SOO v Republic (Criminal Appeal 120 of 2020) [2025] KECA 796 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 796 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 120 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 9, 2025

BETWEEN

SOO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (D.S. Majanja J.) dated 9th October 2014inHCCRA No. 8 of 2013)

JUDGMENT

1. Sammy Odhiambo Odindo, the appellant herein, was arraigned before the Principal Magistrate's Court at Rongo and charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the 24th day of August 2012, at [particulars withheld], North Sakwa, location in Migori County within the Republic of Kenya, he intentionally and unlawfully caused his penis to penetrate into the anus of one T. A. O, a boy aged 10 years. He denied the charge; was tried, convicted of the offence, and was sentenced to life imprisonment.

2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court, on grounds that the learned trial magistrate convicted him against the weight of evidence; failed to conduct a proper voire dire; failure to avail an interpreter; and failed to consider the appellant's mitigation. The High Court (Majanja, J.) in a judgment delivered on 9th October 2014, dismissed the appeal in its entirety, thereby upholding the decision of the subordinate court both on conviction and sentence. Being dissatisfied and aggrieved with the judgment of the High Court, the appellant has now filed this appeal before this Court.

3. The evidence before the trial court; and which was subjected to fresh evaluation and analysis by the High Court was as follows: TAO[1] who testified as PW1 after voire dire examination, stated that he

was 11 years old and that on the material day he left for church with CAA and P.O[2]. TAO and his younger brother, P.O left for home where they found the appellant. The appellant lured them with a storyline about a rabbit he had caught, and propelled by childlike curiosity, TAO requested to see the animal. The appellant took them to a forest; and when they got to a bush the appellant told T.A.O to remove his shorts so that he could see his penis and proceeded to penetrate the anus. Later at home T.A.O reported the ordeal to his grandmother. The following day TAO's parents came and took him to hospital; and the matter reported to the police.

4. who testified as PW2 is a child aged 5 years, and was in the company of his brother PW1. He confirmed how the appellant took them to the forest; how upon getting to the forest the appellant started smoking and told TAO to remove his shorts and bend over. PW2 knew the appellant as Sammy; watched the ordeal, but he did not tell anyone about it.

5. CA the complainant's aunt testifying as PW3 confirmed that on the said date she together with the complainant and PW2 went to church, but the children left earlier to go back home. When she returned home, she found the children home and the complainant informed her of the ordeal.

6. VAA, PW4 the complainant's mother produced his birth certificate and child dedication certificate, confirming that the complainant was 10 years old, having been born in September 2001. She recalls that the complainant informed her that a man had touched his buttocks and told him to bend over. She checked and found that the complainant had a crack on his anus. She took the complainant to hospital and the matter was reported to the police. Eliud Kipleting, PW5, who was the investigating officer, confirmed receipt of a report from TAO's father regarding the defilement; he arrested the appellant; and the complainant's father brought the children who physically identified the appellant.

7. The medical report prepared by Dr. Andrew Were who examined both the complainant and the appellant were produced by John Ruto, PW7, a clinical officer at Migori District Hospital. Dr. Were observed that the complainant had normal genitalia with a crack and blood stains in his anus. He. also examined the appellant and observed that his penis was bruised which signified a forced penetration. Further examination revealed that the complainant was HIV negative, and the rectal swab showed some epithelial cells and the appellant HIV positive.

8. The appellant in his unsworn defence denied the charge, stating that on the material day he had been sent to cut grass at the home of the children's grandmother, and upon the children seeing him dressed in ragged clothes, and carrying a panga, they ran away saying he was mad. The appellant denied knowledge of the offence and stated he was arrested while having lunch.

9. The trial court, having considered both the prosecution and appellant's case was satisfied that the ingredients of the offence of defilement had been proved by the prosecution and convicted the appellant sentencing him to life imprisonment.

10. In his appeal the High Court, the appellant raised the issue that the language in which the proceedings were conducted was unclear; to which the learned judge noted that the appellant did not raise this issue during the trial, and this ground of appeal was dismissed.

11. The appellant also raised the issue of voire dire not having been conducted properly, to which the learned judge noted from the record that that voire dire was conducted for the complainant and as regards PW2, the learned judge made the following observation:

> " In examining the proceedings, I noted that after PW2 had testified, the learned magistrate noted that:

"the child is of tender years aged 5 years and is therefore, not liable to be cross examined."

12. I find that this was an error on the part of the learned magistrate.

    This is a violation of article 50(2)(k) of *the Constitution* which protects the right of every accused person to challenge evidence against him. Even where the victim is young or vulnerable, the right to challenge evidence through cross-examination should not be denied. The accused should always be given an opportunity to put forth his questions. It is for the court to provide sufficient safeguards to the vulnerable witness under section 31 of the *Sexual Offences Act* by for example asking the questions through an intermediary. In this case however, no prejudice was occasioned to the appellant. Other than PW2, there was sufficient evidence to implicate the appellant…"

13. The court was satisfied that the answers given by the complainant and PW2 were intelligent enough and they understood the meaning of telling the truth. This ground of appeal was also dismissed.

14. On the issue as to whether the prosecution had proved its case beyond reasonable doubt, the court determined that PW1 and PW2 were familiar with the appellant as he worked at their grandmother's house; and that the appellant confirmed that he worked for the children's grandmother; and as such the case of mistaken identity did not arise.

15. The learned judge also noted that the trial court convicted the appellant from the evidence of PW1 corroborated by PW3, together with the medical evidence of PW7 and having analyzed the evidence concluded that the appellant penetrated PW1 through the anus.

    On the issue of the sentence being harsh and excessive the court, drawing from Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA.) and 3 others (Amicus Curiae) where the Supreme Court reaffirmed the legality of the mandatory minimum sentences in the *Sexual Offences Act*, holding that for as long as section 8 of the *Sexual Offences Act* remains valid, the various mandatory minimum sentences therein remain lawful. From the evidence on record, the court found the evidence proved the charge; and affirmed and upheld the conviction and sentence, thereby dismissing the appeal.

16. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, we are guided by Section 361(1)(a) of the Criminal Procedure Code which mandates this Court to deal with issues of law only, and which section provides that severity of sentence is a matter of fact unless an issue of law arises therefrom. For instance, in Stephen M'Riungu and 3 Others v Republic [1983] eKLR this Court explained that:

    > " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law, and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

    Similar sentiments were also expressed by this Court in Njoroge v Republic [1982] KLR 388.

17. The appellant's appeal raises 3 grounds. First, the appellant submits that the trial was unfair and violated Articles 25, 27 and 50(2) (b)(c)(i)(k) and (4) of *the Constitution*. The appellant submits that he was not accorded witness statements of the evidence the prosecution relied on to enable him to prepare and participate in the trial. The respondent on the other hand submits that this is the first time this issue is being raised in appeal and ought to be dismissed. On perusal of the record, we take note that the appellant only raised the lack of clarity regarding the language in which the proceedings were

being conducted. The High Court dismissed this argument noting that the appellant did participate in the proceedings and was even able to cross-examine the witnesses and also opted to give an unsworn statement of defence. This Court is inclined to agree with the High Court's findings as well as the respondent's submissions; we say so because there is no record of the appellant raising the issue of not having been given witness statements in the course of the trial. This ground of appeal thus fails.

18. The appellant also argues that voire dire examination was not carried out properly, the trial court having failed to accord the appellant a chance to cross-examine PW2. The respondent on this ground argues that the same question was dealt with adequately by the High Court, which found that although it was an error on the part of the trial magistrate to deny the appellant a chance to cross examine PW2, the same was not prejudicial to the appellant, nor fatal to the prosecution's case, as the conviction was soundly and squarely based on the uncontroverted evidence of PW1 and the medical evidence of PW7. We need not belabour the issue, indeed in the earlier part of this judgment, we have reproduced verbatim, the observations and conclusions of the learned judge, which we consider sound and reasonable, not offending any statutory provisions or legal principles. In any event, even if the evidence of PW2 was completely excluded, the other evidence adduced by the prosecution witnesses was suffice to convict the appellant. We say no more.

19. The absence of voire dire examination is not automatically fatal to the evidence of a witness, an observation that was made by this Court (differently constituted) in Maripett Loonkomok v Republic [2016] eKLR.

20. This position was echoed by this Court again in Athumani Ali Mwinyi v Republic, Criminal Appeal No.11 of 2015 as follows:

> " In appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge… the court may still be able to uphold the conviction."
>
> From these cases, it is apparent that the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person unless there is sufficient independent evidence to support the charge. Our considered view is that there was sufficient testimony other than that of PW2 that led to conviction.
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> On the issue of sentence being excessively harsh, we take note that the recent decision by the Supreme Court is to the effect that sentencing under the *Sexual Offences Act* is valid and constitutional for as long as section 8 of The *Sexual Offences Act* remains in our statute books.
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> The Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA)& 3 Others (Amicus Curiae) (Petition E018 of 2023 [2024] KESC 34 (KLR) (12 July 2024) (Judgment) was tasked with determining whether the imposition of mandatory sentence under the *Sexual Offences Act* was constitutional and in compliance with Articles 25, 27, 28 and 50 of *the Constitution*, and that the imposition of minimum mandatory sentences did not interfere with the independence of the Judiciary under Article 160 of *the Constitution*, nor did it undermine judicial discretion. The court went on to hold that mandatory minimum sentences, the *Sexual Offences Act* remains lawful as long as section 8 of the *Sexual Offences Act*remains valid. In the circumstances therefore, the Court of Appeal has no jurisdiction to interfere with any such sentence.

21. This Court is well guided by the Mwangi case (supra) and finds that it has no jurisdiction to interfere with the sentence as affirmed by the High Court. The upshot of the foregoing is that the appellant's appeal lacks merit and is dismissed.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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L. KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR