Ogutu v Republic (Criminal Appeal 43 of 2019)
[2024] KECA 1659 (KLR) (15 November 2024) (Judgment)

Neutral citation: [2024] KECA 1659 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 43 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 15, 2024

BETWEEN

GEORGE OKOTH OGUTU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Homa Bay (J. R. Karanjah, J.) dated 28th February 2019 in HCCRC No. 22 of 2016)

JUDGMENT

1. George Okoth Ogutu, the appellant, was charged in the Principal Magistrate's Court at Magunga with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 9th October 2016 at [particulars withhled] within Homa Bay County he defiled LAM[1] a child aged 10 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *sexual offences act*, particulars of which are that he touched the sexual organ of the child with his male sexual organ.

2. The appellant denied the charges, whereupon the prosecution called a total of four (4) witnesses in support of its case; and upon close of the prosecution case, the appellant gave an un-sworn testimony in his defence, and called one defence witness.

3. Upon consideration of the evidence on record, the trial court, in a judgment delivered on 5th June 2018, found the evidence did not prove the main charge of defilement but adequately proved the offence of indecent act with a child. The appellant was, thus, convicted and sentenced to 10 years imprisonment on the alternative charge.

[1] Initials used to protect the identity

4. The appellant, being aggrieved with the finding of the trial court, appealed to the High Court on five grounds of appeal that:

> the trial court failed to appreciate the evidence presented;
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> the prosecution did not discharge its burden of proof; evidence of the appellant was disregarded;
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> there were inconsistencies in the evidence of the prosecution; and that the appellant proved his innocence.

5. The case before the trial court; and which was subsequently subjected to a fresh evaluation and analysis was as follows: on 9th October 2016, at around 6.00pm, LAM(PW1) had visited her grandmother at [Particulars Withheld], and was on her way to collect books from the house, when she met the appellant who was grazing goats. He was alone; she knew him as they attended the Maranatha church together. According to the witness, it was not very dark yet, so she was able to see him clearly. The appellant called to her and forced her to lie down, and when she screamed, he strangled her to stifle any sound. He then undressed her, removed his trousers, and inserted his penis in her vagina, she felt pain. At that moment her mother called her; and the appellant disengaged and ran away.

6. PW1 immediately informed her mother what had transpired and was taken to hospital; however, they were not attended. The following day she was taken to Sindo hospital where she was examined and a P3 form filled out. PW1's mother, FAO (PW2), informed the trial court that on 9th October, 2016 while at Chidendi beach she sent PW1 to get books from her grandmother's house. When PW1 took long to get back, PW2 decided to call her out as she proceeded home; she met PWl at Ngeri crying and learnt that the appellant had defiled her.

7. Although PW1 was immediately escorted to hospital she was not attended to as it was late. The next day, PW1 was taken to Sindo hospital where Omwoyo Chajima, PW3, the Clinical Officer examined her and found that the external genitalia was normal and the hymen was intact; there was no bleeding, and he ruled out partial penetration, saying that could have led to a broken hymen.

8. The investigating officer, PC Vane Kerubo (PW4) confirmed receiving a report from PW1 and her mother about the incident. She produced a Health card showing that the complainant was born on 25th April 2005, hence the minor was 11 years. The accused, in his defence, denied the offence and informed the court that he does not herd goats, although he owns some but he sells fish. He informed the court that on 10th October 2016, he was arrested by NO and EO when he was selling fish; then escorted to the police station. His defence witness, MO (DW2), described the appellant as his fellow fisherman, who was in his company on 10th October 2016 fishing, and using the same boat from morning until 10.00pm; so, he was totally amazed at the allegations.

9. The trial court, upon considering the prosecution evidence as well as the defence, found that the appellant and his witness tendered conflicting evidence; and was satisfied that PW1 was truthful about meeting the appellant on 9th October 2016; that the evidence did not establish penetration, a vital ingredient for the offence of defilement, and the pain she alluded to was the weight of the appellant exerting pressure on her, but the evidence nonetheless proved that:

> " The accused had initiated his actions when PW2 who is the mother of the complainant called PW1 out. That would explain why there was no penetration. However, the accused undressed and tried to insert the penis to the vagina."

Thus, proving the alternative charge of an indecent act and attracting a sentence of 10 years imprisonment.

10. The learned judge in his judgment noted that the credibility of the complainant was not in doubt; and it seemed that the charge of defilement was not upheld by the trial court because it was not corroborated by the clinical officer's (PW3) medical evidence, yet if she was truthful, her testimony did not require corroboration by dint of section 124 of the *Evidence Act*.

11. The learned judge held that penetration does not have to be full for purposes of establishing defilement, and even slight penetration was good enough to prove defilement; and that the complainant's evidence pointed towards that direction even without corroborative medical evidence; that upon the complaint confirming on cross examination that she was defiled, and that she felt pain when the appellant inserted his penis into her vagina, there was no way that pain could be attributed to the appellants weight on her; and that this infact established the offence of defilement rather than an indecent act.

12. The learned judge also noted that PW1's evidence was propped up by the fact that she told her mother PW2, immediately after the offence and mentioned the appellant, previously known to her, as the offender. PW2, the complainant's mother found her crying and took her to a nearby hospital where the complainant could not be examined immediately as it was nighttime, and the court concluded that this delay is what caused the generation of a negative medical report by PW3. The court also held that an intact hymen did not disprove defilement but implied that the degree was not high deep enough to break the hymen; and that the child's age, placed at 11 years at the time of the offence was never disputed. It is on this basis that the High Court found that the material ingredients of the offence of defilement were fully established on the basis of the complainant's credible evidence.

13. As to who was the perpetrator, the learned judge held that the appellant's identification as the offender was also credibly established, as the appellant was well known to the minor, effectively doing away with any arguments he may have introduced. Consequently, the court set aside the conviction on the alternative charge and substituted the same for a conviction on the offence of defilement, and also substituted sentence for life imprisonment.

14. Being aggrieved by the outcome in the High Court, the appellant proffered this appeal before us, urging that the conviction be quashed, sentence be set aside, and he be set at liberty on amended grounds that: the learned judge erred in law by quashing the conviction and setting aside the sentence of 10 years imprisonment awarded by the trial court in case of committing indecent act with a child as there was no cross appeal led by the State, nor was the appellant served with a notice of enhancement of sentence; and he was not given time to respond; that the major ingredient of the offence of defilement, namely penetration was not proved in evidence; the learned judge is faulted as misapplying legal principles, and he could not rely on the provisions of section 124 of the *Evidence Act*, as he did not have the opportunity to see the witness testify; and no opportunity to note why it thought the witness was telling the truth.

15. This being a second appeal, the Court is restricted under section 362(1)(a) of the *Penal Code* to considering matters of law only. The confines of the Court's jurisdiction was aptly set out by this Court in *Karingo v. R* [1982] KLR 213 that:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari C/O Karanja v. R* (1956) 17 EACA 146)".

16. The appellant's memorandum of appeal has 3 grounds challenging both conviction and sentence.

17. On ground 1 the appellant basically submits that the court erred in enhancing the sentence without a cross appeal and/or warning the appellant that the sentence may be enhanced. In support of this limb, the appellant refers to the case of *J.O.A v. Republic* Criminal Appeal No. 25 of 2011 and *Charles Muriuki Mwangi v. Republic* Criminal Appeal No. 24 of 2014, which held that in the absence of a cross appeal, it was necessary for the court to warn the appellant that sentence was likely, to be enhanced and having failed to do so, the appeal against sentence was allowed.

18. The State concedes this ground on account of the fact that no cross appeal was filed, nor was the appellant warned of the possibility of the sentence being enhanced. In this regard we are referred to the case of *MGK v Republic* [2020] eKLR where this Court rendered itself thus:

> "(16) As regards the sentence, under section 362(1) of the *Criminal Procedure Code*, severity of sentence is a matter of fact, therefore not a legal issue open for consideration by this Court on second appeal. However, the appellant is not just complaining about the severity of sentence but he is complaining about the legality of the enhancement of the sentence by the first appellate court, and this is a matter open for our consideration".

This Court in *J.J.W. v. Republic* [2013] eKLR held: as follows on enhancement of a sentence by the High Court;

> "It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of sentence that is provided for under Section 354 (3) (i) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in doing so may have serious effects on the appellant because of such a situation. It is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information, is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if, the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

19. While acknowledging that in an appeal against sentence, the court has power to sustain, or increase, or reduce the sentence, or alter the nature of the sentence (section 354(3)(b) of the *Criminal Procedure Code*), learned counsel for the State, concedes that this can only be done, once an appellant has been warned of such intention, and the likely outcome.

20. The test, however, is that the High Court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors or taken into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle. See *Shadrack Kipkoech Kogo v. R.*, Eldoret Criminal Appeal No.253 of 2003, the Court of Appeal, and *Wilson Waitegei v. Republic* [2021] eKLR).

The situation in this case is on all fours with the decisions cited as regards enhancement of sentence.

21. It is admitted that the State did not file any cross appeal nor did the State serve notice of enhancement on the appellant nor was a warning offered to the appellant that his sentence may be enhanced.

22. In the instant case, the trial court having exercised its discretion in sentencing the appellant 10 ten years, provided by statute and based on the evidence the alternative charge of an indecent act was proved, it was not open to the learned judge to review the sentence upwards. It will be noted that the medical report did not corroborate penetration but the complainant's testimony was credible that the appellant lay on top of her and fled before he finished on hearing the complainant's mother call out for her.

23. In *Joseph Muerithi Kanyita v. Republic* [2017] eKLR this Court stated:

> " In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant."

24. With the greatest of respect, we echo the sentiments expressed in the afore-cited decision; and find that the first appellate Court erred in enhancing the sentence without observing the procedural preliminaries alluded to. The upshot of the above is that the conviction by the trial court on the alternative charge was safe and we thus quash the conviction by the High Court which substituted the charge to defilement and revert to the earlier conviction as was found by the trial court; consequently, we set aside the sentence of life imprisonment imposed by the first appellate court and re-instate the original sentence of 10 years imprisonment that was imposed by the trial court.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF NOVEMBER, 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

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