Odayo v Republic (Criminal Appeal 19 of 2022)
[2023] KECA 1227 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1227 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 19 OF 2022

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

OCTOBER 6, 2023

BETWEEN

MOBY OPIYO ODAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Nairobi (J. Lesiit, J.) delivered on the 8th June 2020 in Nairobi HCCA No. 69 of 2019)

JUDGMENT

1. This is a second appeal from the findings of the trial magistrates' court where the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* on four counts.

2. On the first count, the particulars of the charge are that on March 17, 2010 in Nairobi, the appellant intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of VA, a child of 14 years.

3. On the second count, the particulars of the charge are that on May 27, 2010 in Nairobi, the appellant intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of JA, PW2 a child of 13 years.

4. On the third count, the particulars of the charge are that on 8th June 2010 in Nairobi, the Appellant intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of RN, PW3 a child of 14 years.

5. On the fourth count, the particulars of the charge are that on 12th June 2010 in Nairobi, the appellant intentionally and unlawfully committed an act which caused penetration of his penis into the vagina of MA, a child of 14 years.

6. He also faced alternative charges on each count for the offence of Indecent Act with a child by touching her private parts namely, vagina contrary to section 11(1) of the *Sexual Offences Act*.

7. The appellant pleaded not guilty to the charges, and the prosecution called 6 witnesses. The trial magistrate upon hearing the evidence, convicted him of the main counts of defilement of a child in counts 1, 3 and 4, and acquitted him of count 2. He was sentenced to serve 15 years' imprisonment each for count 1, 3 and 4, and the sentences were ordered to run concurrently.

8. The appellant was aggrieved by the decision of the trial magistrate and appealed to the High Court which upheld the conviction, but substituted the sentences of 15 years' imprisonment on each of the counts 1, 3 and 4 counts and the same to run consecutively.

9. The appellant was dissatisfied by the decision of the High Court and has filed an appeal to this Court on grounds that the trial court and the High Court; unfairly adjudicated the matter contrary to the dictates of Article 50 and Article 165(7) of the *Constitution* respectively; convicted the appellant for defilement, yet the ingredients were not established; failed to appreciate that the evidence was contradictory; and wrongly disregarded the appellant's defense.

10. The appellant filed written submissions and appeared in person on a virtual platform before us where he informed us that he would abandon the appeal against conviction, and limit his arguments to the appeal against the sentence. It was his submission that the trial court sentenced him to serve 15 years' imprisonment for each count which sentences were to run concurrently. However, on appeal, he stated that the judge wrongly substituted the sentences to run consecutively instead of concurrently, which he claimed was improper, as no notice to enhance the sentence was filed by the prosecution.

11. In rebuttal, learned counsel for the State, Ms. Matiru submitted that the offence related to different pupils and therefore, the sentence imposed by the High Court was proper. Counsel however confirmed that, no notice of enhancement of the sentence was presented in the High Court by the prosecution.

12. Before addressing the appeal against sentence, a brief outline of the facts of the case is essential.

13. After a voire dire examination, MA (PW1), who lives in [Particulars Withheld] with her aunt stated that she was born in 1996; that on June 11, 2010, the appellant told her, and AS, (PW4) to go to school the following day in their home clothes as they would thereafter attend tuition. The following day, the appellant told them to go to his house under the pretext that they would visit an organization for orphaned children. They found the appellant and his son in the house, and he sent AS and his son to buy mandazis, and later toothpaste. After they had gone, the appellant locked the door, removed her pants, lay on her and then inserted his penis into her vagina. He also touched her breasts as he defiled her. This went on for 30 minutes. When AS returned, the appellant released them to go home at about 7 p.m. and ordered them to inform their parents that they visited an African Christ organization. He also told MA that he would buy her shoes, but if she reported what had happened to her, he would stab her. AS' father complained to the deputy headmaster about his daughter returning home late. When summoned by the deputy headmaster, they lied at first, but, AS subsequently reported the incident to one Mrs. Oyugi and later to the police. The appellant was subsequently arrested.

14. After a *voir dire* examination, RN, PW2 who lives in [particulars withheld] Estate stated that on June 8, 2010, she went for games at Moi Forces school. She was accompanied by the appellant and two other boys. After the games, she requested the appellant to take her to school as she was new to the area, but the appellant took her to [Particulars Withheld] area to a house that he claimed was his brother's. While there, he undressed her, lifted her onto the bed, inserted his penis into her vagina and defiled her. When she tried to scream, he threatened her with a knife, and put a sponge into her mouth. She was thereafter

released and saw that there was blood on her pants. She was then summoned by the head teacher and taken to the Blue House where she was examined and then the incident reported to the police.

15. VA (PW3), was 15 years old. On March 17, 2010, her teacher, the appellant told pupils who did not have a parent to stand up in class. She stood up together with RN and AS. The appellant told them that he would assist with getting sponsors for them. He later told them to go to school wearing another dress under their school uniform so that they could meet a sponsor. On the day in question, the appellant took her to a house he claimed was his brother's to meet with a sponsor. After a while, he grabbed her, took her to the bed, put clothes in her mouth to silence her as she was screaming. He then undressed her, undressed himself and proceeded to insert his penis into her vagina. Thereafter, he gave her Kshs. 30 to buy eggs for his son, and left her to go home. The following day, the appellant warned her that she should not tell anyone. On 14th June 2010, she told one Mrs. Oyugi and the school headmaster what had happened to her. She was taken to Blue House where she was examined and the matter later reported to the police. She later realised she was pregnant as a result of the appellant's actions.

16. AS lives in [Particulars Withheld] with her parents. Whilst remaining in school for tuition on 12th June 2010, the appellant sent her to buy sweets. He took AS and PW1 to his house, and when they arrived, he sent AS and his son to buy mandazis, and later toothpaste, leaving MA and the appellant in the house alone. She returned and they were released at about 7.00 p.m. The appellant told them to say that they were at the African Child offices. Her parents complained about their delay in returning home, and they were summoned by their teacher.

17. BM, (PW5), lives in Umoja and is a teacher at [Particulars Withheld]school. She testified that PW1 to PW4 are all known to her as they were all former pupils at the school with the exception of PW4 who is still a pupil there. The appellant was also known to her as he was a fellow teacher at the school. On 14th June 2010, she was called upon to ask the girls to narrate to her what had happened to them. MA, RN and VA narrated how the appellant had defiled them and that they had informed the head teacher.

18. PKN, (PW6), was the head teacher at the complainants' school on 14th June 2010 when the parents of AS came to complain about their daughter's late arrival home that Saturday after tuitions. He called the girls and assigned BM and another teacher to interview them. The girls revealed what had happened to them and how the appellant had defiled them. He took the girls to hospital for examination and the appellant was later arrested by the police.

19. PC Danile Omayo, (PW7), of Muthaiga Police Station produced as evidence the P3 forms that showed that the complainants had been defiled.

20. When placed on his defence, the appellant stated that he is a retired teacher and lives in Busia; and that he is married. He denied defiling the girls as alleged.

21. This being a second appeal, this Court's jurisdiction is limited to matters of law only. As aptly held in the case of *Karingo v R* [1982] KLR 213 this Court stated;

> " 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 - vs- R (1956) 17 EACA 146)"

22. As indicated above, the appellant abandoned the appeal against conviction. This would leave only the issue of the sentence imposed by the High Court for our determination.

23. Whilst reconsidering the appellant's sentence, the High Court had this to say;

> " ...I find that the learned trial magistrate made an error in declaring that a concurrent sentence order was appropriate in this case. The error he came to should be corrected. Had a notice of enhancement been given to the Appellant before the appeal was heard, this could have been a good case to enhance the sentence given the circumstances of the case. Since no such notice was given to the Appellant, I will merely correct the error in the order on sentence.
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> 51. In the result, I set aside the order of the learned trial magistrate to have the sentence imposed on each count to run concurrently, and in substitution order the sentence of 15 years' imprisonment on each of the counts 1, 3 and 4 should run consecutively".

24. As to whether the High Court rightfully substituted the sentences from running concurrently to consecutively without a notice of enhancement of the sentence having been filed, is a matter that this Court has had occasion to address severally.

25. In the case of *Josea Kibet Koech v Republic* , Criminal Appeal No. 126 of 2009 this Court expressed itself thus;

> " Similarly, the State did not give any notice of enhancement of the sentence. In his submissions before us Mr. Omutelema conceded that the learned Judge of the superior court had no jurisdiction to enhance the sentence. The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 30 years' imprisonment imposed by the High Court is set aside and in its place we reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate."

And this Court in the case of *I.J.W. v Republic* [2013] eKLR observed;

> " 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 the sentence. That is provided for under Section 354 (3) (ii) 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 so doing 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."

While in the case of *Onesmus vs Republic* [2022] KECA 53 (KLR), this Court succinctly concluded;

> " ...Indeed, we confirm that it is within the right of the appellate court to enhance sentence where there is evidence when the person was convicted under the wrong provision or the

provision is not commensurate with the facts. But in doing so, the court must follow the correct steps and procedure.

17. First, is to record if the prosecution intends to change or substitute the sentence to a more serious sentence and give a warning. Second, that warning must be found on the record. Third, it must be brought to the attention of the appellant that if he were to proceed and the court were to find merit in the conviction, it is likely to enhance sentence and fourth, the appellant must be given an opportunity to elect whether to proceed with the appeal or not in view of the warning and that he is aware of the consequences of his actions. That was not done.

18. In the event he elects to proceed with the appeal, this must be reflected in the record; that despite warning in a language he understands, the appellant elected to proceed with the appeal. It is upon taking these steps and requirements that the appellate court is entitled to enhance or substitute the sentence by the trial court".

26. In this appeal, the appellant's complaint is that the sentence was enhanced without his having been duly notified. The record discloses that, no cross-appeal was filed by the prosecution in the High Court. There was also no warning issued to the appellant that an enhanced sentence would be imposed to his disadvantage before the appeal was heard. It is also instructive that though the High Court also appreciated that no notice was given to the appellant, the court nevertheless proceeded to substitute the sentence. In essence, the High Court without a basis substituted the sentence from one that was to run concurrently to one that would run consecutively without notification or cautioning of the appellant. The effect of the substitution was to increase the term of imprisonment faced to the appellant's detriment, without duly warning him. So that, instead of facing a term of 15 years' imprisonment where the three counts were to run concurrently, the appellant stood to face a total of 45 years' imprisonment were the 3 counts to run consecutively. We consider this to be a misdirection on the part of the learned judge.

27. In view of the failure by the High Court to adhere to the procedures for enhancement of the sentence, the appellant's appeal against sentence is merited and is allowed.

28. Accordingly, the sentences to serve 15 years imprisonment each for counts 1, 3 and 4 to run consecutively is set aside and the sentences for each count 1, 3 and 4 to run concurrently is hereby reinstated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR