Obilo v Republic (Criminal Appeal 59 of 2023)
[2024] KEHC 3836 (KLR) (23 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 59 OF 2023

DR KAVEDZA, J

APRIL 23, 2024

BETWEEN

CHRISTOPHER JUMA OBILO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the original conviction and sentence delivered by Hon. Kitagwa (SRM) on 3rd June 2020 at Kibera Chief Magistrate's Court Sexual offense No. 101 of 2018 Republic vs Christopher Juma Obilo)

JUDGMENT

1. The Appellant was charged with two counts of defilement contrary to section 8(1) as read with 8(2) of the sexual. After a full trial by the subordinate court, he was convicted in count I for the offence of defilement contrary to sections 8(1) and (2) of the *Sexual Offences Act*. He was also convicted in the alternative charge to count II for the offense of committing an indecent act with a child contrary to section 11(1) of the Act. The appellant was sentenced to serve 15 years and 10 years' imprisonment in counts 1 and II respectively. The sentences were to run concurrently.

2. Being dissatisfied, he filed an appeal against the conviction and sentence in line with his petition of appeal. This is the first appellate court and in Okeno v. R [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court, and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

3. With the above, I now proceed to determine the substance of the appeal. In his Memorandum of Appeal and submissions, the Appellant has raised four grounds of appeal. He argues that the trial magistrate failed to note that the appellant's right to a fair trial was violated and this rendered the whole trial null and void. He further argues that the trial magistrate failed to find that the medical report that

was relied upon by the prosecution did not comply with the provisions of section 77 of the *Evidence Act*. The appellant also complains that the burden of proof was not established by the prosecution and that his defence was not properly considered.

4. In the first ground of appeal, the appellant argued that his right to fair trial under Article 50(2)(g) and (h) of *the Constitution* was infringed on the basis that the trial court did not inform him of the right to legal representation and legal aid if he could not afford the same. He relied on several cases including Daniel Mpayo Ngiyaya vs Republic [2018] eKLR and Joseph Kiema Philip vs Republic [2019] eKLR.

5. The right of an accused person to legal representation is enshrined in Article 50 (2) of *the Constitution* as follows:

> " (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 this right promptly."

6. The value that legal representation adds to an accused defence in ensuring not only vigorous but skilled participation in the criminal process cannot be gainsaid. The Supreme Court in Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 others [2017] eKLR, while dealing with various aspects of the right to a fair hearing under article 50 of *the Constitution* stated as follows:

> " ...the right to legal representation.....under the said article is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more."

7. Nyakundi J in Joseph Kiema v Republic (2019) eKLR also added his voice when he said as follows:

> " ...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..."

8. As to the right under such article 2 (h), one would only be entitled to an advocate assigned by the state at state expenses if it is demonstrated that substantial injustice would result. The said right is not automatic but is qualified in that one has to demonstrate that injustice will be suffered.

9. The Supreme Court in Republic v Karisa Chengo (supra) expounded on what substantial injustice entails. The court said:-

> " ... in determining whether substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of *Legal Aid Act*, various other factors which include:- (i)the seriousness of the offence;(ii)the severity of the sentence;(iii)the ability of the accused person to pay for his own legal representation;(iv)whether the accused is a minor;(v)the literacy of the accused; and(vi)the complexity of the charge against the accused."

10. For the appellant to benefit from the omission by the trial court, he must demonstrate that from the commencement of the trial, he raised concern about his inability to afford legal representation and that substantial injustice may occur as a result (See Charles Maina Gitonga v Republic [2020] eKLR).

11. I have interrogated the record before me from the trial court judgment that led to the present appeal. Nowhere did the appellant raise the issue of legal representation and therefore, the same has no place in the proceedings before me. The Supreme Court in Charles Maina Gitonga case (supra) said as follows,

> " We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the Appellant to ignore the normal hierarchy of courts would amount to abuse of the process of Court."

12. I have further considered the record before me and noted that the appellant followed the proceedings very keenly. This is informed by the fact that he participated in the trial by cross-examining the prosecution witnesses on very salient points related to the charges. His detailed defence before the trial court is a further demonstration in that regard. He therefore understood the charges he was facing and the evidence presented. There is no evidence that the appellant was incapacitated in the trial for lack of legal representation.

13. To conclude the issue, whereas the appellant faced serious charges of defilement that would have attracted at least fifteen years imprisonment depending on the age of the minor, it was not demonstrated that he did not understand the issues that the case was complex or that he was not able to defend himself. The appellant did not demonstrate that he would suffer injustice if he proceeded without counsel. This ground therefore fails.

14. In ground 2, the appellant argued that the prosecution adduced medical evidence without adhering to the laid down statutory safeguards. Particularly, it was submitted that while the appellant does not dispute the production of the medical evidence by PW5, who was entitled to produce the same under section 77 of the *Evidence Act*, the said evidence was produced without a firm basis for its production. He relied on the case of James Bari Munyoris-vs- Republic [2010] eKLR where the court held that

> " It is not enough for a witness to state that he was familiar with the handwriting of a particular witness. The prosecution must show that it took due diligence on their part to secure the attendance of the maker of the document."

15. It must therefore be shown that the witness was absent for reasons beyond the prosecution's control.

16. A look at the record clearly shows that John Njuguna, a clinician at Nairobi Women's (PW5) who tendered the P3 and the Post Rape Care (PRC) forms for both complainants was not the maker of the said documents. To begin with, regarding the PRC forms for PW2 and PW3 (PEX1 and PEX2 respectively), the doctor who tendered them, Dr. Kennedy Ayiro, was away on annual leave. PW5 also produced the P3 form for PW2 (PEX4) on behalf of Dr. Rhoda. He did not however give reasons why the said Dr. Rhoda could not be availed to testify. Additionally, PW5 produced the P3 form for PW3 (PEX5) on behalf of his colleague, Simon Zabo, who had gone for further studies.

17. In line with the jurisprudence in James Bari Munyoris-vs- Republic (supra), it is clear that the prosecution in this case laid the basis for why the makers of PEX1, PEX2 and PEX5 could not be availed. Particularly, Dr. Kennedy Ayiro, the maker of the PEX1 and PEX2, was away on annual leave and hence could not be availed. Additionally, Simon Zabo, the maker of PEX5 could not be availed

since he had gone for further studies. I therefore find that PEX1, PEX2, and PEX5 were properly admitted as evidence.

18. However, the prosecution made no attempts to lay any basis for why the maker of PEX4, Dr. Rhoda, could not be availed. This court is of the view that this stems from bad practice where medical experts think that all that is required to tender evidence of a colleague is familiarity with their handwriting. This practice flies in the face of legal requirements stipulated under Section 33 of the *Evidence Act*, which demands that the basis for non-availability of the authors/makers of any opinion, written or oral must be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. It is on this basis that this court finds that the PEX4, the P3 form for PW2, was not properly admitted as evidence and thus cannot be relied on. This ground of appeal therefore partially succeeds.

19. I shall now proceed to determine the substance of the offenses.

20. In order to succeed in a prosecution for defilement in count 1, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

21. In addition, in order to prove an indecent act with a child in count 2, the prosecution must show that the perpetrator caused a part of his body to come into contact with the genital organ of a child.

22. Section 2 of the SOA defines an indecent act as:-

    An unlawful intentional act which causes—

    a. any contact between any part of the body of a person with the genital organs, breasts, or buttocks of another, but does not include an act that causes penetration;

    b. exposure or display of any pornographic material to any person against his or her will;

23. The facts as brought out by the prosecution witnesses are that L.M. (PW2) and G.A. (PW3) were friends living in the same estate. On the material date, they were playing outside when one, Guka, called them to his house. PW2, who was the first one to get into the house, testified that the appellant removed his trousers and inserted his penis into her vagina, causing her to feel pain. The said Guka also gave her Kshs. 10 to buy a lollipop. She continued that she did not report the incident to her mother and that it wasn't until the landlord beat her up that she reported it.

24. PW2 gave a similar account of events and testified that when the said Guka called them into his house, he removed her clothes and touched her vagina. He also inserted his penis into her vagina. After the act, the said Guka instructed her not to report to her mother about the incident.

25. Both PW2 and PW3 provided vivid and detailed testimonies regarding the harrowing experience they endured. They unwaveringly asserted that it was Guka, the appellant, who lured them into his residence and subjected them to sexual assault. Given their familiarity with the appellant as a neighbour and the fact that the incident occurred in broad daylight, they had ample opportunity to identify the perpetrator. Hence, I conclude that the appellant was accurately identified as the individual responsible for the acts of sexual assault against PW2 and PW3.

26. The testimonies of PW2 and PW3 did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if there are recorded reasons why the trial magistrate believed the children were telling the truth. In this case, the trial magistrate recorded in her judgement that all the witnesses were credible and truthful. She particularly added that

both complainants were candid and credible as they testified. I have also thoroughly gone through the testimonies of PW2 and PW3 and noted that they were consistent all through.

27. Regarding additional corroborating evidence, the prosecution presented Nancy Wairimu (PW7), the landlady of the residences where both the appellant and the complainants resided. PW7 testified that on 11.12.2018, the two complainants had been at the appellant's residence, situated opposite hers. She further stated that on the relevant day, PW2 was visibly distraught outside the appellant's house. Upon inquiry, PW2 disclosed to her that the appellant had laid on top of her. Three of PW7's female tenants then escorted the complainants for a medical examination, confirming that one had been subjected to defilement. PW7 also testified that the appellant was subsequently apprehended and subjected to mob violence.

28. The testimony of PW7 not only corroborates the accounts provided by both complainants regarding the appellant summoning them to his residence but also reinforces PW2's testimony regarding the sexual assault perpetrated by the appellant.

29. The prosecution also called John Njuguna, a clinical officer at Nairobi Women (PW5), who produced the Post Rape Care (PRC) forms for both complainants on behalf of Dr. Kenneth Ayiro who was away on annual leave. He also produced the P3 form for PW3 on behalf of his colleague, Simon Zabo, who went for further studies.

30. He indicated that on 11.12.2018, PW2 underwent an examination which revealed no physical injuries on her body, but her hymen was found to be broken. The conclusion drawn was that these findings, in conjunction with the provided history, were indicative of vaginal penetration. The medical evidence documented in the PRC form aligns with PW2's testimony of the incident and unequivocally establishes penetration.

31. Furthermore, PW5 testified that upon examination of PW3, she displayed no visible injuries and her hymen remained intact. The fact of the hymen being intact alone does not absolve the appellant of guilt. In her testimony, PW3 asserted that the appellant touched her vagina and inserted his penis into it. While the medical evidence did not definitively confirm penetration, I am confident that the appellant engaged in indecent conduct by touching PW3's vagina with his fingers and his penis, constituting an indecent act.

32. Concerning the ages of the complainants, the prosecution presented a birth certificate for PW2, indicating her birthdate as September 24, 2012, making her 6 years old at the time of the offense. Hence, there is no dispute that PW2 was a minor within the meaning of the law.

33. Regarding PW3's age, the prosecution relied on a clinical record indicating her date of birth as July 25, 2010. However, upon examination of the said clinical card, I noted that the name listed was Slovania Atieno, differing from the name of PW3, G.A.A. (particulars withheld). Despite the investigating officer's explanation that Slovenia was purportedly the same person as G.A.A., the discrepancy between the names is significant. Throughout the trial, and even in the charge sheet, PW3 was consistently identified as G.A.A. No explanation was provided for the discrepancy. Therefore, this court finds the clinical card attributed to PW3 not credible and cannot accept it as conclusive evidence of her age.

34. The question now arises: is there any other evidence regarding PW3's age? In the case of Edwin Nyambaso Onsongo Vs Republic (2002) eKLR, the Court of Appeal established that age can be proven through various means such as documents like birth certificates or baptism cards, oral testimony from the child if sufficiently articulate, or evidence from parents, guardians, or medical evidence, among others.

35. In this case, the P3 form indicated that PW3 was 7 years old at the time of the medical examination. Considering the jurisprudence in Edwin Nyambaso Onsongo Vs Republic (supra), there is no doubt that PW3 was indeed a minor under the law.

36. In his defence, the appellant provided sworn testimony denying the charges, labeling them as fabricated. He claimed that during the alleged incident, he was not at home; instead, he was at work. Upon returning home, he encountered an individual named Mwangi, who informed him that he was being sought after. Subsequently, he was apprehended by members of the public and subjected to assault. However, when compared to the prosecution's evidence, especially the testimonies of PW2, PW3, and PW7, the appellant's testimony amounted to a mere denial of the offense and was rightly disregarded.

37. From the totality of the evidence, the prosecution proved beyond reasonable doubt all the elements of the offence of defilement in count 1. The prosecution also proved beyond reasonable doubt all elements of the offence of committing an indecent act with a child in count 2. I therefore affirm the conviction of the trial court in both counts.

38. On the sentence, section 8(2) of the Act provides that a person who commits an offence of defilement with a child below the age of eleven years is liable upon conviction to life imprisonment. On the other hand, section 11 (1) provides that any person who commits an indecent act with a child is liable upon conviction to imprisonment for a term of not less than ten years. The prosecution proved that the minors were aged 6 years and 7 years old; hence, the court ought to have imposed the sentence of life imprisonment and 10 years imprisonment respectively in the two counts, with the sentences running concurrently.

39. However, the trial court, while relying on the case of Christopher Oohany Vs. Republic (2018) eKLR, exercised discretion and imposed a sentence of 15 years imprisonment in Count I and ten (10) years imprisonment in Count II. In this regard, the trial court did not err in imposing the sentences after considering the facts of the case and the age of the accused, being 72 years at the time of sentencing. I therefore do not find any reason to interfere with the sentence. It is affirmed. The sentence shall run from the date of arrest, 11.12.2018. The appeal is dismissed for lack of merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant present on the platform

Gladys for the Respondent

Nelson Court Assistant