Obara v Republic (Criminal Appeal 12 (E020) of 2021)
[2024] KEHC 424 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 424 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 12 (E020) OF 2021

PN GICHOHI, J

JANUARY 25, 2024

BETWEEN

DAYOSITIN WAKO OBARA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment delivered by Hon. Denis Mikoyan, SPM, dated 2nd day of September 2021 in the original Ogembo Law Courts Sexual Offence Case No. E001 of 2020 State vs Dayositin Wako Obara)

JUDGMENT

1. D. W. O.(the Appellant), was charged with the offence of defilement contrary to Sections 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. He also faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of Count I are that on 14th day of September 2020, at around 1500 hrs at Nyabera Sub - Location Olendo Location in Etago Sub - County within Kisii County, the Appellant intentionally caused his penis to penetrate the vagina of R.M.M. a child aged 10 years.

3. In Count II, which should actually be an alternative charge, the particulars are that on 14th day of September 2020, at around 1500 hrs at Nyabera Sub - Location Olendo Location in Etago Sub - County within Kisii County, the Appellant intentionally touched the vagina of R.M.M. a child aged 10 years with his penis.

4. The Appellant denied the charges and after full hearing , the trial magistrate convicted him on the main charge of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act* and sentenced him to life imprisonment.

5. Dissatisfied with the said judgment, the Appellant preferred this appeal, vide an undated Petition of Appeal on 8 grounds which can be summarized as follows: -

    1. That the trial magistrate failed in both law and fact when he maliciously based the conviction on flawed evidence yet the same was below the standard required by law for the proof of the crime of this nature which makes the sentence meted unsafe and oppressive;

    2. That the trial magistrate erred in law and in fact in convicting the Appellant without considering the prosecution case was not proved beyond reasonable doubt;

    3. That the trial magistrate erred both in law and fact by failing to observe that the medical officer's report disapproved the allegation on the type of weapon causing injury;

    4. That the trial magistrate erred in shifting the burden of prove to the Appellant by failing to scrutinize the evidence that the Appellant defiled the Complainant.

6. The Appellant therefore prayed that the Appeal be allowed , conviction quashed and the sentence set aside.

7. The Appeal was canvassed by way of written submissions. The Appellant filed his undated submissions on 9/3/2023. He submitted on three grounds on amended grounds of appeal but there are no such amended grounds of appeal. He clustered the grounds of appeal and submitted that the PRC report and the P3 forms were produced in court unprocedurally as the maker of the documents did not come to court to produce them contrary to Section 77 (3) and Section 21 (3) of the *Evidence Act*.

8. He submitted that his rights under Article 50 of *the Constitution* and Section 329 and 216 of the Criminal Procedure Code Cap 75 are absolute and cannot be limited under Article 25 (c) of *the Constitution*. Further, he submitted that trial court failed to inform him of his right to legal representation under Article 50 (2)(g)(h) of *the Constitution*. In support of this argument, he relied on the case of David Njoroge Macharia vs Republic [2011] eKLR and Karisa Chengo & 2 Others vs Republic [201] eKLR.

9. He further submitted that the trial court erred in allowing a photocopy of the birth certificate as admissible. It was submitted that PW1 (Complainant) did not testify on her age and neither did she produce an original copy of the birth certificate as required under Section 66 and 64 of the *Evidence Act*.

10. He argued that there were no witnesses to the alleged account which happened in broad daylight and that even if identification by familiarity is reliable, mistakes can happen in recognition of close relatives and friends. He faulted the trial court for convicting him on the Complainant's testimony which was not corroborated.

11. Further, he submitted that his defence of alibi was not taken into account under the provisions of Section 329, 215 and 216 of the Criminal Procedure Code. In conclusion, he submitted that the prosecution failed to establish its case beyond reasonable doubt and therefore, the conviction should be set aside and he be set at liberty.

12. Mr. Justus Ochengo learned Counsel on behalf of the State , opposed the Appeal and filed his submissions on 27/4/2023. He submitted that this was a case of recognition; the offence happened in broad daylight at around 3.00 p.m. and R.M.M (Complainant) explained she knew the Appellant also as Nanu which was his nickname and that he came from Getango. She also identified him during his arrest.

13. He further submitted that the Complainant explained how the Appellant approached her, pulled her to a sugarcane plantation, undressed and defiled her. It was submitted that this evidence was corroborated by the medical officer (PW6) who produced the P3 Form, Clinical Card and PCR form which revealed that the hymen was freshly torn and therefore, penetration was proved beyond any reasonable doubt.

14. On the Complainant's age, he submitted that the Complainant's biological mother (PW2) testified and it was proved beyond reasonable doubt that the Complainant was 10 years old. Submitting that the sentence provided in law is life imprisonment for the charge the Appellant was convicted for, he urged the Court to find the conviction and sentence proper and therefore proceed to dismiss the Appeal for lack of merit.

15. This being a first Appeal, this Court has a duty to re-examine afresh all the evidence adduced before the trial court, analyse it and arrive at its own conclusions bearing in mind that this Court did not see or hear the witnesses testifying. The court is guided by the decision inPeter Kifue Kiilu & another v Republic [2005] eKLR, where the Court of Appeal emphasized its predecessor which stated in the case of Okeno v. R [1972] EA 32, at page 36, that :-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R [1957] E A 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses - See Peters v. Sunday Post [1958] EA 424".19."

16. In this case R.M.M (Complainant) testified as PW1. She told the trial court that on 14/9/2020 at around 3.00 p.m, she was at their gate when the Appellant, who she identified as Dayositini, approached her. He gave her Kshs. 50/= and asked her to get him chips from Nyansembe. He showed her the route to follow.

17. He then waylaid her, covered her mouth so that she could not raise alarm, started beating her and dragged her to a sugar plantation. He removed her pant. He removed his inner pant and penetrated her using his erect penis. He then told her to use the money he had given her to buy him chips. He took away her pant.

18. She walked away and met her sister G.K (PW4) and they went to tell their mother. Her mother took her for medical assessment and later reported the matter to the Moticho Police Station.

19. On being cross – examined by the Appellant, she restated that the Appellant is also known at home as Nanu and that he gave her Kshs. 50/= for chips and turned on her.

20. Her mother I.N. (PW2), testified that on the material date at about 4.00 pm, she called the Complainant but she could not see her. She was accompanied by G.K and to search for her. They saw her near Nyansembe Primary School. She was crying that Nanu had defiled her. I.N knew who Nanu was. It was the Appellant herein. On cross – examination by the Appellant, she testified that she examined the Complainant and saw the injuries.

21. Jane Nyakweba (PW3), told the court how she met the Complainant and the mother. The Complainant was crying and it was reported how she was defiled by Nanu (Appellant). She escorted them to Moticho Police Station form where the Complainant was referred for treatment. Along the way, they saw the Appellant with the Youth from Community Policing and the Complainant identified him. They handed him over to the police.

22. G.K told the court when they failed to find the Complainant, she went looking for her towards the school and met her crying saying the Appellant had defiled.

23. No. 246410 PC Thomas Oyunge (PW5) was the Investigating Officer in this case. He reiterated the Complainant's testimony. He testified that Complainant was taken for treatment and the P3 Form filled. The Appellant was arrested by the public through Community Policing and brought to the station where he was charged.

24. The Clinical Officer Samson Obara Ogero (PW6) testified that on examination, there was blood on the Complainant's clothes. The hymen was missing and she had swelling on her thigh. The lab results showed that there was an infection. The P3 Form, Clinical Card and PRC Form were filled by his colleague Molleen Kwamboka whose handwriting he was familiar with. He produced them as PEXH 1, 2 and 3 respectively.

25. On cross - examination, he testified that the injuries on the labia were due to forced intercourse and that the injuries on the thighs of the victim were due to injuries on the labia; that the Complainant's clothes were dirty and had blood and that her hymen was freshly torn. He explained that it was quite unusual at her age for the Complainant to have hymen broken save for some object penetrating her and, in this case, the object was the penis according to the Complainant.

26. In his sworn statement in defence, the Appellant told the court that he was a class 8 student at Nyansembe Primary School in the year 2020. He stated that on 14/9/2020 he got up to do casual work, took lunch and closed at 5 p.m.; that upon reaching home, he was arrested and taken to Moticho Police Station. He stated that he did not know anything about this case.

Determination

27. This Court has revaluated the evidence, considered the entire proceedings before the trial court and the submissions by both parties in this Appeal. On the issue that the trial court failed to inform the Appellant of his right to Counsel, Article 50 (2) (g) and (h) of *the Constitution* provides:-

> "(2)Every accused person has the right to a fair trial, which includes the right-
>
> (g) to choose, and be represented by an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly;

32. Regarding that right, Nyakundi J held in Joseph Kiema Philip vs Republic [2019] eKLR: -

> "It is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It (the court record) must show that the court did take the profile of the accused person before the trial commenced..."

32. On the point when the accused should be told of this right, Nyakundi J went on to say:

> " ...the earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearing." [Emphasis added].

32. The trial court's record shows that the Appellant was first arraigned in court on 18/9/2020. The charge was read to the Appellant in a language he understood and a plea of not guilty was entered. The undisputed fact is that the Appellant was not represented by Counsel during the trial. The court record does not indicate that the Appellant was informed of his right to be represented by an advocate.

33. The Appellant did not ask to be provided with one. He proceeded with the trial and cross- examined the witnesses. He mounted a defense to this charge. This Court is satisfied that failure to inform the Appellant of his right to Counsel under Article 50 (2) (g) of *the Constitution* did not prejudice the Appellant in this case. Further, he has not demonstrated that any injustice was occasioned to him at all as a result of not being informed of his right or for not being provided for with an advocate at the State's expense in the circumstances of this case.

34. On whether the prosecution proved its case, the Court of Appeal in John Mutua Munyoki vs Republic (2017) eKLR held:-

> " For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:-
>
> i. The victim must be a minor.
>
> ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice."

32. Further, it is clear that the Prosecution must prove the age of the victim, identification of the perpetrator. Regarding the age, the charge sheet indicated the Complainant's age as 10 years. The P3 Form gave the age as 9 years. The copy of the Birth Certificate (PExh. 4) showed that she was born on 23/04/2010. As at the time the offence was committed on 14/09/2020, the Complainant was about 9 years and 5 months old.

33. It was not material that the Birth Certificate was a photocopy. The estimated age of the Complainant was indicated in the P3 Form as 9 years and that is sufficient proof of age. The Complainant was therefore under 11 years of age as provided for under Section 8 (2) of the *Sexual Offences Act* under which the Appellant was charged.

34. Penetration is defined in Section 2 of the *Sexual Offences Act* to mean "the partial or complete insertion of the genital organs of a person into the genital organ of another person." The medical records produced confirmed that the Complainant had bruises at the labia region and there was evidence that the hymen was broken which was an indication that there was penetration. The element of penetration was therefore proved.

35. The Appellant's grievance that the PRC report and the P3 forms were produced in court unprocedurally as the maker of the documents did not come to court to produce them contrary to Section 77 (3) and Section 21 (3) of the *Evidence Act* lacks basis. The producer of the documents worked with the maker and knew her handwriting and signature. The Appellant did not object to that production. His argument is an afterthought and of no effect in the circumstances.

36. On the identity of the perpetrator, the offence was committed during the day. The victim knew the Appellant by name, nickname and where he lived. There was no possibility of mistaken identity. That evidence was not shaken by the defence at all. The Appellant's defence of alibi was not raised at the earliest opportunity. That defence is regarded as an afterthought and untrue. It is s defence that has no effect to the evidence herein.

37. On corroboration of evidence herein, Section 124 of the *Evidence Act*, Cap 80 laws of Kenya, provides that the testimony of the victim alone in sexual offences cases can suffice if the court has reasons to believe the victim. Further, in Robert Mutungi Muumbi v Republic [2015] eKLR, the Court of Appeal differently constituted quoted its decision in Nyeri in Geroge Kioji v Republic CR. APP. NO. 270 of 2012 (Unreported) where the Court pronounced itself on the proof of commission of a sexual offence thus:-

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso of section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

32. This Court is satisfied that trial court was well guided by law and correctly applied the same to the facts presented herein in convicting the Appellant.

33. On whether the sentence is harsh and excessive, Section 8 (1) of the *Sexual Offences Act* provides that :- "A person who commits an Act which causes penetration with a child is guilty of an offence termed as defilement." Further, Section 8 (2) provides that :- "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

34. No doubt , the Appellant committed a heinous act against a defenseless and innocent child of such tender age thus ruining her life. The pain and trauma inflicted will remain a permanent scar in her life. The Appellant was treated as a first offender and in mitigation, he stated:- "I was a student. I was breadwinner and also paid school fees. I seek a sentence that will help me go back to school."

35. The trial court however sentenced him to life imprisonment but did not indicate the reason for the sentence despite noting the mitigation. The life sentence would mean that despite the mitigation, which clearly gave an indication that the Appellant was still young at the time of the commission of this offence, the Appellant would be held in prison probably until his death.

36. Though still provided for in the statute, such a sentence is no longer tenable. Indeed, the Court of Appeal has held in Julius Kitsao Manyeso v Republic (Judgment 7/7/2023)unreported that imposition of a mandatory indeterminate life sentence, is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*.

37. This Court is therefore satisfied that the sentence herein is rather harsh in the circumstances. In the upshot, the Appeal therefore partially succeeds and is disposed of in the following terms:-

    1. The conviction is upheld.

    2. The sentence of life imprisonment is set aside and substituted with a sentence of 30 years imprisonment.

3. In computing the sentence, and pursuant to Section 333 (2) of the Criminal Procedure Code, the sentence to start running from 14th September, 2020 when he was arrested and placed in custody for plea until 2nd September 2021 when he was finally convicted and sentenced.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 25TH DAY OF JANUARY, 2023

PATRICIA GICHOHI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

N/A for Appellant

N/A for Respondent

Laureen Njiru/ Aphline , Court Assistant