**Oloo v Republic (Criminal Appeal E162 of 2023)**
**[2024] KEHC 15154 (KLR) (Crim) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15154 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E162 OF 2023**

**LN MUTENDE, J**

**NOVEMBER 18, 2024**

**BETWEEN**

**DANIEL OGUDA OLOO .......................................................................... APPELLANT**

**AND**

**REPUBLIC ........................................................................................... RESPONDENT**

***(Appeal against the original conviction and sentence in S.O. No. 159 of 2018 at the Chief Magistrate's Court Makadara)***

## JUDGMENT

1. Daniel Oguda Oloo, the Appellant, was charged with the offence of defilement contrary to Section (1) as read with Section 8 (2) of the *Sexual Offences Act*. Particulars being that on 18th September,2015, at Nairobi County, he intentionally caused his penis to penetrate the vagina of MA a child aged 11 years.
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*. The particulars were that on the afore stated date and place, he intentionally touched the vagina of MA a child aged 11 years.
3. Summarily, MA, the complainant, was playing with friends behind their plot when the assailant pulled her inside his house and molested her. She screamed and was rescued by neighbours who called her parents. She was taken to Hospital for examination and treatment. The appellant who was assaulted by people on allegations of being the assailant was arrested and taken to Kiambu Hospital for treatment. Subsequently investigations were carried out which culminated into the appellant being charged.
4. Upon being placed on his defence the appellant denied the charges. He argued that he lent some Ksh. 40,000/- in March, 2015 to PW 3 whose wife would wash his clothes at some fee. That on the fateful day he encountered PW3 JO the father of the complainant who accused him of having an illicit affair

with his wife, an allegation that was believed by people who attacked him. That the police found him lying on the road and took him to Muthaiga Police Station.

5. The court considered evidence adduced and concluded that the complainant was defiled by the appellant herein. He was convicted and sentenced to serve forty (4)) years imprisonment.

6. Aggrieved, the appellant appeals on grounds that:

   (i) Section 200 (3) of the Criminal Procedure Code was not complied with when Hon. A. Mwangi PM took over the matter from Hon. Jalango PM.

   (ii) The case was not proved as required by law.

   (ii) The sentence was harsh and excessive.

7. The appeal was disposed through written submissions. It is urged by the appellant that he was not informed of the reason of his arrest as required by Article 49(1) (a) (i) of *the Constitution* which establishes a doubt that he was arrested and taken to Kiambu Hospital on allegations of being a suspect of a sexual assault. In this respect he relied on Section 6(2) of the Sexual Offences (Medical Treatment) Regulations, 2012; and, the case of Boniface Okeyo v Republic [2001] eKLR where the Court of Appeal held that:

> " It is trite law that in criminal cases the burden of proof rests throughout on the prosecution to establish the guilt of an accused person beyond reasonable doubt save in few exceptions of which this was not one. The appellant had no duty in law to raise a serious defence, nor did he have a duty to elicit crucial evidence by cross-examination of prosecution witnesses. We are satisfied that the burden of proof was, clearly, placed on the appellant and this is another reason to fortify the conclusion we have reached that the conviction was unsafe and cannot stand."

8. Reliance was placed on the case of Akumu v Republic [1954] 21EACA following the argument that the prosecution should have led evidence of the first report to prove correlation between the appellants arrest on 18th September, 2015 and the report made by the complainant on 19th September, 2015.

9. That medical evidence adduced by Dr. Shako was misleading and not corroborated. That no independent witness was called to confirm the allegations by the prosecution. That the trial court shifted the burden of proof to the appellant contrary to the law which was an injustice.

10. On the question of compliance with Section 200(3) of the Criminal Procedure Code it is argued that the court did explain the provision of the law but did not proceed as sought by the appellant which was a misdirection that rendered the trial a nullity.

11. The respondent opposed the appeal. It is submitted that the age of the victim was proved by evidence of the birth certificate. That testimony of the victim was cogent, evidence that was corroborated by medical evidence which established the question of penetration; and, the assailant was well known to the victim.

12. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in Okeno v Republic [1972] EA 32 as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate

courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. 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 courts' 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 - See Peters v. Sunday Post [1958] EA 424".

13. The appellant complains of the court having contravened the provisions of Section 200(3) the Criminal Procedure Code (CPC) that provide thus:

    (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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.

14. The argument raised by the appellant at the outset seemed to suggest that there was no compliance with Section 200 (3) of the CPC. However, his submissions clarify the position which is correct that upon taking over the matter, Hon. A. Mwangi PM the succeeding Magistrate complied with the law as required. The appellant sought to have the matter start afresh. But, the court stated that due to the age of the case it was to proceed.

15. It is recorded that the accused did inform the court that the High Court had ordered that particular case to be heard and determined within six (6) months from June 2021.

16. In Ndegwa v Republic [1985] eKLR . the court stated that:

    " Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where exigencies of circumstances, not only are likely but will defeat the end of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial."

17. In Joseph Kamau Gichuki v R [2013] eKLR the Court of Appeal stated that:

    " This court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the consideration to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial has proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused."

18. A case starting afresh is not mandatory, but, the court ought to explain the provision of the law to the accused. Demanding that the matter start afresh is discretionary. In a case there are two (2) parties, an accused and a victim. Both of them should be treated with fairness, in a way that is right. It is not divulged under what circumstances the High Court gave directions in the matter as disclosed by the appellant therefore the directions given by the trial magistrate could not be faulted.

19. The appellant denies vehemently having committed the offence. Section 8(1) of the *Sexual Offences Act* provides that:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

20. The complainant adduced in evidence a birth certificate. Having been born on 17th September, 2004, she was eleven (11) years old. In Omuroni v Uganda Criminal Appeal No. 2 of 2000, the Court of Appeal held that:

> " 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 ...."

21. It is worth noting that the appellant was the victim's neighbour and he did not dispute her age. Therefore, the prosecution did demonstrate the victim's age to the required standard.

22. Penetration is defined by 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;"

23. The victim testified to have been locked inside the house by the appellant who placed her on the bed and inserted his penis into her vagina but she screamed and pushed him. She was rescued by people including her parents.

24. The complainant was subjected to medical examination at the medecins Sans Frontiers (MSF) Mathare and Eastleigh Project. It was established per the PRC form filed that the victim's hymen was hyperemia and had notches at 3 and 9 o'clock.

25. Subsequently, Dr. Kizzi shako examined her on 21/9/2015 and. She found hyperemia reddening of the hymen which was healing. There was also a dent on the hymen or notch. The victim herein was a child of tender years (see Section 124 of the *Evidence Act*) This is a provision of law that deals with the question of corroboration in relation to the testimony of children of tender years in respect of sexual offences. The proviso for the section provides that:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

26. The stipulation does not require corroboration. The law acknowledges that uncorroborated evidence of a complainant/victim can be sufficient for a conviction as long as the court is satisfied that the testimony is credible and trustworthy. What is required is for the trial magistrate to evaluate circumstances and if he/she believes the complainant's evidence to be reliable, that is sufficient. In doing so the court strikes a balance between protecting the rights of the accused and ensuring justice for the victim.

27. In the instant case the trial court analyzed evidence adduced and found that indeed the accused was found having locked the victim inside the house and upon being taken to hospital the hymen was reddened and was in the process of healing. The court found the complainant truthful.

28. Ordinarily, the question of identification would require thorough investigative work, but each case is usually unique. The critical aspect is, if the offender is known to the victim. In the instant case the victim identified the appellant as their neighbour; and, the parents of the victim having been known to the appellant following the defence put up, there was no mistaken identity.

29. The appellant faults the prosecution for not availing crucial witnesses, possibly the first responders who called the parents of the victim. Section 143 of the *Evidence Act* provides thus:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

30. According to the law as captured in Section 143 of the *Evidence Act*, a fact can be proved based on evidence of a single witness or even through some other form of material evidence. Circumstances of each case should be considered. It is not in dispute that as a result of what transpired neighbours/ members of public attacked the appellant and injured him. What was significant was the quality of evidence adduced by the victim. Failure to avail a multiple of witnesses to testify was not significant. The trial magistrate considered the question and having assessed evidence presented found it having established the required standard of proof. The question of shifting the burden of proof to the appellant does not arise.

31. On the question of sentence, Section 8(2) of the *Sexual Offences Act* provides thus:

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

32. The law emphasizes the critical element in the sexual act aimed at safeguarding the vulnerable victim. The sentence provided is life imprisonment. But, since the State did not file a cross appeal, I do uphold the sentence of forty (40) years imprisonment imposed.

33. In the upshot, I find the appeal lacking merit which I dismiss in its entirety.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 18TH DAY OF NOVEMBER, 2024.**

**L. N. MUTENDE**

**JUDGE**