DOO v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 21993 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEHC 21993 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E010 OF 2022

RPV WENDOH, J

MAY 9, 2023

BETWEEN

DOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. C. Maritim – Resident Magistrate in Migori Chief Magistrate's Criminal Case No. E022 OF 2020 delivered on 25/8/2022)

JUDGMENT

1. The appellant herein is D O O. He was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*.

2. In the alternative he faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

3. The particulars of the charge are that on 3rd and November 4, 2020 in Uriri Sub County of Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of H A A a child aged thirteen (13) years.

4. In the alternative, he is alleged to have, at the some place and time, touched the breasts, buttocks and vagina of H A A a child aged thirteen (13) years.

5. The prosecution called a total of five witnesses to support their case. The appellant on his part gave a sworn statement in his defence. The court convicted the appellant and sentenced him to serve twenty (20) years imprisonment. He is dissatisfied with the judgment of the trial court and preferred this appeal. The grounds of appeal are as follows: -

    1. That the appellants rights under Article 49 (1) (f (i) (ii)and (g) were violated;

2. That the court failed to comply with Article 50 (2) (g) and (h) of the *Constitution*;

3. That the offence of defilement was not proved to the required standard.

6. The appellant filed submissions in support of the grounds. He urged that he was arrested on November 5, 2020 and was not produced in court till November 12, 2020 and was not informed of the reason for the delay; that though he was informed of his right when he appeared in court for plea, he was confused and was prejudiced as he did not know what to do; that when the complainant was examined, she was found to have syphilis while he did not and a DNA should have been done to link him to the child and farther that the evidence on the phone was not produced. He further added that Section 211 was not complied with.

7. The appellant therefore prays that the conviction be quashed and sentence set aside and he be set at liberty forthwith.

8. The prosecution counsel also filed submissions opposing the appeal. Counsel first submitted that the plea was properly taken and the appellant was informed of his right to choose counsel to represent him and hence the right to hearing vide Article 50 (2) (g) was not violated. As for the allegation of breach under Article 50 (2) (h), It was submitted that the right is not absolute but has to be proved that failure to accord an accused counsel at the State expense would result in 'substantial injustice'. Counsel relied on the decisions of Karisa Chengo vs. Republic Criminal Appeal 44, 45, & 46 of 2016; S. vs. Halgryn 2002, (2) Sacr 211 (SCA) and Sheria Mtaani Na Shadrack Wambui vs. Office of the Chief Justice, ODPP & Another (2021) eKLR.

9. As to whether the offence of defilement was proved; Counsel submitted that there was proof of the victims age, thirteen (13) years and relied on Edwin Nyambogo Onsongo vs. Republic (2016) eKLR. As regards penetration, counsel relied on AML vs. Republic (2012) eKLR. It was his view that penetration was proved and so was the identity of the culprit full proof.

10. This is the first appeal and it is the duty of this court to re-examine all the evidence tendered before the trial court, evaluate and analyse it and arrive at the courts own findings but bearing in mind that this court neither saw nor heard the witnesses testify. See Okeno vs. Republic (1972) E. A. 32.

11. The prosecution evidence was that PW1 H A A, a child aged 13, on November 3, 2020 at about 8: 00p.m, called Dennis, the appellant, on phone; that the appellant was her boyfriend and had bought her the mobile phone. She went to meet him at Kanyamkago centre on that night. She did not go back home but they spent the night at a friend's home where they engaged in sexual intercourse. PW1 said that it was not the first time they had sexual intercourse but had done so several times in different places. They had dated for six months. On the said night, she went to tell a relative Mama Ann what had transpired between her and the appellant. The matter was reported to the police station. She was taken to the Doctor who found that she was pregnant.

12. PW2 PC (W) Monica Mboya of Uriri Police Station received a report of a missing child PA. On November 4, 2020; that the child had doped with one Denis Odhiambo; that with the help of the Assistant Chief, the appellant was arrested and he agreed to produce the girl after interrogation. The girl was brought to station and she claimed to have doped with the appellant and she admitted to have been defiled and she took the complainant to hospital for examination. She was found to be pregnant. PW2 also produced the complainant birth certificate PEXNO. 7 indicating that she was seen on April 9, 2007.

13. PW3 Kisuki Dola clinical officer examined the culprit on November 5, 2020. She was found to be pregnant with lacerations on the vagina the hymen had an old tear.

14. When placed on his defence the appellant gave sworn testimony that he knew the complainant but they did not have any relationship; that he ha d gone to Uriri on his motor cycle, the father of the complainant followed him called him and asked where the complainant was; that he was shocked because he did not know the girl. He then told riders that the appellant had ran away with the daughter. The complainant's father told the Chief that the appellant had taken away his daughter and he dropped a police land cruiser. He was taken to the police station and placed in cells; that the complainant was brought to Uriri, taken to hospital and found to be pregnant and had syphilis whereas he was negative.

15. I have duly considered the grounds of appeal, submissions and all the evidence tendered in this case. The first ground is the alleged breach of Article 49 (1) (f) which provides for rights of arrested persons and are meant to ensure that an accused person enjoys fair trial. The appellant alleges that he was arrested and was not produced in court till November 12, 2020. I have looked at the court file and note the appellant never complained to the court about violation of the said right so that the court could call for an explanation from the police. The court cannot call for an explanation from the police authority, if indeed there was a violation of eh said right, it is the officers of the national police service who failed. The said breach cannot vitiate these criminal proceedings because there is a complainant whose rights must be taken into account. In Kuria & 3 others vs. A. G. (2002) 2 KLR 69, the court held:-

> " ..... There is a public interest underlying every criminal prosecution, which is being conclusively guarded, whereas at the same time, there is a private interest on the rights of the accused person to be ....., by whichever means. Given that bi-polar considerations, it is imperative for the court to believe these considerations vis a vis the available evidence (123) consequently, we are not persuaded, just like the High Court and Court of Appeal, that this is an injustice where the court should intervene in order to quash the proceeding before the trial court. The criminal proceedings pending before the trial and should be allowed to continue expeditiously given the amount of time it has taken."

16. Again in Flappyton Mutuku Ngui vs. Republic (2012) EKLR, the Court of Appeal held

> " The correct position in law was set out in Julius Kamau Mbugua vs. Republic (2010) eKLR where the court stated that the violation of the appellants rights to be produced in court within 24 hours would not automatically result in his acquitted. Instead the appellant would be at liberty to seek remedy in damages for violation of his constitutional rights. The law is settled, if the appellants rights under Article 49 (1) (f) were violated, they should seek compensation in damages under Article 22 of *the Constitution*.

17. See Petition 1 of 2017 Joseph Kipkemboi Ariambe vs. Officer Commanding Police Station Kisii paragraphs 35 and 36

18. The second ground I will deal with is the allegation of violation of rights to fair hearing under Article 50 (2) (g) and (h(of *the Constitution*. The said Article provides as follows:-

> " "50(2)Every accused person has the right to a fair trial, which includes the right-
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> (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

19. I have looked at the record of the trial court and I note that on November 12, 2020 when the appellant was arraigned before the trial court even before plea, was taken, the court informed the appellant of his right to choose an Advocate to represent him. Though the appellant claimed that the said right was breached, he admitted in his submissions that the court complied with the requirement under Article 50 (2) (g) but that he got confused. The importance of the said right was captured in the South African case of Mphukwa vs. S (CA& R369 / 2014 (2012), where the court said:-

> " ... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid".

20. In Joseph Kiema Philip vs. Republic J. Nyakundi held that the court should record that it complied with the said right and should inform the accused of the right promptly. Promptly has been defined to be at the time of plea or so soon thereafter but before the hearing, so that the accused can prepare for his defence. In this case, the court informed the appellant promptly even before plea. The said right was not violated.

21. In regard to the right under Article 50 (2) (h), from the way the said provision is conceded the right is not automatic. It is only available to an accused where 'substantial injustice' will otherwise result. In Karisa Chengo vs. Republic S.C. 5 of 2015 the court discussed what amounts to 'substantial injustice'. The court said:-

> " In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will bot be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include:-
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> (i) the seriousness of the offence;
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> (ii) the severity of the sentence;
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> (iii) the ability of the accused person to pay for his own legal representation;
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> (iv) whether the accused is a minor;
>
> (v) the literacy of the accused; and
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> (vi) the complexity of the charge against the accused."

23. In Sheria Mtaani Na Shadrack Wambui vs Office of Chief Justice & Another; Office of the Director of Public Prosecutions, (2021) eKLR , J. Mrima held that the right under Sub Article 2 (h) is not automatic. Substantial injustice must be distracted substantial injustice may cause because of complexity of the case, the seriousness or nature of the case or the inability of the Accused to understand the charge. So far only persons charged with murder and children in conflict with the law are entitled to automatic legal counsel provided at State expense. So far, the appellant has not demonstrated that he was inhibited in any way. In fact from the record the appellant actively took part

in the proceedings and cross examined the witnesses at length. The right under Article 50 (2) (h) was not violated.

24. Whether the offence of defilement was proved. The prosecution has a duty to prove that:-

    1. The victim was a child;

    2. Proof of penetration;

    3. Positive identity of the perpetrator.

    Age:

25. The complainant testified that she was 13 years old having been born on 4/11/2007. A birth certificate was produced in evidence PEXNO. 4. The said certificate was obtained in 2014.

26. The law is settled on how age of a victim of defilement can be determined. It can be by way of birth certificate, baptism card, the parent or guardian. In the case of Mwalango Chichoro Mwanjembe vs. Republic (2016) eKLR the court held:-

> " The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

27. In Francis Omuroni vs. Uganda Criminal Appeal No. 2 of 2000, the court held as in the above case and added that age can also be proved through common sense.

28. In this case, the birth certificate was produced which is one of the best kind of evidence in such a case. I am satisfied that the complainant's age was proved to be 13 years old.

    Penetration:

29. The complainant narrated at length that she had been having an affair with the appellant. She vividly explained how they engaged in sexual activity that resulted in her getting pregnant. PW3 confirmed that PW1 was found to be pregnant. No doubt there was overwhelming evidence of penetration.

    Identity of the perpetrator:

30. According to PW1, the appellant had been her boyfriend for over six months and they ha d been engaged in sexual activity severally. She willingly went to meet the appellant. According to PW3, the father is the one who went in search of the complainant who was later found with the appellant. The appellant gave contrary evidence in his defence. At first, he claimed to know the complainant though they had no relationship and later when the complainant's father was looking for her, he said that he did not know her. I find the complainants testimony to be consistent and the court believed it. I am satisfied that the appellant was the culprit. There is no reason why he would be framed. The identity of the perpetrator was proved.

31. In the end, this court is satisfied that the trial arrived at the correct conclusion in view of the evidence on record. The conviction is affirmed.

32. As for the sentence, the victim was said to be a child age 13 years old. Under Section 8 (3) of the *Sexual Offences Act*, upon conviction one is liable to a minimum sentence of twenty (20) years.

33. I have considered the age of the appellant who is about twenty years. In my discretion I hereby review the sentence downwards to 15 years imprisonment. It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 9TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Owuor for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant