Oucho v Republic (Criminal Appeal E061 of 2021)
[2023] KEHC 17240 (KLR) (12 May 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E061 OF 2021

JRA WANANDA, J

MAY 12, 2023

BETWEEN

APOLLO OUMA OUCHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Arising from Eldoret Chief Magistrates Court Criminal Case No 3925 of 2015.)

JUDGMENT

1. The appellant was charged in Eldoret Chief Magistrates Court Criminal Case No 3925 of 2015 with 2 counts of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* and 2 alternative charges of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The particulars of the offences in Count I and Count II, were respectively, that on the 19th day of July, 2015 within Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (anus) of JK a child aged 9 years and the genital organ (anus) of KK, a child aged 12 years.

3. The particulars of the respective alternative charges were that on the same date and at the same place, he unlawfully and indecently caused his genital organ (penis) to come into contact with the genital organs (anus) of the same children, JK, a child aged 9 years and KK, a child aged 12 years.

4. The Appellant pleaded not guilty and the matter then proceeded to full hearing. The prosecution availed 6 witnesses and the defence called 2 witnesses, including the Appellant.

Prosecution evidence

5. PW1 was KK, a minor aged 12 years old and the complainant in Count 1. The trial magistrate conducted a voir dire examination upon which he stated that he was satisfied that the minor appreciated the need to speak the truth and was intelligent enough to testify. The minor then gave sworn evidence and testified that he is a class 5 pupil at [name withheld] primary school. the Appellant was a caretaker of rental houses near their home, on May 21, 2015 at around 3 pm the minor had gone to watch a movie at the Appellant's house, it was his first time to go there, the day before the Appellant had asked him to go to his house but the minor had declined, the Appellant asked the minor to help him shave the Appellant's beard, when the minor did so the Appellant grabbed him, he asked the minor to sit on his lap but the minor refused, he then gave the minor some soda and crisps to eat, after a while the minor felt unwell and slept, upon waking up he discovered that he was naked, he dressed and went home where he continued sleeping as he was still sleepy, when he woke up he went to the toilet, he felt pain in his buttocks, later he looked for his friend K and told him what happened, K told his mother who told mama Nerea who in turn told the minor's mother, they went to Kapsoya police station where they were given a P3 form which was filled, he was then taken to Moi Teaching and referral hospital.

6. PW2 was JK, the complainant in Count II and who was also a minor. Similarly, the trial magistrate conducted a voir dire examination and found that the minor appreciated the need to speak the truth. The minor then gave sworn evidence. He testified that he was 11 years old, on July 19, 2015 he had gone to church when he felt thirsty, he went to the Appellant's place to drink water, the Appellant is the one who used to take care of the church, his house was in the same compound as the church, he found the Appellant in the house, the Appellant gave him water, the Appellant's house had a video and a barbershop, the Appellant called him to the barbershop and told the minor to help him remove a beard, as the minor was doing so the Appellant pushed him, he told the minor to remove his trousers, the Appellant removed his 'dudu' and put it inside the minor's anus, the minor felt pain, when the Appellant was done he gave the minor Kshs 30/- and told him to go buy bananas then come back and watch videos, the minor did so and returned, he continued watching videos until 6 pm, he later went home and did not tell anybody on that day, he recalled that there was a day he was taken to Moi teaching referral and treated.

7. In cross-examination, he stated that the Appellant did "bad manners" to him, he was taken to hospital by his mother, PW1 was also in the Appellant's house on the date of the incident, the Appellant did the act to him, he had been doing that since 2011, the minor did not tell anyone, the Appellant had told him not to tell anyone, mama Nereah is the one who discovered what had been happening.

8. PW3, one SCM testified that on July 19, 2015 she received information that there was a man who was sodomizing children, after church she interviewed her son JK (PW2) who appeared afraid, he told her that the man who was sodomizing children was called Apollo, he hesitated but later told her that he too had been sodomized by the said Apollo, she reported the matter to the Chief who advised her to take the boy to hospital, she then took the boy to hospital where he and another boy were examined, they were found to have been sodomized, at the time of the incident the boy was 10 years old, he was examined and spermatozoa were found, the Appellant was then arrested. In cross-examination, she stated that the Appellant was a neighbour, the boy used to go the Appellant's house where the Appellant used to operate a video, a neighbour Mama Nereah is the one who told her about the incident.

9. PW4 was one Dr Eunice Temet from Moi Teaching and Referral Hospital, she testified that one Dr Yatich is the one who had filled the P3 forms for both the minors in the case, she knew Dr Yatich's handwriting and signature, the 1st P3 form was filled on behalf of a minor aged 12 years old, the child was sodomized by a person known to him, according to the boy the perpetrator was in the habit

of fondling him with his genitalia whenever he was watching movies in his house, on 7/05/2015 he sodomized the boy after giving him crisps, on examination it was found that there were no injuries on the boy's body, the doctor reported normal genitalia with no injuries noted on the anus, there was no discharge on the genitalia, HIV test was negative, the test for syphilis was negative, they had stayed for 2 months before he was examined, the findings cannot be used to rule out sodomy.

10. She added that the 2nd P3 form was filled on behalf of JK who was 10 years old, the Form was filled on July 21, 2015, the child alleged that he had been sodomized by someone known to him, he reported that the perpetrator had sodomized him for 3 years, the latest incident was on July 19, 2015, he had no injury on his body except on the anus where there was a fresh laceration at position 6 o'clock, there was also pain on linear examination, he had a reduced sphincter tone (redness laxity of the anus), he had normal male genitalia, there was a mucoid discharge seen from the anus, HIV and VDR tests were negative, some blood was seen through the microscope, the findings were consistent with defilement. In cross-examination, she stated that one cannot rule out penetration.

11. PW5, one MC, mother of KK (PW1) testified that on 9/07/2015 her neighbour called and told her that she was informed that her son KK had gone back home, she told the neighbour to discipline the boy and take him back to school, she then called the boy's teacher who told her that the boy had failed to report to school on several occasions, she told her friend one Mama Nereah about the issue, Mama Nereah interviewed the boy, he confided in Mama Nereah by telling her that there is one Apollo who used to receive him at his video place where they would watch adult movies, they would watch pornographic movies with him, he also told her that Apollo ejaculated on him, Mama Nereah reported back to her with the information, PW5 also talked to the boy who repeated the same story, she checked his genital organ, there was a stench coming from the penis, she reported the matter to Kapsoya police station, she later took the boy to hospital.

12. PW6 was one PC Jackson Kiprotich Boi from Kapsoya police station, he testified that on 20/07/2015 two males people came to the police station, they reported that they had been defiled, they were accompanied by their parents, they were issued with P3 forms which were later filled, the complainants stated that their defiler was a Sunday school teacher. In cross-examination, he stated that he could not confirm that the complainants took long before going to the hospital, he could not also tell whether the complainants were intoxicated before being sodomised.

13. At the close of the prosecution case, the Appellant was found to have a case to answer and was placed on his defence.

14. The Appellant elected to give sworn testimony as DW1. He testified that on July 19, 2017 he was at home, after about 4 days he was arrested, he knew the complainants, he was the caretaker of the plot where he was living, there was a lady by the name Mama Nerea who conspired with another lady named Mama Ken to remove him so that she could become the caretaker, he had no relationship with the complainants, they never went to his house, he did not belong to that church, he was a catholic which is a different church, he was never examined by the doctor, the case was fabricated. In cross-examination, he stated that he had never been a Sunday school teacher.

15. DW2, one Hillary Maaga Biwott testified that he used to live in the plot where the accused was a caretaker, on July 19, 2015 he was in his house when he heard some ladies stating that "we finished him. I must be the caretaker here", he got out of his house and saw 2 ladies, he recognized Mama Nerea who was the one making the statement, after 5 days the Appellant was arrested.

Judgment of the trial Court

16. Upon considering the testimony of the witnesses and the evidence produced, the trial magistrate found the Appellant guilty of the charge of defilement in Count I and on September 13, 2021 sentenced him to serve 20 years' imprisonment.

17. On Count II however, the Appellant was acquitted since the trial magistrate found that the complainant's age was not proved.

Appeal

18. Being dissatisfied with the conviction and sentence, the Appellant filed this Appeal on September 23, 2021. 4 grounds were cited as follows:

    a. That the learned magistrate erred in law and in fact in failing to find that the offence of defilement in count 1 of the charge sheet was not established beyond reasonable doubt.

    b. That the learned magistrate erred in law and fact in failing to draw an adverse inference against the prosecution for failing to call crucial witnesses.

    c. That the learned magistrate erred in law and fact in failing to comply with the provisions of section 200 of the *Criminal Procedure Code*, Cap 75.

    d. That the learned magistrate erred in law and fact in failing to find that the voir dire examination of the minor witnesses was not properly conducted as there was a failure to comply with section 19 of the *Oaths and Statutory Declarations Act*, Cap 15.

Hearing of the appeal

19. The parties filed written submissions. The Appellant's Submissions were filed on January 23, 2023 through Messrs Wambua & Kigamwa Associates and the Respondent's Submissions were filed on January 25, 2023 by Ms Emma Okok, Prosecution Counsel.

Appellant's Submissions

20. Counsel for the Appellant submitted that the Appeal was on conviction only, the trial was conducted by 2 Magistrates who succeeded each other without compliance with section 200 of the *Criminal Procedure Code*, the record shows that the Appellant was not informed of his rights under section 200 aforesaid. He cited the decision in *Lenvesio Lekupe & another v Republic* [2016] eKLR.

21. Counsel submitted that the failure to uphold the appellant's right under section 200 aforesaid vitiates the conviction. He urged that that this is not an appropriate case to order a retrial for the reason that the length of time that has passed since the filing of the charges in the year 2015, it is now close to 8 years, the prosecution will also exploit the new trial as a chance to fill in gaps by witnesses who were never called to testify in the initial trial being brought, the retrial will prejudice the Appellant. He cited the decision in *PHN v Respondent* [2016] eKLR.

22. He also submitted that the trial court failed to draw an adverse inference against the prosecution for failure to call crucial witnesses in respect of count 1, namely, Mama Nerea who was said to have witnessed the alleged act and the 8 boys who were alleged to be at the locus in quo. He cited the decision in *Bukenya v Uganda* (1972) E.A. 549.

23. Counsel also urged that the rules on voir dire examination were breached, the initial trial Magistrate instead of first proceeding on an inquiry as to whether PW2 understood the nature of an oath for

purposes of giving sworn evidence, he proceeded on ascertainment as to whether he was possessed of sufficient intelligence and understood the duty of speaking the truth, it was improper to have allowed the minor to tender sworn evidence in violation of section 19 of the *Oaths and Statutory Declarations Act*. Cap. 15. He cited the decision in *John Muiruri v Republic* (1983) KLR 447.

24. He also submitted that the Court failed to note that section 8(1) of the *Sexual Offences Act* which requires proof of penetration was not established in respect of Count 1 as the P3 form clearly indicated in section 'B' that no injuries existed on the part of the complainant, the magistrate proceeded to erroneously conclude that despite the fact that no injuries existed the complainant had sustained harm, the Court failed to make a finding that the failure to accord the Appellant the same treatment to that of the complainant as stipulated in Regulation 6(1) and (2) of the *Sexual Offences (Medical Treatment) Regulations 2012* in terms of conducting a full medical forensic examination and prescribing appropriate medical treatment was an exculpatory fact and a doubt to be resolved in the Appellant's favour, it was a direct violation of the provisions of Article 27(1) of the *Constitution of Kenya* which accorded the Appellant the benefit of equality of protection and benefit of law thus it vitiated a fair trial under Article 50 of the *Constitution*.

Respondent's Submissions

25. Counsel for the State conceded to the Appeal and prayed for a retrial. She stated that they had thoroughly perused the proceedings of the trial Court and concurred that indeed section 200(3) of the *Criminal Procedure Code* was not complied with. She cited the decision in *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR.

26. Counsel submitted that the evidence against the Appellant was strong and would warrant a re-trial as the victims of the offence deserve justice. She cited the Court of Appeal decision in *Samuel Wahini Ngugi v Republic* [2012] eKLR.

Analysis & Determination

27. This being an appellate court, it has a duty as was stated in *Okeno v. Republic* [1972] EA 32 as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala v R (1975) EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

Issues for determination

28. Upon considering the petition of appeal and the submissions by the parties, I find the following to be the issues that arise for determination in this Appeal;

    i. Whether the trial Court failed to comply with section 200 of the *Criminal Procedure Code*.

    ii. Whether the prosecution proved its case beyond reasonable doubt.

29. I now proceed to analyze the matter.

i. Whether the trial Court failed to comply with section 200 of the Criminal Procedure Code

30. Section 200(3) of the *Criminal Procedure Code* states as follows:

> (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

31. It is clear that the said provision is couched in mandatory terms therefore the succeeding magistrate must inform the accused person of his right otherwise the same would amount to a miscarriage of justice. In *Ndegwa vs Republic*, [1985] KLR 534, the Court of Appeal, while dealing with a case of violation of Section 200 aforesaid, stated as follows:

> " No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."

32. I have perused the proceedings of the trial Court and noted that the succeeding Magistrate, Hon. R. Odenyo - SRM, took over the matter on 3/09/2019 after PW1, 2, 3, 4 and 5 had already testified before the initial Magistrate. There is however no evidence that the Appellant was made aware of his rights under section 200(3) aforesaid. In the premises, since the succeeding Magistrate had not had the benefit of seeing and hearing the earlier witnesses, his failure to inform the Appellant of his rights under section 200(3) aforesaid was fatal.

33. On this ground alone, I agree with both Counsels that the conviction cannot be sustained and the Appeal must succeed as a consequence. Accordingly, I set aside the conviction and sentence.

34. Having found as above, I do not deem it necessary to interrogate the second issue on whether the prosecution proved its case beyond reasonable doubt. The question however remains whether this Court should order a re-trial or whether the Appellant should be set free.

35. The law as to when a retrial should be ordered has been discussed extensively over time. In *Fatehali Manji v Republic* [1966] EA 343, the Court of Appeal for Eastern Africa gave the following guidelines:

> " In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require".

36. In *Mwangi v Republic* [1983] KLR 522, the Court of Appeal, following *Braganza v Republic* [1960] EA 854, stated as follows:

> " ... a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result".

37. I have considered the circumstances of this case and I am of the opinion that on a proper consideration of the matter, there is strong evidence on record which might support a conviction.

38. I note that the offences are alleged to have occurred almost about 8 years ago and also the issue of availability of witnesses may arise. However, I also note that the case concerns the very serious offence of defilement and/or sodomy and the alleged victims were minors. It is important that they find closure on the issue if only for their future sanity and to diminish the resultant psychological trauma. The only way that such closure can be achieved is, in my view, by a substantive Judgment reached after a full trial.

39. Further, the conviction herein has been set aside because it has been found to have been illegal or defective, not because of insufficiency or absence of evidence. It is therefore my view that it would be in the interests of justice to order a retrial.

Final Order

40. Consequently, I issue the following orders:

    i. The Appeal is allowed, the conviction is quashed and the sentence passed against the Appellant set aside.

    ii. The Appellant shall be retried before any other Magistrate other than Hon. R. Odenyo - SRM whose Judgment has been impugned herein.

    iii. The Appellant shall appear before the trial court on a date to be given for further directions to be issued by that Court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 12TH DAY OF MAY 2023

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WANANDA J. R. ANURO

JUDGE