Odungi v Republic (Criminal Appeal 320 of 2019)
[2025] KECA 717 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KECA 717 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 320 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

APRIL 25, 2025

BETWEEN

BRIAN OCHIENG ODUNGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (Ochieng, J.) dated 22nd January, 2019, in Criminal Appeal No. 39 of 2018)

JUDGMENT

1. The appellant, Brian Ochieng Odungi, has preferred this second appeal against the decision of the High Court, sitting as the first appellate Court, which upheld his conviction and sentence for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the charge alleged that between 8th and 9th July, 2015, in Kisumu East District, within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of HLA{{^1}, a child aged 4 and ½ years.

2. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant was, on the same date and place, alleged to have intentionally and unlawfully committed an indecent act with HLA, aged 4 and ½ years, by touching her vagina using his hands.

3. The brief facts of the case according to the prosecution were as follows: The complainant, in her unsworn statement, told the court that her mother sent her to shut the windows when she met the appellant. She accompanied the appellant on his motorbike. He took her to a maize plantation. It was her testimony that while at the maize plantation, the appellant undressed her, took out his 'dudu' and hurt her in her private parts. He then took off and left her at the farm. She stated that she spent the

[1] Initials used to protect her identity

night at the farm. A woman who heard her crying came to her rescue. She was taken to a police station and later to a hospital. The complainant testified that she knew the appellant as he used to buy chips at a place near their house.

4. The woman who rescued the complainant was PW2, GEA. It was PW2's evidence that on 9th July, 2015, at 6.30 a.m., she was walking when she heard a child crying from a maize plantation. The child was the complainant. She was calling out for her mother. She approached the complainant and noticed that she had trouble walking. The complainant informed her that one Brighton Omondi brought her to the maize plantation and left her there. PW2 stated that the grass where the complainant lay had traces of blood and faeces. Her skirt was also blood stained. PW2 testified that she pulled up the complainant's skirt and noted that her thighs were covered in blood. She took the complainant to PW3, a village elder, who escorted them to a police station where they reported the matter. They afterwards took the complainant to Kisumu District Hospital for treatment.

5. The complainant's father, TNO (PW4), told the court that on 8th July 2015, at 6.30 p.m., he sent the complainant to buy some sweets, but that she disappeared and did not come back that night. PW4 stated that he searched for the complainant the entire night to no avail. The following morning, he went to the Chief's office at Nyabera and reported that the complainant was missing. At that time, he received a call from the complainant's school. At the school, the headteacher informed him that the area Chief had asked to see him. PW4 introduced himself to the Chief as the complainant's father. The chief asked him if he knew one Brian Otieno Odunge (the appellant), to which PW4 answered in the affirmative. He testified that the appellant was also known as Brighton. The Chief informed him that the appellant had injured the complainant, and that she was receiving treatment at a hospital. PW4 told the court that the complainant was four years and six months old when the incident occurred.

6. PW5, Richard Langat, was a government analyst based at the Government Chemist in Kisumu. It was his testimony that on 16th July, 2015, he received from the police vaginal swabs collected from the complainant, a pink skirt, a white T-shirt, a soil sample containing blood, dried stool and the appellant's buccal swabs. He analyzed the exhibits and found that: the pink skirt and the white t-shirt contained mixed DNA profiles of both the complainant and the appellant; and, the DNA from the soil sample and the stool matched that of the complainant.

7. PW6, Dr. Robert Otieno, examined the complainant on 9th July, 2015, at Kisumu County Hospital. She was brought in by a good Samaritan and was alleged to have been defiled. PW6Vstated that the complainant had bruises on her neck and head.

   A vaginal examination revealed that the complainant suffered a perennial second-degree tear, inflamed urethra, and multiple lacerations on her vaginal wall. Her hymen was not intact and there was a white discharge oozing from her vaginal opening. Her clothes were bloodstained. PW6 testified that a surgical procedure was done to repair the perennial tear. He produced the complainant's Post Rape Care and P3 Forms in evidence.

8. The case was investigated by PC Jack Oturi (PW8) attached at Kisumu Police Station. It was his testimony that on 9th July, 2015, he received a report from village elders that a child aged 4 and ½ years, who had been found at a maize plantation, was alleged to have been defiled by a person known to her. He accompanied the elders to Kisumu County Hospital where the complainant had been admitted. He recorded statements from two witnesses then proceeded to the scene of crime where he collected blood and stool samples believed to belong to the complainant. He forwarded the samples together with the complainant's clothes to the government chemist for analysis. The appellant was arrested by PW7, APC Pildas Odidi, on 9th July, 2015, after he was identified by the complainant's father.

PW8 stated that his investigation revealed that the appellant had defiled the complainant. He was also positively identified by the complainant.

9. The appellant gave a sworn statement and called one witness.

In his testimony, he denied sexually assaulting the complainant. It was his testimony that on 8th July, 2015, he was at his place of work at Ahero between 8.00 a.m. and 6.00 p.m. He stated that the complainant referred to her assailant as Brighton, which was not his name. He stated that the complainant and her father were known to him, as they were his neighbours at Nyalenda, and that he moved from Nyalenda in 2013, and relocated to Ahero. DW2, Peter Odawo, stated the appellant was at Ahero on the material date of 8th July 2015, where they were engaged in some construction work. It was his evidence that he was with the appellant at the site on Sunday and Monday, after which he left, but the appellant remained at the site on Tuesday, Wednesday (8th July, 2015) and left on Thursday, the following day. He testified that the appellant was known to him since 2010, and that he has never been referred to as Brighton.

10. The trial court found that the prosecution sufficiently established its case against the appellant to the required standard of proof beyond reasonable doubt, with respect to the main charge of defilement. The appellant was convicted and sentenced to serve life imprisonment.

11. Dissatisfied with this verdict, the appellant lodged an appeal to the High Court against both conviction and sentence. The appellant challenged the decision of the trial court on grounds that: the trial court failed to make a finding on the authenticity of the DNA sampling and results, as well as the chain of custody from the point of extraction of the samples to analysis; the learned trial magistrate rejected his defence without giving a cogent reason contrary to section 169(c) of the *Criminal Procedure Code*; the trial court erred in meting out the maximum sentence of life imprisonment; the learned trial magistrate failed to consider the likelihood of falsification of evidence by the complainant's father and other prosecution witnesses; the learned trial magistrate relied on biased prosecution evidence; and finally that the trial court failed to critically evaluate the evidence presented before it before arriving at the impugned verdict.

12. The first appellate court, upon re-evaluating the record of the trial court and the evidence tendered before it, in light of the grounds of appeal and the submission made before it, affirmed the conviction and sentence of the appellant by the trial court.

13. The appellant is now before this Court seeking to overturn the decision of the High Court on the basis of five (5) amended grounds of appeal. The appellant asserts that the ingredients of the offence of defilement were not conclusively proved by the prosecution. He was aggrieved that his right to be presented before court within 24 hours as enshrined under Article 49(1) of *the Constitution* was violated. He faulted the learned Judge for failing to find that his defence was not considered by the trial court. He was aggrieved that his constitutional right to a fair hearing was compromised by the admission of DNA evidence that was unlawfully obtained from the appellant without his consent, contrary to Article 31(a) & (c) of *the Constitution*, Section 36 of the *Sexual Offences Act*, and Section 122A and 122C of the *Penal Code*. Lastly, the appellant faulted the learned Judge for failing to find that the sentence awarded by the trial court contravened Articles 2(5) & (6), 2, 19(3), 20(1) & (2), 22, 23, 25(a) & (c), 26(1), 27(1), 28, 29(d) & (f), 50 (2)(q) and 160 of *the Constitution*, as well as the Judiciary Sentencing Guidelines.

14. The appeal was canvassed through written submissions by both the appellant and respondent. The appellant appeared in person. It was his submission that the ingredient of penetration was not sufficiently proved by the prosecution. He faulted the two courts below for relying on the sole evidence

of the complainant, that she was defiled by the appellant, to convict him. He urged that the medical evidence tabled by the prosecution did not incriminate him or place him at the scene of crime. This fact dislodged the complainant's claim that he defiled her at the maize plantation.

15. Regarding the DNA evidence, it was the appellant's submission that DNA samples were collected from him in the absence of a court order allowing the same, contrary to Section 36 of the *Sexual Offences Act*. He stated that Section 122A of the *Penal Code* provides that a police officer of or above the rank of Inspector may, in writing, require a suspect to undergo a DNA sampling procedure, to ascertain whether the suspect committed the offence. He urged that in this case, the officer who authorized the DNA sampling procedure, PW8, was a police constable. It was his submission that the two courts below erred in admitting the DNA evidence which was illegally obtained, thus violating his right to fair trial enshrined under Article 50(2)(a) of *the Constitution*.

16. The appellant further submitted that he was first arraigned before the magistrate's court on 17th July, 2015, which was eight days after his arrest. He explained that there was no evidence on record to show that the investigating officer requested the leave of court to continue holding him in custody as he concluded the investigations. The appellant urged that the two courts below failed to favourably consider his alibi defence which established that he was not at the scene of crime on the material date.

17. With respect to the sentence, the appellant submitted that the mandatory life sentence prescribed by Section 8(2) of the *Sexual Offences Act* was declared unconstitutional by the decision of this Court in Julius Kitsao Manyes*o v Republic Criminal Appeal No. 12 of 2021* due to its indeterminate nature. He urged that, in the event his appeal on conviction fails, he should be sentenced to serve a custodial term of ten (10) years as, in his view, it was appropriate in the circumstances of this case.

18. In rebuttal, Learned Prosecution Counsel, Mr. Okango, made submissions to the effect that the elements of the offence of defilement were sufficiently established by the prosecution. He submitted that the element of penetration was proved by the evidence of PW1, PW2, who saw blood on the complainant's thighs, as well as the medical evidence by PW6. On whether the DNA evidence was illegally obtained, counsel urged that the appellant did not raise this issue before the first appellate court, and cannot therefore raise the same before this Court in the first instance. Counsel explained that the DNA evidence was properly admitted into evidence without any objection from the appellant, and that it corroborated the complainant's assertion that she had been defiled by the appellant.

19. On whether the appellant was arraigned before the trial magistrate's court beyond the constitutional period of 24 hours, learned prosecution counsel urged that this ground similarly was not raised by the appellant before the first appellate court. He asserted that the investigating officer testified that he obtained a court order to hold the appellant in custody pending the conclusion of the investigations. Counsel pointed out that the appellant's right under Article 49(1) of *the Constitution* was not infringed upon, and that in any event if such infringement occurred, the same did not absolve the appellant of his criminal responsibility. On whether the appellant's alibi defence was considered, Mr. Okango explained that this ground was being raised before this Court in the first instance. It was his submission that the appellant having raised his alibi defence at the defence stage, the trial court properly analyzed the same against the weight of the prosecution's evidence, and correctly found that it lacked merit.

20. Regarding the sentence, Mr. Okango submitted that the Supreme Court in R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment) reaffirmed the legality of the mandatory minimum sentences prescribed under the *Sexual Offences Act*. In the premises, he urged us to dismiss the appeal for lack of merit.

21. Being a second appeal, our mandate is limited by Section 361(1) (a) of the *Criminal Procedure Code* to consider issues of law only, but not matters of fact that have been tried by the trial Court and re-evaluated on first appeal by the High Court and concurrent findings arrived at, unless it is demonstrated that the two courts below considered matters they ought not to have considered, or that they failed to consider matters they should have considered, or that looking at the evidence as a whole they were plainly wrong in their decision. See Kaingo v. Republic [1982] KLR 213.

22. We have carefully considered the record of appeal, the submissions by both parties, and the law. The issues arising for our determination can be summed up as follows:

    i. Whether the prosecution established the elements of the offence of defilement beyond any reasonable doubt;

    ii. Whether the DNA evidence was obtained illegally;

    iii. Whether the appellant's alibi defence was properly considered;

    iv. Whether the appellant's right under Article 49(1)(f) of *the Constitution* was breached; and,

    v. Whether the appellant's sentence was unconstitutional."

23. With respect to the first issue, the prosecution was required to establish three elements to support the charge of defilement: age of the complainant; proof of penetration; and a positive identification of the assailant. The age of the complainant was not contested by the appellant. The complainant's birth certificate produced in evidence established that she was four and a half years of age at the time the assault occurred.

24. The appellant argued that penetration was not established by the prosecution. He faulted the learned Judge for relying on the uncorroborated evidence of the complainant to convict him. The act of penetration, as was held by this Court in Kassim Ali v. Republic [2006] eKLR, can be proved by the oral evidence of a victim of rape or defilement, or by circumstantial evidence. In this case, the evidence of penetration was adduced by the complainant's unsworn evidence, and was corroborated by the medical evidence.

25. According to the complainant's father, PW4, the complainant disappeared on the night of 8th July, 2015, at about 7.00 p.m., after she was sent on an errand to a nearby shop. It was the complainant's evidence that she had been sent by her mother, when she met the appellant. He carried her on his motorbike and took her to a maize plantation where he undressed her, took out his 'dudu' and hurt her on her private parts. He then left her at the maize plantation and never returned. The complainant stated that she was rescued by a woman who heard her cries. Her evidence was corroborated by PW2, the woman who found her at the maize plantation. PW2 told the court that she found the complainant on 9th July, 2015, at 6.30 a.m., at the maize plantation, after she heard her crying. It was her evidence that the complainant could not walk, and that there were blood stains and fecal matter on the grass where she lay. Her skirt was also blood-stained. PW2 stated that she pulled up the complainant's skirt and noticed that she had blood stains on her thighs.

26. The complainant was medically examined by PW6 on the same day. It was his evidence that she had bruises on her head and neck. A vaginal examination revealed that the complainant suffered a second-degree perennial tear that extended to her anal region; her urethra was inflamed; she had multiple lacerations on her vaginal walls; her hymen was absent; and there was presence of a white discharge. PW6 recalled that a surgery had to be undertaken to repair the tear suffered by the complainant. It is our

considered view that the medical evidence, considered together with the evidence of the complainant, and that of PW2, established beyond any reasonable doubt that the complainant was penetrated.

27. The third element is identification. The complainant identified the appellant as the man who defiled her. She identified him by name to PW2 and PW3. The name given was Brighton. The complainant told the court that the appellant was known to her, as he used to buy chips at a spot behind their house. Her father, PW4, told the court that the appellant was not a stranger to the family, as he used to buy chips near their house from his daughter in law.

28. The appellant in his defence admitted that the complainant and PW4 were known to him as they were his neighbours when he lived at Nyalenda. The appellant was therefore not a stranger to the complainant. The appellant however denied that he went by the name Brighton or that he was the Brighton referred to by the complainant. Other than the identification by the complainant, which was by recognition, the evidence by the government chemist (PW5) placed the appellant at the scene of crime. PW5 analyzed DNA samples collected from the skirt and T-shirt that the complainant was wore on the material date and concluded that the clothes contained mixed DNA of the complainant and the appellant.

29. The appellant challenged the DNA evidence, claiming that the same was obtained illegally without a court order, in contravention of Section 36 of the *Sexual Offences Act*, and further that it had been obtained by a police officer of lower rank than Inspector, contrary to the provision of Section 122A of the *Penal Code*. As was pointed by the prosecution counsel, the appellant did not raise this issue before the first appellate court. The issue is being raised before us for the first time on a second appeal. Since the two courts below were not given the opportunity to address their minds on the issue, it would be improper for this Court to interfere with their decisions when they did not have a chance to make a finding on the same. See AT *v Republic (Criminal Appeal 63 of 2022)* [2023] KECA 1393 (KLR) (24 November 2023) (Judgment). However, we agree with the finding by the learned Judge that even in the absence of the DNA evidence, the appellant was positively identified by the complainant, which identification was by recognition. The appellant admitted that the complainant and her father were well known to him, and further, the complainant identified the appellant by name in her first report made to PW2 and PW3. The DNA evidence corroborated the complainant's testimony and ruled out any other perpetrator other than the appellant.

30. The appellant contended that his alibi defence was not considered. The burden of disproving the alibi and proving the appellant's guilt lay throughout with the prosecution. The principle has long been accepted that an accused person who wishes to rely on a defence of alibi must raise it at the earliest possible opportunity to afford the prosecution a chance to investigate the truth or otherwise of the alibi. (See the decision of this Court in Athuman Salim Athuman v Republic [2016] eKLR).

31. The appellant in this case raised his alibi defence after being placed on his defence. It was his evidence that he was at Ahero at his place of work on the material date of 8th July, 2015, and that he had been there since 4th July, 2015. He stated that he worked at a construction site from 8.00 a.m. to 6.00 p.m. The appellant availed DW2, who told the court that he worked with the appellant at the construction site in Ahero during the period in question. DW2 testified that he went to Ahero with the appellant, on the Sunday prior to the alleged incident, which was 5th July, 2015, but that he left the following day as he was not feeling well. He stated that he went back to Ahero on Tuesday (7th July, 2015) and returned home, after agreeing with the appellant that he would complete the job the following day, a Wednesday. DW2 stated that he was not in Ahero on 8th July, 2015, but that he confirmed that the appellant was there as he sent him money at 6.00 p.m. to pay the construction workers.

32. The evidence on record is that the complainant was sent to the shops at about 6.30/7.00 p.m., after which she disappeared. We find that DW2 cannot speak to the appellant's whereabouts after 6.00 p.m. as he was not in Ahero with the appellant at the time. Further, as was correctly observed by the trial court, the evidence on record was that Ahero is approximately a thirty minutes' drive to Kisumu. The appellant therefore had the opportunity to commit the offence. Upon weighing the evidence on record, we agree with the finding of the trial court that the respondent's collective evidence displaced the appellant's alibi defence. The appellant was positively and properly identified by the complainant as the person who defiled her. In any event, the alibi defence was raised as an afterthought.

33. From the foregoing, it is our considered view that the prosecution established, to the required standard, its case against the appellant. The complainant's evidence was cogent, even upon cross-examination, and was corroborated by medical evidence as well as the evidence of PW2, PW4 and PW5.

34. The appellant complained that his right under Article 49 of *the Constitution* was breached, as he was not arraigned before the trial court within 24 hours upon his arrest. Article 49(1)(f) of *the Constitution* provides that an arrested person shall be brought before a court as soon as reasonably possible, but not later than twenty-four hours after being arrested, and if the twenty-four hours period ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

35. The appellant was arrested on 9th July, 2015, and arraigned before the trial court on 17th July, 2015. The investigating officer, in his testimony, stated that he made an application to the court for appropriate orders which allowed him to hold the appellant in custody pending the conclusion of the investigations. There is however no evidence on record that the court allowed his application or gave such orders allowing a pre- charge detention. That being said, we agree with the view of the learned prosecution counsel that the violation of the appellant's right under Article 49 of *the Constitution* does not vitiate his conviction. The appellant is at liberty to institute a civil suit before a constitutional court for legal remedies against the State for the alleged violation of his rights as provided by Article 22 of *the Constitution*.

36. The final issue for determination is whether the life sentence imposed upon the appellant was unconstitutional. The appellant was sentenced to serve life imprisonment, which is the prescribed penalty under Section 8(2) of the *Sexual Offences Act*. The appellant relied on the decision of this Court in Manyeso *v Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), which found that an indeterminate life sentence was unconstitutional as it amounted to inhuman treatment and violated the right to dignity of an individual under Article 28 of *the Constitution*.

37. The Supreme Court in a recent decision in the case of R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment), while dealing with the question of constitutionality of minimum sentences prescribed under the *Sexual Offences Act*, observed that the sentences therein are lawful, and remained lawful, as long as the penalty sections remained valid. The apex court found that the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* would need to be tested through the hierarchy of courts before ultimately reaching the Supreme Court for consideration and determination. In that regard, the Supreme Court overturned this Court's decision in Manyeso (supra).

38. In view of the above, we find that the sentence meted upon the appellant was in accordance with the law.

39. In the end, we find that the appeal lacks merit and is hereby dismissed in its entirety. 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