Omar v Republic (Criminal Appeal 64 of 2022)
[2024] KECA 675 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 675 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 64 OF 2022

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JANUARY 25, 2024

BETWEEN

OMAR ABDALLAH OMAR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Reuben Nyakundi, J.) delivered on 23rd October 2019inCriminal Appeal No.57 of 2018Originally Malindi CM's Case No. 5045 of 2017.)

JUDGMENT

1. This is a second appeal by Omar Abdallah Omar, the appellant herein against the judgment of the High Court (R. Nyakundi, J.) that upheld the conviction and sentence by the Chief Magistrate's Court at Malindi (Hon. Dr. Julie Oseko) in Sexual Offences Case. No. 45 of 2017 whereby the appellant was convicted of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No.3 of 2006 (hereinafter 'SOA'). The particulars of the charge are that the appellant on the 16th day of October 2017 at Mere sub-location Malindi sub-county within Kilifi County, intentionally and unlawfully caused his penis to penetrate into the vagina of KKS, a girl child aged 11 years old. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of SOA.

2. The Appellant raised four grounds in his petition of appeal. However, he filed a supplementary grounds of appeal in which he raised six grounds of appeal that faulted the learned High Court judge of erring in law as follows:

    i. For failing to see that voire dire examination was not done on the minor complainant;

    ii. For failing to see that the evidence of the complainant was self-contradictory hence creating a serious doubt in the prosecution evidence;

iii. For failing to find that crucial witnesses were not called to testify;

iv. For failing to find that the requirement for corroborative evidence was not complied with;

v. For upholding the appellant's sentence without considering that the learned trial Magistrate misconstrued the relevant penal law as a mandatory minimum sentence; and;

vi. The learned trial Magistrate failed to consider his mitigation submissions.

3. It is important that we give the facts of the case. The Appellant denied the charges preferred against him, and the prosecution marshalled three witnesses to prove their case, while the Appellant gave an unsworn statement and called no witness. KKS (name withheld), PW1, a minor was the complainant in the case. She testified that at the time to the incident on 16th October 2017, she was aged 11 years. She testified that as she went to collect vegetables from Mama Omar, she met with the appellant, who she knew. That using a scarf he covered her mouth, carried her to his house, and placed her on the floor. He then removed his inner wear and inserted his penis into her vagina. She said that she felt pain and was crying. After the act, the Appellant gave her Kshs.20/= which she used to buy mahamri (doughnut). The complainant testified that she met her brother at home who asked her where she got the mahamri. That he beat her and then took her to the Chief. She was escorted to Malindi Hospital where an examination was conducted

4. Moses Rimba, PW2 a Clinical Officer produced the treatment notes, the P3 form, the age assessment and the PRC report, P. Exhibits 1, 2, 3 and 4 on behalf of Dr. Ibrahim. He stated that Dr. Ibrahim, on examining the complainant found that she had been defiled, evidenced by the abrasions on the labia majora and rupture of the hymen.

5. Corporal Miriam Hussein, PW3, was the investigating officer of the case. She testified that on 17th October 2017, on the instructions of her OCS, accompanied by a colleague they proceeded to Mere Chief's Camp where they collected the Appellant who was arrested for a defilement case. After investigations, she recommended that the Appellant be charged with the offence of defilement.

6. The appellant in defence denied the charges. He stated that on 16th October 2017 he was in his home when a mob arrested him and beat him for an offence he did not commit.

7. In a judgment dated 27th September 2018 the learned trial Magistrate convicted the Appellant of the main count of defilement and sentenced him to serve life imprisonment. Aggrieved by the judgment and sentence of the trial Court, the Appellant preferred an appeal to the High Court. He raised three grounds of appeal. In a judgment delivered on 23rd October 2019, (R. Nyakundi, J.) upheld the conviction. He however substituted the sentence of life imprisonment to a sentence of 30 years imprisonment.

8. We heard the appeal on the 27th July 2023 through this Court's virtual platform. Present was the Appellant in person from Shimo la Tewa Prison, while Ms. Nyawinda, Principal Prosecution Counsel was present for the State. The Appellant relied on his supplementary grounds of appeal and written submissions. Ms. Nyawinda relied on the written submissions dated 19th July and filed on 20th July 2023.

9. The Appellant, in support of the first ground of appeal that the High Court erred for failing to note that the learned trial magistrate erred for not carrying out a proper voire dire before taking the complainant's evidence as provided for under Section 19(1) of the Oaths and Statutory Declaration Act. Relying on the case of John Muiruri v Republic 1983 KLR 445 he urged that the Court is required to form an opinion upon a voire dire examination whether the child understands the nature of an

oath and whether the complainant's evidence will be received on oath, and if not satisfied, an unsworn evidence be received.

10. Ms. Nyawinda for the State, relying on the same case of John Muiruri, supra, and the record of the trial Court, urged that the learned trial Magistrate conducted voire dire examination of the complainant and concluded that the child was possessed of sufficient intelligence to testify, but that she did not understand the meaning of an oath. The Magistrate proceeded to receive unsworn evidence from her. Counsel, relying on the case of Maripett Loonkomok v Republic [2016] eKLR urged that the voire dire examination was not properly taken and that as the High Court ruled, it was proper that an unsworn statement was received.

11. The second ground raised was that the High Court erred for relying on incredible evidence of a single witness that was insufficient to sustain a conviction. This ground raises similar issues to grounds three and four that faults the learned High Court Judge of failure to consider that the complainant's evidence was not corroborated, and that crucial witness were not called. The Appellant argued that the complainant contradicted herself when she said that she met the Appellant who held her by the shoulders and took her to his house, then later changing her evidence to say the Appellant tied her mouth with a scarf and carried her to his house. Further that in cross-examination, she changed her story to say that she collected vegetables from Sarah and that it was as she went home that she met the Appellant. The Appellant, relying on section 124 of the Evidence Act urged that the law required that the evidence of a complainant could not convict an accused unless such evidence is corroborated. He urged that the complainant's evidence did not receive any corroboration and thus was insufficient to found a conviction.

12. Concerning whether the complainant's evidence was credible, relying on Bassita vs. Uganda Supreme Court Case No 35 of 1995, Ms. Nyawinda urged that defilement could be proved by either direct or indirect evidence, and that there was corroboration of the complainant's evidence from the results of medical examination conducted on the complainant by a doctor, on the same day of the incident.

13. The rest of the grounds in the Appellant's memorandum of appeal were not raised before the High Court. These are where the learned Judge of the High Court is faulted for upholding the appellant's sentence without considering that the learned trial Magistrate misconstrued the relevant penal law as a mandatory minimum sentence and failure by the learned trial Magistrate to consider his mitigation submissions. While we have no power to revisit the concurrent findings of fact by the two Courts below, it is not lost to us that unlike this Court, the first appellate Court is under a legal obligation to analyze and re-evaluate the evidence placed before it. Therefore, an allegation that the first appellate court failed to undertake its legal obligation is a matter of law. It is therefore properly within our mandate to deal with the issue whether, the two courts below carried out their mandate imposed on them by the law, and whether the sentence imposed was lawful.

14. Regarding sentence, the Appellant submitted that he appreciated the resolve by the learned Judge to reduce his sentence from the prescribed sentence of life imprisonment to 30 years imprisonment. However, he urged that he had reservations concerning the reduced sentence for reason that on 18th October 2017 when he was sentenced, he was 47 years home, which means he will be 77 years when he completes the sentence. He urged for further review of sentence downwards.

15. Ms. Nyawinda for the State opposed any further review of the sentence. Counsel urged that the first appellate Court reviewed the sentence from life imprisonment to 30 years, that the same was reasonable and urged us to uphold the same without interference.

16. The role of this Court in a second appeal was succinctly set out in Karani v R [2010] 1 KLR 73 wherein this Court expressed itself as follows:

> " 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."

17. In addition, we have a duty, as held by this Court in Adan Muraguri Mungara v Republic [2010] eKLR:

> " ... to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings."

18. These are the principles that will guide us as we consider this appeal. We have considered the issues raised in this appeal and as already stated hereinabove, this Court's jurisdiction on second appeal such as this one is restricted to matters of law.

19. We shall consider all the issues together as they are closely related. The learned trial Magistrate wrote as follows at the commencement of the trial:

> " Prosecutor:
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> My next witness is a juvenile, 11 years old. I request the court to examine her.
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> Court:
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> I have examined the child 11 years. She is intelligent enough for her evidence to be received. She does not understand the meaning of an oath. She will give an unsworn testimony."

20. The issue is whether there was any voire dire examination of the complainant, whether it was necessary and what resulted in what the learned trial Magistrate did. The learned High Court judge delivered himself as follows in that regard:

> " An inquiry statement on voire dire made under Section 19 (1) of the Cap 15 of the Laws of Kenya is clearly set out in the Court of Appeal case of Phisen Muiruri v R [1983] KLR where it was held as follows:
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> "We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses", in Peter Karega Kiuna v R CR. Appeal No. 77 of 1982 "where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient evidence and understands the duty of speaking the truth. In the latter event an accused person shall not be liable to be convicted on such evidence unless is corroborated by material evidence in support thereof implicating him."

It is important to secure the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellant court is able to decide whether this important matter was rightly decided and not be forced to make assumptions. A similar opinion was expressed by the Court of Appeal in England in Regina v Campell (Times 10 of 1982).

'If the girl (ten years) had given her unsworn evidence, the corroboration of these 'fiscus' was an essential requisite. If she gave sworn evidence, there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convince unless there was consideration.'

There level Justice Bridge said:

'the important consideration, when a Judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the state, which is involved in an oath, over and above the duty to tell the truth which is an order any duty of normal social conduct.'

There were therefore two aspects when considering whether a child should properly be sworn. First that the child had sufficient appreciation of the particular nature of the case and, second realization that following the oath did involve more than the ordinary duty of telling the truth in ordinary day today life."'

21. The learned judge then concluded:

> " In the instant case, I observe that though the Learned trial Magistrate is being faulted with the procedure on voire dire, as set out in the above authorities, the complainant's evidence was properly admitted as an unsworn and the appellant accorded an opportunity to cross-examine (PW 1) under Section 208 (2) (3) of the Criminal Procedure Code. Further in terms of Article 50 (2) (k) of Constitution the interrogatories put forth by the appellant was meant to challenge her evidence, test, the veracity and the credibility of her testimony."

22. The learned Judge of the High Court was satisfied that the evidence of the complainant was properly admitted as an unsworn statement.

23. The process of determining whether the child witness is intelligent enough, understands the nature of an oath and the duty to tell the truth in order to determine whether to receive a sworn or unsworn statement or any evidence at all, is through a voire dire examination. The leading authority for a long time was Johnson Muiruri v Republic [1983] KLR which explained the purpose of voire dire as follows:

    1. "Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

    2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.

3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.

4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.

5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

24. This Court, differently constituted, dealing with the same issue examined several cases concluded that a variation has developed, in the case of Maripett Loonkomok vs. Republic [2016] eKLR thus:

> " Section 19 of the Oaths and Statutory Declarations Act is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth.
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> Although this decision, (referring to R v Braisier [1779] 1 Leach Vol. I, case XC VIII, PP 199 – 200) through section 19 of Oaths and Statutory Declarations Act underpinned the legal practice in relation to children's testimony in Kenya, we reiterate that the format and procedure of testing the intelligence, and sufficient knowledge and nature of the oath has been varied. For instance, in the past the courts insisted that voir dire examination must be in the form of a dialogue, with the trial court recording questions posed to the child and the child's answers nearly verbatim in the first person before drawing its conclusion on the question of suitability of the child. See Johnson Muiruri v R [1983] KLR 447. The courts today accept both the question and answer format and the recording of the child's answers only. See James Mwangi Muriithi (supra). What is constant is that, whatever format the court adopts it must be on record. It is equally settled that by dint of sections 208 and 302 of the Criminal Procedure Code, the law allows cross-examination of a witness who does not give evidence on oath. See Nicholas Mutua Wambua and another v Msa Criminal Appeal No.373 of 2006." [Emphasis added]

25. The Judiciary Criminal Procedure Bench Book, February 2018 edition, at page 82 to 83 paragraph 91 gives the following guidance:

> " Where a child under the age of fourteen years is called as a witness, the court must first conduct a vore dire examination before allowing the child to testify in order to:
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> i. Determine whether the child understands the nature of an oath, in which case evidence may be received on oath.
>
> ii. Ascertain whether, if the child does not understand the nature of an oath, the child possesses sufficient intelligence and understands the duty to tell the truth. If in the affirmative, the evidence may be received though not given under oath (s. 19 1. of the Oaths and Statutory Declarations Act, Maripett Loonkomok v. R. Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015)

92. There is no particular format for conducting and recording a voire dire. It could be a dialogue in which the court records the questions posed to the child and the child's answers are recorded verbatim in the first person. Alternatively, the court may choose to omit the question put to the witness but record the answer verbatim in the first person (James Mwangi Muriithi v R Court of Appeal Nyeri No. 10 of 2014, Maripett Loonkomok v R Court of Appeal at Mombasa Criminal Appeal No. 68 of 2015)."

26. The above analysis is evidence that voire dire examination must be conducted before receipt of the evidence of a child witness, and that the said examination can take one of two forms-the taking down verbatim the answers given by a child to questions put to him/her by the court. The variation being where the Court records the questions put to the child before taking down verbatim the child's answers. Where the child testifies on oath, other evidence need not corroborate their evidence before it can found a conviction. See Kibangeny vs. Republic [1959] EA 92. Conversely, the unsworn evidence of a child of tender years must be corroborated by other material evidence that implicates the accused person for a conviction to be sustained. See Oloo v Republic [2009] KLR. There is however an exemption in that where case involves a sexual offence where the victims evidence is the only evidence available, the court can convict on the basis of that evidence provided the Court is satisfied that the victim is truthful as spelt out under section 124 of the Evidence Act and the proviso thereto.

27. What happens where voire dire is not done? That question was answered by this Court, differently constituted in Athumani Ali Mwinyi v R Cr. Appeal No.11 of 2015, which found that:

> "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."

28. In the instant case, the learned trial Magistrate did not record any question put to the child victim/witness, neither were the answers given by the child recorded at all. The evidence was received as an unsworn statement. Rightfully, the child, PW1 was subjected to cross-examination by the Appellant, thus protecting the Appellant's right to a fair trial, as required under section 208 of the Criminal Procedure Code. This is how the learned trial Magistrate treated the evidence of the child witness:

> " Finally it is the issue as to who defiled the complainant. She positively identified the accused as the perpetrator. She knows the accused. She states how he grabbed her and pulled her inside his room. She bought doughnuts with the money given to her by the accused. That is what gave her away as she innocently went with some to her home. When asked she simply stated who gave her the money and what he did to her. She reactivated this evidence and again positively identified the accused to the investigating officer (PW3). On issue of penetration the complainant told the court that the accused penetrated her. She described and demonstrated the act. She also stated that she felt pain when the accused inserted his penis inside of her vagina. There is also medical evidence to prove this fact. The treatment notes PRC for the P3 herein...
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> All these are injuries on the vagina. Evidence of forced entry by accused person. I am convinced and satisfied that penetration was the cause of these injuries and the same is proved.
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> I believe that the complainant a standard (1) student was telling the truth. She appeared quite straight forward. I did not find that she told the court lies. I am satisfied that the

prosecution has proved its case against the accused beyond any^- j o. reasonable doubt. I find no benefit of doubt to award to the accused."

29. We have considered the entire record and find that the complainant gave detailed information of what happened to her under the hands of the Appellant, and that she gave sufficient, clear cogent details of what transpired. [See above excerpt of the trial court's judgment). That being the case, we are satisfied that even though the voire dire was not conducted in the acceptable format, the evidence was subjected to section 124 of the Evidence Act. The learned trial Magistrate recorded the reasons why she believed that PW1 was telling the truth.

30. We find that even though there was a procedural flaw, there were sufficient safeguards to ensure that the Appellant's right to a fair trial was not violated, for example compliance with section 208 of the CPC. The procedural flaw did not go to the substance of the case and was curable under section 382 of the Criminal Procedure Code. In the circumstances, we find that there was sufficient evidence with which to found a safe conviction, that there was corroboration of PW1's evidence in the doctor's evidence, and that from the circumstances of the case, the learned trial Magistrate and the first appellate Court were both right in convicting the Appellant for the main count of offence charged.

31. We have come to the conclusion that this appeal has no merit, and is dismissed with the result that the sentence as reviewed by the High Court is up held.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR