MBO v Republic (Criminal Appeal 342 of 2008) [2010] KECA 468 (KLR) (16 April 2010) (Judgment)

M.B.O v Republic[2010] eKLR

Neutral citation: [2010] KECA 468 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 342 OF 2008

RSC OMOLO, PN WAKI & ARM VISRAM, JJA

APRIL 16, 2010

BETWEEN

MBO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nakuru (M Koome, J) dated 19th June, 2008 in HCCRA No 284 of 2006)

Evidence on record in a sexual offence case can be examined to prove an alternative charge where the main charge has not been proved

The appellant had been sentenced to serve 10 years imprisonment for each count in the alternative counts of indecent assault. The appellant contended that with the quashing of the main charge of defilement, the evidence adduced in support of that charge dissipated with it, and it could not be referred to as a foundation for a finding on the alternative counts. The court held that if the main charge was not proved, the evidence did not evaporate into thin air. It may be examined to see if it supported a minor and cognate offence.

Reported by Kakai Toili

Evidence Law *– evidence – evidence in sexual offences matters – where the evidence on record did not prove the main charge of defilement but proved the alternative charge of indecent assault - whether the evidence on record could be examined to prove an alternative charge where the main charge had not been proved - Criminal Procedure Code, Cap 75, section 179.*

Criminal Procedure *- sentencing – sentencing in sexual offences matters – sentence for the offence of indecent assault - where a sentence of 10 years imprisonment was imposed on an accused – whether the sentencing of an accused person convicted of the charge of indecent assault to 10 years imprisonment only was legal - Criminal Procedure Code, Cap 75, section 361(1).*

Brief facts

The appellant was convicted for three counts of the offence of defilement and sentenced to imprisonment of twenty years on each count. The cumulative sentences were to run consecutively, so that the term of imprisonment would total to 60 years. The appellant argued in his appeal to the superior court that the three main counts were incurably defective for failure to describe the acts of carnal knowledge as 'unlawful'. The superior court quashed and set aside the sentences. The court however found that the evidence on record supported the alternative counts of indecent assault and sentenced the appellant to serve 10 years imprisonment for each count. Each sentence was to run concurrently from the date of the appellant's first conviction. In a second and final appeal the appellant's advocate argued that the quashing of the main charge of defilement, on the technical ground that it was defective, the evidence adduced in support of that charge dissipated with it, and it could not be referred to as a foundation for a finding on the alternative counts. He also submitted that the private parts referred to in the alternative counts were 'buttocks' which did not constitute private parts.

Issues

i. Whether the evidence on record in a sexual offence case could be examined to prove an alternative charge where the main charge had not been proved.

ii. Whether the sentencing of an accused person convicted of the charge of indecent assault to 10 years imprisonment only was legal.

Held

1. If the main charge was not proved, either because it was defective or because the evidence on record did not support any element of the offence, the evidence did not evaporate into thin air! It may be examined to see if it supported a minor and cognate offence and if it proved such offence beyond doubt, a conviction would follow.

2. The charge of indecent assault was a minor and cognate offence that could be considered if the main charge of defilement was unsustainable. Section 179 of the Criminal Procedure Code allowed for such procedure.

3. The Sexual Offences Act defined an indecent act as any intentional act which caused, *inter alia*, any contact between the genital organs of a person or her breasts and buttocks with that of another person. Despite that new development in the law, the buttocks of a woman were private enough to attract the charge of indecent assault if they were intentionally touched or exposed.

4. By dint of section 361(1) (a) of the Criminal Procedure Code the severity of sentence was a matter of fact which was not within the jurisdiction of the Court of Appeal. However, under section 361(1) the court considered the legality of the sentence imposed by the superior court and found that it omitted to include hard labour.

Appeal dismissed and sentence imposed by the superior court enhanced to include hard labour.

Citations

East Africa

1. *Kaingo v Republic* [1982] KLR 213
2. *Gitau v Republic* [1983] KLR 223
3. *JMA v Republic* (2010) 1 KLR (GBV) 12

Statutes

1. Penal Code (cap 63) sections 144(1); 145(1);
2. Criminal Procedure Code (cap 75) sections 179, 361(1)(a)(b)
3. Sexual Offences Act, 2006 (Act No 3 of 2006)
4. Criminal Law (Amendment) Act, 2003 (Act No 5 of 2003)

JUDGMENT

1. MBO ("the appellant"), a 63 -year old grandfather appeared before Nakuru Senior Resident Magistrate (H Nyagah) on three counts of the offence of defilement of a girl contrary to section 145(1) of the *Penal Code*. It was alleged in the charge sheet on each of the three counts that on diverse dates between the month of August and September, 2005 in Nakuru, he had carnal knowledge of JAO, LV and WA, respectively. The three were primary school pupils aged 6, 9 and 11 years respectively and were living with their parents in the same estate as the appellant. An alternative count on each of the defilement counts was also framed in the charge sheet alleging indecent assault contrary to section 144(1) of the *Penal Code* in that between the same dates and place, the appellant indecently assaulted each of the three children "by touching their private parts (buttocks)."

2. The prosecution adduced evidence from the three children, the medical doctor who examined them, two of their parents, and the investigating officer. The appellant also testified on oath in his defence. Upon analyzing the evidence on record, the trial court was satisfied that the main offence of defilement was proved beyond reasonable doubt and convicted the appellant. No findings were made on the alternative counts. The appellant was thereafter sentenced to serve 20 years imprisonment on each count, the cumulative sentences to run consecutively, that is to say, a sentence of 60 years.

3. Aggrieved by that judgment the appellant moved to the superior court (Koome, J) and argued that the three main counts on defilement were incurably defective and they ought not to have been relied on to convict the appellant. The defect in the charges was that they omitted to describe the acts of carnal knowledge as "unlawful". He also challenged the adequacy of the evidence adduced to prove the offences charged, as well as the sentence imposed on him which he contended was harsh, excessive and illegal. The learned Judge examined the provisions of section 145(1) of the *Penal Code* and some relevant authorities and agreed with the appellant that the main counts were incurably defective. The Judge quashed the convictions based on those counts and set aside the sentences. She however re-examined and analyzed the evidence on record and came to the conclusions that it supports the alternative counts of indecent assault. She convicted the appellant accordingly and sentenced him to serve 10 years for each of the three counts, the sentences to run concurrently from the date of first conviction December 17, 2006. The judgment was delivered on June 19, 2008.

4. The appellant now comes before us in this second and final appeal. As the law requires in section 361 of the *Criminal Procedure Code*, only matters of law may be raised for consideration as this court will rarely interfere with concurrent findings of fact by the courts below unless those findings are based on no evidence at all, or are based on a perversion of the evidence on record, which is the same thing as saying the decision is bad in law. See *Kaingo v Republic* [1982] KLR 213.

5. The two issues of law raised by the appellant through learned counsel Mr Olaly Cheche, were, firstly, whether the alternative counts were themselves sustainable after the dismissal of the main counts; and secondly, whether the particulars specified in the alternative counts, amounted to any offence under section 144 of the *Penal Code*.

6. Simply put, the submissions of Mr Cheche on the first issue were that upon the quashing of the main charge of defilement, on the technical ground that it was defective, the evidence adduced in support of that charge dissipates with it, and it could not be referred to as a foundation for a finding on the alternative counts. A defective charge cannot sustain an alternative charge, he asserted. On the second issue, Mr Cheche pointed out that the particulars of "private parts" referred to in the alternative counts are "buttocks" which in his submission were not private parts and therefore no offence was constituted.

At all events, he added, there was no evidence adduced that any of the three children had their buttocks touched by the appellant and such evidence could not therefore be assumed. The only evidence on record related to rapture of the hymens of the three children which could result from any cause other than defilement. The conviction of the appellant was therefore without any basis and the appeal should be allowed.

7. For his part learned senior state counsel Mr Njogu submitted that the alternative counts were sustainable and could stand on their own despite the dismissal of the main counts. In his view, "buttocks" were private parts of a human being and even if there was no specific reference to buttocks in the evidence on record, the alternative counts refer to "private parts" which the evidence on record fully established as having been touched by the appellant. He called for the appeal to be dismissed.

8. We must now contextualize those issues by examining, if only briefly, the concurrent findings of facts made by the two courts below in arriving at the conclusion they did.

9. Six year old JA, (PW1) was in Standard six in B Primary School and lived with her parents in K Estate in Nakuru. She knew the appellant who was staying near their house. She narrated how the appellant, on different days, called her to his house, removed her underpants, removed his trousers and shirt and put some oil on her private parts and did "bad manners" to her. He slept on her and used his "thing" that he urinates with. She felt pain. He gave her one shilling to buy sweets and asked her not to tell anyone. She later informed her parents JOO, (PW6) and EAO (PW4) who confronted the appellant.

10. LV, (PW2) was a 9-year old standard three pupil at F Primary School. She also lived with her parents within K Estate and knew the appellant. She narrated how one day she and WA, (PW3) saw the appellant doing "bad manners" to J, (PW1) and informed L's mother about it. She herself recalled how the appellant on one occasion called her to his house, removed his trousers and hers and put her on a sofa where he slept on her and did "bad manners". He took the "thing" he uses to urinate-his "*Chuchu* " - and put it in her *"Chuchu "* and she felt pain. He then gave her Sh 5. When L told her mother, she was beaten up and told never to go back to the appellant's house.

11. WA (PW3) was with L when they witnessed the goings-on between the appellant and JW was the older of the two at 11 years old in Standard six at St T's Primary School. She remembered the day the appellant invited her to his house and gave her Shs10/=. She sat on a sofa and the appellant knelt before her and asked her to remove her pants. He lowered his trousers and removed his "*dudu*" which is used to urinate and put it in her's. It was painful. A whitish substance came from his "*dudu* "which she wiped out. The appellant told her not to tell anybody. As she went out of the house, another woman saw her and informed her mother that she had gone to borrow money from the appellant. Winnie was warned not to go back there. The following day however, the appellant found her washing clothes and invited her to go and collect some money to buy soap. He then removed his trousers and told her to remove hers. She hesitated but he told her to be quiet. He did "bad manners" again and blood came out of her "*dudu* ". The following day she told her mother what happened.

12. The three girls were medically examined by Dr Maina Kimani (PW4) of Nakuru Provincial General Hospital. He found that J had a slight bruise on the labia and had no hymen. She also had a whitish discharge which suggested a fungal infection. L had no hymen either, but no discharge. W too had no hymen, it was torn. In all three cases, Dr Kimani formed the opinion that the girls were sexually defiled. He also examined the appellant who tested positive for syphilis.

13. It is in evidence that upon the parents of J receiving information about their daughter and confronting the appellant, he sought foigiveness but irate neighbours converged on the home and threatened to lynch him. They started destroying his house before police came to his rescue. Among them was PC

Andrew Kimutai, (PW7) who arrested the appellant and investigate! the matter before charging the appellant accordingly.

14. The appellant denied all the charges and blamed the false accusations on a disagreement he had with the parents of J and L. He had been an Estate Officer with Nakuru Municipal Council before he retired and had refused to protect their kiosk. He also said the children had been coached on what to say by a woman he had declined to give a job. He did confirm however that he was a next door neighbour to the children but denied that they ever entered into his house.

15. The two issues raised before us were first raised before the trial court and rehashed in the superior court. The learned trial magistrate however rejected the submission that the main charge of defilement was defective merely for omission of the word "unlawful". He found that the appellant could not be said to have misunderstood the nature of the charges and the omission did not occasion any failure of justice. No finding was made on the alternative charges, as indeed that was the right procedure, if the main charge is sustained.

16. The reasons given by the superior court for reversing the trial magistrate on the propriety of the main charge was because section 145 of the *Penal Code* provides for defences which would render the sexual acts committed by the appellant lawful. That is to say, that "the accused had a reasonable cause to believe, and did believe, that the girl was of or above the age of 14 years or was his wife." Despite accepting as reasonable the conclusion that in this case the appellant went through a full trial and due to the tender ages of the complainants one could not safely say the two defences were available to the appellant, the learned Judge of the superior court still declared the charges as defective.

17. We are well aware that there is no appeal against that decision and that learned counsel on both sides were not given any opportunity to address us on the issue. As such, the decision remains final and the acquittal of the appellant on the main counts is irreversible. We may however observe in passing, and for the benefit of the superior court, that a similar situation arose before this court in *JMA v Republic* [2009] eKLR (Criminal Appeal No 348/2007) and the court stated as follows:-

> " On first appeal, the superior court, relying on the decision of this court in the case of *Achoki v Republic* [2000] 2 EA 283, held that the conviction of the appellant on the main charge was wrongful as the charge was fatally defective as the particulars in the charge did not allege that the act of having carnal knowledge was unlawful. For that reason that court quashed the appellant's conviction on the main count of defilement of a girl under fourteen years of age and set aside the sentence of life imprisonment which had been imposed on him by the trial court. The court, however, held that the evidence supported the alternative count of Indecent Assault on a female contrary to section 144(1) of the *Penal Code*. Accordingly it entered a conviction against the appellant for the offence and thereafter sentenced him to a term of 15 years imprisonment with hard labour. The sentence was ordered to run from the date the appellant was convicted of the defilement charge.

18. It is noteworthy that the particulars of the alternative count did not, also, include the term "unlawful". Section 144(1) of the *Penal Code* as it then stood provided as follows:-

> " 144(1): Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment with hard labour for five years with or without corporal punishment"

19. Clearly both the main and alternative counts were defective to the extent that in both of them the term "unlawful" was not included in the particulars of the respective counts. Apparently the defects in the

alternative count escaped the attention of the superior court. In view of the holding by the superior court that the main count could not stand in view of that omission, does it follow that the alternative count has to suffer the same fate?

20. We note that the attention of the superior court was not drawn to the provisions of section 382 of the *Criminal Procedure Code*, which provides thus:

> " 382. Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omissions or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. The omission of the term 'unlawful' in both counts was not raised by both the prosecution and the defence. The superior court raised it on its own motion in the course of writing its judgment. We do not know what the respective parties would have said about the defects in the charge had the issue been pointed out to them. In our view, it is not in all cases in which a defect detected in the charge on appeal will render a conviction invalid. Section 382 of the *Criminal Procedure Code*, is meant to cure such irregularities where prejudice to the appellant is not discernible."

22. The court in that decision went on to subject the charges to the test of "failure of justice" and concluded that "The omission of the term "unlawful" from both the main and alternative counts did not in any way whatsoever prejudice him in putting forward his defence." That decision was made on November 6, 2009 and was not therefore available to the superior court.

23. We have considered the two issues of law raised on behalf of the appellant and the submissions of counsel, and we think, with respect, that they are lacking in merit.

24. The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charges once there is ample evidence to support the main charge. If the main charge is not proved, either because it is defective or because the evidence on record does not support any element of the offence, the evidence does not evaporate into thin air! It may be examined to see if it supports a minor and cognate offence and if it does prove such offence beyond doubt, a conviction will follow. Many a times only the main charge in offences such as Murder, Robbery or Rape, for example, will appear on record. But it cannot be argued that if the evidence establishes minor and cognate offences such as manslaughter, theft or indecent assault respectively, the court cannot convict for those offences on the ground that they were not charged. So too with defilement. Indecent assault is a minor and cognate offence and was for consideration if the main charge was unsustainable. Section 179 of the *Criminal Procedure Code* allows for such procedure. The learned Judge did consider the alternative to defilement in the following manner:- "I have considered this case with a very anxious mind, considering the tender ages of the complainants. The trial court believed their testimony. I also find it highly unlikely if not impossible for three minor complainants to frame up a charge against the appellant. Least of all a case of defilement. A case of defilement, indecent assault or any sexual offence for that matter causes a complainant considerable trauma and to some extent stigma and sometimes it may cause the victim lifelong psychological effects the evidence on record shows that the appellant was in the habit of defiling these girls in a similar fashion. He asked them not to tell anybody and used

to give them money for sweets. The complainants were familiar with him. Some referred to him as a grandfather. The appellant must have taken undue advantage of the minors lured them with money for sweets and threatened them not to tell anybody.

> Having closely examined the evidence on record, I find that the alternative offence was also proved. Just like the trial magistrate I am not persuaded by the defence that the appellant was framed up by the parents of the complainants. It defeats reason that one would involve children with such traumatic and a heinous allegation which impacts on their lives negatively in order to fix a neighbour regarding a disagreement. I decline to accept the appellant's defence. The prosecution proved the case of indecent assault against the appellant"

25. With respect, we find no impropriety in those findings. Nor do we think, on the second issue, that the submission that buttocks were not private parts wasseriously made. We may echo the words of this court in *Gitau v Republic* [1983] KLR 223 in defining "indecent assault on females", where it was held:

> " 1. An assault accompanied by utterances suggestive of sexual intercourse is an indecent assault. The touching, for example, of the breasts or private parts of a female without being accompanied by utterances suggestive of sexual intercourse is also indecent assault. The test is usually whether the assault was intentional and whether it was indecent. A simple assault may constitute indecent assault if it is accompanied by utterances suggestive of sexual intercourse.
>
> 2. The intention indecently to assault the female must be evidenced by the assault itself. The offence is complete if a female is indecently treated by touching her private parts even if the intention is not sexual intercourse.
>
> 3. To strip a female naked constitutes indecent assault even if it is done for the sake of it and it is not accompanied by further indecent gestures either by speech of physical contact."

26. The alternative counts in this case referred to "private parts" and only mentioned "buttocks" in parenthesis. There was ample evidence that the private parts of the children were touched by the appellant with his male organ. There was evidence that the children's underwear was removed thus exposing their buttocks. The law does not stand still. It has to keep apace with society. If in days of yore, buttocks, even for women, were liberally exposed and were therefore not considered as private parts, it cannot be the case in this day and age. Nor was it the case when the charges in this case were framed in 2005. Indeed, the following year, 2006, the *Sexual Offences Act* was passed by Parliament to clarify what "genital organs" are. They include the "anus". "Indecent act" now means any intentional act which causes, inter alia,

> Any contact between the genital organs of a person or her breasts and buttocks with that of another person."

27. It is our view, even without this new development, that the buttocks of a woman were private enough to attract the charge of indecent assault if they were intentionally touched or exposed. The finding of fact in this matter was that the children were indecently assaulted on their private parts which was an element of the offence charged in the alternative counts and was proved. We reject that ground.

28. The punishment for the offence under section 144(1) of the *Penal Code* was amended to "imprisonment with hard labour for twenty one years" by Act 5 of 2003. The superior court sentenced the appellant to serve 10 years imprisonment for each of the three counts, the sentences to run concurrently. By dint of section 361(1)(a) of the *Criminal Procedure Code* the severity of sentence is a matter of fact which is not within the jurisdiction of this court. What is within jurisdiction under section 361(1)(b) is the legality of it. The legal sentence under section 144(1) of the *Penal Code* where a term of imprisonment is imposed must include "hard labour". That part of the sentence was excluded, and we must correct it accordingly.

29. In the result this appeal is dismissed. The appellant shall serve the sentence imposed by the superior court together with hard labour.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF APRIL, 2010.

R.S.C. OMOLO

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JUDGEOF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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

DEPUTY REGISTRAR