Odiyo v Republic (Criminal Appeal 72 of 2021)
[2023] KECA 669 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 669 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 72 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JUNE 9, 2023

BETWEEN

PETER OTIENO ODIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 25th May, 2017 in HC. CR. A No. 121 of 2016)

JUDGMENT

1. The appellant, Peter Otieno Odiyo was charged before Makadara Law Courts, Nairobi, on a count of defilement, contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006. The particulars were that, on diverse dates between 22nd and November 30, 2014 at [Particulars Withheld] within Nairobi County, the appellant intentionally caused his penis to penetrate the vagina of CAO, (PW1) a child aged 12 years. The alternative charge was committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, No 3 of 2006.

2. Before we consider the appellant's grounds of appeal, we note that by dint of the provisions of section 361 of the *Criminal Procedure Code*, the Court must be confined to issues of law only as set out in *Karani v Republic* [2010] 1 KLR 73, where the role of the second appellate court was succinctly set out and 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."

3. We thus find it imperative in summary form, to restate the prosecution case before the trial court as well as the appellant's defense.

4. The facts giving rise to the instant appeal are that on diverse dates between 22nd and November 30, 2014 at Dandora estate within Nairobi County, the appellant intentionally caused his penis to penetrate the vagina of CAO, a child aged 12 years.

5. PW1, CAO, the complainant testified that: she was 13 years old and lived with her uncle; that she knew the appellant as he had asked her to be his girlfriend sometime in the year 2014; that she told him that she was in class 6 and the appellant told her that he wanted her to be his girlfriend; that her younger cousins reported her to the uncle who scolded her; that while going to school, she saw some children carrying an envelope which they opened and found a note saying that the appellant was spoiling her; that her uncle warned her and wanted to beat her and she told her uncle it was not true; that she then went to the appellant and told him that her uncle wanted to beat her; that the appellant told her to go back as he did not want to be arrested; that the appellant's brother came and gave her some money; that the appellant took her to his cousin's house in [Particulars Withheld] where they spent the night in the house; that she had sex with the appellant that night and in the morning, the appellant left for work; that the appellant's cousin had gone and spent the night in a neighbour's house; that she stayed in the house for 4 days and had sex for that time; that after 4 days the appellant's brother came and took her to another house in [Particulars Withheld]; that the appellant looked for a house of his own and said that he would take her to his rural home; that she lived with him for one week and they had sex; that one morning, the appellant said he was going to Narok and left and afterwards, the appellant's brother came and took her to the police station where she found the appellant and that she was taken to hospital for examination.

6. PW2, C, stated that he lived in [Particulars Withheld] and worked at [[Particulars Withheld]] as a panel beater and sprayer; that he was the complainant's uncle; that the complainant would be turning 14 years later that year; that his brother, the complainant's father, one E was deceased, and he had been PW1's guardian since she was 3 years old; that PW1's baptism card indicated that he was her father; that on January 22, 2014 he went to work as usual and returned home at about 7.30 pm and found PW1 cooking outside his house; that he entered the house and his children told him that PW1 had gone to talk to a man at [Particulars Withheld] Bar which was right opposite his residence.

7. He further testified that PW1 returned after 30 minutes and saw him standing at the door holding a cane; that when she saw him, she ran away; that he had previously warned PW1 about talking to men, especially the appellant; that PW1 did not come back that night and on the next day, the appellant's brother came to see him and told him that he would call the appellant, whom he supposed was with PW1; that he called the appellant who denied being with PW1; that 4 weeks passed and he reported the matter to the police; that his nephew and another young man managed to trace the appellant who was arrested; that PW1 was traced, one month after she disappeared and taken to hospital ;and that the appellant was then charged.

8. PW3 Irene Gori Nyagwachi, a clinician at Medecines Sans Frontiers (MSF) stated that she had worked for MSF for 4 years under the Gender Based Violence programme; that on December 2, 2014, PW1 was seen over an alleged sexual assault by a known male and that the findings were as follows:- the girl was of an apparent age of 12 years; no physical injuries were visible; the outer genitalia was normal; a whitish discharge was noted; the hymen had old tears; the anal examination was normal; a high vagina swab and other tests were done; no spermatozoa were seen; pregnancy test was negative; urinalysis did

not reveal any spermatozoa; PW1 was given emergency pregnancy pill, antibiotics, and post-exposure prophylaxis to prevent HIV infections.

9. PW 4, Doctor Kizzie Shako, a medical officer based at the police surgery in Nairobi testified that on December 4, 2014, he examined a girl who was allegedly defiled; that on examination PW1 was a girl aged about 14 years; that the hymen had old tears and no other injuries were noted; PW1 had a foul-smelling discharge and in his opinion, the complainant had been induced into sexual activity.

10. PW5 PC Benard Ochola, the investigation officer testified that PW2 used his own means to trace the appellant and alerted the police; that PW2 called him and he sent officers to go and arrest the appellant; the appellant was then taken to the station; the appellant denied seeing PW1; that the appellant directed his cousin to where he would find PW1 and that the police tricked him that the appellant would be released once they found PW1.

11. On his part, the appellant upon being put on his defence, gave sworn evidence and did not call any witnesses. He denied committing the offences and testified that he resided in Dandora and was a vibrator operator; that he knew PW1 through a colleague and PW1's father was to connect him to someone who would teach him panel beating; that on November 29, 2014 he met PW1 at 8.00 pm and she told him that her father had chased her away and she needed a place to stay; that he called Ouma, the person through whom he had met PW1 and her father; that Ouma said he was far away and told the appellant to assist her; that he told PW1 to go back home, but she refused; that he was living with Joshua Oketch, a crane operator; that he took PW1 to his house and told Joshua what was going on; that he helped PW1 as a good Samaritan; that at 10.00 pm Ouma called him and said that he had some work for him and they agreed to meet early in the morning; that he said he would talk to PW1's father and tell him to let her stay in the house; that the following morning, he met Ouma and instead of taking him to work, he was arrested. He denied defiling PW1 and stated that PW1 was taken to the hospital and after that, was coached or coerced to incriminate him and that she was threatened with incarceration hence she agreed to fix him.

12. The trial magistrate found the ingredients of the offence of defilement to have been established and opined that the appellant was not a good Samaritan as alleged; that if indeed, he was, he should have called PW1's guardian, whom he knew very well. Instead, he stayed with her for several weeks and even moved her to another house yet the girl, being a child, was incapable of giving consent to a sexual act. The trial magistrate found the charge to have been proved beyond reasonable doubt and convicted the appellant, as charged. He was sentenced to 20 years imprisonment.

13. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by L. Kimaru, J. (as he was then). In the judgment dated May 25, 2017, the learned Judge upheld both the conviction and sentence, thus precipitating this second appeal.

14. The appellant lodged a notice of appeal on June 8, 2017 and has proffered the instant appeal by filing an undated memorandum of appeal containing 8 grounds that: the learned Judge erred in law in failing to resolve the violation of his constitutional rights under Article 49 (f) of the *Constitution of Kenya*; failing to find that his rights to a fair hearing were violated; that his conviction was based on the evidence of a single witness; that his mode of arrest was not justified in law; that essential witnesses were not produced; that PW1's testimony was coerced and had no evidential value; that his defense was not considered and he sought to have the time spent in legal custody considered in the computation of his sentence.

15. The appellant also filed amended grounds of appeal with the following grounds: that the charge sheet was defective; that penetration was not proved; that proper investigations were not conducted; that essential witnesses were not availed and that the court failed to invoke section 333(2) of the *Criminal*

Procedure Code and that the *Sexual Offences Act* No 3 of 2006 was in conflict with Article 27 of the *Constitution of Kenya, 2010*.

16. The appellant has filed supplementary grounds of appeal with the ground that the court failed to give the appellant his right of access to information under Article 33(1) of the *Constitution of Kenya, 2010*.

17. The Appellant has filed submissions that are undated but which were endorsed with his thumbprint. He submits as follows: that the charge sheet was defective as the evidence tendered in court was at variance with the charge as PW1's age was not clear; that the complainant's age was not proved as no age assessment was done; that penetration was not proved as no medical evidence was adduced which linked the appellant to the incident and that PW3 was not qualified to present and produce the examination report; that the investigation was not conducted properly as the officer did not visit the scene/ house to recover the complainant's clothes therefrom; that the prosecution relied on a baptism card instead of the birth certificate and also relied on hearsay information.

18. On the charge sheet being defective, the appellant submits that PW1 testified that she was 13 years, PW2 testified that she was approximately 13 – 14 years, PW4 testified that she was about 14 years and PW5 put her age at 12. He, therefore, submits that where the evidence does not accord to the particulars of the charge, such as in the instant case, then the charge was defective and since the prosecution did not amend the charge as provided by section 214 of the *Criminal Procedure Code*, there was a miscarriage of justice.

19. On failure to avail essential witnesses, he submits that the following key witnesses should have been produced in court but were not; the nephew and the young man who managed to trace the appellant, the appellant's brother who took the complainant to another house, the children who told PW2 that PW1 had gone to meet the appellant and the arresting officer. In support of this assertion, the appellant relied on the case of *John Kenga v Republic* Cr App No 1126 of 1987.

    As regards his sentence, he submits that both the lower courts failed to consider the period the appellant had served since he was arrested which is November 30, 2014 to August 23, 2016.

20. The respondent has filed submissions dated 8th February 2023. Learned Prosecution counsel submitted that the prosecution proved its case beyond any reasonable doubt; that PW4 corroborated the evidence of PW1 that the appellant slept with the complainant as her boyfriend severally; that PW4 testified that PW1 had old tears which were associated with the appellant; that both PW2 and PW5 testified that PW1 was 12 years old and this was not controverted by the appellant; that the High Court affirmed the sentence to be fair and just and it concurred with the High Court's sentence.

21. We have revisited the record on our own and considered it in light of the rival arguments set out in the submissions by the appellant and the response by the state. In our opinion, four issues arise for our consideration:

    i. Whether the charge sheet was defective;

    ii. Whether the appellant was convicted on the evidence of a single witness;

    iii. Whether there was failure to avail essential witnesses; and

    iv. Whether the ingredients of the offence were proved beyond any reasonable doubt and whether the learned Judge discharged his mandate properly.

22. As regards the charge sheet being defective, the appellant submits that the evidence tendered was at variance with the age of the complainant as indicated in the charge sheet. From those submissions, the question that begs would be, did the charge sheet give information as to the nature of offence charged,

and was the appellant prejudiced in any way thus occasioning a miscarriage of justice? A cursory reading of the charge sheet reveals that the charge sheet clearly specified PW1's age, hence no prejudice could have been suffered by the appellant. We note that evidence on the age of the complainant was adduced, which included a baptismal card produced by PW2, the testimony by PW2, and the doctor's evidence, and the witnesses were cross-examined by the appellant. Moreover, the appellant properly participated in the trial, was aware of the charges facing him, and did not raise any objection regarding the charges that he faced.

23. The appellant submits that section 9 of the *Sexual Offences Act* makes it crucial for the charge to be specific and for the prosecution to prove the same for the purpose of identifying the correct subsection under which to charge the appellant and in determining the correct sentence. From the appellant's submissions, he says it was not clear whether the complainant was 13 years as stated by PW1 or approximately 13 – 14 years as stated by PW2, or about 14 years as stated by PW4, or 12 years as stated by PW5. It is instructive to note that section 8(b) of the *Sexual Offences Act* provides for a minimum sentence of 20 years for the offence of defilement with a child between the age of twelve and fifteen years. Despite the appellant's assertions on the lack of clarity of the complainant's age, the age attributed to her definitely did not go beyond 15 years hence still within the bracket of the sentence he was meted out with.

24. Cognizant of the above principles and having read the record and in consideration of the rival arguments therein, we reach our own independent conclusion, that the appellant was not prejudiced in any way by what he now calls a defective charge sheet. The appellant's contention is that the age indicated in the charge sheet is at variance with the evidence. But as already stated, the age of the complaint was properly proved. Indeed, the appellant was able to understand the charge he had been charged with, as he fully participated in the proceedings and there was no miscarriage of justice.

25. The second issue for determination was the appellant's averment that the learned Judge erred in convicting the appellant based on the evidence of a single witness. Section 124 of the *Evidence Act* and section 19 of the *Oaths and Statutory Declarations Act* is discussed in the Kenya Judiciary *Criminal Procedure Benchbook* 2018 at paragraphs 94-96 as follows:

> " 94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R 1959 EA 92). Unsworn Jevidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R (2009) KLR).
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> 95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (lsaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No 111 of 2011).
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> 96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k)."

26. This Court in Criminal Appeal No 109 of 2014 *Williamson Sowa Mbwanga v Republic* [2016] eKLR, held as follows:

> " The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this Court in George Kioji v. Republic, CR. APP. No 270 of 2012 (Nyeri):
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> > 'Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

27. The learned Judge found that the trial court was satisfied that the complainant possessed sufficient intelligence to understand the nature of the proceedings and was convinced that the complainant told the truth. We agree with the findings of both lower courts and that ground, therefore, lacks basis.

28. The third issue for determination was whether the prosecution failed to call crucial witnesses to give evidence. It is instructive to note that there is no legal provision that the prosecution should call a particular number of witnesses to prove a case. This is reiterated by section 143 of the *Evidence Act* which provides that

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any act."

What matters is that the prosecution calls a number of witnesses that is sufficient to establish their case and they did, and we so find.

29. In the case of *Alex Lichua Lichodo v Republic* [2015] eKLR, this Court held:

> " 13. On the subject of whether the prosecutor failed to call crucial witnesses, we do concur with the trial court and the 1st appellate court that the evidence of the complainant was sufficient and convincing and there was no need for the prosecution to call any more witnesses on the said issue.
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> Section 143 of the *Evidence Act*, Chapter 80, Laws of Kenya provides,
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> > 'No particular number of witnesses shall in the absence of any provision of the law to the contrary be required for proof of any fact.'
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> Further, in Julius Kalewa Mutunga vs Republic - Criminal Appeal No 31 of 2005, this Court held,
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> > '...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal

court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

30. On the last issue for determination, as regards proof of defilement, the learned Judge concurred with the findings of the learned trial magistrate that the prosecution had indeed established to the required standard of proof, beyond any reasonable doubt that the complainant was defiled. The trial magistrate held that:

> " The complainant was clear what he had sexual intercourse with the accused for the time that she was with him. The evidence of Peter is that the girl went to his house and that he was convinced by the brother to help her, but he did not engage in any sexual activities with the complainant. However, the medical evidence contradicts his statement of not engaging in sexual activity with the minor. The hymen had old tears and the patient had a foul smelling discharge. The witness who is an expert opined that the child was involved in sexual activity. The medical evidence is consistent with the complainant's testimony. The accused had the time and opportunity to have sex with the girl. The nature of the offence is such that there is hardly any eye witness to the act. The court has to rely heavily on the testimony of the complainant and the medical evidence."

31. The learned Judge, on the element of penetration held as follows:

> " The complainant identified the appellant as her boyfriend. She expressly told the court that they had lived together in a house in Dandora for a few weeks and that the Appellant had had sex with her throughout the entire period. This was buttressed by the evidence of PW3 and PW4, both medical officers, who testified that the complainant had indeed been defiled. They both stated that the complainant's hymen had old tears and both formed the opinion that the child had been involved in sexual activity. Further to the foregoing, the complainant's evidence, as appeared from the record of the trial court was cogent, vivid and consistent in the description of what the appellant had done to her. In essence, the trial court found the complainant trustworthy and her evidence reliable and credible. The Appellant's contention that the complainant was coerced to incriminate him is therefore unfounded as he did not adduce any evidence to support his assertions. I therefore find that the trial court was alive to its duty under the provisions of Section 124 of the *Evidence Act* in convicting the appellant on the evidence of the complainant."

32. It is trite law that the ingredients of the offence of defilement are identification, penetration and age of the minor. The elements pointed out by the appellant, as not having been proved are the age of the minor and penetration. As regards penetration, the appellant avers that penetration as an ingredient of the offence of defilement was not established as required by law. He submitted that without clear evidence from the doctor indicating that there was penetration, his conviction was not safe. The trial court found that the complainant was clear that the appellant had, had sexual intercourse with the appellant for the time that she was with him and that the medical evidence contradicted his statement of not engaging in sexual activity with the minor. We agree with the two courts below that penetration as an element of the offence, was proved beyond reasonable doubt.

33. With regard to the age of the complainant, the appellant submitted that the age of the minor was not proved as there was variance between the age as indicated on the charge sheet and the age as brought

out by the testimonies of the various witnesses. According to him, it is not clear whether the minor was 12, 13 or 14 years of age. The learned Judge had this to say:

> " It was established to the satisfaction of the Court that the appellant was a child within the meaning ascribed to the terms of section 2 of the Children's Act. Notwithstanding her assertion that the appellant was her boyfriend, she had no legal capacity to consent to sexual intercourse with the appellant."

34. The trial magistrate, on this issue, held:

> " the baptism card produced as an exhibit reveals that the complainant was under the age of 18 years."

35. Having gone through the record, and the judgments from both the trial court and the High Court, we find that the learned Judge was very thorough in re-analyzing the record before him and we find no fault in the approach taken by the learned Judge. Clearly, the age of the PW1 was proved and the submission by the appellant to the contrary has no merit.

36. In view of the trial court and first appellate court concurrent findings of fact, we find no basis on which to interfere with the conclusions reached, that the appellant defiled the complainant.

37. We note that the appellant's other grievance is that the learned Judge failed to exercise his discretion properly by upholding the 20-year custodial sentence, as the Judge failed to take into account the time he had spent in remand.

38. The question of "taking into account period in custody" was considered in the Supreme Court of Uganda in the case of *Bukenya v Uganda* (Criminal Appeal No 17 of 2010) [2012] UGSC 3 (January 29, 2013) in which the Court stated thus:

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgement."

39. We note in this appeal that the trial magistrate is clear in his ruling that in imposing the 20-year sentence, he had considered the period that the appellant had been in custody. The minimum sentence prescribed by section 8(3) is a term of not less than 20 years. The trial magistrate noted that he had considered the period spent in custody and also noted that he saw no reason to give a stiffer penalty. This position was upheld by the High Court and we are satisfied that the period that the appellant had spent in custody was taken into account.

40. We note that the learned Judge considered in great detail each and every complaint raised by the appellant on appeal before him. He gave sound reasoning of his holding and the reasoning was well balanced and we find no fault in the approach taken by the learned Judge. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellant.

41. Having dealt with the above issues, the upshot of the foregoing is that the appeal fails on each and every ground and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR