Oundu v Republic (Criminal Appeal 29 of 2019)
[2024] KEHC 4012 (KLR) (24 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL 29 OF 2019

KW KIARIE, J

APRIL 24, 2024

BETWEEN

MOSES ODHIAMBO OUNDU ALIAS MUSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. case NO.5 of 2011 of the Senior Principal Magistrate's Court at Oyugis by Hon. R.C. Ngetich–Senior Principal Magistrate)

JUDGMENT

1. Moses Odhiambo Oundu alias Musa, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He was also convicted of an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence in count one is that on the 19th day of May 2011 at Kawere sublocation, in Rachuonyo South District within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of K.M.A.J., a child aged ten years. In the alternative to count two, the particulars are that on the 19th day of May 2011 at Kawere sublocation, in Rachuonyo South District within Homa Bay County, unlawfully and intentionally rubbed his penis against the vagina of V.A.O, a girl aged twelve years.

3. The appellant was sentenced to life imprisonment in count one while he was sentenced to twenty years imprisonment in the alternative charge in count two. The sentences were ordered to run concurrently. He was aggrieved and filed this appeal against the conviction and the sentence.

4. The appellant was in person. He raised grounds of appeal as follows:

    a. That the age of the complainant was not proved.

b. That the trial magistrate erred in law and fact by failing to warn himself against the danger of convicting the appellant on uncorroborated evidence of the complainant.

c. That the prosecution case was not proved beyond reasonable doubt.

d. That penetration was not proved.

e. That the vital witnesses did not come to court to testify.

f. That the medical did not support the offence.

g. That learned trial magistrate erred in law and fact by sentencing the appellant to life imprisonment.

h. The time spent in custody was not factored into the sentence.

5. The state opposed the appeal. I was urged to dismiss the appeal for lack of merits.

6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. That the accused was the perpetrator and

c. The victim must be below eighteen years old.

8. This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

9. The age assessment report produced as prosecution exhibit 2 indicates that the age of K.M.A.J. (PW1) was assessed at eleven years. The report is dated 6th October 2011. Her age, for Section 8(2) of the *Sexual Offences Act*, was therefore proved. Section 8(3) of the *Sexual Offences Act* provides:

> 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.

10. K.M.A.J (PW1), the complainant, testified that the appellant summoned her so that he could send her to the shops. She went in the company of V.A.O (PW2). They found the appellant seated outside the house with a boy called Ouma. The appellant asked her to get inside the house and get some money from his pair of trousers. When she entered the house, her sister V.A.O followed her. The accused followed her into the bedroom; meanwhile, the Ouma bolted the door from outside.

11. While the trio were in the house, V.A.O remained in the sitting room, and the appellant defied her on his bed. At the time of the defilement, he had tied her mouth with a piece of cloth. Once he was through with her, he ordered her to go to the sitting room. He then took her sister in the bedroom.

12. V.A.O (PW2) testified to the same effect and confirmed most of the details in the evidence of PW1. Her evidence was that when he took her inside the bedroom, he defiled her and left her when the door was unbolted from outside.

13. The medical examination of both girls was done by Dr. Peter Ogola (PW4). He found that the hymen of PW1 was breached, and the external genitalia were inflamed and tender. He concluded that there was penetration. The genitalia of V.A.O. was inflamed, but the hymen was intact. He, therefore, concluded that there was an attempt to penetrate her.

14. The appellant pleaded an alibi. 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 v 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.

15. The evidence on record displaced the alibi defence of the appellant.

16. In this case, as in most sexual offences cases, the complainants' evidence was the only one that directly implicated the appellant. The proviso to section 124 of the *Evidence Act* states:

> 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.

17. After analysing the evidence on record, I found no reason to disbelieve the two complainants. This incident could not have been exposed, for the appellant had instilled fear into the minors. However, when the appellant's wife learnt of the matter, she went and beat K.M.A.J (PW1) and accused her of sleeping with her husband. This is how the ugly incident was exposed.

18. Though the appellant contended that the sentence was harsh, it was legal and commensurate with the offence.

19. The upshot of the preceding analysis of the evidence on record is that the appeal lacks merit. I dismiss it.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF APRIL 2024.

KIARIE WAWERU KIARIE

JUDGE