Odongo v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 27511 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEHC 27511 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E058 OF 2022

RPV WENDOH, J

MAY 9, 2023

BETWEEN

JULIAS JUMA ODONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. A. Munyuny, Resident Magistrate in Chief Magistrate's Sexual Offence Case No. 81 of 20221 delivered on 21/3/2022)

JUDGMENT

1. The appellant Julius Juma Odongo was convicted by Migori Chief Magistrate in Criminal Case No. E081 of 2021 for the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The particulars of the charge are that on 3rd December, 2021 at (Particulars withheld) Township in (Particulars withheld) Sub County of Migori County, intentionally caused his penis to penetrate the vagina of R.E. M. a girl child aged eight (8) years.

3. In the alternative, at the aforementioned place and time, intentionally and unlawfully touched the vagina of R. E. M., a girl aged eight years with his hands and penis.

4. The appellant denied the charges and the case proceeded to full trial with the prosecution calling five (5) witnesses. The Appellant gave unsworn statement when he was called upon to defend himself.

5. The trial court convicted the appellant and he was sentenced to life imprisonment. It is the said judgment that has provoked this appeal. The grounds of appeal are as follows:-

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

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

3. That the court failed to specify the language of the court this occasioning the appellant injustice;

4. That the mandatory nature of the sentence under Section 8(2) of the *Sexual Offences Act* is unconstitutional.

6. He therefore prays that the conviction be quashed and sentence set aside. The appellant filed written submissions in support of the grounds of appeal. It was submitted that as drafted, the charge did not disclose on offence i.e. Section 8(1)(2) of the *Sexual Offences Act*; that it was not indicated that Section 8(1) was to be read with Section 8(2) *Sexual Offences Act*.

7. Secondly, it was submitted that the court did not ask the appellant what language he understood best; that the charge was read in Kiswahili but not translated to Dholuo; that PW2 testified in Kiswahili and no interpretation to Dholuo. Lastly, that the interpreter was not sworn to interpret truthfully as held in *Republic vs. Abah Ali* (1991) KL 171, hence a miscarriage of justice was occasioned. It was further submitted that if the court dismisses the appeal on the fact that the mandatory sentence is unconstitutional, then the court should exercise its discretion under Article 50 (2) (p) of *the Constitution*.

8. The Respondents opposed the appeal and it was submitted that the offence of defilement was proved in that the age of the complainant was confirmed to be about eight (8) years seventeen (17) days, by the production of the birth certificate. As to whether there was penetration; it was submitted that PW1 narrated what happened to her; that after she was taken to the farm by the assailant, he applied saliva to her genitalia, and put his thing into her vagina and she screamed and that is when people came and chased, caught and arrested the appellant; that PW6 confirmed injuries to PW1's genitalia and a tear extending to the annal region. PW6 confirmed that there was penetration.

9. As to identity, it was submitted that though the complainant did not know the assailant before, the appellant was arrested at the scene and was therefore properly identified by PW2 and PW3 who arrested him.

10. As regards the allegation of violation of Article 50 (2) (g) & (h) of *the Constitution*, the State referred to the Record of Appeal at page 3 where the appellant was informed of his rights under Article 50 (2) (g) by the court and that though the court did not capture the appellant's response, he chose to represent himself and cross examined the witnesses extensively and testified in his defence and hence was aware of his rights under Article 50 (2) (g) and (h).

11. As regards the sentence, it was urged that sentencing is the discretion of the court and that the Muruatetu case does not apply to all provisions of law prescribing mandatory or minimum sentences. Counsel urged the court to dismiss the appeal in its entirety.

12. The prosecution case was as follows; PW1 R.E.M., after undergoing a *voire dire* examination, gave unsworn evidence. She recalled that she was coming from the market at about 6:00p.m having been sent for mangoes, she was near a bar Kepres, when she met the appellant, who called her to board a motor cycle and hold tomatoes for him and that he would give her 200/=. She boarded the motor cycle with him and they alighted in a farm and when she said she wanted to go home because it was dark, that the appellant removed her pant, socks and also removed his shorts, lifted her dress, put saliva on her vagina and put his thing in her vagina. She felt pain and screamed and he told her that even if she screamed, nobody could hear; that people came and the appellant ran off but was caught; that she vomited and defecated on herself, bled and blood dropped on the socks; that the appellant was taken to

police station while she was taken to hospital where she was stitched; that the appellant also strangled her and her neck was injured.

13. PW2 EJA recalled that on 3/12/2021, about 7:00p.m, he was walking with his brother SO on a footpath in a bushy area, going home. They heard people arguing, then they heard a scream, with a person saying "you are hurting me. He had a torch and they decided to check. They went stealthily and saw two people, a child on the ground and the appellant who was half naked was on top of her. The person started to run on seeing them and they chased and caught him. They went to the landlord, one OO, whose house was one kilometer away. They observed and noticed that the child was bleeding from her private parts; they took them to Sori Police Station where they recorded statements. They went back to the scene with police officers while the child was taken to the hospital. They found slippers and a panty at the scene and feaces, a red dress which the complainant wore and was blood stained.

14. PW3 reiterated PW2's testimony and identified the appellant as the person they arrested when they found him in the field with the complainant. He also identified the complainants red dress and socks which had blood stains and confirmed that PW1 was bleeding from her private parts when they found PW1 and the appellant.

15. PW4 RAA, the mother of the complainant told the court that she was born on 15/11/2013 and produced a birth certificate to that effect. PW4 had left the complainant with one Lavender Otieno who called her on 4/12/2021 and informed her of what had happened to the complainant.

16. PW5 Sgt. Zablon Ogutu recalled that on 3/12/2021 at about 7:30p.m, I received a call from the OCS CIP Vincent Omuse that police officers had arrested someone. The appellant was brought to station and ha d been assaulted by members of public and that the complainant was bleeding from her private parts. He was led to the scene by PW2 and PW3 where they recovered a panty and shoes.

17. PW6, Leonard Omweri of Karungu Sub County Hospital was the first to examine and treated PW1 on 3/12/2021. He found that PW1 had sustained extensive vaginal tears extending to the rectum and there was bleeding from the tears and the perineum, vaginal opening walls upto the anal region. He stitched the complainant and formed the opinion that there was penetration. He produced the treatment notes and P3 Form as exhibits. PW5 also examined the appellant and produced his P3 Form.

18. The appellant in his unsworn defence stated that on 3/12/2021, when coming from the lake where he does fishing, he met two people who informed him that he had a case at the Sori Police Station and he agreed to go with them. When he enquired what he had done but he was informed that he would know the charges in court. He has not indicated the charge.

19. I have now considered the grounds of appeal, the rival submissions and all the evidence tendered. I will start by considering the allegation that the appellant's rights to fair hearing were violated.

20. Article 50 (2) (g) and (h) provide as follows:

> " 50(2) Every accused person has the right to a fair trial, which includes the right-
>
> (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.

21. To confirm whether or not the rights were breached I must look at the court record. When the appellant was arraigned in court on 6/12/2021, before plea was taken, the court recorded that Article 50 (2) had been explained to the Accused. The court was very mean with its words because it did not record what the magistrate told the appellant and what the appellant said in response if at all he reacted. The above Sub Article 2 (g) requires that an accused person be informed of the right to choose and be represented by an advocate of his choice and he should be informed of the right promptly. The said right cannot be abrogated by dint of Article 25 (c) of *the Constitution*. Though the court did not state exactly what the magistrate told the Appellant, it is clear that the said information was communicated to the appellant promptly. It is necessary for the court to inform the appellant of his right promptly to enable the accused to make a decision whether to engage counsel or even apply to legal Aid Board for pro-bono assistance. In the South African case of Mphukwa vs. (CAR & r 369/20 of (2012) the court held

> " ... 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".

22. In *Joseph Kiema Philip vs. Republic* (2019) eKLR, J. Nyakundi held that the trial court has the duty to inform an accused of the right to choose counsel. The court also observed that the court had the duty to record that it had complied with the said requirement. That is important in case the decision is challenged.

23. In this case the appellant was informed of his right under Sub Article 2 (g) before plea hence the right was not violated.

24. As regards the right under Article 50 (2) (h), the same is not automatic. It must be demonstrated that "substantial injustice" would result if the State did not provide counsel at State expense. Presently, only an accused person charged with murder and children in conflict with the law are entitled to free legal representation provided by the State. For any other accused person, it has to be demonstrated that 'substantial injustice' will result if he is not accorded legal representation by the State, for example if he cannot understand the proceedings. In this case, the appellant has not demonstrated that he has suffered any injustice for the failure by the State to provide him with free legal representation. For that reason, no right was breached and that ground must fail.

25. The appellant also alleged that no offence is disclosed in the charge as framed because Section 8 (1) (2) of the *Sexual Offences Act* does not exist. Though that error existed when the charge was presented, no objection was raised during the trial. Section 214 of the *Criminal Procedure Code* provides for what the contents of the charge. The said Section provides:-

> " 214(1) Where at any state of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."

26. Though, the charge does not read that Section 8 (1) was to be read together with Section 8 (2) of the *Sexual Offences Act*, the particulars of the charge are clearly set out and the court on sentencing, clarified that the appellant had been found guilty under Section 8 (1) as read with Section 8 (2) of

the *Sexual Offences Act*. Besides, under Section 382 *Criminal Procedure Code*, a decision cannot be rendered invalid because of an error in the charge sheet. That Section 382 *Criminal Procedure Code* provides as follows:

> "Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the compliant, summons, warrant, charge, proclamation, order, judgment or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure if justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

27. The defect did not go to the root of the charge and did not prejudice the appellant.

28. The appellant complains that the court did not indicate the language of the court. On the date of plea, the c*the Constitution*ourt explained Article 50 (2) of in Kiswahili language. After that, the court did not indicate the language of the court. It is not clarified what language PW1 used but PW2, PW3 spoke in luo. PW4 spoke in Kiswahili while PW5 spoke in English translated to luo and so did PW6. The appellant extensively cross examined the witnesses and agave his defence in Kiswahili. The court is required to caution court the proceedings which language the accused understand. It is necessary when such challenge arise, the court can look at the proceedings. Even if the court was not clear which language was used, this court is satisfied that the appellant understood the language of the court and he did not suffer any prejudice.

Was the offence of defilement proved?

29. To prove a charge of defilement, the prosecution has to establish that the following ingredients exist:-

    1. The victim was a child;
    2. Proof of penetration;
    3. Proof of identity of the preparator.

Of age:

30. The complainant was a child of tender age because the court took her through voire dire examination and found that she did not understand the meaning of the oath and was allowed to give unsworn evidence. In addition, her mother PW4, produced a birth certificate which confirms the complainant's date of birth as 15/11/2013. It means that as of 3/12/2021, she was about eight (8) years old. PW6, the clinical officer corroborated PW1, PW4's testimonies that the complainant was eight years old. In the Court of Appeal decision of *Mwalongo 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."

31. Also see *Flappyton Mutuku Ngui vs. Republic* (2014) eKLR .

32. I am satisfied that the prosecution proved the age of the complainant to be eight years.

Proof of Penetration:

33. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person."

34. In the case of *Mark Oiruri Mose vs. Republic* (2013) eKLR, the Court of Appeal held as follows:-

> " ... in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ...."

35. In this case, there is overwhelming evidence of penetration. PW1 narrated in detail how the appellant inserted his thing in her gentalia, she felt pain; screamed and even defecated on herself. She screamed and PW2 and PW3 who were passing by came to her rescue and confirmed that they found the appellant lying on the complainant. After he fled, they noticed the complainant was bleeding from her private parts.

36. PW6 also corroborated PW1'S evidence that she sustained very serious injuries to her genitalia i.e. extensive vaginal tears extending to the rectum, bleeding from the tears from the perineum, vaginal walls, hymen was torn, covering of cervix was torn and PW6 stitched the tears PW6 formed the opinion that the hymen were evidence of sexual penetration.

Proof of identity of the perpetrator:

37. PW1 testified that he met the assailant at about 6:00p.m as she came from the market where she had bought mangoes. She said that the defilement took place about 7:00p.m and by then it was night. PW2 and PW3 who heard the complainant screams also stated that the incident occurred about 7:00p.m. It was dark and PW2 and PW3 used a torch to spot the complainant and the assailant. PW1 had never seen the assailant before. She however saw him that evening as he walked to her and convinced her to get onto the motor cycle. Even if PW1 may not have seen the assailant well, PW2 and PW3 who caught the appellant in the act chased and caught him. PW3 said he was the one who actually caught him with his pants still down. The appellant did not escape from the scene but was caught soon thereafter. PW2 and PW3 knew the scene so well that they took police back there where they recovered the complainants pant and shoes. The trial court found that,

> " PW1 was clear, consistent and gave a detailed account of what transpired between her and the accused and she remained firm on the details of her narration of the incident during cross examination by accused. I find that the circumstances are favourable to prove the identification".

38. The trial court found that though no corroboration in this case, was necessary by dint of Section 124 of the *Evidence Act*, yet PW1's evidence was corroborated by that of PW2 and PW3 who caught the appellant red handed in the act of defiling the minor. Having so found, this court totally agrees with the findings of the trial court. I am satisfied that the appellant never escaped from the scene and was

properly identified as the preparator. In the end, I find that the court arrived at the proper finding that the offence of defilement contrary to Section 8 (1) was committed. The conviction is sound and I affirm it.

39. The appellant also complained that the mandatory minimum sentence under Section 8(2) of the *Sexual Offences Act* was unconstitutional. The appellant did not state why the sentence is unconstitutional. It is a provision of a statute passed by parliament. The appellant cannot rely on the Supreme Court decision in *Francis Karioko Muruatetu vs. Republic* Petition 15 & 16 of 2021. In that case, the Supreme Court held that the mandatory death sentence in murder cases was unconstitutional. It did not declare the death sentence unconstitutional. In this case, under Section 8(2) of the *Sexual Offences Act*, an accused upon conviction, is liable life imprisonment. The appellant did not demonstrate the unconstitutionality of Section 8(2) of the *Sexual Offences Act*.

40. I have considered the circumstances of this case. The complainant was a child of tender years, aged eight years. The ordeal she went through at the hands of the appellant is unimaginable. It was a beastly actions and most callous. The complainant must have been traumatized and has to live with it. The appellant ignored the fact that the complainant was a child who is not fully developed and tore her as he hurriedly tried to satisfy his lust. The injuries that the complainant suffered tell it all. She had a tear from the vagina till the rectum and no wonder she defecated on herself during the act. The appellant deserves nothing less but to be kept in prison, away from other children who are likely to be victims. The sentence is legal and lawful. I find no good reason to interfere with the sentence. The appeal is dismissed in its entirety.

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. Nyauke –Court Assistant