



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Olembo v Republic (Criminal Appeal 69 of 2020)
[2023] KECA 334 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 69 OF 2020
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA
MARCH 17, 2023**

BETWEEN

HABIL ACHONGO OLEMBO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya (Hon. L. Kimaru J) dated 5th May, 2016) in Nairobi HCCRA No 110 of 2011)

JUDGMENT

1. The appellant was charged with defilement contrary to section 8 (1) as read with section 8(3) of the Sexual Offences Act. The particulars were that on September 15, 2007 at Huruma estate in Nairobi, the appellant intentionally and unlawfully committed an act which caused penetration of his male genital organ (penis) into the female genital organ (vagina) of MLS a child aged 12 years. He also faced an alternative charge of indecent act with a child contrary to section 11 (1) of the Sexual Offences Act. It was alleged that on the same day and place, he intentionally and unlawfully committed an indecent act with MLS, a child aged 12 years by touching the genital organ (vagina) of MLS with his genital organ (penis).
2. The appellant denied the charges, was tried, found guilty and upon conviction, was sentenced to 20 years' imprisonment on main count.
3. Aggrieved by the conviction and sentence, the appellant preferred a first appeal against both conviction and sentence in the High Court at Nairobi. The same was heard by Kimaru J (as he then was) who by a judgment delivered on May 5, 2016 dismissed it in its entirety.
4. During the trial the prosecution called a total of 8 witnesses. Hereinafter is a summary of their evidence. PW1, the complainant, was a class 7 pupil. On September 15, 2007 at 1.00pm she was from tuition when she met the appellant who told her to pick something from his house and deliver it to her mother.



She knew the appellant as he was a neighbour. On arrival he locked the door, and sexually assaulted her. When done, he warned her not to disclose to anybody what had transpired. Later, she told her friend MA, PW2 what had happened, who advised her to tell their teacher. The teacher subsequently called her mother, PW3, JSM, who came to school and took her to hospital and Huruma Police Station. PW2 was a classmate of PW1 and were friends. She confirmed the evidence of PW1 in material particulars. She also recalled seeing the appellant call PW1 into his house. PW3, JSM, PW1's mother received a call from PW4, LKN, a teacher in PW1's school who told her that PW1 had been sexually assaulted. They reported the matter to Huruma police station and were referred to Nairobi Women Hospital for medical examination and treatment.

5. PW4 was approached by PW2 and told that PW1 had been sexually assaulted.

She called PW3, who came and PW1 reiterated the story to her. They reported the incident to the police station which was received by PW5, PC Michael Mutwiri. Accompanied by PW3, he together with PW8, PC Florence Thurania went to the appellant's house and arrested him, having been pointed out to them by PW1. PW6, Dr Ketra Muhombe, from Nairobi Women Hospital examined PW1 and noted that she had an old tear of the hymen and no spermatozoa was found. Nonetheless, she concluded that PW1 had been defiled. PW7, Zephania Kamau a police surgeon also examined PW1 for purposes of filling the P3 form who opined that there was no penetration as the hymen was intact. PW8, the investigating officer received a report from PW3 of defilement and reiterated the evidence of PW5.

6. Placed on his defence the appellant admitted to knowing PW1 as her father was his cousin. He denied committing the offence and claimed that he was framed with the case by PW3 following a misunderstanding due to her household goods that were destroyed when her house was demolished by the Government.
7. Being dissatisfied with the judgment of the High Court on first appeal, the appellant has now preferred this second and perhaps last appeal on 10 grounds but which we have subsumed into 7, being: *voire dire* was never conducted; case was not proved beyond reasonable doubt; material contradictions and inconsistencies in the prosecution case; plausible defence disregarded; violation of constitutional rights by not being presented to court within constitutional timelines upon arrest; minimum mandatory sentence was not considered; and, relying on the evidence of a single witness.
8. The appeal was canvassed by way of written submissions. On the first issue, it was submitted that the evidence adduced by PW1 was not sufficient to warrant the conviction of the appellant and hence the need for corroboration of the said evidence. That the testimonies of the other witnesses did not link the offence to the appellant and their evidence was in any event hearsay. That there was no ascertainment of penetration. PW6 who examined PW1 pointed out that she conducted vaginal examination and noted an old tear but the hymen was intact. PW7 examination on the other hand, found that there was no penetration, therefore her external genitalia were normal. Thus, the findings of the court based on the evidence of PW1, PW2, PW3, PW4, PW6 and PW8 was erroneous and should not have been the basis for the conviction of the appellant.
9. On the second issue, the appellant submitted that the prosecution did not satisfy the legal requirement for the reception of circumstantial evidence to justify the conviction. That when it comes to circumstantial evidence, the evidence must link the appellant to the commission of the offence without leaving or suggesting any other conclusions, without which circumstantial evidence loses its probative value as was held in the case of *Sawe v Republic* [2003] KLR 364. That the evidence of PW6 and PW7 contradicted each other and the contradictions should have been resolved in favour of the appellant.
10. Coming to the third ground, the appellant submitted that in all criminal cases, the prosecution bears the burden of proving the accused person's guilt. It is a burden the prosecution must discharge in



relation to each and every ingredient of the particular offence charged and, in this case the threshold was not met. That PW6 who examined PW1, pointed out that she conducted vaginal examination after ten (10) days of the commission of the offence and there was an old tear. That it was clear that both the first appellate court and the trial court erred in law by failing to evaluate the veracity and importance of this piece of evidence. That the first appellate court erred in law by appreciating that the prosecution proved its case beyond reasonable doubt, when the crucial evidence of PW6 and PW7 did not connect the appellant to the alleged offence.

11. The appellant relied on the case of *Kaingu Elias Kasomo v Republic* Criminal Appeal No 504 of 2010 for the proposition that age of the victim of sexual assault under the *Sexual Offences Act* is a critical component which must be proved. That the prosecution failed to produce documentary evidence such as the age assessment certificate and or birth certificate of PW1 to prove her age.
12. Turning to the fourth ground, it was submitted that the appellant's constitutional rights were infringed by the delay of not arraigning him in court within 24 hours of his arrest which undoubtedly violated his fundamental rights as guaranteed by Article 49 f(i) and (ii) as read with Article 50 (2)(e) of the *Constitution* which was sufficient to entitle the appellant to an acquittal.
13. Lastly, on sentence, the appellant submitted that the sentencing policy guidelines were totally ignored during the sentencing. That he was arrested on September 28, 2007 and convicted on April 4, 2011 having spent 3 years and 5 months in remand custody which period was not considered. Reliance was placed on the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR
14. The respondent on the other hand submitted that the appellant was properly identified as the perpetrator of the offence and was well known to PW1 as a neighbour and that the offence was committed in broad daylight. Thus, mistaken identity is a no go zone. That there was evidence of penetration as per the medical evidence adduced by PW6. The two courts below considered the appellant's defence and found it not plausible. A P3 form was produced by PW6 which confirmed the age of PW1 and in any event, at no time, neither in the trial court nor in the High Court, was the issue of the age of PW1 ever raised. That the prosecution proved its case beyond reasonable doubt and, therefore, both the conviction and sentence were proper. There was no shifting of the burden of proof to the appellant. If there was delay in presenting the appellant to court upon arrest, that alone cannot be the basis to impugn the judgments of the two courts below as his remedy lies in a civil suit for damages. Lastly, on sentence, it was submitted that the sentence imposed was justified and legal and this court should not interfere.
15. As this is a second appeal, our jurisdiction is confined to consideration of matters of law only by dint of section 361(a) of the *Criminal Procedure Code* and that we should also not interfere with concurrent findings of facts by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Karingo v Republic* [1982] KLR 213.
16. Cognizant of the above principles and having read the record and in consideration of the rival arguments, we discern the issues of law falling for our determination are as to whether: the ingredients of the offence were proved; plausible defence was disregarded; constitutional rights of the appellant were violated and whether the sentence imposed was justified in the circumstances.
17. On the first issue, the appellant submitted in particular that penetration as a key ingredient of the offence of defilement was not proved as required by law. That there were two conflicting medical reports; one confirming penetration and the other disputing the fact, which contradiction should



have been resolved in favour of the appellant. The first appellate court after re-analyzing the evidence adduced before the trial court made similar findings as the trial court and pronounced itself as follows:

“As regards whether the prosecution proved penetration, the prosecution relied on the evidence of the complainant who testified that the appellant defiled her on September 15, 2007. The prosecution’s case is that the evidence of the complainant is corroborated by that of medical evidence produced by PW6 who examined the complainant on September 25, 2007. PW6 noted that the complainant had old hymenal tears. This court therefore finds that the prosecution proved the second ingredient of penetration to the required standard of proof beyond any reasonable doubt. This court finds the subsequent medical report prepared by Dr Zephania Kamau to be unreliable as it was made three weeks after the event.

18. Given these concurrent findings of two courts below, we have not been given any reasons or justification why we should depart from them. PW1 informed PW2 what had happened to her immediately after the incident. PW2 too confirmed actually, seeing the appellant call PW1 into his house. The reasoning of the trial court and the first appellate court on the doubts raised by PW6, whether or not there was penetration cannot be faulted. We think that both courts were justified in believing the evidence of PW6. This evidence was corroborative of the evidence of PW1 contrary to the submissions of the appellant. Neither was the evidence tendered hearsay as the evidence of PW1 was direct. The age of PW1 was proved through the medical evidence tendered in court. The two courts equally made a concurrent findings that the age could be proved through other means not necessarily by way of a birth certificate. We agree with the concurrent finding of the two courts below which conclusion is bolstered by the holding in the case of *Francis Omuroni v Uganda*, Criminal Appeal No 2 of 2000, where the Court stated as follows:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim’s parents or guardian and by observation and common sense.”

19. As to the identity of the appellant, PW1 knew him very well, being neighbours and relatives. In fact, this caused PW1 naively to believe that indeed the appellant wanted to send her to her mother and innocently followed him to his house. This was in broad daylight and the possibility of mistaken identity is remote. Both courts below were satisfied that PW1 was a truthful witness, a finding that we cannot easily impugn. The appellant did not on his part deny knowing PW1. PW2 too confirmed seeing PW1 enter the appellant’s house with the appellant. His defence that he had last seen PW1 way back in 2005 was not plausible given the evidence on record. There was no basis upon which the two courts below would have concluded that both PW1 and PW2 would have falsely testified against the appellant. We therefore find no reason to differ from the concurrent findings of the two courts below on the identification of the perpetrator.
20. On the issue that his defence was disregarded, we find this to be untrue as the trial court in the judgment stated:

“.....I discredit his evidence as mere denial. His defence that he was arrested because he had failed to compensate the complainant kshs 30,000/- has no basis. It is his defence that he was adamant to settle with the complainant since he was not the one who evicted him. The accused was arrested on September 28, 2008 based on the report that was made on September 25, 2008 by the complainant who was accompanied by her father. There was no other evidence that was tendered to the effect that he was arrested for any other offence other



than the one before court. His defence that he had not seen the complainant since the year 2005 and only saw her at Dr Kamaus office during examination does not hold any water as PW2 Maureen confirmed that she saw the accused calling the complainant on the material day. All in all I find that his defence is not credible.”

On its part, the High Court stated:

“.....The complainant knew the appellant as she had seen him on several occasions. In his defence, the appellant claimed that he had been framed with the offence by PW3 following his refusal to compensate him for his lost household goods. From a careful examination of the surrounding circumstances of the case, this court is satisfied that the complainant was truthful in her evidence.”

21. From the aforesaid, the two courts which were concurrent in their findings, the appellant cannot be vindicated on the ground that his defence was not considered.
22. The appellant equally raised the issue of his constitutional rights being violated. That he had been detained in police custody for over twenty-four hours before being arraigned in court. Indeed, he was held in police custody for thirty days, which was an infringement of his fundamental rights under the old Constitution. The record shows that this issue was not ventilated in the two courts below. It is being raised for the first time in this Court. We doubt whether we have jurisdiction to entertain it.
23. That said in *Mwalimu v Republic* [2008] KLR 111, this court when considering the application of the provisions of sections 72(3) and 84 of the previous constitution on an issue similar to the present one, stated as follows:

“Section 84(1) of the Constitution suggested that there had to be an allegation of breach before the court could be called upon to make a determination of the issue and the allegation had to be raised within the earliest opportunity.”

Further, this court has now held that even where there is a violation of an accused person’s constitutional rights, the remedy available to such an accused person is not an acquittal but a claim for compensation in a civil suit. See *Julius Kamau Mbugua v Republic* Criminal Appeal No 50 of 2008.

24. On sentence, the appellant entreated this court that he had learnt skills while in prison and that he was now a reformed man. The appellant urged the court, at least to allow the appeal against sentence and reduce it to the term already served and allow him to go home. In the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR this court stated as follows:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

25. From the foregoing, we are satisfied that the trial court took into consideration all the facts of the case as well as the mitigation from the appellant. The two courts were of the view that given the circumstances under which the offence was committed, the sentence imposed was justified, leave alone legal.



26. Accordingly, the appeal is devoid of merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

