Ongong'a v Republic (Criminal Appeal E008 of 2021)
[2023] KEHC 1827 (KLR) (15 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1827 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E008 OF 2021

KW KIARIE, J

MARCH 15, 2023

BETWEEN

MARK BONFACE OCHIENG ONGONG'A ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in SOA case No 40 of 2019 of the Senior Principal Magistrate's Court at Oyugis (Kendu Bay Mobile Court) by Hon CA Okore–Principal Magistrate)

JUDGMENT

1. MarkBonface Ochieng Ongong'a, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence are that on diverse dates between July 15, 2019 and October 5, 2019 in Rachuonyo South sub Couny within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO, a child aged (11) eleven years.

3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant was represented by the firm of Bana & Company Advocates. He raised grounds of appeal as follows:

    a. The trial magistrate failed to properly analyse the evidence before her and thus arrived at a wrong decision.

    b. The trial magistrate based her conviction on insufficient and contradictory evidence.

c. The trial magistrate misdirected herself when she shifted the burden of proof and required the appellant to produce contrary medical evidence on penetration.

d. The learned trail magistrate treated the appellant's defence casually and perfunctorily and thus arrived at a wrong decision.

e. The learned trial magistrate failed to consider the appellant's alibi defence thereby pre-empting herself from an exhaustive and complete analysis of the evidence before her.

f. The conviction went against the weight of evidence.

g. The learned trial magistrate misdirected herself when she found and held that she had no discretion on sentencing and pre-emptied herself from properly and judiciously considering the appellants' mitigation.

h. The sentence was based on a wrong principle.

5. The appeal was opposed by the state through Mr Ochengo, learned counsel on grounds that:

a. The ingredients of the offence were established.

b. The defence was an afterthought.

c. The alibi defence was inconsistent.

d. The sentence was the minimum provided for.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.

7. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. That the accused was the perpetrator; and

c. The age of the victim must be below eighteen years.

This position was echoed in the case of *Fappyton Mutuku Ngui vs. Republic* [2012] eKLR.

8. At the time of hearing, SAO (PW1) testified that she was 12 years old having been born in the year 2007. Her mother (PW2) testified that she was born in February 2007 and produced a copy of her Certificate of Birth. At the time of the complained of offence she was therefore twelve years and five months old. The appellant ought therefore to have been charged under section 8(3) of the *Sexual offences Act*.

9. Section 8(3) of the *Sexual offences Act* provides:

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

10. Had the appellant charged under the correct section, then this would have affected the sentence in his favour.

11. This case revolved around the testimony of the complainant and some circumstantial evidence. The proviso to section 124 of the *Evidence Act* provides:

> 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.

I will therefore endeavour to establish if the learned trial magistrate arrived at the right conclusion in believing the minor.

12. The complainant herein was a minor whose conduct indicate that she was a willing participant. She however did not have the capacity to consent to sexual liaison. My finding so is buttressed by the fact that she had to be caned to reveal what had transpired. Since her evidence was shifty, the trial was required to seek for corroboration from some other material evidence. This was mainly circumstantial. In the case of *Mohamed & 3 others vs. Republic* [2005]1KLR 722 Osiemo Judge explained what circumstantial evidence is as follows:

> Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.

13. When Philip Otieno (PW4) the complainant was examined on October 5, 2019, the following were the findings:

    a. Freshly broken hymen;

    b. Lacerations around the vulva; and

    c. Many epithelial cells which was a confirmation of friction in the vagina.

    From these findings he concluded that there was penetration.

14. I therefore find that the evidence of the minor was corroborated on the issue of penetration and who did it.

15. The appellant pleaded an alibi. In the case of *Victor Mwendwa Mulinge vs. Republic* [2014] eKLR the Court of Appeal rendered itself thus on the issue of alibi:

> It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see Karanja v R, [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.

16. In the instant case, weighing the alibi against the evidence adduced by the prosecution, I find that it was displaced by the evidence on record. The learned trial magistrate was therefore justified to dismiss it.

17. The appellant in his mitigation stated:

> I am sorry for what I did. I don't know what came over me. I knew she was below 18 years, but I still slept with her. It was temptation pardon me. I am a bishop and a prophet in my church. I pray for people and I will ask God for forgiveness for what I did to the minor. I will never do it again.

If there were any doubts on whether the appellant committed the offence, this mitigation erased them.

18. I find that the conviction was safe except that it was under the wrong subsection. This affected the sentence. I therefore set aside the life sentence and substitute it with twenty (20) years imprisonment as provided for under section 8(3) of the *Sexual offences Act*.

19. The upshot of the foregoing analysis of the evidence on record is that the appeal on conviction is dismissed. The appeal on sentence has succeeded as indicated hereinabove.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MARCH, 2023.

KIARIE WAWERU KIARIE

JUDGE