Oduor v Republic (Criminal Appeal 25 of 2019)
[2025] KECA 409 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 409 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 25 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 28, 2025

BETWEEN

MARTIN RICHARD ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Siaya (Aburili, J.) dated 28th January, 2019 in HCCRA No. 46 of 2017)

JUDGMENT

1. Martin Richard Oduor, the appellant herein, was tried, convicted and sentenced to life imprisonment by the Senior Resident Magistrate's Court at Ukwala for the offence of defilement of an eleven-year-old girl.

2. As per the charge sheet, the charge of which the appellant was convicted stated as follows:

> " Defilement contrary to Section 8(2) of the Sexual offences *Act No. 3 of 2006*.
>
> Martin Richard Oduor,
>
> On the 5th day of December, 2016, at around 1730hrs at Rangala Sublocation, Ugunja Sub County, within Siaya C ounty, intentionally caused his penis to penetrate the vagina or JA (name withheld), a child aged eleven years."

3. The appellant appealed to the High Court against his conviction and sentence, and upon hearing his appeal, the High Court (Aburili, J.), dismissed the appeal and upheld the sentence of the trial court. The appellant is now before us in this second appeal, in which he has raised two grounds which we reproduce herein verbatim:

i. that both the learned trial magistrate and Honourable Judge of the first appellate court erred in law by convicting him and sentencing him to life imprisonment without considering that the charge sheet was defective,

ii. that both the learned trial magistrate and the Honourable Judge of the first appellate court erred in law by convicting and sentencing him without considering the age of the complainant which is above eleven years that is required by Section 8(2) of the *Sexual Offences Act*, Section 3 of 2006.

4. The appellant has also filed written submissions in person. He contends that the charge sheet is defective when it is "congested" or when the section used does not exist in the provision of law or if some words are omitted. He argues that under the *Sexual Offences Act* the age of the minor is very important in guiding the court to arrive at the correct sentence. That in this case, the evidence of the complainant was that she was thirteen years old. There was also evidence that she was twelve years old when she was defiled, but the P3 Form indicated her estimated age as thirteen years.

5. The appellant argues that from the evidence adduced, the complainant's age was between twelve and thirteen years, and this placed the offence under Section 8(3) of the *Sexual Offences Act*, which provides that a person who commits an offence of defilement with a child aged between twelve and fifteen years old, is liable upon conviction to imprisonment for a term of not less than twenty years. He contrasts this with an offence under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, which provides for a mandatory life imprisonment where the child defiled is eleven years and below.

6. The appellant also refers to the comments made by the trial magistrate at the time of sentencing, that her hands were tied by the mandatory sentence. He argues that sentencing is a matter for the discretion of the trial court, and that the life sentence imposed upon him was harsh and shocking.

7. The respondent also filed written submissions which were duly prepared by Mr. Patrick Okango, Senior Principal Prosecution counsel, in the office of the Director of Public Prosecutions (ODPP). Counsel submitted that the two grounds raised in the appellant's memorandum of appeal are matters that were raised before the first appellate court and were well dealt with.

8. As regards the appellant's contention that the charge sheet was defective, learned counsel observed that the proper provision of the law was not indicated on the charge sheet, because, the charge should have read "defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*" and not just "defilement contrary to section 8(2) of the *Sexual Offences Act*".

9. Nevertheless, counsel argued that the charge sheet was clear that the appellant was being charged with defiling a child aged eleven years; that although the first appellate court noted the omission, it concluded that the omission did not prejudice the appellant nor did any miscarriage of justice arise as a result of the defect; and that the defect was curable under Section 382 of the *Criminal Procedure Code*.

10. As regards the issue of the age of the complainant, Mr. Okango conceded that the onus was on the prosecution to prove that the complainant was aged eleven years old. He argued that this onus was discharged by the production of the birth certificate which indicated that at the time of the incident the minor was eleven years and three months, having been born on 2nd September, 2005 and the offence having been committed on 5th December, 2016. Counsel argued that this issue was also well addressed and determined by both the trial court and the first appellate court. Counsel therefore urged the Court to dismiss the appeal.

11. This being a second appeal, this Court has the duty of reconsidering the evidence and evaluating it, before drawing its own conclusions. (See Okeno -vs- Republic [1972] EA 32). As was stated in Mark Oiruri Mose -vs- Republic [2013] eKLR:

> " ...the first appellate court has the duty to revisit the evidence tendered before the trial court afresh, analyze 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."

12. From a perusal of the record of appeal and the concurrent findings of the two lower courts, the complainant was accosted by the appellant when she was coming from a stream. The appellant forced her to the ground, ripped off her panty and put his penis into her vagina. As the appellant was in the process of defiling the complainant, her father, who was also on the way to the stream, saw the complainant and the appellant lying on the ground. He moved closer and saw that the appellant was having sexual intercourse with his daughter. He watched them and at that point the appellant saw him, got up and ran away. The complainant's father took her home and later took her to Rangala Mission Hospital where she was examined by Victor Odhiambo Achaya (Victor), a clinical officer at the hospital. On examining the complainant, Victor noticed that her cervix was open and there was fresh blood discharge. Her hymen was freshly broken, and the vaginal wall was lacerated with the labia majora and minora inflamed. The appellant was subsequently arrested and charged with the offence.

13. The appellant in his two memorandae of appeal is challenging the decision in two aspects, the legality of the charge of which he was convicted. First, in so far as the charge sheet was drafted and secondly, its compatibility with the evidence that was adduced. This raises the issue whether the charge sheet was defective and whether the appellant was sentenced under the correct provisions. Both are matters of law which as a second appellate court we are obliged to address.

14. The record of appeal shows that both the trial court and the learned Judge of the High Court were alive to the issue of the alleged defect in the charge sheet. This is how the learned Judge addressed the issue:

> " 68. ... As far as the main charge is concerned, the trial magistrate considered the defect and observed that the said defect was not fatal to the case as the Appellant understood the charge facing him and that more so, no prejudice had been occasioned to him by the defective charge.
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> 69. The Court of Appeal while addressing itself to the question of a defective charge stated as follows in the case of Obedi Kilonzo Kevero vs Republic [2015] eKLR (CA at Nairobi) per Koome, G.B.M. Kariuki & Sichale JJA.
>
> 'The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an Appellant's conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the Appellant. In the case of J.M.A v R [2009] KLR 671, it was held inter alia that:
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> > "It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the *Criminal Procedure Code* was meant to cure such an irregularity where prejudice to the Appellant is not discernible.'

70. Applying the principles above to this case, I am satisfied that in the instant case, the drafters of the main charge inadvertedly left out the subsection to Section 8 of *Sexual Offences Act* that provides for punishment for a convicted offender charged under subsection (1) of Section 8 of *Sexual Offences Act* and that this was an omission and discrepancy which did not prejudice the Appellant and that no miscarriage of justice was as a result of the said defect. The said defect, in my humble view, was and is curable under Section 382 of the *Criminal Procedure Code* which provides that:

> 'Subject to the provisions hereinabove contained, no finding, sentence or order passed by a court of competent jurisdiction shall be revised or altered on appeal or revision on account of an error, omission or irregularity in the complaint, proclamation order, judgment or other proceedings before or during the trial or in any inquiry 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 of 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.'

71. The above statutory curative position is also replicated in Section 214(2) of the *Criminal Procedure Code* which I have reproduced above. Accordingly, I am of the view that the failure to state the subsection for punishment in the charge sheet was not prejudicial to the Appellant as he understood the charge facing him and participated in the trial without raising it at the earlier stage in the proceedings, having pleaded not guilty to the charge and a full trial having taken place.'"

15. We have already reproduced verbatim the charge of which the appellant was convicted. It is appropriate to set out Section 8(2) of the *Sexual Offences Act* under which the appellant was charged. That section states as follows:

> " 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."

16. Clearly, that section provides the penalty where the age of the victim is eleven years or less. However, the offence of defilement is created under Section 8(1) which states that:

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

17. The ideal situation is that the charge sheet ought to have charged the appellant under Section 8(1) of the *Sexual Offences Act* as read with Section 8(2) of the *Sexual Offences Act*. Therefore, it is correct as contended by the appellant that there was a defect in the charge sheet. As to whether an anomaly can render a charge sheet defective, Section 134 of the *Criminal Procedure Code* states as follows:

> " 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

such particulars as may be necessary for giving reasonable information as to the nature of the offence."

18. The Court of Appeal (Nambuye, Maraga & J. Mohammed, JJA), in Peter Ngure Mwangi v Republic [2014] KECA 405 KLR, stated that:

> " A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edition), page 52 paragraph 53, this Court stated in Yongo v R, [1983] eKLR that:
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> > 'In England, it has been said: An indictment is defective not only when it is bad on the face of it, but also:
> >
> > i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
> >
> > ii. when for such reason it does not accord with the evidence given at the trial."

19. In Benard Ombuna v Republic [2019] KECA 994 KLR, this Court (Visram, Karanja & Koome, JJA) stated on the issue of a defective charge sheet that:

> " 15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

20. Thus, the key issue is whether the charge sheet was defective in such a manner that the trial and/or outcome prejudiced the appellant. A perusal of the charge sheet shows that the charges preferred against the appellant are known in law. The manner in which the charge is framed clearly states the offence, and particulars of the charge which indicate the date, time, and place when the offence was allegedly committed, the victim and the age of the victim.

    Therefore, the particulars of the charge were adequate to inform the appellant of the offence that he was charged. He not only pleaded not guilty to the offence, when the same was read out to him but also fully participated in the trial. Thus, the appellant was not prejudiced in any way by the defect.

21. We agree with both the trial court and the learned Judge, that the defect was not prejudicial to the appellant nor did it cause him any injustice as it was clear that the charge against him was that of defilement of a child aged eleven years old. We agree with the learned Judge that the defect was curable under Section 382 of the *Criminal Procedure Code*.

22. As regards the issue of the age of the complainant, during her voire dire examination, she stated that she was thirteen years old. Her father, who also testified, also stated that she was thirteen years old and produced a birth certificate showing that she was born on 2nd September, 2005. Both the complainant and her father testified on 30th January, 2017. This meant that as per the birth certificate, the complainant was about eleven years four months as at the time she was testifying, and the offence having taken place on 5th December, 2016, she was eleven years and three months at the time of the

commission of the offence. The evidence of the complainant and that of her father that she was thirteen years was, therefore, not consistent with the birth certificate.

23. The learned Judge noted that part 'C' of the P3 form indicated that the estimated age of the complainant was thirteen years but the treatment notes from Rangala Mission Hospital, where the complainant was examined, shows her age as eleven years. In view of the contradictions, the learned Judge opted to go by the birth certificate reasoning as follows:

> "75. ...a birth certificate is a public document. In this case, the birth certificate produced in evidence was issued in 2014 and not during the trial. That being the case, and in the absence of any evidence to the contrary, the trial court and therefore this court heard and or has not been given any reasons why it should doubt the authenticity and or credibility of the birth certificate which shows that the complainant was born on 2nd September, 2005, and therefore as at 5th December, 2016, when she was allegedly defiled she was eleven years and three months old.
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> 76. In so finding this court is a live to the fact that the younger the age of the complainant in sexual violation, the harsher the sentence provided for in law but in the instance case, I am persuaded beyond doubt that the discrepancies in the evidence by PW2 and documents such as P3 and the treatments notes on the age of the complainant were resolved by the production of a birth certificate S/No.2127624 dated 4th April, 2014 that showed that JA, the complainant herein was born on 2.9.2005 at Rangala in Siaya District to her father CWO and mother, RAO.
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> 77. Accordingly, I find and hold that the age of the complainant was conclusively determined by the said birth certificate to be eleven years and three months."

24. Of concern to us is that despite the fact that the learned Judge found that the appellant was not eleven years or less, but was actually eleven years and three months, the learned Judge upheld the sentence of life imprisonment that was imposed upon the appellant under Section 8(2) of the *Sexual Offences Act*. We appreciate that under the *Sexual Offences Act*, there is no penalty section provided for defilement of a victim who is between eleven years and twelve years. Section 8(3) of the *Sexual Offences Act* provides for penalty where the victim is between the age of twelve and fifteen years.

25. In light of this ambiguity, the appellant should not have been prejudiced by being sentenced under Section 8(2) but should have been sentenced under Section 8(3) of the *Sexual Offences Act* which provides for a sentence of not less than twenty years.

26. The upshot of the above is that we dismiss the appeal against conviction but allow the appeal against sentence to the extent of setting aside the sentence of life imprisonment that was imposed on the appellant and substituting thereto a sentence of twenty years imprisonment. In addition, by dint of section 333(2) of the Criminal Procedure Code, the period between 29/12/2016 and 08/02/2017 during which the appellant was in custody shall be computed as part of the sentence.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR