Otieno v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 2030 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E009 OF 2022

JN KAMAU, J

FEBRUARY 26, 2024

BETWEEN

HILLARY OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Sexual Offence Case No 50 of 2019 on 17th December 2021)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was further charged with the offence of assault contrary to Section 251 of the Penal Code Cap 63 (Laws of Kenya) on Count II.

2. He was convicted by the Learned Trial Magistrate, Hon S. O. Ongeri (SPM), on the charge of defilement and assault and was discharged of the alternative charge. He was sentenced to life imprisonment and three (3) years imprisonment in respect of the offences of defilement and assault respectively.

3. Being dissatisfied with the said Judgement, on 22nd August 2022, he lodged the Appeal herein. His Petition of Appeal was dated 5th August 2022. He set out six (6) grounds of appeal. On 10th October 2023, he lodged Amended Grounds of Appeal dated 4th October 2023 in which he set out eight (8) amended grounds of appeal.

4. His Written Submissions were dated 30th October 2023 and filed on 15th November 2023 while those of the Respondent were dated and filed on 28th November 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Amended Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Amended Charge Sheet was defective;

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

9. Ground of Appeal No (6) of the Amended Grounds of Appeal was dealt with under this head.

10. The Appellant submitted that the Charge Sheet was amended after the closure of the Prosecution's case which prejudiced his right to free and fair trial under Article 50(2) of *the Constitution* of Kenya, 2010. He, however, did not specify which Charge Sheet he was referring to considering that the Amended Charge Sheet referred the offence of defilement, committing an indecent act with a child and assault.

11. On its part, the Respondent submitted that Section 214 of the Criminal Procedure Code allowed the Trial Court to make an order for alteration of the charge where it appeared that the charge was defective either in substance or form.

12. It averred that the evidence that was adduced showed that the Complainant (hereinafter referred to as "PW 1") had injuries on her neck caused by strangulation and that the same was corroborated by the P3 form and treatment notes that were produced by Jentix Kemunto (hereinafter referred to as "PW 4").

13. It emphasised that there was therefore need to amend the Charge Sheet to reflect the charge of assault. It asserted that no prejudice was occasioned to the Appellant as he was given a chance to plead to the charges and also was able to cross-examine the Prosecution witnesses.

14. Notably, Section 214(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

> "Where at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make

such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."

15. This court had due regard to the case of Obedi Kilonzo Kevevo vs Republic [2015] eKLR where the Court of Appeal held that when an appellate court was determining whether or not the charge sheet was defective, the applicable test was whether the conviction based on the defective charge occasioned the appellant great prejudice.

16. Other than stating that he was prejudiced by the Amended Charge contrary to Article 50(2) of *the Constitution* of Kenya, he did not demonstrate any prejudice that he suffered as a result of the amendment.

17. Notably, under Article 159(2)(d) of *the Constitution* of Kenya, courts have been mandated to administer justice without undue regard to procedural technicalities. That notwithstanding, Section 214 of the Criminal Procedure Code allows the prosecution to amend the charge at any time before it closes its case.

18. The Prosecution closed its case on 15th October 2021. It was the same date that it amended the Charge Sheet. This was within the period stipulated under Section 214 of the Criminal Procedure Code.

19. A perusal of the Amended Charge Sheet showed that it contained all the necessary information to inform the Appellant of the offences that he had been charged with. It specifically explained what offences were committed, how the offences were committed. It also set out the date and place of the incident and further mentioned the name and age of the person who was defiled, indecently assaulted and assaulted. He pleaded "Not guilty" and the case proceeded to full trial. This was evidence of the fact that he was aware of what charges he was facing before the Trial Court.

20. This court did not therefore find any merit in his assertions that the Trial Court erred in having allowed the amendment of the charge as the Prosecution had a right to amend the charge at any time before it closed its case with an accused person having a right to plead to the amended facts afresh which he did on 15th October 2021 before the court proceeded to take the evidence of No 86662 PC Rachel Ambasa (hereinafter referred to as "PW 5") who was the last Prosecution witness to testify.

21. In the premises foregoing, this court found and held that Ground of Appeal No (6) of the Amended Grounds of Appeal was not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

22. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (8) of the Amended Grounds of Appeal were dealt with under this head as they were all related.

23. In determining whether or not the Prosecution had proved its case to the required standard, which in criminal cases is proof beyond reasonable doubt, this court considered the ingredients of the offence of defilement.

24. It is now settled that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and identification of the perpetrator as was held in the case of George Opondo Olunga vs Republic [2016] eKLR. This court dealt with the same under the following distinct and separate heads.

A. Age

25. The Appellant submitted that there was no evidence that was tendered during trial to prove PW 1's age. He pointed out that the evidence presented placed her age as between eleven (11) to twelve (12) years old. He asserted that RHM a (hereinafter referred to as "PW 2") informed the Trial Court that she could not remember the year when her daughter was born. It was his contention that the age could only be proven by a birth certificate and not the age assessment. He argued that no expert was called to produce the Age Assessment Report hence the court should disregard it.

26. To buttress his point, he placed reliance on the cases of Francis Omuroni vs Uganda, Court of Appeal in Criminal Appeal No 2 of 2000 and Alfayo Gombo Okello vs Republic [2020] eKLR where the common thread was that in defilement cases, medical evidence was paramount in determining the age of the complainant and that the doctor was the only person who could determine the age of the victim in the absence of any other evidence.

27. On its part, the Respondent submitted that PW 1 testified that she was a student at [Particulars Withheld] Special School and that her evidence was corroborated by PW 2. It pointed out that No 86662 PC Rachel Abasa (hereinafter referred to as "PW 5") produced an Age Assessment Report which out her age at twelve (12) years.

28. In the case of Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 (unreported), the Court of Appeal stated that in a charge of defilement, the age of a minor could be proved by medical evidence, baptism cards, school leaving certificates, by the victim's parents and/or guardians, observation or common sense as was held in the case of Musyoki Mwakavi vs Republic [2014] eKLR.

29. Notably, the offence herein was committed on 9th September 2019. The said age assessment was done on 24th October 2019. This was about one and a half (1½) months after the said offence. The Age Assessment put PW 1's age at twelve (12) years at the material time.

30. In this case, PW 1's age was proven by medical evidence. The Appellant did not challenge the production of the aforesaid Age Assessment Report and/or rebut this evidence by adducing evidence to the contrary. He could not therefore purport that the Age Assessment (sic) was non-existent. Consequently, this court was satisfied that the Prosecution had proved that PW 1 was about twelve (12) years which corroborated her evidence and that of PW 2.

B. Identification

31. The Appellant submitted that there were contradictions in the Prosecution's evidence. He asserted that PW 1 and PW 5 testified that the incident took place at the banana farm while the other evidence (sic) was that the incident took place in the house on the floor. He questioned which evidence was the truth.

32. He pointed out that PW 5 admitted that it was true that every torn cloth of a minor meant that she was defiled. It was his contention that there was no evidence tendered to support his identification as the one who committed the offence.

33. On the other hand, the Respondent submitted that through her intermediary, PW 1 testified that the Appellant defiled her. It asserted that PW 1 stated that she knew him as he was her step brother, he lived near their house and that the incident took place during daytime when she was coming back home from school. It added that PW 2 testified that PW 1 informed her that he had defiled her.

34. It pointed out that the Prosecution invoked Section 31 of the *Sexual Offences Act* because the voire dire, PW 1 was declared vulnerable as she was mentally challenged and had stopped responding to questions. It averred the Trial Court allowed the use of an intermediary who was reminded that she was to inform it of what PW 1 told her and thus strictly adhered to the provision of the law.

35. It contended that although the Appellant gave a defence of alibi he did not avail witnesses in support thereof. It termed his defence as a mere denial which did not rebut the Prosecution's case.

36. In his sworn evidence, the Appellant denied having known PW 1. He did not state where exactly he was at the material time of the incident but his evidence was that he was at Kisumu on that date and he only came back the following day on 10th September 2019 when he was arrested.

37. Notably, PW 1 and the Appellant knew each other because they were step siblings and neighbours. PW 2 told the Trial Court that he was her son as his mother was his co-wife. Both she and the Appellant's mother were married to one man known as TM. She clarified that the Appellant was not her husband's biological son.

38. PW 1 positively identified the Appellant at the dock during trial. Identification was by recognition. Without belabouring the point, this court came to the firm conclusion that the Prosecution proved the ingredient of identification.

C. Penetration

39. The Appellant submitted that the incident was reported after two (2) days and that there were no spermatozoa that was seen in PW 1's genitalia. He relied on the case of John Mutua Munyoki vs Republic [2017] eKLR where he pointed out that the appellant therein was acquitted on such grounds.

40. On its part, the Respondent submitted that the evidence of PW 1, PW 2 and PW 4 proved that penetration had occurred.

41. According to PW 1, she was on her way back home from school when the Appellant pulled her by hand, took her to her grandmother's banana farm, tore her uniform, petticoat and underpants and defiled her. She added that that he covered her mouth with his hand and stepped on her legs so that she would not walk (sic). It was her further evidence that he strangled her when she tried to scream for help.

42. It was PW 2's testimony that she was informed by one Gladys that PW 1 was heard crying at her grandmother's house and that when she went looking for her, she found her at her mother-in-law's house.

43. PW 4 testified that PW 1's private parts had a foul smell. Her labia minora had bruises showing forcible entry. The hymen was freshly torn and reddish. She opined that there was penetration and defilement. She produced Post Care Rape (PRC) form, Treatment Note and P3 form as exhibits in support of the Prosecution's case.

44. The Trial Court found PW 1's evidence to have been well corroborated by scientific evidence. The Trial Court could not therefore be faulted for having found that the Appellant did in fact penetrate her and that the Prosecution had proved its case beyond reasonable doubt.

45. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (8) of the Amended Grounds of Appeal were not merited and the same be and are hereby dismissed.

III. Sentencing

46. Amended Ground of Appeal No (7) was dealt with under this head.

47. The Respondent did not submit on the issue of sentencing. On his part, the Appellant did not challenge his conviction of the offence of assault and/or indicate whether or not the sentence of three (3) years imprisonment that was meted upon him in that regard was excessive in the circumstances of the case.

48. He only focused on the sentence of life imprisonment that was imposed on him and argued that the same was harsh and unconstitutional as held in the case of Julias Kitsao Manyeso vs Republic Criminal Appeal No 12 of 2021(eKLR citation not given).

49. The Appellant herein was sentenced under Section 8(2) of the *Sexual Offences Act*. The same provides as follows:-

> " 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."

50. However, the Age Assessment Report showed that PW 1 was aged twelve (12) years at the material time. The Amended Charge Sheet showed that she was aged twelve (12) years. He then ought to have been sentenced pursuant to Section 8(3) of the *Sexual Offences Act* which provides that:-

> " 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."

51. This court therefore noted that the sentence of life imprisonment that the Trial court meted on him was not only illegal but the same was inconsistent with the law and had no legal basis. It was a grave error on the part of the Trial Court. This caused a great travesty of justice against the Appellant herein as the Trial Court ought to have sentenced him to twenty (20) years imprisonment which was what provided for under Section 8(3) of the *Sexual Offences Act*.

52. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

53. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

54. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of Dismas Wafula Kilwake vs Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

55. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another vs Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

56. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK vs Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of

Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

57. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of *the Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

58. In the case of Joshua Gichuki Mwangi vs Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake vs Republic (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

59. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

60. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to a lower sentence than the twenty (20) years imprisonment that had been prescribed in Section 8(3) of the *Sexual Offences Act*.

61. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and for the society to find retribution in that sentence.

62. Turning to the sentence that was meted upon the Appellant for the offence of assault, this court was of the considered view that the Trial Court ought not to have sentenced him to three (3) years imprisonment for the offence of assault because the sentence of life imprisonment that it meted on him for the offence of defilement was indeterminate and would have subsumed the three (3) years sentence.

63. Be that as it may, as this court had now found that a determinate sentence was appropriate herein, it sufficed to state that it was necessary to address itself to the question of how the sentences of the two (2) offences should run.

64. Section 14 of the Criminal Procedure Code provides as follows:-

> " 1. Subject to sub-section (3) when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently."

65. In the case Peter Mbugua Kabui Vs Republic [2016] eKLR, the Court of Appeal addressed its mind to the question of concurrent and consecutive sentences when it stated as follows:-

> " In the case of Sawedi Mukasa s/o Abdulla Aligwaisa [1946] 13 EACA 97, the then Court of Appeal for Eastern Africa in a judgment read by Sir Joseph Sheridan stated that the practice is where a person commits more than one offence at the same time and in the same transaction, save in very exceptional circumstances, to impose concurrent sentences. That is still good practice. As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment."

66. In the said case, the Court of Appeal found that the appellant therein had committed different offences on different dates and as a result, Achode J who heard the appeal was correct in upholding the Trial Court's holding that the sentence the Appellant was to serve was to run consecutively.

67. On his part, in the case of George Mwangi Chege & 2 others v Republic [2004] eKLR, Khamoni J (as he then was) rendered himself as follows:-

> " ....where more than one sentence of imprisonment are imposed without specifying whether the sentences will run consecutively or concurrently, Section 333(2) of the Criminal Procedure Code will apply so that every one of those sentences is-
>
> > "deemed to commence from, and to include the whole of the day of, the date on which it was pronounced" with the result that:-
> >
> > a. If the sentences are in one trial and are pronounced on the same date, they definitely run concurrently.
> >
> > b. If the sentences are in different trials and are pronounced on the same date, they also run concurrently.
> >
> > c. If the sentences are in one trial but are pronounced on different dates, the sentences will run concurrently only to the extent of the balance of the formerly pronounced sentence is yet to be served so that if at that time the latter pronounced sentence is longer than the remainder of the formerly pronounced sentence, then the latter pronounced sentence, following the end of the formerly pronounced sentence, will be served consecutive to the formerly pronounced sentence.
> >
> > In other words, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding.
> >
> > d. If the sentences are in different trials and are pronounced on different dates, the prison sentences will run concurrently only to the extent of the duration of service of the two sentences coinciding. Otherwise the sentences will run consecutively."

68. This principle was also expounded in the cases of Ng'ang'a vs Republic (1981) KLR 530 and Ondiek vs Republic (1981) KLR 430 where the common thread was that concurrent sentences should be awarded for offences committed in one criminal transaction unless exceptional circumstances prevail.

69. In the instant case, the offences were committed on the same day and arose from the same transaction. There were no exceptional circumstances that would warranted the sentence to run consecutively. The sentences for the offence of defilement and that of assault therefore ought to run concurrently. This court came to a similar conclusion in the case of Venant Mwachanya v Republic [2016] eKLR.

70. As this court had found that a determinate sentence herein was most appropriate, it was mandated to consider if the Appellant had spent time in custody while his trial was ongoing and if so, to take it into account and further direct that the same be taken into account while computing the sentence that he was going to serve.

71. In this regard, Section 333(2) of the Criminal Procedure Code provides as follows:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall (emphasis court) be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

72. This duty to take into account this period is also contained in the Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that: -

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

73. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

74. A perusal of the proceedings of the lower court showed that although the Trial Court granted the Appellant bond of Kshs 100,000/= with one (1) surely of a similar amount, there was no indication in the court file if he was released on bond/bail while the trial was ongoing. He remained in custody throughout his trial. He was arrested on 10th September 2019 and was sentenced on 1st August 2022. The period that he spent in prison between 10th September 2019 when he was arrested and 31st July 2022 therefore ought to be taken into account while computing his sentence.

Disposition

75. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 22nd August 2022 which was subsequently amended on 15th November 2023 was partly merited but only on the aspect of sentence only. His conviction on the offence of defilement and assault be and are hereby upheld as they were both safe.

76. It is hereby directed that the sentence of life imprisonment be and is hereby set aside and/or vacated and replaced with an order that the Appellant be and is hereby sentenced to fifteen (15) years imprisonment to run from the date of his arrest on 10th September 2019.

77. For avoidance of doubt, the sentence of three (3) years in respect of the offence of assault be and is hereby upheld with an order that it shall rum concurrently with the sentence of fifteen (15) years that was imposed on him for the offence of defilement.

78. It is also hereby directed that the period between 10th September 2019 when the Appellant was arrested and 31st July 2022 be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

79. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE