Oidho v Republic (Criminal Appeal E014 of 2022) [2023] KEHC 1880 (KLR) (8 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1880 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E014 OF 2022

TA ODERA, J

MARCH 8, 2023

BETWEEN

AUGUSTINE ABUTO OIDHO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the original conviction and sentence of Hon B.K.Kiptoo R.M in original Maseno SPMC Criminal Case No. 2098 of 2015 delivered on 9/11/2016)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(4) of the *Sexual Offences Act*. The particulars were that on the 9th day of December, 2015 at [Particulars Withheld] village in Kisumu County, he intentionally caused his penis to penetrate the vagina of MAA, a child aged 16 years.
2. He also faces and alternative charge of indecent act with a child contrary to section 11 (1) of the *sexual offences Act*. The particulars of the charge are that in the 9th day of December, 2015 at [Particulars Withheld] village in Kisumu County, he intentionally touched the buttocks. Breast/anus and vagina of MOA a child aged 16 years with his penis.
3. The appellant denied the charges and the matter proceeded to hearing. PW-1 MAA narrated that on 9/12/2015 at about 5 pm, visiting her grandmother, the appellant held by her hands and pulled her to his bed where he defiled her while blocking her mouth. He defiled her and warned he would kill her if she revealed to anyone. At that time, her grandmother had gone to the market and she was to follow her after taking bath.
4. PW-2 EA, the minor's mother testified that on the material day, she had gone to Kisumu town when she received a call from the minor saying she had been defiled by the appellant. She called the minor's

grandmother instructing her to ensure safety of the minor and advised the minor should not shower. She went there the following day and took the minor to Kombewa Sub County Hospital. That the minor was 17 years old at the time of incident.

5. PW-3, Paul Owiti a Clinical Officer from Kombewa Sub County Hospital testified that he examined the minor on December 10, 2015 and found tenderness on joints and abdomen. The vagina had inflamed laceration of the hymen as well as whitish greenish discharge from the vagina. The laboratory tests showed presence of epithelial cells. He opined the minor had been defiled. He approximated the injuries to be approximately 20 hours old.

6. PW-4, PC Joseph Emuron, the Investigating Officer stated that he alongside PC Hassan arrested the appellant over defilement and charged him.

7. The appellant was put on his defence an opted for a sworn statement. He denied defiling the minor and was arrested without cause.

8. After considering the evidence, the trial magistrate convicted the appellant and sentenced him to 15 years imprisonment prompting the instant appeal anchored on the following grounds;

    a. That he pleaded not guilty to the charge.

    b. The bond he was given was excessive.

    c. The minor was assisted by a stranger to call her mother.

    d. That PW-2 knew nothing about the incident but was informed by PW-1.

    e. The clinical officer did not attend in person to testify.

    f. The investigating officer did not visit the scene for investigations.

    g. The investigating officer did not attend court in person to testify.

    h. There was no independent witness in the matter who testified.

    i. The trial court failed to consider his defence.

9. The appeal was canvassed by way of written submissions. The appellant complied by filing his submissions on 13/1/2023. The same have been considered.

Analysis and determination.

10. This being a first appeal, I am guided by the sentiments expressed by the Court of Appeal in *Kiilu & Another vs Republic* (2005)1 KLR 174, where it was stated;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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."

11. On the ingredients of the offence charged, the prosecution in a charge of defilement ought to establish the complainant's age, the act of penetration and positive identity of the perpetrator.

12. As relates to age, the record shows that the minor testified being 17 years. Her mother PW-2 stated that her daughter was aged 17 years. The birth certificate produced as Pexh 4 shows the minor was born

on 15/4/1999. This therefore means the minor was about 16 years of age at the material time and still under 18 years old.

13. As regards the identity of the perpetrator, the minor testified that she had visited her grandmother on the material day and while there, her grandmother left for the market and she was to follow her after taking a bath. While taking bath, the appellant who was within the compound grabbed her and pulled her to his house where he penetrated into her vagina. pw1 said she knew the appellant before as her mother and the grandmother of the appellant were sisters. In his defence the appellant admitted thatpw1 was her niece. I have no doubt that the appellant and the minor were known to each other very well before the incident and were relatives. The appellant denies being at the scene at the material time and said he was in Kisumu. This is a defence of *alibi*. In the case of of *Karanja Vs Rep* 1983 KLR 501 held as follows:

> " The word "alibi" is a Latin verb meaning "elsewhere" or "at another place". Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant's story in this case did not amount to an *alibi* as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, i.e. when he was initially charged.
>
> In a proper case, the 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, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought."

14. In the case of *Uganda v Sebyala & Others* [1969] EA 204, the learned Judge quoted a statement by his lordship the Chief Justice of Tanzania in Criminal Appeal No 12D 68 of 1969 where his lordship observed:

> " The accused does not have to establish that his *alibi* is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

15. I have weighed the defence of alibi raised by accused with the evidence of Pw1, the offence is said to have occurred during broad day light and the minor and the appellant knew each other before the incident and I see no reason why the minor could have lied against appellant who is her uncle as she said on cross-examination that she had no grudge against appellant. She also said that there was no one else at the scene save for her and appellant. The defence of *alibi* was also not put at the earliest opportunity as required so that it could be tested. I find that Pw1 was firm and consistent and placed appellant at the scene at the material time. I proceed to dismiss the defence of alibi as a mere denial.

16. On the issue of penetration, it is trite law that penetration is an important ingredient of the offence of defilement. Section 2 of the *Sexual Offences Act*, 2006 defines the term as the partial or complete insertion of the genital organ of a person into the genital organs of another person. The minor testified that she had visited her grandmother on the material day and while there, her grandmother left for the market and she was to follow her after taking a bath. While taking bath, the appellant who was within the compound grabbed her and pulled her to his house where he penetrated into her vagina. This court did not see the witness testifying but her evidence was corroborated by medical evidence in the treatment notes and p3 form produced by the clinical officer Pw3 attached to Kombewa District hospital who saw the patient on December 9, 2015 and found that she had inflamed vaginal carnal,

laceration of hymen, whitish discharge was coming out of her vagina and tenderness of the jaw and abdomen.

17. The issue of penetration was discussed in *Bassita vs Uganda* SC Criminal Appeal No 35 of 1995, (Uganda) it was stated:-

> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable, it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

18. In the instant case, the evidence of penetration available is that of the minor and the clinical officer. In any event , 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 offense, 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.''

19. I am satisfied that the element of penetration was proved to the required standards.

20. The argument that the clinical officer and the investigation did not personally attend court is without merit. The witnesses testified without any objection by the appellant. He is precluded from raising the objection to their testimony at this appeal stage.

21. There also is the contention by the appellant that the trial court failed to consider his defence. I have read through the defence tendered in the trial court and the gist of his defence was that he did not commit the offence. His was a narration of the events preceding his arrest and the subsequent arraignment. He also introduced a stranger who had allegedly called the minor using his phone. Not much was said of the stranger. The trial court termed his defence "too weak to shade any doubt of the prosecution's version".

22. In the upshot, I have carefully re-evaluated the entire evidence on record and I find that the appellant's defence was a mere denial and does not cast doubt on the prosecution's case. Prosecution proved their case against the appellant beyond any reasonable doubt.

23. For the above stated reasons, I find no merit in the appeal on conviction and I uphold the same.

24. On sentencing, the appellant was sentenced to serve 15 years imprisonment. Considering the decision in Petition No 97 OF 2021 Mombasa *Edwin Wachira and 9 others vs Republic* consolidated with Petition number 88 of 2021, 90 of 2021 and 57 of 2021 Mombasa where it was held Marivo J held that;

> 'Luckily for me the Supreme Court in Muruatetu one was categorical that mitigation forms an intergral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the

circumstances of each offence ''. The said decision emanates from the High court and I am persuaded by the reasoning in it.

25. The sentences in *sexual offences Act* are couched in mandatory terms but it is trite law that any law which takes away the discretion of a Judge to sentence an offender upon hearing his mitigation violates the right to fair trial under article 50 of the *constitution*. I therefore do not agree with the submission by prosecution that the courts must impose the mandatory sentences in every matter under *Sexual Offences Act*. It is my view that the discretion is given to the courts to consider the circumstances of the offence in arriving at an appropriate sentence. I have considered the age of the victim and the circumstances of the offence and I proceed to substitute the sentence of 15 years with 7 years imprisonment. The charge sheet indicates that appellant was arrested on 13.12.15, was charged on 14.12.15 and he has been in custody throughout to date. I order that the said remand period from 13.12.15 be taken into account while computing his sentence under section 333(2) of the *Criminal Procedure Code*.

T.A. ODERA - JUDGE

8.3.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

APPELLANT,

OKOTH FOR PROSECUTION AND

COURT ASSISTANT OYANDO.

T.A. ODERA - JUDGE

8. 3.2023