Odhiambo v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 18979 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E034 OF 2022

RE ABURILI, J

JUNE 21, 2023

BETWEEN

MAXWELL OTIENO ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction & sentence by the Hon. F. Rashid on the 21.6.2022 in the Senior Principal Magistrate's Court at Winam in Sexual Offence Case No. 13 of 2020)

JUDGMENT

Introduction

1. The appellant herein Maxwel Otieno Odhiambo was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *sexual Offences Act* No 3 of 2006, the particulars of which were that on April 9, 2021 at about 0200hrs in Kajulu West location in Kisumu East Sub County within Kisumu County, he Intentionally caused his penis to penetrate the vagina of BAO, a child aged 14 years old.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty to the charge and the case proceeded to full trial where the prosecution called six (6) witnesses. Placed on his defence, the appellant gave sworn testimony denying the charges brought against him and giving an alibi. The appellant also called one witness to support his defence.

4. In her judgement, the trial magistrate found that the prosecution had proved its case beyond reasonable doubt and after considering the appellant's mitigation and as a first time offender, imposed on him 15 years' imprisonment.

5. Aggrieved by the conviction and sentence, the appellant filed this appeal dated July 21, 2022 raising the following grounds:

   i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.

   ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.

   iii. That the court be pleased to consider that the investigation tendered was shoddy.

   iv. That the trial court did not consider the circumstances that surrounded the veracity of the offence.

   v. That the trial court failed to consider that the p3 form contradictive in nature in terms of the date the complainant was taken to hospital.

   vi. That the appellant hereby beseeches the superior court to indulge into the same and or be pleased to reduce the sentence proportionately as enshrined in Article 50 (2) (p) of the*Constitution*.

   vii. That the trial court failed to consider the appellant's defense statement which was cogent and reasonable.

   viii. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.

6. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. The appellant submitted that the charge sheet brought against him having missed the word "unlawful", it did not specify and categorize whether the offence was unlawful or not and thus the particulars of the offence were not clear and thus contravened section 134 of the Criminal Procedure Code.

8. It was further submitted that the investigations carried out were flimsy and shambolic and did not create any nexus between the appellant and the offence. The appellant further faulted the Birth Certificate produced claiming that it did not have an original stamp for verification purposes and that the age assessment report was not inclusive in the evidence adduced.

9. The appellant submitted that the medical evidence adduced did not support the allegation of defilement and penetration as the delay by the complainant in going to the hospital ousted the prosecution evidence and witnesses' version that the complainant attended the hospital on the fateful day.

10. It was submitted that the defense of alibi raised by the appellant was not considered by the trial court and that the judgement as crafted by the trial magistrate was not in tandem with the evidence adduced by the trial court and in several instances the trial magistrate deliberately shifted the burden of proof to the appellant without considering that the prosecution had not proved their case beyond reasonable doubt.

The Respondent's Submissions

11. The respondent through the ODPP submitted that the age of the complainant was proved to be 14 years old as evident from the complainant's testimony that was corroborated by PW2, her father and

by the birth certificate that indicated the date of birth as January 14, 2007. Reliance was placed on the cases *MW v Republic* [2020] eKLR where it was held *interalia* that the age of the victim can be established by medical evidence, birth certificate, the victim himself or herself, parents or guardians through their testimony before the trial court.

12. On penetration, the respondent submitted that this was proved by the complainant's evidence corroborated by medical evidence. Reliance was placed on the case of *Charles Wamukoya v Republic* Criminal Appeal No 72 of 2013.

13. The respondent submitted that from the complainant's testimony, it was clear that she spent time with the appellant and was thus able to identify him and even pointed him out in court.

14. It was submitted that the sentence meted out to the appellant was fair and therefore this court was urged not to interfere with the same.

The Role of this Court

15. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and arrive at own independent conclusions bearing in mind that it neither saw the witnesses nor heard the evidence when the parties were testifying so as to see their demeanour. The said duty was stated by the Court of Appeal in the case of *Mark Oiruri Mose –vs- Republic* [2013] eKLR as follows:

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Evidence before the Trial Court

16. The complainant testified as PW1. It was her testimony that she was 14 years old. She recalled that on April 8, 2021 at 6pm, she was sent by her aunt to [Particulars Withheld] market to bring vegetables. PW1 testified that she also had a broken phone which she took to the fundi who said he would repair it but at a price her mum could not afford. PW1 further testified that the appellant appeared and talked to the fundi then he stated that the phone would be repaired at Kshs 4,000 and that he would also give her another phone.

17. The complainant testified that the appellant stated that the phone was in his house so they proceeded there at around 7pm where the appellant beckoned her to get into the house. She stated that she went in and sat on a chair as the appellant was in the bedroom. PW1 testified that the appellant held her by the neck and covered her mouth removed her and his clothes then defiled her. It was her testimony that it rained up to 9pm and she could not go home.

18. PW1 testified that the appellant forced her to go and sleep with him in the bedroom where he defiled her severally that night as his brother slept in the sitting room. She testified that she left the house at 5am and went to Obwolo Hospital where she found a lady who took her to Obwolo Police Station.

19. In cross-examination, the complainant testified that the appellant covered her mouth with a red bandana and then undressed her. She further stated that the appellant took her phone and she was not able to communicate with her mum. The complainant stated that she did not scream as the appellant covered her mouth.

20. PW2, the complainant's father testified that on April 9, 2021 at around noon, he received a call from Obwolo Police Station asking if he knew the complainant and was told that the complainant had been raped. He testified that the complainant was his daughter and that she was 14 years old though he did not have a birth certificate. In cross-examination, PW2 stated that he did not witness the incident.

21. PW3 PC Sarah Adhiambo testified that on April 9, 2021 at 0900hrs she received a report from a C.H.W. from Simba Okeko dispensary who testified that the complainant had been defiled by one Maxwel in his house. PW3 testified that she issued the P3 and that later that day she arrested the appellant. In cross-examination, PW3 stated that the minor identified the appellant.

22. PW4 Kigen Ouma a clinical Officer at Jootrh testified that on April 9, 2021, he attended to the complainant herein, a victim of sexual violence and filled a PRC form. It was his testimony that on examination of her genitalia he found the hymen broken. He further testified that though the PRC was dated April 7, 2021, he examined the complainant on April 9, 2021.

23. PW5, DAO testified that on April 9, 2021, he reported to work at [Particulars withheld] at 8.30am when he saw a juvenile with one of their staff who informed the girl to go to him. He testified that the girl informed him that she had gone to pick a phone in a man's house where the person grabbed and defiled her. PW5 testified that he took her to Obwolo Police Post to report the matter.

24. PW6, Dr Ombok, from Jootrh produced a P3 form filled by his colleague Dr Eugene Ochieng on April 20, 2021 for the complainant herein. She testified that the complainant had changed clothes and reported that she had been sexually assaulted. It was her testimony that on examination of the genitalia, the same was normal on the outside with no tear and inflammation and bleeding. He produced the P3 form as PEX1.

25. In his defence, the appellant gave an alibi that on the date of the incident he went to work and that his boss sent him to Nairobi and that he travelled from April 2, 2021 at 2pm and returned on April 10, 2021 when he was called by police from Obwolo Police Station where he went. He testified that he worked with PW2 at a scrap metal yard and that they had disagreed. The appellant produced his travel receipts as DEX1 and DEX2.

26. In cross-examination, the appellant stated that he was employed by one George Aolo in the scrap metal. He stated that he travelled by Nairobi Bus and returned vide Climax Bus. He admitted that his receipt was not stamped.

27. DW2 George Ouma Aomo testified that he had employed the appellant and that on April 9, 2022 the appellant was in Kisumu and he sent him to Nairobi and the appellant returned on April 10, 2022. In cross-examination, DW2 stated that he sent the appellant to Nairobi on April 2, 2022 and that the appellant returned on April 10, 2022. He then stated that he did not know the exact date.

Analysis and Determination

28. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well and the submissions by the appellant and the respondent. The issues for determination are:

    a. Whether the prosecution's case against the appellant was proved beyond reasonable doubt and

    b. Whether the sentence imposed on the appellant was excessive and harsh.

Whether the prosecution proved its case against the appellant beyond reasonable doubt

29. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act* and the alternative charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

30. This being a case of defilement, it is trite law that the ingredients of the offence of defilement be proved beyond reasonable doubt and these are: identification or recognition of the offender, penetration and the age of the victim.

31. On the prove of age of the complainant, in sexual offences, the age of the complainant is relevant for two purposes. Firstly, it is meant to prove that the complainant was below 18 years establishing the offence of defilement, and secondly; it establishes the age of the complainant for purposes of sentencing. See *Moses Nato Raphael v Republic* Criminal Appeal No. 169 OF 2014 [2015] eKLR.

32. On the age of the complainant, the *Sexual Offences Rules* of Court 2014 Rule 4 provides that: -

> " When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document."

33. The age of the minor was proven by the testimony of the complainant who testified that she was 14 years old. Her testimony was corroborated by her father PW2 as well as PW3, the investigating officer produced a birth certificate PEX3 that showed that the complainant was born on January 14, 2007.

34. Contrary to allegations by the appellant, the birth certificate clearly shows a stamp at the point stamped by the seal of the District/Assistant Registrar.

35. In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR it was held:

> " ... That "conclusive" proof of age in cases under *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."

36. From the birth certificate, the complainant was about 14 years and 2 months' old. I therefore find that the age of the victim was proved beyond reasonable doubt.

37. On penetration, Section 2(1) of the *Sexual Offences Act* defines penetration as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person." See the case of Mark Oiruri Mose v R [2013] eKLR.

38. The complainant testified how the appellant held her by the neck then tore her clothes and proceeded to defile her. She further testified that as she could not go home, the appellant defiled her severally that night.

39. Her testimony was corroborated by the medical evidence adduced by PW4 who examined her on the next day, April 9, 2021 and filled the PRC form that he produced as PEX2 that showed that the complainant's hymen was broken.

40. The appellant argued that the medical evidence adduced by the prosecution specifically the P3 form did not support his conviction as it showed that the injuries on the complainant were 10 days old.

41. However, I note that the P3 form was filled April 20, 2021 a whole 11 days after the incident and after the PRC form had already been filled. The 10 days indicated in the P3 form gave the number of days it took to fill the P3form after the incident had taken place.

42. The evidence contained in the PRC form corroborated the complainant's testimony in line with the provisions of section 124 of the *Evidence Act*.

43. In his defence, the appellant denied committing the offence and gave an alibi that he was away from Kisumu from April 2, 2022 to April 10, 2022. DW2, the appellant's employer initially gave contradicting testimony stating that he sent the appellant to Nairobi on April 9, 2022 and he returned on April 10, 2022. He insisted in his testimony that the appellant was in Kisumu on April 9, 2022. In cross-examination however, DW2 stated that he sent the appellant on April 2, 2022 but then stated that he was not sure of the date when he sent the appellant to Nairobi.

44. In the case of *Kiarie v R* {1984} KLR The Court of Appeal laid down the following principle:

> " An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons."

45. It is settled Law that the prosecution bore the burden of proving the charge against the appellant at the trial court. However, in relying on an *alibi* defence,the entirety of the prosecution direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence at a late stage of the proceedings should not escape scrutiny of the court.

46. In support of this proposition, the court in *R v Sukha Singh S/o Wazer Singh & Others* {1939} 6 EACA 145 held as follows:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

47. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant.

48. Turning to the short statement of defence, his whereabouts at the time described by the complainant were never disclosed in his answer to the prosecution case. Accordingly, Iam persuaded, just as the trial court was, that the appellant alibi defence was an afterthought.

49. As was stated in the persuasive case *R v Mahoney* {1979} 50 CCC:

> " The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."

50. I thus find that the prosecution proved penetration beyond reasonable doubt.

51. As to whether the appellant was the perpetrator, the complainant testified that the appellant held her by the neck and tore her clothes off. Surely, the complainant despite knowing the appellant must have seen him at that time. Further to the above, the complainant testified that she spent the night in the appellant's room where he defiled her severally. The complainant must have been able to identify the appellant through this interaction.

52. PW3 further testified that after his arrest, the appellant was identified by the complainant. It is clear from the above that the complainant was able to recognize the appellant. I find no reason why the complainant could have framed the appellant with the offence, in the circumstances described herein. Accordingly, I find that the prosecution proved the identity of the appellant beyond reasonable doubt.

53. Further, in this appeal, the appellant argued that the charge as framed against him was defective as it missed the word "unlawful" and thus it was not clear whether an offence was committed. The charge against the appellant stated as follows:

> " Charge: Difilement Contrary To Section 8 (1) (3) Of The *Sexual Offences Act* No. 3 OF 2006" Particulars " .."on the 9th April 2021 at about 0200hrs in Simboi Area, Kajulu West location in Kisumu East Sub County within Kisumu County, he Intentionally caused his penis to penetrate the vagina of B.A.O, a child aged 14 years old."

54. The Law on framing of charges is provided for under Section 137 of the *Criminal Procedure Code*. It will also be noted that under Section 134 of the *Criminal Procedure Code*:

> " Every charge or information shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged together with particulars as may be necessary for giving reasonable information to the nature of the offence charged."

55. The material elements and the test to be applied is to be found in the case of *BND v R* {2017} eKLR where the court held that:

> " The principle of the Law governing charge sheets is that an accused should be charged with an offence known in Law. The offence charged should be discussed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand, it will also enable an accused person to prepare his defence."

56. On consideration of this ground, the appellant dealt with semantics of language without pointing out which part of the charge sheet embarrassed or prejudiced his right to a fair trial.

57. It is clear that the main charge of defilement and alternative count were based upon the set of facts to put him on notice with regard to the specific allegations.

58. In my view, if there was any defect, which I find none, the same is curable under Section 382 of the *Criminal Procedure Code*. The appellant has however not demonstrated that failure to add the word "unlawful" occasioned a failure of justice, as the offence itself is not lawful and if it were lawfully justified, it would not be an offence under the law. This ground of appeal is therefore found to be devoid of merit and is dismissed.

59. The upshot of the above is that the appeal against conviction fails, the prosecution having proved its case against the appellant beyond reasonable doubt.

Whether the sentence imposed on the appellant was excessive and harsh

60. The punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a sentence of 20 years or more. The evidence in this case discloses that the victim was in that age bracket as can be seen from the charge sheet where the applicant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*.

61. In his mitigation, the appellant pleaded for leniency on the grounds that he took care of his grandmother and siblings and thus sought a non-custodial sentence. In considering the same, the trial magistrate sentenced the appellant to 15 years' imprisonment.

62. It is trite that sentencing is an exercise of judicial discretion by the trial court which discretion should not be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R. and *Wilson Waitegei v Republic* [2021] eKLR).

63. In this instance, the effect of the offence on the minor are long lasting and the psychological effect is even worse. I find the sentence of fifteen years' imprisonment that was meted herein to be proper and lawful.

64. The appellant has failed to demonstrate how the trial magistrate acted upon wrong principles or overlooked some material factors or even took into account irrelevant factors in arriving at his decision. In the instant case, I find no reason to interfere with the trial court's decision on sentence.

65. The upshot of the above is that the instant appeal lacks merit and is dismissed. The conviction of the appellant is sustained and the sentence of fifteen years imprisonment upheld.

66. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2023

R E ABURILI

JUDGE