Odoyo v Republic (Criminal Appeal E024 of 2022)
[2023] KEHC 27494 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEHC 27494 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL E024 OF 2022

RPV WENDOH, J

MAY 9, 2023

BETWEEN

JARED ODHIAMBO ODOYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence by Hon. R. l. Langat – Principal Magistrate in Rongo Senior Resident Magistrate's Criminal Case No. 31 OF 2019 delivered on 21/3/2022)

JUDGMENT

1. This is an appeal arises from the judgment of the Principal Magistrate Rongo Court in a judgment delivered on 21/3/2022. The appellant Jared Odhiambo Odoyo, was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) 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 15/7/2018 at (Particulars withheld) Village in (Particulars withheld) Sub County, Migori, internationally and unlawfully caused his penis to penetrate the vagina of E. M. a child aged sixteen (16) years.

4. In the alternative he is alleged to have touched the vagina of E. M. with his penis.

5. The prosecution called a total of five (5) witnesses in support of their case. On being called upon to defend himself, the appellant testified on Oath.

6. The trial court convicted the appellant and he was sentenced to serve twenty (20) years imprisonment. He is aggrieved by the said judgment and he preferred this appeal. The amended grounds of appeal are as follows:-

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

2. That the sentence was harsh and excessive;

3. That the court violated Article 50 (2) (g) and (h) and (h) of *the Constitution*;

4. That the prosecution case was marred with contradictions.

7. As regards contradictions, the appellant submitted that PW2's testimony on her age was inconsistent in that the offence occurred on 15/7/2019 when she was sixteen (16) years and yet when she testified on 11/8/2021, she still claimed to be sixteen (16) years old; that in her testimony PW2 claimed that the appellant was with his wife when she was taken into the maize plantation. and in cross examination, she denied; that the contradictions in PW2's testimony over her age resulted in the court convicting him under Section 8 (3) of the *Sexual Offences Act* instead of under Section 8 (4) of the *Sexual Offences Act* which was preferred and to him. He urged that the court should not have relied on the testimony of PW2. He relied on the decision of Eliud Waweru Wambui vs. Republic (2019) eKLR.

8. As to proof of ingredients of the offence of defilement, the appellant relied on the case of Francis Omuroni vs. Uganda Criminal Appeal No. 2 of 2000 on how age should be proved; that no birth certificate was tendered in evidence save for the age assessment report and that the said report was not produced in accordance with Article 50 (1) and (2) in that the document was never given to him before it was presented to court and it denied him a chance to prepare his defence; that no expert was called as a witness and age was therefore not proved.

9. As to penetration, it was argued that the appellant was not linked to the offence. He relied on the case of R vs. Howard (1965)3 ALL E. R. 684; where the court held that the prosecution had to prove lack of consent for a sixteen (16) years old girl; that the hymen was not freshly broken nor was there presence of spermatozoa and no DNA was done. The appellant also urged that sentence was excessive because first he was wrongly convicted under Section 8 (3) instead of Section 8 (4) of the *Sexual Offences Act* where the minimum sentence was fifteen (15) years; that being a first offender, he was entitled to a lenient sentence. He relied on Jared Koita Injiri vs Republic (2019) eKLR where the court substituted life sentence with thirty (30) years imprisonment under Section 8(2) *Sexual Offences Act* and *Paul Ngei vs. Republic (2019) eKLR (Criminal Appeal 33 of 2015*) where the court applied Article 50 (2) (g). He urged that the mandatory provision in sentencing deprives the court of its discretion to consider mitigation. He urged the court to consider the objectives of sentencing contained in the Kenya Sentencing Policy Guidelines.

10. Lastly, the appellant argued that the court failed to inform him of his rights under Article 50 (2) (g) & (h); that he was an ignorant youth when he was charged and was not accorded fair trial by failure by the court to inform him of his rights.

11. The Respondents filed submissions opposing the appeal. The prosecution counsel Mr. Mulama submitted that the offence was proved to the required standard. On age, counsel relied on the decision of Mwalango Chichoro Mwanjembe vs. Republic (2016) and that even though there was no documentary evidence to prove age, medical assessment is scientific and accurate compared to the estimate in the P3 Form. He regretted that the medical officer was not called as a witness. He urged the court to rely on the age assessment report; that the appellant did not oppose the production of the report but if it finds it to be a grave omission, it should remit the case for retrial for purposes of production of the report.

12. On penetration, counsel relied on the case of Mark Oiruri Mose vs. Republic (2013) eKLR and the definition of penetration under Section 2 of the *Sexual Offences Act*; that the testimony of PW2 was

corroborated by the findings of the clinical officer (PW1); that the appellant was a relative of the complainant and was therefore recognized.

13. On violation of the appellant's rights under Article 50 (2) (g) and (h), counsel submitted that the record indicates that the appellant was informed of his right to choose an advocate to represent him. As for the right under Article 50 (2)(h) he submitted that the right is not automatic because it has to be demonstrated that 'substantial injustice' would result if counsel is not provided to an accused at State expense. Counsel relied on the case of David Njoroge Macharia vs. Republic (2011) eKLR vs. Karisa Chengo & 2 others vs. Republic (2017) eKLR – which considered when substantial injustice may occur i.e. complexity, seriousness and nature of the case and ability o f the accused to conduct his trial. Counsel argued that the appellant had not demonstrated his inability to conduct his defence as he cross examined the witnesses and gave his defence. Therefore, the appellants constitutional rights were not violated.

14. On the sentence, it was submitted that the Francis Muruatetu case did not apply; that the law prescribing mandatory or minimum sentences was inconsistent with *the Constitution*; that the sentence was lawful and not excessive. The court was urged to dismiss the appeal.

15. This being a first appeal, it is imperative that this court re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusions but make allowance for the fact that it neither saw nor heard the witnesses testify. See Okeno vs. Republic (1972) E. A. 32.

16. The prosecution case was as follows:-

17. PW1 Mwita Keri Sasi, a clinical officer then of Awendo Sub County Hospital recalled the 15/7/2019 when he examined E. M. a child, with history of sexual assault. On examination, the hymen was not intact, there was vaginal lacerations with no discharge. He filed the post rape care form with which he later filled the P3 form on 16/7/2019.

18. PW2 stated that she was sixteen (16) years old and illiterate. She recalled that on 15/7/2019, she went to fetch water in the river while Odhis, – appellant was herding. He got hold of her, took her to the maize plantation and removed her pant and put his genital organ in hers. He later released her to go home where she reported to her grandmother and was escorted to police station and hospital. She knew the appellant as a neighbour and he was their vigilante. She said that the appellant was with the wife but she did not see him take PW2 into the maize plantation.

19. PW3 Eunice Atieno, is a sister to PW2 who lives with her. PW3 identified the appellant as her brother in law. She was at the market on 15/7/2019 when George (PW4) informed her that the appellant had defiled PW2 whom she had left at home at 2:00p.m They took PW2 to hospital, reported to police. PW4 George Otieno knows PW2 as the sister in law and the appellant is a son to his brother. He said that PW3 informed him that the appellant had defiled PW2. He interrogated PW2 and took her to hospital and reported to police.

20. PW5 CPL Ann Okumu then of Kamagambo Police Station was the investigating officer in the case; she recalled that on 17/9/2019, the appellant was taken to the station on allegation of defilement. At the time a report had been made by the complainant and she had been taken to hospital. The appellant went missing and so did the complainant. The complainant was found and recorded her statement. PW5 took the complainant for age assessment as per the report produced in court.

21. The appellant in his sworn defence stated that on 15/7/2019 after work, his elder brother went with him to his house where he talked to the uncle who alleged that the (appellant) had defiled a girl. He was called and informed by village elder that the mother of the girl asked for money she had spent. He refused to pay since he had not done anything. He was later arrested in September 2019.

22. Having considered all the grounds of appeal, the evidence tendered before the trial court and submissions of the parties, I think I will first deal with the question whether the appellant's right to fair trial under Article 50 of *the Constitution* were violated. To do so, I must examine the court record. Article 50 (2) (g) & (h) of *the Constitution* provide as follows:-

> " A50(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.

23. The appellant was arraigned in court for plea on 25/9/2019. Immediately after the charge was read to the appellant and he denied the offence, the court informed him of his right to legal representation. Although the court did not record his response, the record is clear. All that is required of the court under Article 50 (2) (g) is to inform an accused person that he has a right to choose an advocate to represent him. The said information has to be passed to the accused promptly so that he can be able to prepare for his defence. In the South African case of Mphukwa vs. S (CA& R369 / 2014 (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".

24. In Joseph Kiema Philip vs. Republic (2019) EKLR J. Nyakundi also held that the court has the duty to inform an accused of his right to choose counsel and to do so promptly. In addition, the court record has to show that the court complied with the said requirement. See also Criminal Appeal 36 of 2018 S. K. vs. Republic.

256. As regards the right under Article 50 (2) (h), it requires that an accused be informed of his right to counsel provided at State expense if 'substantial injustice' would otherwise result. From the wording of that provision, the said right is not absolute or automatic. It must be established that if counsel is not given at State expense, 'substantial injustice' will result. Such injustice may result due to the complexity of the case; the inability of the accused to comprehend the proceedings or seriousness or nature of the case. In Karisa Chengo (supra) the court said:-

26. 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 expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not 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 provisions of the *Legal Aid Act*, various other factors which include:

(i) the seriousness of the offence;

(ii) the severity of the sentence;

(iii) the ability of the accused person to pay for his own legal representation;

(iv) whether the accused is a minor;

(v) the literacy of the accused;

(vi) the complexity of the charge against the accused;

27. As held by J. Mrima in Sheria Mtaani Na Shadrack Wambui vs Office of Chief Justice & Another; Office of the Director of Public Prosecutions, (2021) eKLR the right under Article 50 (2) (h) is not automatic. The appellant should have demonstrated that he was inhibited in the presentation of his case and hence injustice was committed. The appellant's rights were not violated.

Whether the offence of defilement was committed.

28. The three ingredients that need to be proved in an offence of defilement are:-

1 . Proof of the victim's age;

2. Proof of penetration;

3. Proof of the perpetrator's identity.

Proof of age:

29. The charge reads that the complainant was sixteen (16) years at the time the incident occurred on 15/7/2019. When PW2 testified about two years later on 11/8/2021, PW2 still claimed to be 16 years old. She could not tell the year she was born and she has never been school. Her sister PW3 and PW4 her brother in law did not testify to the complainant's age. PW5 produced an age assessment report which indicates that she was sixteen (16) years of age. The assessment was made on 23/9/2019 which accords with the charge. The age assessment report was prepared by the investigating officer. Though the appellant did not oppose its production I do agree that the said exhibit was not produced in evidence in accordance with the *Evidence Act* Section 73 because the maker should have been called. If the maker was not available, the investigating officer could only produce it after an explanation as to why the maker could not do so was made and the appellant should have been asked whether or not he was opposed to its production in accordance.

30. Rule 4 of the Sexual Offences Rules provides on how age may be determined. It states that in determining age of a person, the court may take into account the evidence of age of that person which is contained in the birth certificate, school documents or baptism card or other document. In Mwalango Chichoro Mwanjembe vs. Republic supra the court said

> " 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. In Omuroni *vs. Uganda Criminal Appeal 2 of 2000*, the court held inter alia:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

32. In Flappyton Mutuku Ngui vs. Republic (2012) EKLR, the Court of Appeal held :-

> " the conclusive proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases."

33. The appellant seems to have been challenging the age assessment mainly because the complainant said she was sixteen (16) years in 2021. However, taking into account the fact that PW2 is illiterate, she may not have known her age. PW4 identified the age assessment report and agreed with it, that the complainant was sixteen (16) years old. I am satisfied that the court having observed the complainant the court is satisfied that age was proved.

Of penetration:

34. It is defined in Section 2 of *Sexual Offences Act* as:-

> " The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

35. The Court of Appeal in the case of Mark Oiruri Mose vs. Republic (2013) eKLR expounded on the term penetration when it said:-

> " ... 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...."

36. PW2 narrated in detail what was done to her, that the appellant removed her pant, removed his trouser and inserted his penis in her vagina. Upon examination, the clinical officer (PW1) found that PW2's hymen was missing and she had lacerations to the vagina. The complainant reported the occurrence to the grandmother the day of the incident and was treated on the same day. I am satisfied that there is overwhelming evidence of penetration.

Whether the perpetrator was identified:

37. The appellant is not a stranger to the complainant immediately after the incident, the complainant named the culprit as Odhis, the appellant, PW3 and PW4 were informed of the incident on the same day. The appellant is a nephew to PW4. PW2 was living with her sister PW3. The incident occurred in broad day light and it was a matter of recognition. The trial court considered the appellants defence and concluded that it did not dislodge or discredit the prosecution evidence. Although the complainant stated that the appellant was with the wife, she changed and said that the wife did not see the appellant take PW2 into the maize plantation. There was no contradiction in PW2's testimony as regards where the appellants wife was. I am satisfied that the prosecution proved that it is the appellant who defiled the complainant who is a minor. The conviction is well founded and I affirm it.

On sentence:

38. The appellant was charged under Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The court sentenced the appellant under Section 8 (3) of the *Sexual Offences Act*. Section 8 (3) provides that where a victim is between the age of twelve to fifteen years, one is liable to imprisonment for a term of not less than twenty (20) years. The complainant was found to be sixteen (16) years and hence sentence the should have been under Section 8 (4) which provides for a term of imprisonment of not less than fifteen (15) years. The trial court erred in sentencing the appellant under Section 8 (3) *Sexual Offences Act*. I hereby set aside the sentence. I substitute it with fifteen (15) years imprisonment. The sentence will commence on the date the appellant was sentenced, on 21/3/2022. 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