Omondi v Republic (Criminal Appeal 124 of 2018)
[2024] KEHC 4370 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4370 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL 124 OF 2018

A. ONG'INJO, J

APRIL 25, 2024

BETWEEN

PRINCE ODHIAMBO OMONDI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence by Hon. C. A. Ogweno, Resident Magistrate on 8th October 2018 in Mombasa Chief Magistrate's Court S O. Case No. 66 of 2016, Republic v Prince Odhiambo Omondi)

JUDGMENT

Background

1. Prince Odhiambo Omondi was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that Prince Odhiambo Omondi on the 20th day of June 2015 in Changamwe Sub-county within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina and anus of DA a girl aged 4 years old.

2. In the alternative count, the appellant was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that Prince Odhiambo Omondi on the 20th day of June 2015 in Changamwe sub-county within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of DA a girl aged 4 years.

3. The trial magistrate considered the evidence of the six prosecution witnesses and the sworn statement of the appellant and convicted the appellant who was sentenced to serve life imprisonment.

4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -

1. That the learned trial magistrate erred in law and fact by failing to find that my constitutional right to a fair trial which cannot be limited pursuant to article 25 (c) and article 35 (1)(a)(b) of *the Constitution* were violated by the failure to provide me with the first report made to police by the victims.

2. That the learned trial magistrate erred in law and fact by convicting and sentencing me to life imprisonment without proper finding that there is no suggestion as to whether the victim made any identification claims in the first report made to police.

3. That the learned trial magistrate erred in law by failing to find that the prosecution evidence was riddled with material contradictions and lack of forthrightness that impact on integrity/ credibility of the evidence adduced in court contravening section 163 (1)(c) of the *Evidence Act*.

4. That the learned trial magistrate erred in law and fact by failing to find that crucial witnesses were not called to testify during trial contravening section 150 of the Criminal Procedure Code.

5. That the learned trial magistrate erred in law and fact by failing to analyze and reevaluate the prosecution evidence sufficiently before reaching to its conclusion.

6. That the learned trial magistrate erred in law and fact by summarily rejecting my defence which was reasonable enough to cast doubt upon the poor, shoddy investigated and fabricated prosecution case which lacked no earlier coronation.

7. That the learned trial magistrate erred in law and fact by giving me a harsh sentence of life imprisonment without proper finding that the court has wide power under section 354 of the Criminal Procedure Code to reduce the mandatory sentence.

5. The appellant prayed that the appeal be allowed, conviction quashed and sentence set aside. The appeal was canvasses by way of written submissions.

Prosecution case

6. PW1, D. A., underwent voire dire examination and it was established by court that she was in a position to give an unsworn evidence. That on 17.11.16 when PW1 initially appeared in court to testify, she stated that she knew the accused but did not know his name as she had forgotten it. PW1 stated that the accused did tabia mbaya to her. She stated that she was taken to hospital because she was feeling pain on the hand. PWI was in tears then went mute. The prosecution prayed for the complainant to be declared a vulnerable witness and the court exempted her from testifying. On 12.2.2018, PW1 was recalled and she stated her name, that she goes to school but could not remember the class she was in. She then stopped responding to questions. 30 minutes later when court resumed, she stated that she knew why she was in court and it was because uncle Prince did bad manners to her.

7. PW1 identified uncle Prince as the accused in the dock. PW1 stated that the accused did bad manners to her vagina by pointing to the genital area using her hand. She stated that the accused did bad manners to her while they were in the house and on the floor and that when her aunty returned, she told her what had happened. She stated that the accused also did bad manners to her anus by pointing at her buttocks. She stated that the accused used his penis to do bad manners to her and that the penis is the part he uses to urinate.

8. PW2, LA, stated that on 20.6.2015 at 10.00 am, she went to buy food and left the complainant with her father, and that she was playing outside. She stated that on her way back, she met the complainant and her father going to the police station. PW2 stated that she only took 30 minutes at the shop and did not

go with them to the police station. That she later went to Changamwe Police Station and was told they had been referred to Coast General Hospital. She stated that the following day she went to hospital with the complainant and they were admitted where blood test was also taken. That the complainant told PW2 that Prince had injured her at the anus and when PW2 examined her, she saw blood at the anus. That the complainant was operated and an incision made on the stomach to pass feaces.

9. PW2 informed court that they stayed at the hospital for six months where the complainant was operated twice leaving her with a huge scar on the lower abdomen. That upon discharge, the complainant was taken to a children's home in Tononoka. PW2 stated that they lived in a deserted building which was in a bad condition and that it is only the accused and them who lived in the building. She also pointed out that the complainant was 5 years old and that she had her treatment notes, P3 Form – MFI – P1, treatment notes from Coast General Hospital – MFI – P3, Lab Request Form MFI – P4 and Invoice from Coast General Hospital – MFI – P5. That PW2 had known the accused for 8 months as a neighbour and that it was the first time the accused had defiled the complainant. PW2 identified the accused in court.

10. PW3, PO stated that on 20.6.2015 at 10.00 am, he saw D at the Verandah when he was from work. That the complainant told him that Uncle Prince had injured her at the anus and that she told him her mother was not at home. PW3 testified that he took her and rushed to Changamwe Police Station and that he had checked her and saw some mucus substance. That on the way, he met his wife's friend who accompanied him to the station where he recorded his statement. PW3 states that he was referred to take her to Coast General Hospital where she was examined, first aid administered and advised to return the following day. That his wife returned with her to hospital and she was admitted for about eight months. PW3 informed court that he visited her in hospital and found that she had been operated on the stomach to enable her pass stool. That upon discharge, she was taken to the children's home PW3 stated that Prince was his landlord and he had known him for years. That prince had a room in the building and there were other tenants. PW3 identified the accused in court and stated that he was arrested one year after the incident.

11. PW4, Dr. Tima Nassir from Coast General Hospital stated that she knew Dr. Munir who had been transferred to another hospital. That he is acquainted to his handwriting and signature and that the P3 Form is for D. A. That the clothes had been changed at the time of assessment and that it was a case of defilement/sodomy, and that all the body parts were normal. PW4 testified that the approximate age of the injury was one year five months and the probable weapon was blunt. That post-exposure prophylaxis and antibiotics had been given, and surgery – colostomy done. That degree of harm was maim and the patient was 4 years old. PW4 stated that there was oedema on the labia majora, a perenial tear and there was a freshly broken hymen. That there was a tear of the anal orifice which was loose. She informed court that the HIV test was negative and the results for VDRL and Hepatitis B were not indicated. She stated that the P3 Form was filled on 4/12/2016 and she produced it as Exhibit 1.

12. PW4 also had a Post Rape Care (PRC) Form which indicated that the hymen was broken, that there was a vaginal tear and abrasion, there was a tear on the anal orifice, there was a discharge which was whitish, the anal orifice was loose, and that post exposure prophylaxis was given. PW4 produced it as Exhibit 2. She stated that she had a discharge summary for the patient who was admitted on 26.6.2015 and discharged on 14.7.2015 which was produced as exhibit 3 (a), and a note attached to it, exhibit 3 (b). She also had a request for haemogramme MFI-4 and the haemogramme report MFI-6 which were produced as exhibit 4 and 6 respectively. She stated that she had an invoice from Coast General Hospital which shows the medication and the procedures that were done – Exhibit 5. That age assessment was done on 4.11.2016 and the approximate age was 4 years. That it was done by Dr. Jumbi who is a dental

officer and he produced the report as exhibit 7. That colostomy was done to allow the anal orifice to heal.

13. PW5, No. 77368, Sergeant Josephine Mwangemi, stated that on 22.2.2015, she received information that a child had been defiled in Magongo Wayani area and that the child had been admitted at Coast General Hospital. That she went to the hospital and found the child in ward 4 where she interviewed and recorded her statement. PW5 testified that the child told her that she was playing outside their house alone when the accused took her to his house and defiled her on both her vagina and anus. That the accused then released the girl to go to her home. That PW5 left the girl to continue with treatment where she was admitted for one month and underwent an operation as well. That the complainant was 4 years old and living with her mother. PW5 stated that the accused disappeared after the incident and when she conducted investigations and got information that the accused was in Bamburi area, one of the witnesses, Isaack Keya, assisted in arresting him where he was charged with the offence. That PW5 did not know the accused before and had no grudge against him.

14. PW6, Isaack Keya stated that on 17.7.2016, he was in Bamburi area at 8.30 pm where he was with PO, the complainant's father who was also his neighbour. PW6 testified that the accused went underground after defiling the complainant in this case. That they arrested the accused and took him to Bamburi Police Station. That he then recorded his statement at Changamwe Police Station and that he has no grudge against the accused.

Defence case

15. The accused, Prince Omondi Odhiambo, stated that he is a boda boda operator and understood the charges he was facing. He stated that on 20.6.2015, he was a t home and at around 12.00 pm, a woman called Mama Mercy went looking for him. That she asked where Rama was and he told her that he did not know where he was. That she asked him to take her to Changamwe Police Station and he agreed. The accused informed court that on arrival, he met two police officers who placed him in the cell. That at around 6.00 pm, a policeman went and interrogated him in the presence of Mama Mercy who said that if he did not get her a motorbike, she will ensure he disappears. That his fingerprints were taken and charged in court for a different offence. He stated that he did not defile D. A. as alleged as he does not know her and has never met her before. The accused stated that he only saw her in court for the first time.

The Appellant's submissions

16. The Appellant cited Article 35 of *the Constitution* and contended that as an accused person, he has a right to fair trial which cannot be limited pursuant to Article 25 (c) of *the Constitution*. He states that this right can be said to include the right to be supplied or given a copy of the report made to the police by the victims in accordance with the set down procedure prior to the accused being charged. He states that on 18th January 2017, page 14 line 12 and line 19 of the typed proceedings, he made an application to court which was granted but the prosecution took no action on the same.

17. The Appellant further submitted that if there is no identification of the suspect in the first report made to the police, then the accused cannot be convicted unless there are other factors connecting him with the offence. The Appellant cited the case of Kipwenen Arap Musonik v Republic (1980) KLR 153, where the Court of Appeal stated, "… No proper first report was given in support of the witness identification. A proper description of the assailant was essential to enable the witness identify the assailant later … There having been no first report tendered in evidence, PW1's alleged identification of the appellant almost 2 years later cannot be said to be full proof … PW1's first report to the police was of no use as she did not give any useful description of the appellant."

18. The Appellant cited the case of Tekerali and Others v Republic, Vol. 19-1952 EACAPG 259 (182-185) where it was held that evidence of first report to a person in authority are very important as they often provide a good taste by which the truth and accuracy of subsequence statement may be a made up case. The Appellant therefore averred that the entire evidence of the prosecution was fabricated. That PW2 at page 9 line 11 of the typed proceedings stated that, "On my way back, I met her father with D going to the police station" That this was contrary to what PW3 stated on page 11 line 3 that, "I did not meet her mother on the way". That PW3 instead stated that, "On the way I met my wife's friend who accompanied me to the station" That further, PW3 at page 11 line 25 on cross examination stated that, "A neighbour heard. Her name is Mishi" The Appellant submitted that PW3 at page 11 line 1-4 stated that, "On 20.6.2015 at 10.00 am, I saw D at the Verandah. I was from work. She told me uncle Prince had injured her at the anus. She told me her mother was not at home. I took her and rushed to Changamwe Police Station"

19. Further to the above, the Appellant contended that the evidence of PW2 contradicted that of her husband PW3. Additionally, that no single person was called to corroborate the evidence of PW3 on the alleged defilement reported to the police. That PW3 informed court that he went and reported the defilement on the same day on 20.6.2015 but PW5 informed court that she received information of the alleged defilement on 22.2.2015, almost 5 months before the alleged incident took place, at page 25 line 3-4. That PW5 at page 25 lines 19-20 further informed court that, "I cannot recall the officer who received the first report. The officer who received the first report is not a witness in this case."

20. In support of the above, the Appellant relied on the case of Gilbert Nyongesa Oloo and Another v Republic (1997) eKLR where it was held that, "A witness in a criminal case should not create an impression in the mind of the court that he is not a straight forward person or raise suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence."

21. The Appellant also cited the case of Emmanuel Muthoka Mutisya and Another v Republic HCCR APP No. 248 of 2009 where it was held that, "These were police officers, public servants who have a duty to appear in court to testify more so when they played such a crucial role. Their failure to testify is a clumsy omission on the part of the prosecution and again weakens the thread of evidence. On the whole, we find that in this case, the prosecution failed to meet the legally established standard of proof. The conviction of the two accused persons on both counts was unsafe." To add on, the Appellant cited Olivia v Rep (1965) EACA where it was held that, "whenever the name of a person appears and indictment then such person should be called as a witness"

22. On the issue of mandatory life sentence, the Appellant stated that the court has wide powers under Section 354 (3)(a)(ii) of the Criminal Procedure Code to review any sentence imposed upon the Appellant as was held in Salim Kaingu v Republic HCCR APP No. 36 of 2019 where the sentence was reduced from 15 years imprisonment to 10 years imprisonment and in Misc. Criminal Application No. E014 OF 2021, High Court Narok (2022) Baragoi Rotiken v Republic where a life sentence was substituted with 25 years imprisonment.

Analysis and Determination

23. This being the first appellate court, I am guided by the principles in David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant

court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

24. After considering the grounds of appeal Records of trial courts and submissions, issues for determination are as follows: -

    i. Whether the appellant was accorded fair trial under Article 25 (c) and Article 35 (1) (a) and (b)

    ii. Whether the appellant was properly identified

    iii. Whether there were material contradictions in the prosecution's evidence

    iv. Whether crucial witnesses were not called to testify

    v. Whether the appellant's defence was considered in the judgment of the trial magistrate

    vi. Whether the sentence of life imprisonment was harsh and excessive in the circumstances

Whether the appellant was accorded fair trial under Article 25 (c) and Article 35 (1) (a) and (b)

25. The Appellant submitted that he made an application to court to be supplied with the first report which was granted but the prosecution took no action on the same. On the contrary, upon perusal of the proceedings, three witnesses had already testified and when the matter came up for hearing on 1st March 2017, the Appellant was ready to proceed with the hearing and even objected to the prosecution's prayer for adjournment. The Appellant never raised the issue of the first report again and that he had not been supplied with the same. The Appellant cross examined all the witnesses comprehensively leaving this court with no choice but to conclude that the ground herein is an afterthought and therefore does not stand.

Whether the appellant was properly identified

26. On the issue of identity of the Appellant, this court established that he was well known to the complainant as she even knew him as uncle Prince. PW2 and PW3 testified that they lived in the same building with the Appellant whom they had known for many years. Therefore, identity of the Appellant as the perpetrator was established to the required standard of proof.

Whether there were material contradictions in the prosecution's evidence

27. In Erick Onyango Ondeng' v Republic [2014] eKLR, the appeal court held: -

> " Nor do we think much turns on the alleged contradictions on the time of commission of the offence. The trial court, after hearing all the evidence accepted that the offence was committed at "about 7 pm" in accordance with the evidence of PW2. As noted by the Uganda Court of Appeal in Twehangane Alfred vsUganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:
>
> > "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."

28. The contradictions referred to by the Appellant arein the evidence of PW2, the mother of the Complainant, who said that she met the Complainant and the father, PW3, on their way to the police station whereas PW3 stated that, "On the way I met my wife's friend who accompanied me to the station". However, the said contradictions do not affect the fact that the Complainant was defiled. They are therefore not material and does not controvert the substance of the prosecution's case and cannot be regarded.

Whether crucial witnesses were not called to testify

29. Section 143 of the *Evidence Act* provides that: -

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any act."

30. In Julius Kalewa Mutunga v Republic [2006] eKLR it was held: -

> " As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

31. The Appellant submitted that no single person was called to corroborate the evidence of PW3 on the alleged defilement reported to the police. Particularly, a neighbour by the name Mishi and the officer who received the first report.

32. Section 124 of the *Evidence Act* provides: -

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> > Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

33. The proviso to Section 124 of the *Evidence Act* is clear that corroboration is not required in a sexual offence where the victim is a credible witness and the court believes that the witness is telling the truth. The trial magistrate indicated that it was clear that the Appellant was known to the Complainant and that is why he was able to lure her into his house and defile her. This is an indication that the Trial Magistrate believed that the Complainant was telling the truth. There was therefore no need of calling other witnesses to corroborate the evidence of the Complainant as to the identity of the Appellant as she even referred to him as uncle Prince and they were even staying in the same building.

Whether the appellant's defence was considered in the judgment of the trial magistrate

34. It is evident that the trial court in its judgment considered the Appellant's defence, on page 44 and 45 of the record. The defence of the Appellant was that he was arrested on 20.6.2015 at the instigation of Mama Mercy who told him that she will make sure that he disappears if she did not get her motorbike. From the Charge Sheet, it is indicated that the Appellant was arrested on 19.7.2016, over one year after the commission of the offence. The Trial Magistrate did not believe his defence and said the Appellant disappeared immediately after the incident and went into hiding to run away from the law enforcement officers because he knew he had perpetrated a heinous crime on an innocent child. The Appellant did not say who Mama Mercy was and how she was connected to the offence for which he was charged or how it was said she was related to the Complainant and her parents to make her relevant to the trial against him. This court finds that his defence was considered and therefore, the ground of appeal herein fails.

Whether the sentence of life imprisonment was harsh and excessive in the circumstances

35. The complainant was aged 4 years old. The Appellant was therefore sentenced in accordance with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 which 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.

36. However, in consideration of the emerging jurisprudence and preference for determinate sentences, and the holding in the case of Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), in which life sentence was declared unconstitutional this court sets aside the life imprisonment and substitutes thereof 30 years imprisonment to run from 20th July 2016 pursuant to Section 333(2) of the Criminal Procedure Code.

37. The appeal succeeds partly on sentence. Conviction is upheld. 14 days right of appeal explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 25TH DAY OF APRIL 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE