Omumbo v Republic (Criminal Appeal 80 of 2008)
[2008] KECA 315 (KLR) (5 December 2008) (Judgment)

Jacob Odhiambo Omumbo v Republic [2008] eKLR

Neutral citation: [2008] KECA 315 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 80 OF 2008

RSC OMOLO, EO O'KUBASU & JA ALUOCH, JJA

DECEMBER 5, 2008

BETWEEN

JACOB ODHIAMBO OMUMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J.) dated 12th March, 2008 in H.C.CR.C. No. 133 of 2007)

A court can convict an accused based solely on the uncorroborated evidence of a child of tender years if the court was satisfied that the child was telling the truth.

The trial convicted the appellant of the offence of defilement and sentenced him to life imprisonment. His appeal to the High Court was dismissed. In the instant appeal, he challenged his conviction and sentence on the ground, among others, that it was based on uncorroborated and unsworn evidence of a child of tender years. The instant court upheld the High Court's holding that when the only evidence was that of a child of tender years who was the alleged victim of the offence, the court was to receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court was satisfied that the child was telling the truth.

Reported by Moses Rotich

Criminal Practice and Procedure *- appeals - second appeal - victim being a child of tender years - appeal against conviction - jurisdiction of the appellate court to only entertain matters of law - whether the appeal was merited - Criminal Procedure Code (cap 75) section 361*

Evidence *- child witness - evidence of a child of tender years without comprehensive corroboration - determination of child's ability to understand the meaning and nature of an oath - whether the court could convict on the evidence of a child of tender years in a case involving a sexual offence- whether there was need for corroboration - section 124 of the Evidence Act (cap 80) Laws of Kenya*

Sexual Offences *- defilement-definition and ingredients of the offence defilement - ingredients that must be proved in a charge of defilement -applicable principles - whether the persecution's case was proved to the required standards - Sexual Offences Act (Act No 8 of 2001) section 8(2)*

Constitutional Law *- right of an accused person - right to be brought to court as soon as is practicable - how the issue is to be raised - section 72(3) of the Constitution*

Brief facts

The appellant was tried and convicted of the offence of defilement of a girl contrary to section 8(2) of the Sexual Offences Act No 3 of 2006 and sentenced to life imprisonment. The particulars of the charge were that on 6 March 2007 at Kabongo Sublocation in Nyando District the appellant defiled complainant, PA, a girl under the age of 11 years at the time. The appellant allegedly entered the kitchen, in which there was complainant and three other children, chased out the other children, and defiled complainant. At trial, the trial magistrate convicted the appellant based on the complainant's testimony, the complainant's grandmother's testimony, and the presentation of the medical examiner's P3 form by the medical examiner's clinical officer, and the police report. The appellant lodged an appeal to the High Court which was dismissed. The appellant further appealed to the Court of Appeal, assigning error on the grounds that the medical examiner did not present her own P3 form. Further that there was no comprehensive corroboration from the witnesses and that the prosecution failed to prove its case beyond reasonable doubt. He also argued that there was violation of his constitutional rights for failure to arraign him within 24 hours of arrest.

Issues

i. What were the ingredients of the offence of defilement as provided under section 8(2) of the Sexual Offences Act No 3 of 2006?

ii. Whether the court could convict an accused based on the uncorroborated evidence of a child of tender years in a case involving a sexual offence.

Held

1. On a second and final appeal, the Court of Appeal could only entertain matters of law under section 361 of the Criminal Procedure Code.

2. The P3 form by the medical examiner properly established that there was penetration of the complainant. Her testimony that the appellant defiled her was corroborated by the P3 form. It was not necessary for a medical examiner to personally present her report to a court. A clinical officer presentation of the report was sufficient.

3. Where in a criminal case involving a sexual offence and the only evidence was that of a child of tender years who was the alleged victim of the offence, the court was to receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court was satisfied that the child was telling the truth. Hence the other children present in the room did not need to be called to corroborate complainant's testimony.

4. Section 72(3) of the Constitution provided for an accused person to be arraigned within 24 hours of his arrest. The argument had to be argued either orally or in written submission to be considered by the Court of Appeal. Failure to do by the appellant resulted in a ruling that arraignment occurred within a reasonable time.

5. The Court of Appeal had no power to interfere with the sentence unless the sentence was unlawful.

Appeal dismissed.

Citations

Statutes

Kenya

1. Constitution of Kenya (Repealed) section 72(3) - (Interpreted)
2. Criminal Procedure Code (cap 75) section 361 - (Interpreted)
3. Evidence Act (cap 80) sections 77, 124 - (Interpreted)
4. Sexual Offences Act (cap 63A) section 8(1)(2) - (Interpreted)

JUDGMENT

1. The appellant, Jacob Odhiambo Omumbo was tried and convicted by a Senior Resident Magistrate, Nyando, of the offence of defilement of a girl under the age of eleven years, contrary to section 8(2) of the *Sexual Offences Act* No 3 of 2006, and sentenced to life imprisonment. His appeal to the superior court (JR Karanja, J) was dismissed on March 12, 2008. He now appeals to this court on points of law.

2. The particulars of the charge against the appellant read that on the 6th day of March, 2007 at Kabongo Sub-location in Nyando District within Nyanza Province he defiled PA, a girl under the age of eleven (11) years.

3. The prosecution called a total of four witnesses including PA, PW2 (hereinafter PA), a child of tender years within the meaning of the Children Act, No 8 of 2001. Her evidence was taken in chambers by the trial magistrate after conducting a '"*voire dire*" examination to determine her capability of understanding the meaning and nature of an oath. She was thereafter affirmed. She was then a standard three student at Konim Primary School. She recalled the March 6, 2007 at about 2.00 pm whilst at home with E, S and M; Jacky the appellant whom she also knew as Jacob came from work and found her in the kitchen together with other children who walked out immediately he entered. The appellant grabbed her, placed her on a seat and had sexual intercourse with her in the kitchen. PA described the appellant's action as follows:-

> " Jacky who is in court here (points at accused) whom we also call Jacob came from work and found us in the kitchen. The children I was with came out. Then Jacob seized me when I was in the kitchen and he had sexual intercourse with me on a seat. He had grabbed my hands and placed me on a seat. He then removed my underpant. He then removed his (sic) and he then slept on me. He did bad thing on me. He had sex with me. I screamed but he blocked my mouth and vowed to repeat again. I still tried to scream. He then told me to go to my grandmother's house just nearby and I went there. Grandmother had gone to the market. I didn't tell grandmother until later, when she asked me if Jackie had slept with me. I told her how he even squeezed my breasts. He later came and was questioned by grandmother. He denied."

4. PA was taken to the police station by her grandmother. She was issued with a P3 form and directed to go to the hospital. She later made a statement to the police. She identified the appellant as the person who defiled her.

5. PAN, PW2 (hereinafter PAN) is the grandmother of PA. She is a business woman at Ahero Market. She testified that on March 6, 2007, she returned home at about 6:30 pm and did not find PA, her grandchild at home. She enquired from E, a brother of PA where PA was and E told her that she had gone to fetch water. PA did not return that evening. PAN went to PA's school the following day and saw the deputy head teacher. Apparently, the school officials also wanted to see her because of the observations they had made on PA. She was brought by her teacher to where they were and PAN noticed that her dress was stained with something at the back, and she was asked what happened. PA explained that Jackie had sex with her after chasing E and the other small children. PAN took her to Ahero hospital where she was treated. She had earlier reported the matter to Boya Police Station and was issued with a P3 form which was completed at Ahero hospital and returned to the Police Station.

6. PAN identified the appellant whom she has known for a long time and referred to as Jackie or Jacob, a grandson of her in-law, who sometimes even sleeps in her house. PAN referred to an earlier complaint PA had made to her concerning the appellant when she said:-

> " PA had told me earlier on that accused touched her breasts and lips. I had then questioned accused and he had said PA's breasts are too small and he can't go further. That was a week before the incident."

7. Meshack Maritim Sirorey, PW1 (hereinafter Meshack) works at Ahero sub-district hospital as a clinical officer. One of his colleagues for the past five years was Mrs Hongo. He was familiar with her writing, and identified the P3 form she completed - on 8th March, 2007, after examining one, PA, who was referred to the hospital for examination by Ahero Police Station. PA alleged that she had been defiled, and had, "a thick substance stained dress. She was in pain (sic) with difficulties in walking. Injuries were 24 hours old. She had swollen tender labia (sic) mgara, vagina (sic) orifice was red and vaginal carnal was lacerated and tender. She had fluidy watery discharge. There was penetration. P3 was signed on March, 2007 (sic) 8th "

8. PC George Omondi, PW4 (hereinafter Constable Omondi) of Boya Police Station received a report from a woman he referred to in his evidence as "V" who was accompanied by her grand-child, who was alleged to have been defiled by a person known to her. He accompanied the woman to her home from where she pointed out the appellant who was arrested and subsequently charged with the offence of defilement.

9. The appellant made an unsworn statement and denied the offence claiming that he was arrested after being tricked by a woman who had given him a house to live in.

10. The trial magistrate was satisfied that the appellant defiled PA when he said in part:-

> " As regards the first issue, I have no doubts that PW2 was defiled. Her evidence is consistent with that of PW3 and it is also corroborated by the medical evidence of PW1 the clinical officer who avers that there was evidence of penetration."

11. The trial magistrate concluded thus:-

> " All in all, I did find that the evidence is overwhelming against the accused as the prosecution has proved its case beyond reasonable doubts against the accused. I hence (sic) find accused guilty as charged and is convicted accordingly under section 215 of Criminal Procedure Code."

The trial magistrate subsequently sentenced the appellant to life imprisonment.

12. The appellant was aggrieved by the trial magistrate's conviction and sentence, and appealed to the superior court who dismissed his appeal on March 12, 2008, by stating:-

> " The trial court's conclusion that the complainant spoke the truth was proper and is hereby upheld. This court would also arrive at the conclusion that it was the appellant who was responsible for defiling the young complainant. The appeal against conviction is without merit and is dismissed."

13. On the sentence imposed by the trial magistrate, the learned Judge said:-

> " The life imprisonment sentence passed against the appellant by the lower court was lawful and is hereby upheld. In the end result this appeal must and is hereby dismissed in totality."

14. The appellant was aggrieved by the learned Judge's finding, hence the present appeal where he cited 6 grounds namely:-

> " 1. That there was no comprehensive corroboration from the witnesses that was considered by the Honourable Judge to uphold both conviction and sentence; and further the omission by the state to call in some more witnesses - the school teacher - and the children who were together with the complainant - would have or would have not changed the direction of the evidence as adduced in court.
>
> 2. The production by Meshack Maritim Sirorey of the P3 form is an obvious contravention of the court's standing regulations and was further more disastrous at the lower court as no records show any explanation for the failure of Mrs Hongo to avail herself and produce the P3 form. It is in (sic) law that a document must only be produced by the author in court as exhibit.
>
> 3. That there was an obvious doubt in the statements of PAN (PW 3) - over alleged previous information from the complainant - PA (PW2) and the period of time it took the said complainant to relay the message to her grandmother.
>
> 4. That court left burden of proof on the appellant at the cost of the state who is served (sic) with the duty to prove their case beyond any reasonable doubt.
>
> 5. That the appellant prays to the honourable court to consider that the accused's constitutional rights were violated under section 72(3) - as the accused person was arraigned in court after the mandatory expiry period of 24 hours without any apparent reason hereof.
>
> 6. That the life sentence imposed on the accused is too heavy and alot of irregularities arose during trial that would warrant a re-trail and further request the honourable court to invoke the powers conferred upon under section 364 to reduce and or do whatsoever is appropriate to the same."

15. The appellant also filed a "supplementary ground of appeal" on November 24, 2008 with a complaint which reads:-

> "That PW4 who is the investigation officer and at the same time was the arresting officer said during testimony that, V reported the incident with her grandchild." The woman who gave evidence in this case was called PAN (PW3) - V was not part of the prosecution witnesses to support the same."

16. This being a second and final appeal, this court can only entertain matters of law - see section 361 of the *Criminal Procedure Code*. The appellant appeared before us in person and handed over to us what he referred to as written submissions, though the paper is headed "memorandum of appeal". Over and above that he asked for a re-trial because he said the doctor who examined the complainant did not give evidence in court. That further, there were three other children who were in the same house with the

complainant who were not called to give evidence. He also referred to the evidence of PW4, Constable Omondi, who called PA's grandmother. V. yet the woman who gave evidence in court was called PAN.

17. Mr Musau, the learned senior principal state counsel, submitted that though the appellant complained of having been convicted on hearsay evidence, the two courts below believed the evidence of the prosecution witnesses who knew the appellant quite well. About the children whom the appellant said were not called to give evidence, the evidence on record was that the appellant chased them from the kitchen before he allegedly defiled the complainant. That once again the two courts below believed this evidence. Mr Musau submitted further that under the proviso to section 124 of the *Evidence Act* as amended, the court can convict on the evidence of a child of tender years in a case involving a sexual offence. He said that the charge as drafted was proper under section 8(2) of the *Sexual Offences Act, 2006*. and the appellant was convicted on sound evidence.

18. The offence of defilement is defined in section 8(1) of the *Sexual Offences Act* No 3 of 2006 as follows:-

> "A person who commits an act which causes penetration with a child is guilty of an offence termed defilement."

19. From the above definition, it is clear that "penetration" is an important ingredient in a charge of defilement under the *Sexual Offences Act* which must be proved by tire prosecution. In this case, the evidence of Meshack the clinical officer confirmed that there was penetration. The two courts below accepted this evidence, as well as the evidence of PA that she was defiled by the appellant. Though PA's evidence was that of a child of tender years, tire court can convict on it by virtue of the proviso to section 124 of the *Evidence Act* cap 80 Laws of Kenya, as amended by Act No 5 of 2003. The proviso reads.

> "Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

20. Indeed the trial magistrate convicted the appellant on PA's evidence and recorded Iris reasons when he said in part:-

> "Was the accused the culprit? I find that PW2 has referred to her assailant as Jackie whom they also call Jacob or Jakobo. She further says that this is a man she has known well as he stays nearby. Accused has not rebutted that evidence of PW2 in particular that he is even referred to as Jackie. Jacob or Jakobo. Indeed PW3 says that accused even sometimes sleeps at PW1 's place. Accused is therefore not a case of mistaken identity. Nor could PW2 be implicating him as she has no reason to."

21. The learned judgeof the superior court accepted the trial magistrate's finding on PA's evidence when he said:-

> "The trial court's conclusion that the complainant spoke the truth was proper and is hereby upheld. This court would also arrive at tire conclusion that it was the appellant who was responsible for defiling the young complainant. The appeal against conviction is without merit and is dismissed."

22. We uphold tire finding of the two court's below that it was the appellant who defiled PA. and reject the appellant's first ground of appeal to the effect that there was no "comprehensive corroboration" from the witnesses considered by the learned Judge and further that the failure by the prosecution to

call other children who were together with the complainant in the kitchen "could have changed or not changed the direction of the evidence in court."

23. Meshack. the clinical officer who produced the P3 form in court clearly stated that he had worked with Mrs Hongo for five years and was therefore familiar with her handwriting which he identified as he read the clinical notes she made after examining PA. The appellant complained in Iris grounds of appeal that Mrs Hongo did not appear in court to produce the P3 report herself and that this contravened the court's standing orders, but we find no merit in this ground and dismiss it. because under section 77 of the *Evidence Act*. such a document need not necessarily be produced by its maker.

24. Ground 5 of the appellant's memorandum of appeal complained about the breach of his constitutional rights under section 72(3) of the *Constitution* in that he was arraigned in court after the expiry of the mandatory period of 24 hours without any apparent reason.

25. The complaint was not argued before us either orally or in the written submissions, and we are unable to conclude one way or another that he was unlawfully held in custody before being taken to court. We are satisfied that the appellant was arraigned in court within a reasonable time.

26. Finally was the evidence of Constable Omondi, PW4 who apparently referred to PA's grandmother as V instead of PAN. To this we can say no more than to refer to the findings of fact by the two courts below that PAN was the grandmother of PA who reported the incident to the police, and also took her to the hospital for treatment. It was the same grandmother with whom she lived. Here again, we find no merit in this ground of appeal as there was only one grandmother in this case, so there cannot be any confusion as to who was being referred to by Constable Omondi, though he called her V.

27. All in all, we find no merit in the appeal as regards conviction.

28. The sentence imposed is lawful and we have no power to interfere with it. The appeal wholly fails and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF DECEMBER, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR