



REPUBLIC OF KENYA



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**Odhiambo v Republic (Criminal Appeal 97 of 2021)
[2023] KECA 949 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 949 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 97 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JULY 28, 2023**

BETWEEN

KELVIN OTIENO ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 23rd July, 2019 in High Court Criminal Appeal No. 127 of 2016)

JUDGMENT

1. The appellant, Kelvin Otieno Odhiambo was charged before Makadara Law Courts, Nairobi, on a count of gang rape, contrary to section 10 of the *Sexual Offences Act* No 3 of 2006. The particulars were that, on 6th February, 2010 at [Particulars Withheld] estate in Nairobi east district, the appellant in association with Joseph Mugendi Mutharaka, intentionally and unlawfully caused his penis to penetrate the vagina of WSN. 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. To put this appeal in context, we find it imperative to give, in summary, the background that reads like a script from Hollywood. The three main characters in the legal drama that played out in the trial court are WSN, a minor, who we shall refer to as PW1, another young girl called Kamum and the appellant.
3. At the start of the trial, the magistrate conducted a voir dire on PW1, a minor, by posing questions and recording her answers thereto. The court found her to be intelligent and she understood the duty to speak the truth.
4. PW1 testified that on February 5, 2010, she went with her aunt MK (PW3) to the city center, Nairobi to beg for money and that they went in different directions upon arrival in the city. She said that one girl called Kamum (wife to the appellant), who was her friend asked her to go to their house. They went to [Particulars Withheld] estate where they found the appellant and another man (Joseph Mugendi



- Mutharaka, who was also charged as the 1st accused but later jumped bail). She testified that when they went to sleep, Kamum told her to undress as people did not sleep in their clothes at her place. The house had two rooms and she slept in one with Kamum. Kamum later got up and strangled her neck and that Jose, the other man who was in the house with the appellant (1st accused before the trial court who later jumped bail) held her legs and that the appellant, inserted his penis in her vagina and anus repeatedly. It was her further testimony that, on the second day she pretended she was going to the toilet and managed to escape to another woman's house in the neighborhood, who gave her money for transport to return home.
5. She further testified that when she got home, she found her aunt K. Her grandmother came home later in the evening. She told her grandmother what had happened and her grandmother took her to a clinic where they referred her to Nairobi Women's Hospital where she was examined. They later went to the police and made a report. She further testified that she was admitted at Kenyatta National Hospital where she was taken for treatment and underwent an operation.
 6. PW2, MNK, the grandmother to PW1, testified that on 5th February, 2010, PW1, who had been missing for two days returned home. She stated that she took a whip and spanked her; that PW1 narrated how a girl called Kamum took her to a house in [Particulars Withheld], where she found the appellant and another man. She further narrated how that man, who was the 1st accused in the trial court and Kamum held her as she was repeatedly sexually assaulted by the appellant.
 7. She further testified that the following day, she called a friend who assisted her to take PW1 to Nairobi Women Hospital and that PW1 was admitted and examined by the doctor who recommended that she be taken to theatre as she had suffered serious injuries.
 8. PW3 GMK, stated that she was a beggar in town and that on February 5, 2010 at about 1.00 am she was in town with PW1. They went in different directions and that later she could not find her, so she left for home alone. PW 4, the testimony of FN, mother to PW1 was a narration of how she learnt of the defilement of her child, who was staying with her grandmother.
 9. PW5 NM, testified that he was a resident of Ngara and also stayed in town with other street families. He testified that he knew the appellant as they had grown up together as street boys. It was his evidence that he got the report from a street family that the appellant had sexually assaulted PW1 who he knew as 'Kawinnie'. When he got that information, he offered to assist in the arrest of the appellant and that he went to the Chief Officer at Ngara and made a report to the administration police and requested for their assistance in arresting the appellant.
 10. He further testified that later at around midnight on May 28, 2010 another street boy told him that the appellant had been seen and informed him where he was. He rushed there and apprehended the appellant, whom he had known for about 13 years and took him to the police.
 11. PW6, Doctor David Thuo working with Nairobi Women Hospital produced the medical report that confirmed the injuries to PW1. He testified that the medical report that had been prepared by Dr. Muhombe on 19th February, 2010, but who had since died and that he was familiar with the hand writing of the late Dr. Muhombe.
 12. PW7, but recorded as PW8, Dr Zephania Kamau, of police surgery testified that on March 5, 2011, PW1 was "taken to him" and upon examination, he completed and signed the P.3 form, that set out the injuries that PW1 had suffered. The injuries found were that she had a left sided colostomy and a 4th degree perineal tear that was severe and which involved the vagina and the anus. There were no signs of infection and her external genitalia were normal.



13. PW9, Paul Waweru Kang'ethe worked with Government Chemist at Nairobi as a government analyst. He testified that upon examination and analysis, his findings were that the blood stains on PW1's clothes were blood group O and that he could not link the appellant to the blood as both the appellant and PW1 were in the same blood group O.
14. PW10, Sgt Mary Wanjiru Ndiritu, the investigating officer, gave evidence on the investigations that she conducted and that upon conclusion of the investigation, she made the recommendation to charge the appellant and another accused person, who later jumped bail in the course of the trial.
15. On his part, the appellant, gave unsworn evidence and did not call any witnesses. He denied committing the offences and that he used to work at Ngara selling shoes. He stated that on May 28, 2010 he woke up as usual and went to work and that in the evening at about 7.00 pm when he was about to close shop, two Administration Police officers arrested him and took him to Central Police station and later transferred him to Kayole Police station where he was questioned over an alleged defilement. It was his testimony that he was arraigned in court with another accused whom he did not know. He stated that he was a stranger to the allegations and that he has a family and his children are aged 12 and 14 years.
16. The trial magistrate upon hearing all the witnesses together with appellant, found that it was clear that the appellant actually defiled PW1 while assisted, aided or abetted by the girl known as Kamum and one Joseph Mugendi Mutharaka, who had been charged as the 1st accused before the trial court, but later jumped bail. The Magistrate held that the ingredients of the offence of gang rape had been proved beyond reasonable doubt. The appellant was convicted and sentenced to life imprisonment.
17. 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 then was) who upheld both the conviction and sentence.
18. Aggrieved by the decision, the appellant has filed an un-dated memorandum of appeal containing 6 grounds. We take the liberty to summarize the grounds as follows: that the learned Judge failed to reconsider and reevaluate the evidence afresh; that crucial witnesses were not called by the prosecution; that the prosecution's case contained contradictions; and that the prosecution's evidence fell too short of the certainty required in law and that the learned judge failed to observe that section 169 of the *Criminal Procedure Code* was contravened.
19. When the matter was called out for hearing, the appellant adopted his written submissions and Mr Okatch appearing for the State, highlighted his written submissions.
20. The appellant's submissions can be summarized as follows: that identification was not established to the required standard because he was not known to PW1 prior to the incident; that the incident happened late at night/early morning around 1.00 am and that when PW1 and Kamum entered the house, there was no interaction between PW1 and the appellant, as she was told to undress and to go sleep; that he should have been subjected to an identification parade for PW1 to identify the perpetrators. On recognition, he submits that there is no evidence to indicate that PW1 recognized him and cited the case of *Terekali s/o Korongozi & Others vs. Rex* (1952) EACA 259.
21. On the failure to call crucial witness, the appellant submits that 'Fish' the man who arrested him, the Administration Police officers and the chief were not called to testify. On reliance of a single witness, he submits that PW1's testimony was procured by threats and that it was only given after being spanked by PW2. The appellant questions why the PW1 did not tell her sister, PW3 about the ordeal, yet she met her before meeting her grandmother, who then spanked her.



22. On penetration, he submits: that it was not clear if PW1's genital organ was penetrated; that the evidence brought by the prosecution on the medical evidence concerning penetration did not support PW1's evidence; that it was not clear when the complainant was taken to hospital, and when the operation was done; and that the medical documents alleging the operation was done were not authentic as they had no rubber stamp.
23. The respondent's submission was that the ingredients of the offence were particularized in the charge sheet and supported by evidence, and that the case against the appellant was proved beyond reasonable doubt.
24. Having duly considered the record, the appellant's grounds of appeal and the rival submissions, we start by reminding ourselves of the approach of this Court this being a second appeal, where, the Court is restricted to addressing itself to matters of law only as provided in section 361 of the Criminal Procedure Code. This Court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence or they are based on a misapprehension of the evidence, or that the courts below acted on wrong principles in making the findings. In Karingo vs. Republic [1982] KLR 213 this Court stated as follows:

“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.”

25. We have considered the rival submissions and the authorities that were cited and note that four issues arise for our consideration:
- i. Whether the prosecution proved their case beyond reasonable doubt;
 - ii. Whether the prosecution's case had contradictions and inconsistencies;
 - iii. Whether the prosecution failed to call crucial witnesses to testify; and
 - iv. Whether the learned Judge relied on the evidence of a single witness.
26. On whether the prosecution proved their case beyond reasonable doubt, it is trite law that the elements of the offence of defilement the prosecution needed to establish were; identity of the accused, the act of penetration and age of the complainant. With regard to proof of the identity of the appellant, the learned Judge concurred with the findings of the learned trial magistrate that the prosecution had indeed established beyond any reasonable doubt that the complainant was properly identified. The trial magistrate held that:

“The next issue is that of identification. From the evidence, the complainant was not a stranger to the accused person so this is a case of recognition. The complainant was clear that she knew the 2nd accused. It is him who defiled her while she was being held by accused 1 and Kamami...

In my view, there is no doubt at all that the 2nd accused had been identified as the person who did the actual act of defilement while aided and abetted by his wife and the 1st accused.”

27. In the case of Wamunga v Republic (1989) KLR 424, this Court held:

“It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied



that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

28. The learned Judge found that the trial court was satisfied that the complainant was properly identified. We too are satisfied that the appellant was properly identified. There is no doubt that though the offence was first committed at night, there is evidence it was done repeatedly and that PW1 only managed to escape on the second day, during which time she had ample opportunity to see and identify the appellant.

29. On the second limb of the offence to wit penetration, the appellant avers that as an ingredient of the offence of defilement, penetration was not established as required by law and that there was no sufficient evidence to prove this ingredient of the offence. We note that the trial Magistrate held as follows:

“In her testimony WSN stated that upon reaching the 2nd accused's house at Kayole, Kamami and the 1st accused held her as the 2nd accused did "Usherati" or bad manners to her. She narrated how the 2nd accused inserted his genital organ, namely Penis into her anus then into her vagina. There is expert evidence on record to show that there was penetration as defined by the Act Doctor Thuo (PW)6 noted severe injuries that included the following;

- a. The hymen was torn (check sp)
- b. there was a 4th degree on WSN's vagina that extended to the Anus.
- c. The arial spectrum was torn.

The doctor described the surgical procedures that the medical personnel had to perform in order to treat WSN- Doctor Kamau (PW 7) also observed the tears referred to by Dr Thuo. He classified that a 4th degree tear of the anus and vagina is the severest form of a tear.”

30. 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:

“In the present appeal, proof of penetration was established by medical evidence and the testimony of the complainant.....The medical evidence corroborated the element penetration as narrated by the complainant. The prosecution therefore established that the complainant was penetrated.”

31. As regards the age of the minor, the third limb of the offence of defilement, the learned Judge found the minor to be below eighteen (18) years old at the time of the offence. He held as follows:

“The appellant submitted that the prosecution failed to establish the age of the complainant as there was contradictory testimony on the same. The complainant stated that she was ten (10) years old at the time of giving evidence. She however stated that she did not know her date of birth. Her mother PW4 stated that she was twelve (12) years old at the time of the sexual assault. PW8 stated that the complainant was aged eleven (11) years when he examined her. He produced in evidence a P3 form which indicate that the complainant was eleven (11) years. The investigating officer (PW10) produced in evidence the complainant's clinic card which indicated that she' was. born on January 4, 1999 and was therefore eleven (11) years at the time of the sexual assault, In the face of the evidence laid before the trial court, the complainant was below eighteen (18) years old at the material time of the offence. The Appellant did not adduce any evidence to the contrary. The court therefore holds that



the prosecution did establish that the complainant was a child within the meaning of Section 2(1) of the *Children Act*. The complainant was therefore defiled in accordance with the provisions of Section 8 of the *Sexual Offences Act*.”

32. Upon analysis of the evidence and the submissions, we find that the learned Judge addressed this issue and made a finding that we have no basis to disturb as the evidence is cogent, credible and trustworthy.

33. The second issue for determination was that the prosecution’s evidence was riddled with inconsistencies and was contradictory.

For instance, he submitted that the date of the operation was in question as the report from Nairobi Women’s Hospital states that the date of operation was February 9, 2010, while elsewhere it was February 10, 2010 and lastly said to be on May 12, 2010. He also submitted that it was not clear which date PW1 was taken to hospital.

34. We have considered the submissions on this issue and in our view the minor discrepancies are not material. Whether or not discrepancies in the evidence of witnesses have the effect of discrediting evidence, a court has to consider the nature of the discrepancies against the totality of the evidence. The court should only find that the discrepancies are material, if they are of such a nature that would create a doubt as to the guilt of the accused and in the instant case, they do not.

35. In *Philip Nzaka Watu v Republic* [2016] eKLR, this Court held that:

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person’s guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

36. We note that the inconsistencies in the evidence given by the various witnesses were not of a magnitude that would affect the culpability of the appellant. The evidence on the date the offence was committed, the place, the actors who aided and supported the appellant as he sexually assaulted PW1, in a very salvage, beastly and cruel manner were identified; the medical evidence was credible and confirmed the injuries; and the events leading to the arrest of the appellant were well explained.

37. On the ground that crucial witnesses were not called to give evidence, there is no legal requirement that the prosecution should call a particular number of witnesses to prove a case. Section 143 of the *Evidence Act* 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.” It is true that the chief, the Administration Police officers and the man known as “Fish”, who assisted in arresting the appellant were not called as witnesses. Upon analysis of the evidence, we are satisfied that the evidence that was adduced proved the case against the



appellant beyond reasonable doubt. It is not lost on us that the record shows that the appellant jumped bail for almost 3 years and was only rearrested after he was charged with another offence and such a long delay will certainly affect the availability of witnesses. However, we are satisfied that the witnesses who were called, gave evidence that established the culpability of the appellant beyond reasonable doubt. See the case of *Julius Kalewa Mutunga vs Republic* [2005] eKLR.

38. The appellant submitted that the learned Judge erred in convicting him 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 evidence 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*).

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 (*Isaac 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*).

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)).”

39. The learned Judge held that the trial court, after conducting a voir dire, was satisfied that the complainant possessed sufficient intelligence to understand the duty to speak the truth and was convinced that the complainant told the truth. We agree with the findings of both trial court and the High Court that the evidence of PW1 was clear and consistent.

40. Having considered all the grounds of appeal and the rival submissions, it is our finding that the conviction of the appellant is safe and that the sentence that was meted out is proper in the circumstances of this case. Accordingly, this appeal fails and it is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 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

