Aola v Republic (Criminal Appeal E059 of 2023)
[2024] KEHC 4380 (KLR) (24 April 2024) (Abridged Judgment)

Neutral citation: [2024] KEHC 4380 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E059 OF 2023

KW KIARIE, J

APRIL 24, 2024

BETWEEN

JACOB ODONGO AOLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case No. E023 of 2022 of the Chief Magistrate's Court at Homa Bay by Hon. C.A.S. Mutai–Senior Principal Magistrate)

ABRIDGED JUDGMENT

1. Jacob Odongo Aola, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the night of 11th June 2022 Rangwe sub-county in Homa Bay County, a male person caused his penis to penetrate the vagina of J.A.O aged ten years, a female person who was to his knowledge his niece.

3. In count two, he was convicted of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars thereof were that on the night of 11th June 2022 Rangwe sub-county in Homa Bay County, he wilfully and unlawfully assaulted FMO, occasioning him actual bodily harm.

4. The appellant was sentenced to serve twenty years imprisonment in count one. In count two, he was sentenced to four years imprisonment. He has appealed against both conviction and sentence. The appellant was in person. He raised the following grounds of appeal:

    a. The trial court relied on the evidence crafted by the father of the two children to implicate the appellant falsely.

    b. That there was malice and score-settling on the part of the prosecution witnesses.

c. That the sentence meted was very harsh in the circumstances.

d. That the trial court did not consider the sentences to run concurrently.

e. That the trial court did not consider the period served in the remand to be included as part of the already served portion of the sentence.

f. That the trial court did not consider the alibi defence.

5. The state opposed the appeal. It argued that the two offences were proved to the required standards and that the sentences were commensurate with them.

6. This is a first appellate court. As expected, I have analysed and evaluated all the evidence adduced before the lower court afresh, drawing my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will, therefore, be guided by the celebrated case of *Okeno vs Republic* [1972] E.A 32.

7. Section 20 (1) of the *Sexual Offences Act* provides:

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

8. If the incidents complained of took place as narrated in this case, it would appear that the appellant and the father of the two complainants had profound differences.

9. J.A.O (PW1) 's evidence was that her brother F.M (PW2) went and woke her. It was about 11 p.m. He told her that the appellant was calling them. When she went out, the appellant told them to lock their house and accompany them to his house. The appellant locked their door, and they accompanied them to his house.

10. When they arrived at his house, the appellant gave F.M. a mattress and asked him to spread it in the sitting room and sleep. Initially, he asked her to spread the mattress he gave her in the sitting room but changed his mind and asked her to go and spread it in his bedroom. She complied. The evidence of F.M. (PW2) was to the same effect.

11. Before she could catch sleep, PW1 went on to testify that the appellant went and carried her to his bed. He asked her to remove her clothes, but she refused. She managed to run away and hid in the kitchen. The appellant asked F.M. to look for her, or else he was going to kill him. F.M. found her in the kitchen and told the appellant so. He went for her, hit her with a hammer, and threatened to kill her. He pushed her to his bed and defiled her through the anus and vagina.

12. At the time of the ordeal, she screamed, and the appellant asked her brother whether he could “hear how sweet the things were.” Later, the accused went to the sitting and cut her brother on the head. The evidence of F.M. was to the same effect.

13. Paul Nyapaya Atera (PW3) testified that J.A.O. had multiple bruises and rigged wounds on the pelvic-anal opening with the flaccid wall, which were tender to touch. She was psychologically traumatized and had a limping gait. When F.M. was examined, his elbow joint was tender to the touch, and he had swelling on the lumber. On the head, he had a fresh wound with blood clots.

14. Though there was no finding on the vagina of J.A.O, the evidence on the anal opening proved the element of penetration.

15. In his defence, the appellant contended that this was false. He claimed that he had gone to Mbita to work. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

    An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer, and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.

16. I have perused the evidence of these two minors. The learned trial magistrate recorded it in detail, displacing the appellant's allegations that he was falsely framed. Their evidence corroborates each other's materially, displacing the appellant's alibi defence. These children went through a harrowing experience at the hands of their uncle.

17. The appellant contended that the sentence meted out was very harsh. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of *Nillson vs Republic* [1970] E.A. 599, as follows:

    The principles upon which an appellate court will exercise its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *JAMES Vs. REX (1950), 18 EACA 147*, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R Vs. SHERSHEWSITY* (1912) C.CA 28 T.LR 364.

18. The proviso to section 20 of the *Sexual Offences Act* states:

    Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

19. The complainant in count one was ten years old at the time of the offence. A copy of her Certificate of Birth (P exhibit 6) indicates that she was born on March 8, 2012. However, after considering the child's age, I find no justification to interfere with the sentence.

20. I have noted that the appellant remained in custody from his arrest to the date he was sentenced. I therefore order that the sentence run from the 13th day of June 2022.

21. The circumstances of this case militate against making an order for the sentences in the two counts to run concurrently. The same will run consecutively.

22. The upshot of the preceding analysis of the evidence on record is that the appeal lacks merit. The same is dismissed.

Delivered and signed at Homa Bay on this 24th day of April 2024

KIARIE WAWERU KIARIE

JUDGE