Odonde v Republic (Criminal Appeal 293 of 2019)
[2025] KECA 201 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 201 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 293 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

SAMWEL DIANG'A ODONDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Sitati, J.) dated on 27th September, 2013 in HCCRA No. 138 of 2010))

JUDGMENT

1. The appellant, Samwel Diang'a Odonde, was the accused person before the Senior Resident Magistrate's Court at Homa Bay in Criminal Case No. 1048 of 2009. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 14th day of July, 2009, at Lambwe location in Suba District within Nyanza Province, now Homa Bay County, the appellant willfully and unlawfully committed an act which caused penetration with L.A., a child aged 3 years by inserting his male organ (penis) into her vagina.

2. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that of the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment as provided for by the law.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (R.N. Sitati, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 27th September, 2013.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised five (5) grounds of appeal which are that: the trial court failed to consider that the evidence of identification parade was not proper to warrant a life sentence; the trial court did not consider his mitigation; the trial court failed to exercise its discretion in sentencing him as it felt bound to the provisions of the *Sexual Offences Act*; the sentence imposed is unconstitutional as it fails to meet the tenets of a fair trial under Article 25 of the Constitution; and the sentence imposed is harsh and excessive and a violation of Article 29(d) and (f) of *the Constitution*.

7. The evidence that emerged from the trial was as follows.

8. PW1 testified that on 14th July, 2009, at 1.00pm, she left school and was on her way home with one Winnie, whilst the complainant (L.A) was ahead of them. She said she saw the appellant, who was unknown to her, carry the survivor towards the bush whereby he removed her biker and panties. He also removed his trousers and inner wear and put his penis into the complainant's vagina. She said she saw the complainant cry; and that she left them there and proceeded home for lunch. She told the court that thereafter, she saw the appellant inside a vehicle she boarded on her way to Mbita Police Station; and she again saw him at the police station when she went to give her statement.

9. We take note that the complainant (L.A.) who was a minor aged three (3) years, did not testify. The record shows that on 29th September, 2009, the prosecution applied for an adjournment in order to write to the Attorney General for directions as the complainant was a baby. Later on 27th October, 2009, the record shows that a report on the case was produced before court but the details thereof were not recorded. However, the hearing continued with the testimony of the complainant's mother (PW2). She testified that on 14th July, 2009, at about 1.00pm when L.A. arrived home from school, she noticed that she was not walking properly. She asked her what was wrong and L.A. pointed towards her vagina. She looked at her vagina and saw blood stains and white stuff. She immediately rushed her to Ogongo Health Center and upon examination, the medical officer informed her that it seemed like L.A. had been raped. She then went to her school and reported the matter to L.A's teacher. The following day, she took the complainant to Homa Bay District Hospital whereby L.A. was examined and it was found that she had been defiled. Thereafter, she reported the matter to Mbita Police Station. She also told the court that she saw the appellant at Ogongo Chief's Camp; and he was familiar to her as she had seen him twice in May that year.

10. The arresting officer, Wilberforce Kemboi (PW5), testified that on 15th July, 2009, PW2 made a report at Ogongo District Office that her daughter had been defiled. Upon receiving that information, he went to the appellant's house together with his colleague, CPI Kirui and arrested the appellant who was identified by PW2.

11. The investigation officer, PC Peter Nyamu (PW7), testified that on 16th July, 2009, at around 3.00pm, one APC Kemboi from Ogongo AP Post, arrived at Mbita Police Station in the company of the appellant, L.A, one Edgar Juma and the L.A's school teacher. They informed him that on 14th July, 2009, while the complainant was on her way home, PW1 saw the appellant accost and drag the complainant to a thicket whereby he defiled her. PW7 recorded their statements and was also given the complainant's clothing which included: a brown skirt, red sweater, maroon underwear, cream biker and blue t-shirt, all of which he produced as exhibits before court. Afterwards, he charged the appellant.

12. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Kebaso appeared for the respondent. Both parties relied on their written submissions.

13. This is a second appeal. As a second appellate court, our remit is circumscribed. We are limited to consideration of matters of law only by dint of section 361 of the *Criminal Procedure Code*. Given this remit, this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. (See Chemogong vs. R [1984] KLR 61; Ogeto vs. R [2004] KLR 14 and Koingo - V - R (1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See Reuben Karari S/o Karanja vs. R [1956] 1 E.A.C.A. 146).

14. The appellant has attacked his conviction on the ground that the identification evidence was not watertight. The respondent's response is two-fold. In the first place, the respondent argues that the issue of identification is a matter of fact over which the two courts below made concurrent findings. As such, it is not open to this Court to consider it again on second appeal. In the second place, the respondent argues that the identification evidence was watertight; and that the evidence by the witnesses ruled out any possibility of error.

15. We have carefully scrutinized the identification evidence in this case. In criminal cases the identification of a suspect is always a pivotal question and whenever it arises, the trial court has to satisfy itself that the identification evidence is free from any probable error before convicting. The evidence must be such that threshold set by the rules and decisional law has been met. Care ought to be taken to ensure that the appellant was positively identified as the perpetrator of the offence in accordance with the guidelines set in various cases, among them Kiarie vs. Republic [1984] KLR 739; Charles O. Maitanyi v R [1988-92] 2KAR 75 and Nzaro vs. Republic, 1991 KAR 212. In Wamunga Vs. Republic [1989] eKLR this Court described the circumspection with which a court must treat identification evidence thus:

> " It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

16. Indeed, identification evidence is so crucial that this Court has always treated the manner in which the trial court dealt with it as a matter of law. In the present case, PW1 was the most crucial witness and the only identifying witness. She testified that she did not know the appellant prior to the incident. She saw him for the first time on that day. There is no doubt that she had a clear view of the appellant as it was in broad daylight; and she testified that she had ample time to see him. However, the identification evidence in this case raises two concerns. The first one is that since the identifying witness in this case stated that she did not know the appellant before, it would have been prudent to conduct a properly arranged identification parade. This was not done in this case. As a result, it is difficult to determine exactly how and when the witness identified the appellant as the perpetrator of the crime. PW2 seems to suggest that a "home-grown" identification parade was done in the village and PW1 identified the appellant. It is readily obvious that that identification parade, if at all it was carried out, was not done according to the laid procedures.

17. Identification parades are crucial in criminal cases as they provide a structured method for eyewitnesses to identify potential suspects, thus playing a pivotal role in establishing whether an accused person is

the individual involved in a crime, ensuring a fair trial by mitigating the risk of mistaken identification and strengthening the prosecution's case when conducted properly.

18. A lack of a properly-arranged identification parade can significantly weaken the evidence against a suspect as is the case here. As this Court stated in In John Mwangi Kamau v Republic [2014] eKLR, "identification parades are meant to test the correctness of a witness's identification of a suspect."

19. In Kenya, the procedure for conducting identification parades are set out in the National Police Standing Orders and Section 5 of the Police Act Cap 5. The importance of conducting identification parades with scrupulous fairness, adhering to prescribed procedures outlined in police standing orders and relevant statutes cannot be overemphasized.

20. As aforesaid, in the present case, there was no proper identification parade. This weakens the prosecution case considerably. The weakness in the prosecution case ripens to reasonable doubt when one considers that no evidence was adduced by the prosecution about how the appellant was arrested. The arresting officer simply states that the complainant's mother told him that it was the appellant who had committed the offence; and so they went to his house and arrested him. However, the complainant's mother is not the identifying witness. This doubts in this case are compounded by the fact that, sadly, the complainant was only 3 years old and did not testify.

21. The upshot is that we find the identification evidence in this case too weak that it raises reasonable doubt as to the guilt of the appellant. The conviction was, therefore, not safe.

22. Having reached this conclusion, we find it unnecessary to address the issue of sentence raised by the appellant. Suffice it to say that a recent Supreme Court decision in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), categorically held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences. This would have rendered the grievances raised by the appellant regarding his sentence moot.

23. In any event, having found the conviction herein unsafe, we must allow the appellant's appeal herein. His conviction is hereby quashed and the sentence imposed set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

24. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH 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