Omollo v Republic (Criminal Appeal 61 of 2021)
[2023] KECA 1134 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1134 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 61 OF 2021

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

SEPTEMBER 22, 2023

BETWEEN

CYRUS OMBACHI OMOLLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye-Macharia, J.) dated 15th February, 2018 in HC. CR. A. 85 of 2015)

JUDGMENT

1. The appellant, COO, was charged with various offences under the *Sexual Offences Act*, as follows:
    1. Count 1: Attempted defilement contrary to section 9 (1) of the *Sexual Offences Act* that on an unknown date in December 2011, in Nairobi he attempted to insert his penis into the vagina of CA, a girl aged 4 years. In the alternative, he committed an indecent act contrary to section 11(1) whereby he touched the breast and vagina of the said CA.
    2. Count 2: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi, he attempted to cause penetration of his penis into the vagina of SA, a girl aged 6 years. The alternative charge was committing an indecent act contrary to section 11(1) of the said Act particulars being that on an unknown date in December, 2011 he touched the breast and vagina of the said SA.
    3. Count 3: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi, he attempted to cause penetration of his penis into the vagina of SAA, a girl aged 7 years. The alternative charge was indecent act contrary to section 11(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi he touched the breast and vagina of the said SAA.

4. Count 4: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi he attempted to cause his penis to penetrate the vagina of FO, a girl aged 6 years. The alternative charge was indecent act contrary to section 11(1) particulars being that on an unknown date in December 2011 in Nairobi he touched the breast and vagina of the said FO.

5. Count 5: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi he attempted to cause his penis to penetrate the vagina of QA, a girl aged 5 years. The alternative charge was indecent act contrary to section 11(1) of the said Act the particulars being that on an unknown date in December 2011 in Nairobi he touched the breast and vagina of the said QA.

6. Count 6: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date December 2011 in Nairobi he attempted to cause his penis to penetrate the vagina of SSA, a girl aged 4 years. The alternative charge was indecent act contrary to section 11(1) of the said Act the particulars being that on an unknown date in December 2011 in Nairobi he touched the breast and vagina of the said SSA.

7. Count 7: Attempted defilement contrary to section 9(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi he attempted to cause his penis to penetrate the vagina of SAAA, a girl aged 7 years. In the alternative, he was charged with indecent act contrary to section 11(1) of the said Act particulars being that on an unknown date in December 2011 in Nairobi he touched the breast and vagina of the said SAAA.

2. The prosecution called 16 witnesses in support of its case and the Court concluded that there was a prima facie case to warrant the appellant being placed on his defence. The appellant testified in his defence and called two witnesses in support of his case. At the end of the trial, judgment was delivered on 13th May, 2015 where the trial Court held that there were glaring inconsistencies in the evidence of the clinical officer and the complainants and the same could not support the charges of attempted defilement in counts 1 to 6. It was held that the elements of attempted defilement only arose in count 7 but not with enough certainty to conclusively find the appellant guilty. Accordingly, the appellant was acquitted on all the main counts. The trial court found that the alternative counts had been proved beyond reasonable doubt. Consequently, the appellant was convicted on all the alternative charges and sentenced to 10 years' imprisonment on each count with an order that the sentences were to run consecutively. The appellant filed an appeal to the High Court of Kenya at Nairobi challenging the conviction and sentence. The High Court gave judgment on 11th December, 2017 where it differed with the findings of the trial Court regarding the medical evidence; stating that the trial Court wrongly disregarded the evidence of the clinical officer. The High Court found that on counts 1 and 3, the appellant ought to have been convicted of the offence of sexual assault and not that of committing an indecent act with a child. He was sentenced to 10 years' imprisonment on counts 1 and 3. On count 2 and 4, the High Court found that the offence proved was that of defilement and the sentences were revised to life imprisonment. On counts 5 and 6, the Court found that the alternative charge of indecent act was proved and the convictions and sentences were upheld. On count 7, the Court held that the main charge of attempted defilement was proved but maintained the sentence passed. The Court directed that the sentences in counts 1, 3, 5, 6 and 7 would be held in abeyance due to the life sentences in counts 2 and 4.

3. The appellant is dissatisfied with those findings and is now before us on a second appeal. Our mandate on second appeals is limited under section 361 (1)(a) of the *Criminal Procedure Code* to a consideration

of matters of law only. This mandate has been the subject of many judicial pronouncements in such cases as *Michael Ang'ara Paul v Republic* [2021] eKLR where this Court stated:

> "Being a second appeal our jurisdiction is limited by Section 361(1) (a) Criminal Procedure Code where we are to consider only issues of law if any are raised in the appeal but must not go into a consideration of facts which have been tried by the trial Court and re-evaluated on first appeal unless we reach the conclusion that the findings were not backed by evidence or are based on a misapprehension of the evidence or it is shown that the two Courts demonstrably acted on wrong principles in making those findings or the conclusions are perverse – *Chemagong v Republic* [1984] KLR 611."

4. When the appeal came up for hearing before us on a virtual platform on 18th July, 2023 the appellant who appeared in person from Kamiti Maximum Prison, applied to withdraw the appeal on conviction. Miss Vitsengwa, learned counsel appearing for the Office of the Director of Public Prosecutions had no objection and we marked the appeal on conviction as abandoned. The appeal proceeded on sentence only.

5. All the children who were aged between 4 to 7 years separately testified on how the appellant would call each of them to his house on various occasions and show them lurid sexual videos and proceed to ask them to do to him what they were seeing in the videos. They later informed their parents and as we have seen the appellant abandoned his appeal on conviction meaning that the case that was made by the prosecution was true. The appeal is on sentence only.

6. Upon conviction, the appellant pleaded for leniency which the trial Court considered. The Court also considered the circumstances of the case and gave sentence.

7. In written submissions which also include grounds of appeal the appellant complained that the Judge of the High Court erred in matters of law when she substituted the 10 years sentence to life imprisonment in respect of two counts. He says that the Judge was wrong to have done that as the trial magistrate had observed the minors and found that they had not been defiled.

8. He says that the High Court erred in enhancing the sentences without warning him of the consequences that may have arisen if he proceeded with the appeal.

9. The respondent in opposing the appeal on sentence in written submissions supports the action taken by the High Court in correcting the error committed by the trial Court.

10. It is true that the High Court on first appeal should warn an appellant of the consequences that may follow if his appeal proceeds and the sentence is to be enhanced. This warning may take the form of a cross-appeal by the ODPP or a warning served on an appellant that sentence may be enhanced.

11. An appellant may also be warned by the Judge before the appeal at the High Court is heard that sentence may be enhanced if the appeal fails.

12. But that was not the position that obtained in the appeal at the High Court. The Judge re-analyzed the evidence of each of the children and reached the following position:

> " In count 1 however, the evidence did not prove that this was the case. PW1 was candid that the Appellant only touched her genitals with his hand which only establishes an offence under Section 5(b) of the *Sexual Offences Act*. The same reads;
>
> Any person who unlawfully-

> Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into por (sic) by any part of the person's body, Is guilty of an offence sexual assault.

The penalty for the offence of sexual assault is provided under sub section (2) which is imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

I then ask, was the alternative charge of committing an indecent act with a child proved? The same is provided for under Section 11(1) of the *Sexual Offences Act* as follows;

> " any unlawful intentional act which causes-
>
> a. any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;
>
> b. exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration."

In the (sic) respect of PW7 the Appellant had contact with her genitalia with his hand. The definition of genital organ in the *Sexual Offences Act*:

> includes the whole or part of male or female genital organs."

With respect to count II the complainant who was PW1 recounted how the Appellant had made her watch a pornographic movie and urged her to do the acts that were shown in the movie. She refused and he urged her to suck his genitals. She also declined. On the third occasion he did bad manners to her by inserting his genitalia into hers and then gave her sweets. Clearly the main charge of attempted defilement was not proved. There was however sufficient evidence that established the offence of sexual assault under section 5(b).

In Count III, the complainant gave evidence as PW4. Her testimony was that the Appellant called her to his house and he started touching her genitalia with his fingers after which he gave her Kshs. 10/-. Equally an offence under Section 5(b) was established. I am alive to the fact that the medical evidence at MSF indicated that there was absence of the hymen but in view of the PW4's evidence, the penetration could only have been occasioned by the hand and not a genital organ. Hence, the absence of sufficient evidence for proof of an offence under either Section 8 or 11(1) of the *Sexual Offences Act*.

With regard to the Count IV the complainant gave evidence as PW6. She recalled that the Appellant called her to his house and offered her tea and afterward asked her to remove her clothes and lie on her bed. He then inserted his genitalia into her genitalia. Afterwards he asked her to dress up and leave. He asked her not to tell anyone. In light of the evidence regarding her missing hymen, and in view of her age, i find that the offence of defilement was proved.

As for Count V the complainant was PW2. She recalled being called by the Appellant to his house then showed her a pornographic video and tried to get her to suck his genitalia which she refused. He then sent her away after giving her some tea and bread. In cross examination she said that he did bad manners to her but did not expound on it. Given the evidence it is clear that the exposure of the child to the pornographic material constituted an indecent act and as such the alternative count was established.

As for count VI the complainant was PW5. Her testimony was that the Appellant called her to his house where he showed her a pornographic movie and then touched her private parts. The Appellant then told her to leave the house. The medical evidence relating to her was that her hymen was broken which clearly indicated penetration. In view of the absence of evidence pointing to the intention to defile and what was used to touch the complainant's genitalia, I conclude that only the alternative charge of indecent act was established

In Count VII, the complainant testified as PW3. She recalled that the first time the Appellant called her over he showed her a pornographic movie and asked her to mimic what was done in the movie but she refused. That on a different day the Appellant called her again and showed her a pornographic movie before touching her genitalia using his fingers. On the third occasion he called her to his house and put her on his bed and lowered her panties and when he was about to put his genitalia in her genitalia he noticed that she was about to cry and he stopped. He then gave her money and asked her to leave. This clearly demonstrates that there was an intention to defile the victim save that she attempted to scream, hence the main charge was established.

In summary, I find that with regard to Counts V and VI the alternative charge of indecent act was proved and I uphold the sentences passed. Equally, in Count VII, I confirm the conviction for the offence of attempted defilement and the sentence passed thereunder.

With respect to Counts II, III and IV, I have arrived at a finding that the evidence established offences other than those charged. Section 186 of the *Criminal Procedure Code* confers upon the court the power to convict for the offence other than the one charged. I also have regard to the fact that the offences established are cognate to those charged. It states;

When a person is charged with the defilement of a girl under the age of fourteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the *Sexual Offences Act*, he may be convicted of that offence although he was not charged with it."

13. The Judge also found that she was empowered by section 354(3)(a)(ii) *Criminal Procedure Code* in an appeal on conviction to alter the finding of the trial Court. That provision of law gives various powers to the High Court on hearing of an appeal on conviction, acquittal or sentence to do various things including, at section 354 (3)(a)(ii) and (iii):

> "... alter the finding, maintaining the sentence with, or, without or without altering the finding, reduce or increase the sentence; or
>
> (iii) with or without reduction or increase and with or without altering the finding, alter the nature of the sentence; ..."

14. The Judge applied those powers and in respect of Counts 2 and 4 substituted the convictions for the offence of an indecent act with a child under section 11(1) of the *Sexual Offences Act* with convictions for the offence of defilement under section 8(1) as read with section 8(2) of the said Act. The Judge, in respect of counts 1 and 3 substituted the offence of indecent act with the offence of sexual assault under section 5(b) of the said Act. The Judge had power to correct errors committed by the trial magistrate and convict for offences that were proved as found by the Judge. It was not necessary in these circumstances to give any warning to the appellant at all that he may suffer a stiffer sentence. The convictions were founded upon the evidence and we see no merit in the complaint by the appellant

in the way the first appeal was conducted or the findings made. There is no merit in this appeal which we accordingly dismiss.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

.....

S. ole KANTAI

JUDGE OF APPEAL

.....

M. GACHOKA

JUDGE OF APPEAL

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I certify that this is a true copy of the original

Signed

Deputy Registrar