Okumu v Republic (Criminal Appeal 196 of 2019)
[2024] KECA 1113 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1113 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 196 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

PETER MAIKUMA OKUMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, (Sitati, J.) dated 22nd May, 2019inHCCRA No. 106 of 2016)

JUDGMENT

1. Peter Maikuma Okumu, the appellant herein, was tried and convicted for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *sexual Offences Act*. He was sentenced to serve 20 years' imprisonment; the child victim being aged 12 years. He appealed to the High Court but his appeal was unsuccessful - both the conviction and sentence being upheld.

2. He has now appealed to this Court against both conviction and sentence. In his original memorandum of appeal, he raised ten grounds contending inter alia that he was convicted and sentenced on a defective charge sheet for a nonexistent offence; that the ingredients of the charge of defilement, including penetration, were not established; that there were glaring inconsistencies, discrepancies and contradictions in the prosecution case; that his alibi defence was not considered, and that the court erred in basing a conviction on a charge that did not have a prescribed sentence.

3. The appellant also filed six supplementary grounds of appeal, in which he contended that his right to a fair trial, as guaranteed under Article 50(2) of *the Constitution* was breached; that the High Court erred in associating the breakage of the complainant's hymen with the appellant, and failing to note that there was no forensic or scientific evidence including DNA that could connect the appellant with the offence; and that the court erred in failing to note that the appellant was not furnished with the

prosecution witness statements, and could not, therefore, take advantage of Section 165 of the *Evidence Act*.

4. The appellant filed written submissions in which he argued that penetration was not proved as there was no evidence of any injuries and the doctor could not tell when penetration occurred, if at all. He also contended that the age of the complainant was not proved; and that although it was alleged that the hymen was absent, this could not necessarily establish penetration. He maintained that his alibi defence was not considered, and that the court did not exercise discretion in imposing the minimum sentence, because it did not take into account his mitigation including his age which was then 65 years and currently 71 years.

5. The appellant further submitted that the minimum mandatory sentence provisions provided under the *Sexual Offences Act* No. 3 of 2006, are unjust and unfair, as they fetter the discretion of Judges and Magistrates in sentencing. In this regard, he relied on Yawa Nyale -vs- Republic [2018] eKLR. He urged the Court to quash his conviction and set aside the sentence that was imposed upon him.

6. The respondent filed written submissions through Grace Gacau, a prosecuting counsel in the office of the Director of Public Prosecutions. The respondent submitted that the key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration, and proof that the appellant was the perpetrator of the defilement.

7. As regards age, the respondent cited Richard Wahome Chege v Republic, Criminal Appeal No. 61 of 2014, contending that the complainant's mother, who testified as PW4, was clear on the age of the complainant, and produced a birth certificate which clearly established that her age was 12 years.

8. On proof of penetration, the respondents cited Mark Oiruri Mose v Republic [2013] eKLR, for the proposition that:

> " So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"

9. The respondent also relied on Erick Onyango Ondeng' vs Republic [2014] eKLR, where it was stated that in sexual offences, the slightest penetration of a female organ by a male sex organ is sufficient to constitute the offence, and it is not necessary that the hymen be raptured. The respondent argued that the findings indicated on the P3 form and the PRC form, confirmed that there was proof of penetration. In addition, the clinical officer who testified as PW3 stated that the minor's labia minora and the vagina were inflamed and tender, which was consistent with penetration.

10. On the issue of identification, the respondent submitted that the appellant was not a stranger to the complainant, and that he actually accosted and defiled the complainant on three other occasions. She was therefore able to properly and accurately identify him to the investigating officer.

11. On the issue of a defective charge sheet, the respondent cited this Court's decision in Peter Ngure Mwangi v Republic [2014] eKLR, and submitted that though the appellant was charged under Section 8(1)(3) of the *Sexual Offences Act*, the charge sheet clearly spelt out the correct section creating the offence of defilement, which is 8(1), and that the particulars of the offence which included the date of the offence, the place of the offence, the act constituting the offence, the name and age of the victim, were all included in the charge sheet. It was submitted that the mistake on the charge sheet regarding the section under which the offence was committed, was a typographical error which did not materially affect the proceedings in the trial court, as the charge sheet clearly cited the section creating the offence, and the offence exists in the law.

12. The respondent, relying on Moses Nato Raphael v Republic [2015] eKLR, submitted that in that decision, the Court of Appeal drew a distinction between proof of age for purposes of establishing the offence of defilement, and age for purposes of sentencing. The respondent urged that the error on the charge sheet was innocuous and curable under Section 382 of the Criminal Procedure Code, and that in any case no prejudice was caused to the appellant as he clearly understood the charge facing him, and the ingredients of the charge, and was, therefore, able to model his defence accordingly.

13. As regards the appellant's defence of alibi, the respondent submitted that the appellant never gave an account of his whereabouts on the material dates of the offence being 17th February, 2015, to 19th February, 2015, either through his own testimony or that of his witnesses. The defence raised was, therefore, an afterthought and did not constitute an alibi.

14. Finally, the respondent submitted that the appellant was sentenced to 20 years, and the victim having been 12 years old, the sentence imposed on the appellant was within the law and was properly upheld by the 1st appellate court. The Court was, therefore, urged to uphold the appellant's conviction and sentence, and dismiss the appeal in its entirety.

15. We have carefully considered the appeal, the submissions made by the parties and the law. We also bear in mind that this is a second appeal which under Section 361(1) of the Criminal Procedure Code is limited to considering matters of law only. We take note that we have not had the advantage of seeing the witnesses testify and therefore as stated in Stephen Muriungi and another v Republic [1982-88] 1 KAR 360, we must defer to the findings of the trial court on facts and only interfere when it is clear that the trial court misapprehended the facts or arrived at a conclusion that was clearly wrong.

16. During the plenary hearing of the appeal, the appellant initially insisted that he was appealing against both conviction and sentence and relied on his written submissions which we have already referred to above. At the end of his submissions, the appellant pleaded that his sentence be reduced because he was unwell, he is anemic and has had to have blood transfusion twice. He then indicated that he wished to withdraw his appeal against conviction. This would imply that he is only appealing the sentence. However, since the appellant had essentially argued his appeal against conviction, it is appropriate that we address the same.

17. The ingredients of the offence of defilement under Section 8(1) of the *Sexual Offences Act* are clear and were well set out by the respondents in their submissions. These are: proof of the age of the complainant, proof of penetration, and proof that the appellant was the perpetrator of the offence.

18. From the concurrent findings that were made by the two courts below, there was clear evidence that the appellant, who was properly identified by the child, accosted the child in a maize plantation, tripped her and upon her falling on the ground, proceeded to remove her panties and inserted his penis into her vagina, having removed his trousers. The child screamed and her creams attracted her father who, on rushing to the scene, saw the appellant still in the process of defiling the child. Apart from the child's evidence and that of her father, the penetration was confirmed by medical evidence, the clinical officer who examined the child concluding that there was evidence of sexual activity as the child's labia and vaginal walls were inflamed and tender, and that there was a whitish substance from the vaginal area. Thus, there was overwhelming evidence implicating the appellant as the perpetrator of the offence. The complainant's age was also established through production of a birth certificate.

19. The only substantive issue in regard to the appellant's conviction was the alleged defective charge sheet, the charge sheet having indicated that the appellant was charged with "Defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*." This was a defect as the relevant section ought to have been section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The question is whether this is a fatal defect

and whether any prejudice was caused to the appellant. In our view, the defect is not a fatal defect but a simple typographical error that is curable under Section 382 of the Criminal Procedure Code.

20. The appellant was not in any way prejudiced by this defect, as the particulars of the charge were very clear, and the appellant was in a position to understand the charge facing him. Indeed, he responded to the charge facing him as defilement involving a child of 12 years and therefore falling under Section 8(1) as read with Section 8(3) of the *Sexual Offences act*. We find that nothing turns on the alleged defect as the same was not prejudicial to the appellant and is curable under Section 382 of the Criminal Procedure Code.

21. As regards the appellant's complaint regarding violation of his constitutional rights, we have on our part examined the proceedings in the trial court, and do note that on 27th July, 2015, when the appellant was first taken to Court, the substance of the charge was explained to him and he pleaded not guilty and an order was made for him to be released on bond with surety, and for witness statements to be availed to him.

22. Thereafter, the matter came before the trial court for mention several times, and the appellant did not complain about not being furnished with the witness statements. On 17th September, 2015, when the hearing proceeded the appellant indicated he was ready to proceed and indeed, the hearing proceeded. No issue arose before the trial magistrate, regarding failure to furnish the appellant with witness statements.

23. Of interest, however, is the fact that on 22nd January, 2016, long after the hearing had commenced, the appellant is recorded as having appeared before S.N. Abuya, PM where he asked for statements. He did not clarify which statements he wanted, but the court made an order for the prosecution to supply him with copies of the said documents. On 5th February, 2016, he again appeared before S.N. Abuya, PM, and made the same request and again an order is recorded that he should be given copies of the said statements before the hearing date. On 11th February, 2016, hearing proceeded before the trial court (C.N. Oruo, RM) and the last prosecution witness testified, where upon the court ruled that the appellant had a case to answer. The appellant indicated that he would give unsworn evidence and that he had three witnesses to call. The Court then ordered that the defence hearing would proceed on 23rd March, 2016.

24. Thereafter, the appellant appeared before the trial court on 9th March, 2016 for mention, and he did not raise any complaint. but on 18th March, 2016, he appeared for mention before S.N. Abuya, PM and he is indicated as asking for witness statements and S.N. Abuya, PM making an order for the prosecution to supply him with the said documents. Thereafter, on 23rd March, 2016, he appeared before the trial court where he proceeded to give his unsworn statement, called one witness in his defence and closed his case. Again he made not complaint before the trial magistrate nor did he request for any statements before his defence hearing.

25. We do not understand why the appellant never complained before the trial magistrate about not having been given statements, either before the trial started or during the trial. The order for him to be supplied with the statement was made when he first appeared before the trial magistrate for plea, and if the order was not complied with the trial magistrate was the most appropriate person to whom he should have complained. The appellant appeared to have been comfortable in proceeding with the case, and he cross-examined the prosecution witnesses and even proceeded with his defence without difficulty. The only conclusion we can draw from the appellant's failure to complain about the statements before the trial magistrate, is the possibility that he had actually received the statements. The applications for statements before a magistrate other than the trial magistrate even after the prosecution witnesses had given evidence, was not a genuine request. We, therefore, find no substance in this ground.

26. On sentence, the appellant pleaded with us to reduce his 20 years' term of imprisonment. Under Section 8(3) of the *Sexual Offences Act*, the minimum sentence provided where a victim is aged between "twelve and fifteen years", is twenty years' imprisonment. The circumstances of the offence leading to the appellant's conviction were serious, given the young age of the child and the manner in which the offence was committed. The sentence of 20 years' imprisonment was no doubt deserved.

27. The appellant now pleads that we reconsider the sentence as his circumstances have now changed: He is ailing and is a very old man; He has been in prison since 15th April, 2016, when he was convicted, and has therefore already served over eight years of the 20 years' imprisonment sentence that was imposed upon him. His age is currently 71 years and his ill health, is certainly a matter of concern, and we do sympathize.

28. Much as we wish we could tamper justice with mercy, we are constrained by our jurisdiction as provided under section 361(1)(a) of the Criminal Procedure Code, which circumscribes our jurisdiction on second appeal to matters of law only, severity of sentence being excluded as a matter of fact. Secondly, the Supreme Court has reiterated, in its recent decision in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023*) [2024] KESC 34 (KLR), that until the issue of the constitutionality of minimum sentences under the *Sexual Offences Act* is addressed by the High Court as a constitutional issue, and escalated to the Court of Appeal and the Supreme Court for a conclusive determination, the minimum sentence under section 8(3) of the *Sexual Offences Act* remains lawful and binding on the Court.

29. For the above reasons the appellant's appeal fails. Both the conviction and sentence are affirmed. We direct that under section 333(2) of the Criminal Procedure Code, the sentence of 20 years' imprisonment shall run from July 22, 2015 when the appellant was arrested and remanded in custody.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR