Obare v Republic (Criminal Appeal 165 of 2018) [2024] KECA 385 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 385 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 165 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 12, 2024

BETWEEN

VINCENT ONEKO OBARE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Busia, (Kiarie, J.) dated 18th July, 2017 in HCCRA NO. 24 OF 2016)

JUDGMENT

1. The appellant was tried and convicted of the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*, and a second charge of Sexual Assault contrary to Section 5(2) of the *Sexual Offences Act*. It was alleged that, being an uncle to the 1st complainant, APA[1] an 8-year-old girl, he caused his penis to penetrate the complainant's vagina, and in the second count, it was [1] Initials used to protect the identity of the minor alleged that he unlawfully penetrated the vagina of CA[2], the 2nd complainant, a 3-year-old girl using his fingers.
2. He was sentenced to life imprisonment on the first count and ten years' imprisonment on the second count. Being aggrieved, the appellant appealed to the High Court, but his appeal was dismissed against both conviction and sentence.
3. The appellant is now before us in this second appeal in which he has appealed against both conviction and sentence. In his memorandum of appeal, he is challenging the judgment of the High Court contending that the learned Judge upheld an unlawful sentence; that the age of the complainants and penetration were not proved; and that he was not accorded a fair hearing as he was not supplied with necessary documents.

4. The appellant filed written submissions in which he challenged the life imprisonment imposed upon him arguing that it is not a mandatory sentence under Section 20(1) of the *Sexual Offences Act*. He relied on *M K v Republic* [2015] eKLR and *Opoya v Uganda*, 1967 EA 752, for the proposition that the use of the words "shall be liable" means that the trial court had discretion to impose [2] a maximum sentence of life imprisonment or a term of imprisonment guided by the minimum term provided of 10 years. He argued that the sentence for incest is predicated on the age of the complainant and that the complainant having been under 18 years of age the appellant was liable to a term of between 10 years and life imprisonment and therefore, it was wrong for the trial magistrate to sentence him to life imprisonment.

5. The appellant further argued that the elements of the offence of incest were not satisfied as the ages of the two victims were not clearly stated, nor was any age assessment done, nor did the clinical officer state the ages of the complainants. In addition, the maker of the P3 forms was not called to produce them in evidence.

6. The appellant contended that the evidence was not sufficient to prove penetration, and that there was no eye witness other than the two complainants whose evidence should be treated with caution. Relying on *PKW v Republic*, the appellant pointed out that hymen is not only raptured by sexual intercourse, as some girls are born without hymen, and sometimes the hymen is broken by factors other than sexual intercourse.

7. In addition, the appellant urged that he was not accorded a fair hearing as he was not supplied with witness statements during the trial. Secondly, he was not provided with legal representation nor was Article 50 of *the Constitution* relating to fair hearing complied with.

8. The respondent opposed the appeal through written submissions that were prepared by learned Prosecution Counsel, Ms. Busienei from the Office of the Director of Public Prosecution. She urged the Court to uphold the appellant's conviction and sentence, maintaining that the ingredients of the offence of incest were proved to the required standard, and that this included proof that the appellant was an uncle to the complainants, proof of the complainants' ages, proof of penetration, and proof of the appellant as the perpetrator. Ms. Busienei submitted that the trial court properly evaluated the evidence and rightly rejected the appellant's defence.

9. In regard to the appellant's complaint that his rights under Article 50 of *the Constitution* were violated, Ms. Busienei submitted that the appellant was given reasonable access to the witness statements and never raised the issue again. She cited *Simon Ndichu Kahoro v Republic* (Nairobi Criminal appeal no. 69 of 2015) [2016] eKLR; and *MEM v Republic* (Nakuru HCCRA no. 314 of 2015) [2018] eKLR, for the proposition that failure to furnish witness statements to an accused is not necessarily fatal to the prosecution's case, but the court must look at the circumstances and the prejudice if any caused to the Accused.

10. On sentence, Ms. Busienei conceded to the setting aside of the mandatory life sentence that was imposed on the appellant. She relied on Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR); and *Julius Kitsao Manyeso v Republic* (Malindi Criminal Appeal No. 12 of 2021), (Judgement 7/7/2023) (unreported) in which this Court declared the indeterminate nature of life sentence unconstitutional. She urged the Court to consider the seriousness of the nature of the offence of Incest and the tender ages of the victim as an aggravating factor, and substitute the life sentence with a term sentence of 30 years' imprisonment.

11. During the plenary hearing, the appellant relied entirely on his written submissions, while the respondent also relied on their written submissions, that were highlighted by Ms. Busienei.

12. This being a second appeal, our jurisdiction is limited under Section 361(1) of the *Criminal Procedure Code* to matters of law only. In this regard the appellant has raised issues in his appeal against sentence, related to the legality of the sentence that was imposed upon him. As regards the appeal against conviction, the appellant has raised issues concerning whether the charges against him were proved to the required standard. Both issues are issues of law. Therefore, the threshold for our appellate jurisdiction has been met.

13. Briefly, the evidence before the trial court was as follows: The appellant was an uncle to both the complainants. On the material day, the appellant gave the 1st complainant Ksh.20/ to go to the shop and buy some mandazi. The 1st complainant left the 2nd complainant in the company of the appellant, who, then, took the 2nd complainant to a bed, removed her clothes and sexually molested her by inserting his fingers into her vagina. When the 1st complainant came back, she found the 2nd complainant crying but she could not get the 2nd complainant to tell her what the problem was. The appellant then asked the 2nd complainant to go play outside the house while he remained inside the house with the 1st complainant. He, then, put the 1st complainant, on the bed, removed her clothing and inserted his penis into her vagina. Later in the evening when the 2nd complainant's mother came back, the 2nd complainant reported to her what had happened.

14. The 2nd complainants' mother examined her genitalia and found it reddish and swollen. The following morning, the 2nd complainant's mother asked the 1st complainant who bought them mandazis, and she said it was the appellant. The two complainants were taken to the hospital where they were examined. According to the treatment notes and the P3 form, the 1st complainant was found with bruises at the opening of her vagina, she also had torn hymen and bruises at the vaginal wall. The conclusion was that there was penetration due to the abrasion on the vaginal wall and the torn hymen.

15. The 2nd complainant was also examined by a clinical officer who noticed that her genitals were tender; and she was of the opinion that there was attempted penetration. Both the trial court, and the first appellate court believed the evidence of the two complainants, and were satisfied that the appellant, whom the two children knew, was properly identified as the perpetrator of the offence. In addition, the learned Judge found the medical evidence consistent with the evidence of the two complainants, and was satisfied that there was direct evidence implicating the appellant. The learned Judge, therefore, dismissed the appellant's contention that he was convicted on insufficient circumstantial evidence.

16. We have, on our part, considered whether the ingredients of the offence of incest and sexual assault were proved to the required standard. The 1st complainant, her mother, and her grandmother all testified that the appellant was an uncle to the two complainants, and this was not disputed by the appellant. The age of the 1st complainant was proved through her evidence and a birth certificate that was produced by her mother. A birth certificate was also produced to prove the age of the 2nd complainant.

17. As regards penetration, the evidence of the 1st complainant, the evidence of mother to 2nd complainant and that of the complainants' grandmother, taken together with the evidence of the clinical officer, the treatment notes and the P3 Form, all confirmed that there was penetration of the 1st complainant by the appellant. Hence, we are satisfied that the appellant was properly convicted of the charge of incest in regard to the 1st complainant.

18. As for the 2nd complainant, her evidence was that the appellant pressed her vagina with his fingers. This was not consistent with the evidence of her mother to whom she first reported the matter, as the mothers' evidence was that the 2nd complainant had informed her that the boy did bad things to her, and that he oiled his penis and inserted it in her vagina. The mother stated that when she

examined the 2nd complainant, she found her vagina reddish and tender. To this extent the evidence was consistent with the evidence of the clinical officer who produced the treatment notes in regard to the 2nd complainant her, which reflected there was tenderness in her labia minora and there were signs of attempted defilement. However, in cross examination, the clinical officer stated that there was no penetration.

19. The appellant was convicted in regard to the 2nd complainant, of the offence of Sexual assault under Section 5 of the *Sexual Offences Act*. That section states as follows:

5. Sexual assault

1. Any person who unlawfully—
    a. penetrates the genital organs of another person with—
        i. any part of the body of another or that person; or
        ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;
    b. manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body;

    is guilty of an offence termed sexual assault (emphasis added)

20. Given this statutory provision, we find that penetration is a critical ingredient of the offence of sexual assault. The evidence before the court was contradictory and did not prove the charge of sexual assault as there was no penetration proved. We find that the 2nd complainant's evidence showed that there was unlawful contact between the appellant's fingers and the 2nd complainant's vagina. This was an indecent act, which is defined under Section 3 of the *Sexual Offences Act* to mean:

any unlawful intentional act which causes—

a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

21. We find that both the trial magistrate and the learned Judge erred in finding the appellant guilty with regard to the main charge of sexual assault, as the offence which was established in regard to the 2nd complainant was the alternative charge of indecent act contrary to Section 11(1) of the *Sexual Offences Act*. Accordingly, we acquit the appellant of the charge of sexual assault, but convict him of the alternative charge of committing an indecent Act.

22. The appellant raised an issue regarding the violation of his constitutional rights under Article 50 of *the Constitution* with regard to the prosecution's failure to supply him with witness statements. A careful perusal of the record of proceedings reveal that an order was made for the appellant to be given witnesses statements on 25th March 2014 when the plea was taken. On 6th June 2014, an order was made for the witness statements to be given to the appellant upon payment. On 17th June 2014, the appellant again requested for witness statements and again an order was made for the statements to be issued upon payment.

23. The appellants' rights to a fair trial under Article 50 (2)(j) of *the Constitution* included a right "to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence." To require the appellant "to pay" to obtain witness statements is to place a fetter that has the effect of denying the appellant reasonable access to the prosecution evidence,

more so as the appellant was in custody and making payment was not easy for him. Although the requirement compromised his constitutional right, we agree with Ms. Busienei that the contravention of the appellant's constitutional right to be given witness statements was not necessarily fatal to the prosecution case without any prejudice to the appellant being demonstrated.

24. As already adverted to, as at 16th June 2014 the appellant had not been issued with the witness statements. The record of proceedings reveal that the appellant's trial started de novo on 29th January, 2015. The appellant did not raise the issue about the witness statement again. He proceeded with the hearing and effectively cross examined the witnesses. It is not clear whether the appellant had obtained the witnesses statement by then. Suffice to note that he was not prejudiced in his defence. Therefore, while the failure to provide the prosecution witnesses statements may provide a good basis for a constitutional petition for redress of violation of the constitutional right, the failure had no impact on the appellant's conviction.

25. As for the appeal against sentence, we note that the respondent has conceded to the setting aside of the mandatory life sentence that was imposed upon the appellant. The High Court in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022 KEHC 13118 (KLR), declared mandatory minimum sentences in the *Sexual Offences Act*, as unconstitutional for taking away the trial court's discretion in sentencing. That decision was further fortified by this court's decision in *Julius Kitsao Manyeso v Republic* (Malindi Criminal Appeal No. 12 of 2021), (Judgement 7/7/2023) (unreported), in which this Court declared the indeterminate nature of life sentence as unconstitutional. In sentencing the appellant, the trial magistrate noted that the life imprisonment and the sentence of 10 years' imprisonment were the minimum sentences provided for the offences of which the appellant was convicted.

26. Section 20(1) of the *Sexual Offences Act* states as follows:

    (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

    Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

27. The trial magistrate misapprehended the above provision as although the section provides for a minimum sentence of 10 years' imprisonment, the proviso to that section provides for a maximum sentence of life imprisonment where the victim of the incest is under 18 years. The trial magistrate took into account the appellant's mitigation, the circumstances of the offence, and the circumstances of the victims, including the 1st complainant's tender age of 8 years. We are satisfied that the trial magistrate exercised his discretion and opted to impose the maximum sentence of life imprisonment and not the minimum sentence which was 10 years. The reference to the minimum sentence was therefore an error.

28. Taking cognizance of the serious nature of the offence of incest and particularly the tender age of the victims herein, the appellant deserved a severe sentence, and the sentence of life imprisonment was appropriate. In view of the indeterminate nature of life sentence and in accordance with our decision in E*vans Nyamari Ayako v Republic*, Kisumu CoA Criminal Appeal NO. 22 OF 2018 (UR), we translate the sentence of life imprisonment that was imposed upon the appellant to a term sentence of 30 years' imprisonment.

29. As for the offence of indecent assault, Section 11(1) of the *Sexual Offences Act* provides for a minimum sentence of 10 years. The child was of the tender age of 3 years and this called for a deterrent sentence. The sentence of 10 years' imprisonment, though the minimum sentence provided for this offence under the statute, was, in our, view appropriate.

30. The upshot of the above is that in regard to the first count, that is the incest charge, the appeal against conviction is dismissed, while the appeal against sentence is allowed to the limited extent of the sentence of life imprisonment being translated to a term of 30 years' imprisonment. In regard to the second count, the appellant's conviction for indecent assault is set aside and substituted with conviction for the offence of indecent act with a child, and the sentence of 10 years' imprisonment is affirmed. The sentences in regard to the two counts shall run concurrently.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR