Odhiambo v Republic (Criminal Appeal E021B of 2023)
[2025] KEHC 4889 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4889 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E021B OF 2023

DK KEMEI, J

APRIL 25, 2025

BETWEEN

JOSEPH ODUOR ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon.L.N. Sarapai (PM) delivered on 25/4/2023 and sentence on 22/5/2023 in Sexual Offences Case No. 16 of 2020)

JUDGMENT

1. The Appellant herein Joseph Oduor Odhiambo was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 21st day of May 2020 at South Ugenya Location, Ugenya Sub County within Siaya County, intentionally attempted to cause his penis to penetrate the vagina of R.N.N a child aged 1twelve years.

2. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. No. 3 of 2006. The particulars were that on the 21st day of May 2020 at South Ugenya Location, Ugenya Sub County within Siaya County, intentionally touched the vagina of R.N.N a child aged twelve years with his penis.

3. The Appellant denied the charges and after a full trial, he was convicted and sentenced to ten years' imprisonment for the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

4. Aggrieved, the Appellant lodged the present appeal wherein he raised the following grounds:

    i. That the trial magistrate erred in law and in fact by failing to evaluate the entire evidence and draw proper conclusions.

ii. That the trial magistrate erred in law and in fact by convicting the Appellant without proof of mens rea.

iii. That the trial magistrate failed to appreciate that the prosecution's case was not properly investigated.

iv. That the trial magistrate erred in law and in fact when she failed to take into account the Appellant's mitigation while imposing the harsh sentence.

Reasons wherefore, the Appellant prays that the appeal be allowed, conviction quashed and the sentence set aside or varied.

5. This being a first appeal, this Court must re-consider and re-evaluate the evidence adduced before the trial Court and to arrive at its independent findings and conclusions. (See *Okeno v Republic* [1972] EA 32. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.

6. RA (PW1) a minor aged twelve years gave a sworn statement after a voire dire examination by the trial magistrate. She stated that she is twelve years old, a grade three pupil at [particulars Withheld] primary school and that her father is called ZO. She recalled that on 21/05/2020 she went to the farm looking after their goats while with O who was looking after their cattle. Then Jalego went and asked her to go buy a soda and so they went with him. On returning, Jalego took her to a maize plantation where he removed her short and underpants and that she remained naked. That he put her on the ground and removed his trouser too and remained naked. That he then lay on her and took his 'dudu" that he uses to urinate and put it here (pointing at her vagina) where she uses to urinate too. That he did not put the whole of it inside while he was holding her breasts. That he then blocked her mouth so that she could not scream. That Omollo went to assist her and that Oduor ran over the fence and disappeared. That her father was still on the farm and so she went to report to him on what had happened. That her father took her to Simenya hospital and later to Ambira hospital then back to Simenya police to report. That she knew Jalego as he was a neighbor. She pointed at the Appellant in the dock saying "that's Jalego".

On cross- examination, she stated that the incident happened at about 5.00 PM and that she and the Appellant went to the shop. That she went with the Appellant to the plantation and that he did bad things to her and that she cried. That the Appellant then jumped over a barbed wire fence.

7. Joseph Omollo (PW2) a minor aged 16years testified on oath after a voire dire examination by the trial magistrate that he is 16 years old,. He confirmed knowing the Appellant by the name Obago, as a herdsman near their home. That he also knows Rosina as their neighbor. He recalled on 21/5/2020 while at home when the Appellant went to get him to go look after cattle and so they went to where he worked. That the Appellant then left saying he was going to buy sugarcane and that he went with the father to the child. That the Appellant then returned alone and then left with the child. After a while, the father of the child returned and that he informed him that Obago had left with R. That they tried to call out for the child but there was no response. It was then that he saw Jalego Appellant) jumping over the wire fence while R came out of the maize plantation while crying. That the child' father took her to the hospital.

On cross-examination, he reiterated that he knew the Appellant as a neighbor's herdsman. That he was not present during the rape but that he had earlier seen him running with the child. That they were herding cattle about 100 meters from where the child came from.

8. ZOO (PW3) testified that he knew the Appellant as he was his friend but when he defiled his child their friendship ended. He recalled that on 21/5/2020 as they were grazing cattle together, he rushed to buy sugarcane and upon returning his child was not where he had left her. That he enquired from PW2 who informed him that Jalego had sent her to the shop. A while later, he saw Jalego running from the maize plantation and jumping over the fence and headed towards his home. Upon inquiring what had happened, the child kept crying while claiming that Jalego had sent her. That he took the child to Simenya hospital then to Ambira hospital and later reported the matter to the police. That when he returned, Jalego came to his home while boasting and claiming that if he got him arrested then he would see.

   On cross examination, he stated that it was the Appellant who sent him to buy sugarcane.

9. No. 112661 PC Winston Obare (PW4) testified that he is currently based at Bondo police station but initially he was at Ugunja police station. He recalled that on 22/5/2020 at around1600 hours the complainant (PW1) went to the station in the company of her father (PW3) who reported that the previous day on 21/5/2020 at about 1600 hours while attending to their cows, the Appellant sent PW1 to the shop to buy cakes and that the Appellant followed her and then took her to a maize plantation where he undressed her then he undressed himself then he tried to insert his penis into the vagina of the complainant. That the complainant raised alarm and that her brother O came to her rescue. That when the Appellant saw O, he ran away. That the complainant was then taken to Ambira Sub-County hospital where she was examined and a P3 form filled. That the birth certificate of the complainant shows that she was born on 09/03/2000 making her 12 years at the time of the incident. That the same was produced as exhibit2.

   On cross examination, he stated that after the report was made he escorted the minor to the hospital. That the offence happened the previous day and that the child was in her father's company. That he went to the scene and heard from witnesses. That the owner of the nearby home informed him that she was away when the incident occurred.

10. Kennedy Okanda (PW5) stated that he is a clinical officer attached to Ambira sub county hospital. That he had a P3 form filled by Ocean Kibet Chemunyo on 23/5/2020 whom they had worked with for over three years and that he is thus conversant with his signature and handwriting. On the examination, her vagina showed visible small bruises on the labia minora. That the vagina had sticky brown substance extending to the labia minora. That the doctor made additional notes that "this is a minor with clear allegation of a man who is well known to her who has been touching her breasts, buttocks and luring her with money and tokens". That he produced the P3 form as Exhibit 1a)

11. That marked the close of the prosecution's case. The trial court ruled that a prima facie case had been established and placed the Appellant on his defense. He opted to tender an unsworn statement.

12. Joseph Oduor Odhiambo (DW1), stated in his defense that he was not aware of the said allegations. That on the said date of the incidence he was away as he had travelled to his grandmother's place. He maintained that he was arrested by his neighbour who wanted to take over his land. That the area chief was not even aware of the alleged incident and who issued him a letter of good conduct in the village.

13. On appeal, the Appellant submitted that the prosecution failed to prove the alternative charge beyond reasonable charge and secondly that the sentence passed was very harsh. He relied o several cases all of which I have considered.

14. The Respondent on the other hand submitted that he proved the alternative charge beyond reasonable doubt and that the sentence meted was commensurate with the offence.

15. I have considered the record of appeal, the rival submissions and the authorities cited. I find the issues for determination are as follows:

    a. Whether the alternative charge of committing an indecent act with a child was proved beyond reasonable doubt by the Respondent.

    b. Whether the sentence imposed was appropriate.

16. It is noted that the Appellant was convicted on the alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Section 11(1) of the *Sexual Offences Act* provides as follows

> 'Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.'

17. From the record, PW1 stated that she knew the Appellant as their neighbor. That the Appellant, after luring her with cake and soda took her to a maize plantation, removed her pair of shorts and underwear, removed his own trousers, laid her on the ground, laid on top of her and put his 'dudu' (penis) inside her vagina. That Omollo came to her rescue and that the Appellant jumped over a barbed fence and ran away. PW1's testimony was corroborated by that of Joseph Omollo and the clinical officer (PW5). The said doctor noted that the complainant experienced pain on the shoulders and the knees as well as upper and lower limbs. The doctor also noted some bruises on the labia minora and that her vagina had some sticky brown substance extending to the labia minora. That the urethral opening had some discharge and that there was some foul smell from the vagina. That HIV test was negative and likewise syphilis and pregnancy test were negative. That pus cells were seen from the urine analysis. The said doctor made additional notes that "this a minor with clear allegation of a man who is well known to her who has been touching her breasts, buttocks and luring her with money and tokens".

18. That as per the testimony of PW 1, the Appellant was a neighbor and a herdsman. This was likewise corroborated by PW2 who confirmed that the Appellant was a herdsman while the father of the complainant (PW3) stated that the Appellant was a friend and that they would go and look after cattle together. This was a case of recognition as opposed to a case of identification of a stranger. The Appellant was well known to the complainant and the two witnesses (PW2 and PW3). Nothing transpired from the evidence that there existed any grudge between the Appellant and the complainant's parents. In fact the complainant's father (PW3) confirmed that the Appellant was his friend with whom they herded cows together. The incident took place in broad daylight and that the Appellant was seen by PW2 fleeing and jumping over a barbed wire fence and that the complainant informed PW2 about what the Appellant had done to her before fleeing away. Iam satisfied that the Appellant was placed at the scene of crime. I find the Appellant's alibi defence did not shake or cast doubt upon that of the Respondent which was overwhelming against him. I am therefore satisfied that the alternative charge was sufficiently proved beyond any reasonable doubt and that the conviction arrived at by the learned trial magistrate was quite sound and must be upheld.

19. On the issue of the sentence, the same is usually at the discretion of the trial court. It is trite law and based on the doctrine of stare decisis that an appellate court will not normally disturb the sentence imposed by the trial court unless the said sentence is illegal, unlawful, or outrightly excessive in the

circumstances. This position was stated succinctly by the Court of Appeal for East Africa in the case of *Ogola S/O Owuor v Regina* (1954) 21 270 as follows: -

> " The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James V R*., (1950) 18 E.A.C.A 147: "It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."
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> To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. V Sher Shewky*, (1912) C.C.A. 28 T.L.R. 364."
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> The case of *Ogola s/o Owuor* (supra) has been accepted and followed by the Court of Appeal and the High Court on matters of sentence for many years. What was stated there still remains good law to-date.

20. In the High Court case of *Wanjema v R*. [1971] EA 493, the court held:

> " A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. "

An appellate court should not interfere with the discretion that a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or that the sentence is manifestly excessive in the circumstances of the case. In the instant appeal, the trial magistrate took into account everything that was urged before her by the Appellant. She did not disregard any material factor, nor did she take into account any irrelevant matter. Similarly, she did not act on any wrong principle. The very same matters that the Appellant urged before me were urged before the learned trial magistrate and that she took all of them into account.

21. Based on the foregoing, I am convinced that the trial magistrate correctly addressed herself on the issue of sentence. It is noted that the Appellant's conduct has psychologically affected the complainant. The Appellant who was a neighbour was expected to protect the complainant but not to prey on her. I find his actions were abhorrent as the victim has been traumatized thereby. I find the sentence was legal, lawful, and appropriate in the circumstances and the minimum possible in law. Pursuant to the decision of the Supreme Court in Petition No. 18 of 2023 *Republic v Joshua Gichuki Mwangi* [2023] eKLR where it held that trial courts do not have jurisdiction to interfere with the minimum sentences under the *Sexual Offences Act* as long as the same remains valid. Hence, iam unable to interfere with the sentence imposed by the trial court. I affirm the same.

22. It is noted that the Appellant posted bail soon after taking plea and hence the sentence imposed shall commence from the date of conviction.

23. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. KEMEI

JUDGE

In the presence of :

Joseph Oduor Odhiambo.....Appellant

Ooro F.....for Appellant

Ms. Mumu.....for Respondent

Mboya.....Court Assistant