Omundi v Republic (Criminal Appeal 327 of 2018)
[2023] KECA 1557 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KECA 1557 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 327 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 19, 2023

BETWEEN

EDWIN OSORO OMUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyamira (Nagillah, J.) dated 28th April, 2017 in HCCRA No. 8 of 2016)

JUDGMENT

1. This is an unusual appeal. The appellant's main contention before us as the second appellate court is that the first appellate court failed to do any re-evaluation of the evidence as required by the law. To reiterate, the complaint is not the usual one that the first appellate court erred in its analysis; rather, it is that it did not do any analysis whatsoever.

2. The oddity of the appeal is accentuated by the fact that the respondent agrees with the appellant that the first appellate court failed in its duty to reevaluate the evidence and come up with its independent decision. However, the appellant and the respondent disagree on the legal implication of that failure: the appellant insists that this Court should, then, seize on the first appellate court's failure, allow the appeal and quash the conviction and set aside the sentence imposed on the appellant by the trial court. On the other hand, the respondent is persuaded that the right course is for us to remit the case back to the High Court for a re-hearing of the first appeal. This, then, is the singular question before us.

3. First, a brief rehashing of the facts of the case for context is necessary.

4. The appellant was charged at the Nyamira Chief Magistrate's Court with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 25th day of September, 2014 at (particulars withheld) Sub-location in Masaba

North District within Nyamira County, he intentionally caused his penis to penetrate the vagina of JKO, a child who was 15 years old.

5. The appellant pleaded not guilty and the prosecution called a total of five (5) witnesses to prove its case. Upon close of the prosecution case, the trial Magistrate found that a prima facie case had been established and placed the appellant on his defence where he gave sworn testimony and called no witness.

6. In a judgment delivered on 5th February 2016, the trial court found the appellant guilty and convicted him as charged. The learned Magistrate imposed a sentence of 30 years in prison.

7. The appellant filed an appeal to the High Court sitting at Nyamira. He raised a number of grounds in his appeal. The High Court heard his appeal and delivered its decision dated 28th April, 2017. In the judgment, the learned Judge summarized the arguments made by both the appellant and the respondent and then delineated only a singular issue for determination: "was there penetration into the complainant's vagina?". The learned Judge, then, made his findings on that singular question in a single paragraph before concluding that the charge of defilement had been proved beyond reasonable doubt. He then affirmed the sentence without further analysis or comment.

8. We have no doubt that the judgment did not fully satisfy the obligation imposed on a first appellate court in criminal cases. That obligation is most famously phrased in Okeno v Republic [1972] EA 32:

> " It is the duty of a first appellant court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

9. The duty of a first appellate court as stated in this case boils down to three related ones: First, the first appellate court is duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to its own conclusions about all the elements of the crimes charged. Second, in doing so, the first appellate court must make appropriate allowance for the fact that did it did not have a chance to see or hear the witnesses. Third, in re-evaluating and re-considering all the evidence, the first appellate court must consider the evidence on any issue in its totality and not any piece in isolation. This principle constrains the first appellate court to reach its own conclusions on the totality of the evidence as opposed to merely using the trial court's findings as a foil to endorse or reject its findings. See, also, Pandya vs. R (1957) EA 336 and Ruwala vs. R (1957) EA 570.

10. Even a cursory perusal of the judgment dated 28th April, 2017 reveals that the first appellate court did not discharge its burden in subjecting the appellant's case to de novo review as required by law. As a consequence, the learned Judge neither made his own findings nor drew his own conclusions on all the essential parts of the case as the law required him to do. As a result, the judgment as delivered is, essentially, a nullity.

11. The question that arises is what should happen in such circumstances. This question must be answered with an eye to our limited jurisdiction as a second appellate court. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. See *Samuel Warui Karimi vs. Republic [2016]* eKLR.

12. The appellant argues that after confirming the error committed by the first appellate court, we should proceed to allow the appeal and quash the conviction. The respondent disagrees. The respondent argues that the proper recourse is to remit the appeal for re- hearing by the High Court. We think that the respondent is right. In the circumstances of the case, we cannot truly be said to be sitting as a second appellate court given our finding that the first appellate court failed in its duty to re-evaluate

the evidence de novo as required and that the judgment delivered was, therefore, a nullity. If this Court were to re-evaluate the evidence tendered in the trial court, we would, then, be sitting as a first appellate court yet deploying the standard of review of a second appellate court. Needless to say, that congruence would lead to injustice either to the appellant or the respondent depending on the fact in issue. The solution is, also, not to simply quash the conviction on the basis of the error. The conviction and sentence remain lawful until validly quashed or set aside – and a fundamental error on the part of the first appellate court does not, ipso facto, render the initial conviction and sentence unlawful.

13. We, therefore, agree with the respondent that the correct solution is to remand the appeal back to the High Court for a re-hearing of the appeal by a judge other than the one who heard it in the first place. In doing so, we are mindful that the appellant has been in custody for more than nine years. However, we note that the factors to consider in making the determination whether to remit the case for a re-hearing of the appeal are different from the factors to be considered in remitting a case for re-trial. This is because a re-hearing of the appeal does not involve any re-tender of the evidence but is undertaken only on the basis of the record already in existence. While there may be instances where an order for rehearing of the appeal would be unjust or imprudent, for example where the record of appeal is no longer available, the circumstances in this case militate in favour of an order for rehearing. Our decision in this regard is in accord with a recent one by this Court differently constituted in Hezron Rioba Achiki v R (Court of Appeal at Kisumu Crim. App. No. 155 of 2017).

14. Consequently, we set aside the judgement dated 28th April, 2017 of C.B. Nagillah, J. and order that the first appeal be remanded back to the High court for accelerated hearing and disposal by a High Court Judge other than C.B. Nagillah, J., who, in any event, has already retired from the High Court. The appeal herein succeeds only to that limited extent.

15. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER,2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR