 32, *Felix Kanda v Republic*, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.

8. I will commence with the age of the complainant (PW1). Her mother (PW3) testified that the complainant was born on 14th December 2006. She produced her birth certificate (exhibit 4). I am thus satisfied that on the date of the incident, the child was aged 13 years.

9. The next important matter relates to the procedure of taking the evidence of PW1. On 10th November 2013, the trial court conducted a detailed voire dire examination. The learned trial magistrate formed the opinion that PW1 was intelligent and understood the duty to tell the truth. The minor thus gave sworn evidence.

10. I am accordingly satisfied that the trial court complied fully with the procedure of taking the evidence of a child of tender years. See *Republic v Peter Kiriga Kiune* Criminal appeal 77 of 1982 (unreported), *Johnson Muiruri v Republic* [1983] KLR 445.

11. I will next deal with identification. According to PW1, on 27th July 2019, she was going to pick a social studies book from Gloria's place, which was about five minutes away from home. She testified that before she got to the place, she met the accused person, whom she knew was an electrician, and they exchanged greetings. Although the appellant claimed in his defence that he did not know the complainant, he misled her to believe that Gloria's family had relocated to another place in the slums. He offered to take her there. It was a ruse. He diverted her to his one-roomed house and detained her there overnight.

12. I thus find, firstly, that the complainant and the appellant were not complete strangers; and, secondly, that they spent a whole night together. It follows that the appellant was positively identified. This was in fact evidence of recognition. *Wamunga v Republic* [1989] KLR 424.

13. I will then turn to penetration. In a criminal trial, the legal and evidential burden primarily rests on the Republic. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant.

14. Penetration is defined in section 2 of the *Act* as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

15. In this case, both the appellant and the complainant were in his house that night. After he forced the complainant into his room, he threatened to strangle her with an electric cable. He then held her mouth with his hand and pulled her onto the bed. She attempted to scream but he threatened her again. He then tied her mouth with a piece of cloth, undressed her and inserted his penis into her vagina. Every time he left the room, he would lock the door from outside. The complainant only got an opportunity to escape the following day when the appellant stepped out to take a shower.

16. PW1 met Mercy on the way who informed her that her mother had been looking for her. Her two uncles prevailed over her mother not to beat her up. She narrated to the three about the incident. That version was largely confirmed by her mother (PW3) and her uncle (PW4). They proceeded to the Police

Post at 10:00 pm and made a report. The matter was assigned to PW5, Sergeant Agnes Mworia. She and two other police officers arrested the appellant on 21st August 2019.

17. The complainant was taken to Mama Lucy Hospital for treatment. I have carefully studied the Post Rape Care Form (exhibit 2) prepared on 28th July 2019 by Dr. Jacinta Gachugu and produced by her colleague Dr. Farah Mohammed (PW2) both of Mama Lucy Hospital. The genitalia were normal. The vagina had a whitish smelly discharge but no visible injuries. The hymen had old tears at 3:00 and 6:00 O'clock position. The same conclusion appears in the SGBV medical summary report (exhibit 1) and the P3 Form (exhibit 3). PW2 testified that a high vaginal swab revealed presence of spermatozoa.

18. I note that the hymen had an old tear at 3:00 and 6:00 o'clock positions. That is why the appellant argues that there was no proof of penetration. But I have taken into account that the examination was done immediately after the incident. Importantly, the high vaginal swab revealed presence of spermatozoa. All that corroborates the evidence of PW1 that she was penetrated by the appellant during the night.

19. I should add that PW1 was the victim of a sexual offence. Under the proviso to section 124 of the Evidence Act, where the victim of a sexual offence is the complainant, corroboration is not mandatory if the court is satisfied that the witness was truthful. But in this case, I have found that there was sufficient corroboration of penetration from the results of the high vaginal swab.

20. When the appellant was placed on his defence, he denied that he defiled the complainant. As I said earlier, he claimed he did not know her and was at a loss why the police arrested him. He then said that his wife (DW2) would exonerate him. But when she took to the stand, all that she stated was that the police did not tell her why they were arresting her husband; and, that she only learnt of the details in court.

21. I would agree with the submissions by the appellant that there were discrepancies between the evidence of the complainant, her mother and uncle. But I find that they were minor and immaterial. Furthermore, in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.

22. I would also agree with the appellant that lack of any fresh injuries on the complainant's genitalia overrules forcible entry. The complainant may also have exaggerated the threats made to her to avoid punishment from her mother or relatives. But the point to be made is that she was a child under the Act; and, any consensual sex would still amount to defilement.

23. From my analysis of the evidence and the law, the defence tendered by the appellant was thus evasive and did not cast any doubt on penetration. I thus readily find that all the elements of the offence were proved beyond reasonable doubt. It follows that the appeal against conviction is dismissed.

24. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. Under section 8 (3) of the *Sexual Offences Act*, the minimum sentence was 20 years. The trial court took into consideration that the accused was remorseful and a first offender. It also took into account the aggravating factors and impact on the victim. In particular, the court relied on a pre-sentencing report before it dated 14th January 2022. So much so that I cannot say that the court erred in its sentence.

25. I am alive of previous decisions by the Court of Appeal on minimum sentences under the Act. For instance, in *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

> In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court [in Muruatetu's Case] was applied to this provision, it too should be considered unconstitutional on the same basis.

26. However, the Supreme Court has now reiterated in *Republic v Joshua Gichuki Mwangi & others*, Petition 018 of 2023,that the *Muruatetu* decision did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act*, or any other statute. Furthermore, the court, and for other reasons (including assumption of original jurisdiction on constitutional matters not raised at the High Court), set aside the judgment of the Court of Appeal that had declared minimum sentences for sexual offences unconstitutional.

27. I accordingly decline to disturb the sentence.The upshot is that the entire appeal lacks merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH SEPTEMBER 2024.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.