Owiti alias Daddy Job v Republic (Criminal Appeal E046 of 2024)
[2025] KEHC 7568 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7568 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E046 OF 2024

A MABEYA, J

MAY 30, 2025

BETWEEN

JOAB OGADA OWITI ALIAS DADDY JOB ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment, conviction and sentence of Hon. J. Kimeto PM delivered on the 10/6/2024 in Maseno SO Case No. 23 of 2020, Republic v Joab Ogada Owiti alias Daddy Job)

JUDGMENT

1. This appeal emanates from the judgment and conviction made on the 30/5/2024 and sentence passed by the Hon. J. Kimeto PM, on the 10/6/2024 in Maseno Sexual Offences Case No. 20 of 2024.

2. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

3. The particulars of the charge were that on the 29/4/2020 at about 1600hrs in Seme sub-county within Kisumu County, the appellant caused his penis to penetrate the vagina of C.A.A. a child aged 14 years old.

4. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

5. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of eight (8) witnesses. The defence evidence was based on the appellant's sworn testimony and his witness.

6. Dissatisfied by the trial court's conviction and sentence, the appellant filed his petition of appeal dated 21/6/2024. There are seven grounds of appeal presented by the appellant which grounds can be summarised as follows:

a. That the trial court erred in both law and fact in convicting the appellant on insufficient evidence presented by the prosecution which evidence was full of contradictions and inconsistencies.

b. That the trial court erred in law and in fact in failing to consider evidence and submissions presented in the appellant's defence.

c. That the trial court erred in law and in fact by failing to take into consideration the probation report prior to sentencing and proceeding to sentence the appellant based on wrong and/or flawed principles.

7. In support of his appeal, the appellant filed written submissions in which he stated that the evidence presented by the prosecution had glaring contradictions specifically the testimony of PW1, PW3 and PW7 in regard to how the offence was committed; that the prosecution failed to consider his evidence and submissions which brought out the fact that the prosecution had failed to prove penetration.

8. That the forensic evidence presented by the prosecution did not connect the appellant to the commission of the offence and was contrary to the provisions of section 36 (2) of the *Sexual Offences Act* and section 48 of the *Evidence Act*; that the trial court failed to ascertain the validity of the medical records presented by the prosecution.

9. Finally, that the trial court failed to take into consideration the probation report while sentencing that showed that the appellant was a fresh graduate who had secured an internship opportunity with a financial institution which stood stalled as a result of his conviction and that this led the appellant to conclude that his right to a fair trial as entrenched in Article 25 (1) (c) of *the Constitution* had been infringed.

10. Ms. Kagali, Prosecution Counsel for the respondent made oral submissions that all ingredients of the offence of defilement were proved beyond any reasonable doubt. That the age of the complainant was proved through the provision of a birth certificate produced as PExh2 showing that the complainant was 14 years old.

11. That penetration was proved by medical evidence which was corroborated by the testimony of PW1, the complainant and PW3 who found the appellant in the act and that the identity of the appellant was proven by the complainant's testimony who knew him as well as that of PW3 and PW4 who placed the appellant at the scene.

12. On the issue of the forensic evidence, Ms. Kagali submitted that the examination carried out on the appellant showed nothing; that the appellant's mitigation was considered and found to be an afterthought as it was never raised throughout the trial; that the appellant's sentence was commensurate with the offence and that the appeal lacks merit and should be dismissed.

13. This being the first appellate Court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion but at all times considering that I did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

14. The Court has considered the record. The prosecution case in the trial court was supported by the evidence of eight (8) witnesses. PW1 was the complainant. She told the court how on the material day the appellant got into her bedroom, pushed her to the bed, covered her mouth, removed her panty and inserted his penis into her vagina.

15. PW2, Edwin Ochieng Owuor, a Clinical Officer who examined the complainant testified that he noticed vaginal bleeding with bruises on the complainant as well as a whitish discharge. That the hymen was bleeding and was freshly broken whereby he concluded that there was forceful sexual contact. He also testified that the appellant was similarly examined but nothing was found.

16. PW3, DAA, the complainant's sister testified that on the material day she came to the house and found the appellant lying on top of the complainant. PW4, Lucy Atieno Akeyo testified that she was alerted to what the appellant was doing by PW2 and on confronting him, the appellant ran away.

17. PW5, GAA, the complainant's mother produced the complainant's Birth Certificate showing that she was 14 years old at the time of the incident. PW6, Shadrack Oluoch Ocholla, the area Senior Assistant Chief identified the appellant and stated that he received news of the offence from PW4 and advised her to take the complainant for medication after which he commenced investigations to find the appellant.

18. PW7 PC Rukia Ismael was the Investigating Officer. She testified that she was assigned the case and following her investigations and arrest of the appellant, proceeded to charge him with the offence. PW8, George Lawrence Oguda, a government analyst testified that, he examined the black dress presented to him and compared it to a DNA sample from the complainant and arrived at the conclusion that the DNA profile generated from the black dress matched the DNA profile of the complainant.

19. When placed on his defence, the appellant admitted to being in PW5's residence when the offence was committed but denied committing the offence. He attributed the charges brought against him to a grudge between his father, Dw2 and PW4, Lucy Atieno Akeyo. Dw2, GMO, the appellant's father supported the appellant's testimony that Pw4 framed his son because of a grudge between them because Dw2 had refused to inherit Pw4.

20. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him. The Court has considered the record. The first ground of appeal raised by the appellant is that he was convicted and sentenced on insufficient evidence that was full of contradictions and inconsistencies.

21. The appellant submitted that the forensic and medical evidence relied on by the state did not connect him to the offence and further that the testimonies of Pw1, Pw3 & Pw7 were contradictory in nature as to how the offence occurred. On its part, the state submitted that all ingredients of the offence were proven; that the medical evidence adduced corroborated the testimony of Pw1 and that the forensic examination carried out on the appellant revealed nothing.

22. The appellant was convicted as charged in the main count. The charge sheet against him provided the charge against the appellant as that of defilement contrary to section 8(1) as read with Section 8(3) of the SOA.

23. Section 8(3) of the Act is the penal provision and prescribes the sentence for the offence thereunder as follows:

> " 8. Defilement
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> (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

24. The offence of defilement is rooted on three main ingredients being the age of the complainant (must be a minor), penetration and the proper identification of the perpetrator.

25. The first element is age. In Edwin Nyambogo Onsongo v Republic (2016) eKLR, the Court of Appeal held: -

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the complainant's age, it has to be credible and reliable." (emphasis added)

26. In the present appeal, the age of the complainant is not disputed. From the evidence on record, the age of the complainant was proved by the complainant (Pw1) herself. It was corroborated by her mother (Pw5) who produced the complainant's Birth Certificate as PExh2. The birth certificate showed that the complainant was born on the 19/5/2006. In this regard, as at the date of commission of the offence, the complainant's age was 13 years 11 months and 20 days.

27. In its judgment, the trial court found that the age of the complainant was proven to be almost 14 years old. There is no doubt therefore in the Court's mind that the first element of the age of the complainant was proved to the required standard.

28. The second element is penetration. Penetration is defined under section 2 of the *Sexual Offences Act* as follows: -

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

29. The complainant testified in detail how the appellant came to her room, gagged her, pulled down her dress and proceeded to insert his penis in her vagina. Her testimony was corroborated by both Pw2 and Pw3. Pw2 who examined the complainant found that her hymen was bleeding and freshly broken. He produced the P3 form and medical notes in which he concluded that there had been penetration. On her part, Pw3 testified that she saw the appellant lying on top of the complainant.

30. The appellant faulted the evidence on penetration on the basis that it was not supported by the medical evidence presented by the prosecution as the forensic examination carried out on him failed to connect him to the offence.

31. It has been held severally that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessary calling for medical evidence. This is in line with section 124 of the *Evidence Act* which states that corroboration is not necessary in sexual offences.

32. In Kassim Ali v Republic Cr. App. No. 84 of 2005 (2006) eKLR, it was stated that: -

> " ... [The] absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a complainant of rape or by circumstantial evidence."

33. The appellant contended that he was subjected to medical examination but that the results did not connect him to the alleged offence. It is noteworthy that no law requires that an accused person must be subjected to medical examination to connect him to a case of sexual assault.

34. Section 36 of the *Sexual Offences Act* does not make medical examination mandatory, except where the court thinks it is appropriate in the circumstances of the case to subject an accused person to such examination. Further, the law has been settled that, despite section 36 of the *Sexual Offences Act*, sexual assault is proved, not by medical examination, but by evidence adduced at the trial. The evidence of a complainant and the corroborative witnesses or circumstantial evidence is usually enough to establish a sexual offence.

35. In the present case, the totality of the evidence on record shows that there was penetration and that the complainant was defiled. In the premises, the Court is satisfied that penetration was proved to the required standard.

36. The third and last element is identification. In this case the appellant was well known to the complainant. Both the complainant (Pw1) and Pw3, who testified that she saw the appellant on top of the complainant, testified that they knew the appellant. The probation report also revealed that the appellant was a relative to the complainant.

37. In James Murigu Karumba v Republic [2016] eKLR, it was held by the Court of Appeal based, on Suleiman Juma alias Tom – v- R (2003) eKLR; (2003) KLR 386 that: -

> "Lastly, the three identifying witnesses did admit that they knew the appellant prior to the incident. Consequently, this was a case of recognition as opposed to identification of a stranger. Therefore, there was no need for the identification parades and the identification evidence therein was of no probative value."

38. In the present case, the trial court found that Pw1 and Pw3 knew the appellant. They recognized him and that recognition cannot be faulted as they were relatives. Accordingly, the Court is satisfied that the evidence presented by the prosecution proved the identity of the appellant beyond reasonable doubt as the complainant's assailant.

39. The appellant contended that the case against him was not proved beyond reasonable doubt as the evidence presented was full of contradictions.

40. In MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment) cited with approval Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 as follows: -

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

41. In the present case, this Court has subjected the evidence adduced to fresh scrutiny. Though there were minor inconsistencies in the evidence of the prosecution witnesses, which is common, the same were not material enough to warrant interference with the conclusions arrived at by the trial court. The evidence of the complainant was corroborated by the medical evidence adduced by Pw2 as well as the evidence of Pw3. Pw3 who knew the appellant testified that she saw the appellant on top of the complainant.

42. Accordingly, the Court finds that the offence of defilement was proved beyond any reasonable doubt and that the appellant's conviction was safe.

43. The second ground of appeal is that the trial court failed to consider the evidence and submissions presented in his defence.

44. This court has considered the trial court's judgment. At page 2 thereof, the trial court summarized the appellant's defence as presented by the appellant and his father, Dw2. At page 3 of the judgment, the trial court analysed the appellant's evidence as well as that of Dw2. It also considered the submissions made on behalf of the defence and concluded that the same did not displace the prosecution's case.

45. That second ground of appeal therefore lacks merit and therefore fails.

46. Finally, the third ground of appeal was that the sentence was flawed and based on wrong principles. That the trial court ignored the probation report presented before it thereby infringing on his right to fair trial.

47. The appellant was sentenced to 20 years' imprisonment as provided in section 8 (3) of the *Sexual Offences Act*. It is worth noting that sentencing is in the discretion of the trial court. This is never to be interfered with unless it is shown that the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R., and Wilson Waitegei v Republic [2021] eKLR)

48. The probation report dated 10/6/2024 presented in court noted that the appellant was a suitable candidate for a non-custodial sentence but prayed that the court sentences him as required by law taking into consideration that he was a young man with a future.

49. It is trite that probation reports are not binding on the court as they merely act as a guide. In Haron Mandela Naibei v Republic [2014] eKLR, the court held that: -

> " A court is entitled to call for a probation report on an accused before passing its sentence. However, such a probation report is not binding on the court. The report only acts as a guide. A court can either adopt or ignore such a report. In the case of Samuel Maobe Sereti v Republic (2004) eKLR the court held that: -
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> "Of course, the court is not bound by the recommendations of the probation officer but having called for the report and the report being favourable, the court should have stated why it felt that it was not proper to place the appellant on probation."

50. In the present case, the trial court considered the appellant's mitigation and the probation report. It noted that the appellant was a first offender as well as his age. However, it proceeded to sentence the appellant to the minimum sentence provided in law.

51. This Court finds no reason to interfere with the sentence as the appellant has not shown that the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors. The charge brought against him was a serious one and the nature of how the offence was committed similarly was heinous considering it was against a younger relative.

52. In the circumstances, the Court finds no reason to interfere with the trial court's decision on sentencing.

53. Finally, the appellant submitted that his conviction and sentence violated his right to a fair trial under Article 25 (1) (c). Article 25 of *the Constitution* addresses fundamental rights and freedoms that cannot be limited. Sub-Article 2 (c) specifically protects the right to a fair trial.

54. Article 50 (2) (a) of *the Constitution* provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved. The aforementioned Article goes on to provide the specific rights that constitute a fair trial.

55. The appellant did not particularise the aspects of fair trial that was infringed. This Court has already found that the trial court was not bound by the Probation Report. Failure to place him under probation does not amount to a violation of his right to fair trial. This limb of the appeal also fails.

56. The upshot is that the Court finds that the appeal to be without merit and dismisses the same in its entirety.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE