Odit v Republic (Criminal Appeal E190 of 2022)
[2024] KEHC 10734 (KLR) (Crim) (17 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10734 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E190 OF 2022

K KIMONDO, J

SEPTEMBER 17, 2024

BETWEEN

MOSES ODONGO ODIT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the decision by F. N. Kyambia, Chief Magistrate in Makadara S.O. Case No. 1658 of 2015 dated 7th October 2022)

JUDGMENT

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (2) of the *Sexual Offences Act* (hereafter the *Act*). He was imprisoned for thirty years.
2. The particulars were that on diverse dates between 2014 and 19th April 2015 at [particulars withheld], within Nairobi county, he intentionally caused his penis to penetrate the vagina of V.M.N. [particulars withheld], a girl aged 10 years.
3. The petition of appeal was lodged on 19th October 2022. It raised five grounds but which can be compressed into four: Firstly, that penetration as the primary element of the offence, was not proved. Secondly, that the evidence of the complainant was not backed up by medical evidence or other corroboration. Thirdly, that the appellant was not positively identified or connected with the offence, and, fourthly, that the evidence of the clinical officer was riddled with inconsistences and contradictions.
4. In a synopsis, the appellant contends that the Republic failed to discharge the legal and evidential burden; and, that consequently, the conviction and sentence should be set aside.

5. At the hearing of the appeal, learned counsel for the appellant, Mr. Migele, relied largely on the written submissions dated 11th January 2023. He challenged the evidence of the clinical officer (PW4) on a number of fronts: Firstly, that a more thorough medical examination of the appellant would have exonerated him. He also argued that the HIV status of the victim or appellant was inconclusive; and, that the dates of the offences was cast into doubt, Finally, he contended that the totality of the medical evidence did not support the assertions by the complainant.

6. The appeal is contested by the State through submissions dated 16th May 2023. 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 entire 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] E. A. 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). According to her mother (PW2), the complainant was born on 18th August 2004. This is further confirmed by the certificate of birth formally produced by PW6. I thus readily find that at the time of the incident, the child was between 10 and 11 years and thus fell within the bracket of the penal provision in section 8 (2) of the Act.

9. The next important matter relates to the procedure of taking the evidence of PW1. 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 was thus affirmed.

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.

14. I will next deal with identification. PW1 knew the appellant as Moses Odongo and a choir member in her mother's church. That fact was confirmed by her mother (PW2) and admitted by the appellant in cross-examination. Furthermore, the appellant resided in the same plot with PW1's friend, M. The alleged offences occurred over a long period of time between 2014 and 2015. The complainant's father (PW3) also testified that the appellant was a "long-time friend" and that they attended the same church.

15. I thus find that the complainant and the appellant knew each other well and was thus positively identified. This was in fact evidence of recognition. *Wamunga v Republic* [1989] KLR 424.

16. 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.

17. 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".

18. According to PW1, during the school holidays in August 2014, the appellant lured her and some other girls to help him carry some items from his kiosk to a downstairs room in the church. He gave all the other girls sweets and told them to leave. He then closed the door, got hold of her and pulled down her skirt and underwear. He lowered his trousers, took out his penis and inserted it in her vagina. He then gave her a chocolate and warned her against revealing the details. The complainant ran out and kept the secret.

19. The second incident happened on 19th April 2015 in a toilet after visiting her friend, M. He again warned her not to reveal the matter. However, on 19th May 2015 at around 5:00 p.m., she was on her way from school when she saw the appellant outside their plot. She was apprehensive that he was moving into their plot and would continue to molest her. She went to her house, changed into home clothes and reported the matter to the Chief's office opposite her school. That version was confirmed by PW5, Wycliffe Anami, a volunteer children's officer who assisted the complainant at the station.

20. I am disturbed that the complainant did not immediately disclose the defilement on both occasions in the year 2014 and 2015. The last incident was only reported a month later. On that aspect, learned counsel for the appellant submitted that the lengthy gap cast serious doubt about the culpability of the appellant.

21. But I have kept in mind that this was a child and she had been threatened against reporting the matter. I have thus paid keen attention to the medical evidence. The latter must be taken with caution as the examination took place nearly a month after the last incident.

22. Emmy Koskei (PW4) was a clinical officer at MSF. She testified on behalf of her colleague, Purity Kajuju, who had since left the facility. From the medical certificate and the PRC Form, the complainant's vagina had no injuries. However, the hymen had old tears at 3:00 and 9:00 o'clock positions.

23. The appellant thus submitted that the injuries could not be connected with him. I however find that although the tears were aged, they were consistent with the emphatic evidence of PW1 that it is the appellant who inserted his penis into her vagina on at least two occasions.

24. Secondly, the scars in the hymen were old because it was not the first time she was having sex. 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. Granted all the circumstances of this case, I have no cause to doubt PW1. In any event, there was sufficient medical corroboration.

25. I have then studied the appellant's defence. Its tenor was that he was framed-up. He claimed that on the dates of the offences, he was no longer stationed at the Redeemed Gospel Church. He testified that he only worked there between 2011 and August 2013. He then went to Kitengela until January 2014 when he returned to [particulars withheld]. He said he was employed as a tout until December 2014 when his father died.

26. He said he was injured in a road traffic accident and hospitalized at Mama Lucy Hospital and Kenyatta National Hospital. It was during a fundraiser at [particulars withheld] to meet the medical bills that he was accused of defiling the complainant. He blamed the owner of the vehicle that hit him for instigating the false charges. In cross examination, he said that he had lent some money to the complainant's father.

27. The appellant was thus raising two limbs of defence. The first one was that he was set up for a fall by the complainant, her father or the owner of the vehicle that injured him in a road traffic accident. The complainant stood firm on her evidence even under the cross. Like I stated, I see no reason to doubt her. Secondly, the introduction of the owner of the vehicle was extraneous and a red herring.

28. The second and more serious limb of defence was his alibi. The alibi was raised well after the close of the prosecution's case. But it did not shift the burden of proof to the accused. See *Republic v Johnson* [1961] 3 ALL E.R. 969, Saidi *Mwakawanga v Republic* [1963] E.A. 6. Like I stated earlier, the legal burden of proof lay throughout with the prosecution. *Woolmington v DPP* [*supra*] *Bhatt v Republic* [*supra*].

29. I have thus weighed the alibi against the evidence of key prosecution witnesses. When juxtaposed against the complainant's evidence, I find that it was a sham. I am also unable to say that the burden of proof was unfairly shifted to the appellant or that his defence was disregarded by the trial court: The impugned judgment dealt at some length with the appellant's defence. The learned trial magistrate simply did not believe the appellant. I concur entirely in that finding.

30. At the hearing of the appeal, learned counsel for the appellant submitted at length that the appellant was not medically examined; and, that there was no evidence about his HIV status or that of the complainant. I have kept in mind that the appellant was not charged for transmitting the virus. Secondly, considering the late report by the complainant, any examination of the appellant may as well have been worthless. So much so that the conviction largely turned on the evidence of the complainant and the medical evidence that I dealt with earlier.

31. I agree with the appellant that there were some discrepancies between the evidence of PW1, PW2 and PW3. Furthermore, the medical examination by Purity Kajuju took place a month after the last incident. But I find the inconsistences minor and immaterial. I remain alive that in any trial there are bound to be such discrepancies. *Joseph Maina Mwangi v Republic*, Criminal Appeal No. 73 of 1993.

32. The appellant also challenged the production of the medical documents above by PW4. I agree that documents should ideally be produced by their makers. But there are exceptions to that general rule. For instance, Purity Kajuju had since left the station at MSF. PW4 was her colleague and conversant with her handwriting and signature. He thus laid a basis for production of the impugned medical certificate and the PRC Form.

33. Regarding the P3 form, the same was made by Dr. Maundu who had passed on. I think it was an error to admit it as no proper foundation was laid. However, there was sufficient evidence from the medical certificate and the PRC Form confirming that the complainant's hymen had old tears at 3:00 and 9:00 o'clock positions.

34. Lastly, learned counsel for the appellant submitted that material witnesses were not called to the stand. That may well be so. However, under section 143 of the *Evidence Act*, no particular number of witnesses is required to prove any particular fact.

35. From my analysis of the evidence and the law, the defence tendered by the appellant was evasive and unbelievable. 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.

36. I will now turn to the sentence. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. Under section 8 (2) of the *Sexual Offences Act*, the mandatory sentence was life imprisonment. The trial court however took into consideration that the accused was remorseful and a first offender.

37. I am alive that the Court of Appeal had given guidance on minimum or mandatory sentences under the Act 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.

38. However, the Supreme Court in *Republic v Joshua Gichuki Mwangi & others*, Petition 18 of 2023, has restated,that the *Muruatetu* decision did not invalidate mandatory or minimum sentences prescribed under 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 which had declared minimum sentences for sexual offences unconstitutional.

39. The appellant took advantage of a vulnerable child within church precincts and also in a public toilet. But seeing that there is no cross-appeal, I 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 17TH SEPTEMBER 2024.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Mr. Migele for the appellant instructed by Migele & Company Advocates.

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

Mr. E. Ombuna, Court Assistant.