Oloo v Republic (Criminal Appeal 56 of 2018)
[2025] KECA 1422 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1422 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 56 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

JULY 31, 2025

BETWEEN

STEPHEN OJUANG OLOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the conviction and Sentence of the High Court of Kenya at Kisumu (Makau, J.) Dated 17th March, 2016 in HCCRA. No. 25 of 2015)

JUDGMENT

1. In upholding the conviction of Stephen Ojwang Oloo [the appellant] for the offence of defilement contrary to section 8[1][3], the High Court [J.A. Makau, J] observed:

> "In the instant case the offence was committed at 4.00 a.m. The only witness was the complainant. The complainant gave detailed account of how she encountered the appellant, who was stranger to her. She testified she heard someone coughing ahead of her and on nearing the person she saw it was a man wearing black clothes. After passing him, he followed her and she started running, but she fell down and he caught up with her. He was armed with a panga and started assaulting her, using the panga, hitting her on the thighs and back. He also strangled her using her necktie. He pulled her into the bush. He talked to her threatening her as he demanded sex. PW1 testified she was able to see and appreciate her attacker through the aid of moonlight. She described the clothes the attacker was wearing as black coat, black trouser and brown shirt. She noted his face was scarred and had a spot of grey hair near his temple. That this ordeal took a while and at one time PW1 got time to ran away but she fell down and the assailant caught up with her. The assailant tied PW1's legs apart using paper bags, he had around his waist while lying on PW1, tore her inner wear apart using a panga. He removed his clothes and inserted his penis into PW1's vagina. He

had sex with PW1 for ½ hour. That as the assailant was assaulting PW1 she was able to see his appearance and colour of his clothes through the moonlight which was shining on their faces. That PW1 was able to immediately and at the earliest opportunity give the description of the assailant to her teacher, school mates and area chief."

2. This is a second appeal in which our remit is circumscribed as acknowledged time without number by this Court. For example, in *Karani v R* [2010] 1 KLR 73 stated:

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court 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, in which case such omission or commission would be treated as matters of law." See also *Karingo v R* [1982] KLR 213"

3. The appeal before us is on three grounds:

   i. The learned Judge erred in law in holding that the infringement of the appellant's constitutional right had no effect on the proceedings and subsequent Judgment of the trial court.

   ii. The identification of the appellant as the defiler was not safe to found a conviction.

   iii. The sentence imposed was excessive in nature.

4. The undisputed evidence at trial was that there was detention of the appellant at Yala Police station from 9th August, 2013 to 12th August, 2013, a period of 5 days. The High Court correctly held that this prolonged detention was in breach of Article 49[1] [f] of the *constitution* which reads:

> " 49. Rights of arrested persons
>
> [1] An arrested person has the right—
>
> f. to be brought before a court as soon as reasonably possible, but not later than—
>
> i. twenty-four hours after being arrested; or
>
> ii. if the twenty-four hours ends outside ordinary court"

5. In holding that the violation of the appellant's constitutional rights had no effect on the proceedings and subsequent Judgment by the trial court, the learned Judge returned the view that:

> "...though I have found that the appellant's constitutional rights as enshrined in the *constitution* were violated, the trial court as well as this Court being not a constitutional court in this matter, I find and hold that the lower court proceedings properly proceeded before the trial court."

6. We think that the trial Judge was entitled to take that view but more importantly not all pre-trial constitutional violations can vitiate a criminal trial. Discussing this issue, this Court in *Douglas Komu Mwangi v Republic* [2013] KECA 503 [KLR] held that:

> " There are many instances in which courts have held that a delay in arraigning a suspect in court beyond 24 hours does not necessarily entitle the suspect to an acquittal. [See *Domimic Mutie Mwalimu v R* Crim. Appeal No. 217 of 2005; and *Evanson K. Chege v R* Crim. Appeal No. 722 of 2007]. This Court has stated that if any constitutional right of an accused person is violated, the remedy lies not in an acquittal but an action in civil suit for damages. In *Julius Kamau Mbugua v R* Criminal Appeal No. 50 of 2008, this Court stated that:
>
> > " a trial court can take cognizance of pre-charge violation of personal liberty, if the violation is linked to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g where an accused has suffered trial related prejudice as a result of death of an important witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise, the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 [6] expressly compensatable by damages."

7. There was no evidence that the illegal pre-trial detention of the appellant compromised his ability to mount a defence or in any way other manner disadvantaged him at trial. Nothing much can turn on this ground.

8. Regarding identification of the appellant as the person who violated and defiled the appellant, the two courts below were of concurrent opinion that he was positively identified. As a second appellate Court, we should defer to this concurrent finding unless it is so perverse that no reasonable tribunal could, on the evidence available, reasonably reach that conclusion.

9. In this instance the High Court, as did the trial court, was alive, to the need to test the identification evidence of the single witness with the greatest care. On our own assessment of the evidence of the complainant, we endorse the following findings by the two courts below: although the sexual assault happened at 4.00 am, there was light from the moon that enabled the victim to see the assailant; the encounter was for a period of 30 minutes and at close quarters which involved a physical struggle; the length of time and proximity of the victim to her assailant presented sufficient opportunity for the victim to see the face of the appellant so well as to notice that it was scarred and he had a spot of grey hair near his temple; the victim was able to see the type and colour of the clothes worn by the assailant at the time of the assault; and the victim immediately and at early opportunity was able to describe the appellant to her teacher, school mates and the area Chief. Our conclusion is that there was sufficient evidence upon which a safe conviction could be returned against the appellant.

10. Regarding the sentence, although the first appellate Court held that there was no appeal against sentence, we note that the appellant has, right from trial to this point, acted in person. He drew the petitions and submissions in person. Both were, not surprisingly, somewhat inelegant. Nevertheless, at the pre-amble to his petition before the High Court he "begs leave to appeal against the sentence of 40 [fourty] years imprisonment." We think this is a sufficient plea before the first appellate Court to review the sentence. As this was not done, we proceed to do so.

11. The statutory minimum sentence for the offence is 20 years. So, the 40 years' imprisonment was double the length of sentence. A sentence defended by Mr. Okango, Learned Prosecution Counsel, representing the State. The trial court, in a judgement endorsed by the High Court, held that a harsh sentence was deserved on the supposed prevalence of such offences in Siaya, beastly nature of the act and the fact that the appellant was not remorseful. On our part we will be more sympathetic. We think that imposing a sentence that is double that prescribed by the law to be the minimum must be left to the most egregious of incidents and although there was some violence here, this was not the most atrocious of assaults. While the offence of defilement may be prevalent in Siaya County, experience has taught us that the offence is prevalent countrywide and if this was a good reason to mete out a sentence beyond the minimum prescribed by the law, then all convicts of the offence of defilement would be deserving of such sentences. Neither do we view the statement by the appellant at mitigation that "I leave the Court to decide" as necessarily a sign of belligerence or indifference. It may well have been despair. Taking all these into account, we think that the punishment deserved by the appellant is not more than the minimum prescribed by law.

12. Ultimately, we dismiss the appeal against conviction and allow the appeal on sentence to the extent that it shall be reduced from a term of 40 years imprisonment to a term of 20 years from the date of sentence. Any period in which the appellant spent in custody at the time of trial shall be considered in the computation of the period to be served [Section 333 [2] of the *Criminal Procedure Code*].

13. Last, we apologise for the delay in delivering this decision. It has long been ready but due to some human failing was not listed for delivery when it should have been.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI [PROF]

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR