Ogulo v Republic (Criminal Appeal 5 of 2020)
[2025] KECA 706 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 706 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 5 OF 2020

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 25, 2025

BETWEEN

KENNEDY ODIEMBO OGULO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Homabay (Karanjah, J.) dated 11th December, 2019,in Criminal Appeal No. 40 of 2018)

JUDGMENT

1. Kennedy Odiembo Ogulo (the appellant) was arraigned before the Principal Magistrate's Court at Mbita, and charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act*. The particulars of the charge alleged that on 22nd December, 2016, at [particulars withheld] village, Suba Sub County within Homa Bay County, the appellant intentionally caused his penis to penetrate the vagina of VOO, a girl aged 13 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that; on the same date and place, the appellant intentionally touched the vagina, breast and buttocks of VOO, a child aged 13 years.

3. The appellant denied the charges. During trial, the prosecution called four (4) witnesses. The complainant (PW1) stated that the appellant was her religious father at their church. It was her testimony that she lived with her grandmother, and that she would occasionally go to the appellant's house, which was located within the church compound, to cook and clean house for him. She stated that on 22nd December, 2016, she went to the appellant's house, together with one Imelda Apiyo, aged six years old, to cook for the appellant. She stated that they spent the night at the appellant's house, and that she and Imelda slept in separate rooms. It was her evidence that at about 10.00 p.m., while

asleep, she felt someone lie on top of her. He was doing "bad manners" to her. She stated that the said person was the appellant, and that she identified him using the light from appellant's mobile phone torch, which he was using to assist with illumination. She testified that he sexually assaulted her twice that during the night.

4. The complainant testified that her grandmother came the next day, but she did not inform her of the incident. She stated that on a separate day, her grandmother requested her to take some food to the appellant's house. That was when the complainant informed her grandmother that the appellant had defiled her. Her grandmother asked her not to tell anyone. She however told her sister and brother, who in turn informed their mother (PW2). PW2 confronted the appellant and he asked for forgiveness. The complainant stated that after two weeks, she got an infection and was taken to the hospital by her mother. They also reported the incident at Magunga Police Station.

5. The complainant was examined by PW3, Stephen Kerario, a clinical officer at Suba County Hospital, on 12th January, 2017. After conducting a vaginal examination, PW3 stated that no lacerations, bruises or tears were noted. Her hymen was intact, and no venereal infection was noted. It was his finding that penetration did not occur. The investigating officer, PW4, after concluding his investigations preferred charges against the appellant.

6. The appellant was placed on his defence. He elected to give sworn evidence. He denied defiling the complainant. He told the court that he knew the complainant as she resided at the church with her grandmother. He stated that on 10th January, 2017, members of the public arrested him and took him to the Chief's office, where he found the complainant amongst other people. They accused him of defiling the complainant but he denied the accusations. He was escorted to Magunga Police Station and later arraigned before the trial court the following day.

7. At the conclusion of the trial, the learned magistrate determined that the complainant was a truthful witness, and that her evidence was cogent, but that due to the lapse of time, the medical evidence did not establish penetration. The learned magistrate found that the prosecution had established its case against the appellant, with respect to the alternative charge of committing an indecent act with a child, to the required standard of proof beyond any reasonable doubt. The appellant was acquitted of the main charge of defilement. He was consequently convicted in the alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*, and sentenced to serve twenty (20) years imprisonment.

8. The appellant, aggrieved by this decision, filed an appeal before the High Court. The first appellate court, after re-evaluating the record of the trial court, and the evidence tendered before it, overturned the decision of the trial court, and convicted the appellant in the main charge of defilement. The learned Judge found that the P3 form prepared by PW3 was conclusive that the complainant had been penetrated, and that his subsequent oral evidence before the trial court, contradicted the findings earlier recorded on the P3 form. The learned Judge found that the prosecution sufficiently proved the main charge of defilement against the appellant. In the premises, the appellant's conviction in the alternative charge was quashed, and substituted with a conviction in the main charge of defilement, contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The twenty (20) years custodial sentence imposed by the trial court was set aside, and substituted with a life imprisonment sentence.

9. The appellant is now before us seeking to overturn the decision of the High Court on grounds that: the learned Judge erred in enhancing his sentence from twenty (20) years to life imprisonment, in contravention of the provisions of Sections 354(6) and 364(2) of the *Criminal Procedure Code*; the first appellate court failed to warn the appellant of the consequence of proceeding with the appeal before it; and, that the appellant was convicted in the alternative charge of committing an indecent act with a

child contrary to section 11(1) of the *Sexual Offences Act*, and he ought to enjoy the minimum sentence prescribed by law.

10. The appeal was heard by way of written submissions. The appellant appeared in person. He intimated to this Court that his appeal was against sentence only. He faulted the first appellate court for enhancing his sentence from twenty (20) years to life imprisonment, without issuing any notice to the appellant to that effect. The appellant stated that he was not represented by counsel in his appeal before the High Court, and that the court failed to warn him of the consequences of proceeding with his first appeal. It was his submission that the prosecution did not urge enhancement of sentence, or file any notice of enhancement of the sentence. He reiterated that the enhancement of his sentence violated the provisions of Section 364(2) of the *Criminal Procedure Code*, as well as his right to a fair trial, enshrined under Article 50 of *the Constitution*. He urged us to allow his appeal on sentence, set aside the life imprisonment sentence awarded by the first appellate court, and in its place, reinstate the original custodial sentence of twenty (20) years meted by the trial court.

11. Learned Prosecution Counsel, Mr. Okango, did not oppose the appellant's appeal. He conceded that no notice of enhancement of sentence was issued to the appellant prior to his sentence being enhanced. He submitted that the respondent did not file a cross-appeal challenging the conviction and sentence by the trial court. He was in agreement with the appellant's contention that the decision of the first appellate court ought to be set aside, and the trial's court judgment which convicted the appellant in the alternative charge be reinstated, and the sentence of twenty (20) years imprisonment be restored.

12. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> " As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

13. We have considered the record of appeal, the submissions made and the law. This appeal is against sentence only. The appellant's bone of contention concerns enhancement of his sentence by the first appellate court, while exercising its discretion under Section 354(3) of the *Criminal Procedure Code*. The sentence was enhanced from a custodial sentence of twenty (20) year to life imprisonment. It is not contested that no notice of enhancement of sentence was issued to the appellant prior to his sentence being enhanced by the first appellate court.

14. This Court in the case of J.J.W v Republic [2013] eKLR found as follows on enhancement of sentence by the High Court:

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which

it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

15. In Sammy Omboke & another v Republic [2019] eKLR this Court observed as follows:

> "In the instant appeal, there was no cross- appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."

16. In this case, it is common ground that the respondent did not plead enhancement of sentence or even file a cross appeal in that respect, before the first appellate court. Further, the first appellate court failed to warn the appellant of the possibility that his sentence could be enhanced in the event he chose to proceed with his appeal. As such, the appellant was not given a chance to be heard, or argue his case against the possibility that his sentence could be enhanced.

17. We find that the manner in which the appellant's sentence was enhanced by the first appellate court calls for our interference. The appeal against sentence is hereby allowed. The life imprisonment sentence imposed by the first appellate court is hereby set aside, and is substituted thereof with the original sentence awarded by the trial court of twenty (20) years imprisonment. The sentence shall run from the date the subordinate court meted it, as the appellant was out on bail during the trial.

18. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL,2025.

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR