



**Siwan alias Lomomwai Moses v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 13599 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E006 OF 2023
RPV WENDOH, J
OCTOBER 31, 2024**

BETWEEN

SIWAN ALIAS LOMOMWAI MOSES APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of conviction and sentence of Hon. Kipchumba Kenei (Senior Resident Magistrate) in Kapenguria Chief Magistrate's Court Criminal Case E013 of 2023 delivered on 9 th August, 2023)

JUDGMENT

1. The appellant, Siwan alias Lomomwai Moses was convicted by Kapenguria Senior Resident Magistrate's Court for the offence of defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#).
2. In the alternative he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#).
3. The particulars of the charge are that on 30/3/2023 in West Pokot County, intentionally and unlawfully caused his penis to penetrate the vagina of RCL a child aged 2 years or that the appellant intentionally touched the buttocks, anus, vagina of RCL a child aged 9 years.
4. After a full trial, the appellant was convicted on the main charge and sentenced to 25 years imprisonment.
5. Aggrieved by the conviction and sentence, the appellant preferred this appeal filed in court on 21/8/2023 based on the following amended grounds of appeal;
 1. That the court infringed the appellant's rights enshrined in Article 50(2) (j)&(h) of [the Constitution](#);



2. That the court erred in convicting the offender by failing to consider the medical evidence;
3. That the court failed to consider the contradictions in the prosecution evidence;
4. That the court rejected his defence without giving reasons;
5. That the offence of defilement was not proved to the required standard.
6. He therefore prays that the conviction be quashed, sentence set aside and he be set at liberty forthwith.
7. The appellant also filed submissions on 17/7/2024 in support of the appeal. He submitted that upon arrest, he was not informed of the reason for arrest as required under Article 49(1)(a)(i) – that he was not given copies of witness statements and the conviction should be quashed on that basis.
8. On contradictions, the appellant submitted that PW4 claimed she was defiled on 30/3/2023 yet he was arrested by members of public on 4/4/2023; that the medical evidence was also contradictory in that the complainant was not found to have any injuries; that DNA was not done to ascertain who defiled the complainant and hence no evidence connecting him with the offence; that there are contradictions as regards the complainant’s age, was she 8 or 9 years; that penetration was not proved because the complainant did not bleed.
9. The prosecution counsel Mr. Majale filed submissions. Counsel submitted that PW3 identified the appellant as the person whom the husband came home with and they let him share the children’s bedroom; that despite the darkness, PW4, the complainant confirmed seeing the appellant leave in the morning after defiling her in the night; that PW5, PW4’s father recalled that on 30/3/2023 the appellant visited his home when en route to his in law’s home and he offered him food and a place to sleep in the children’s room; that the appellant left about 6.00am; PW6 testified to the appellant having slept in their bed; that the appellant pulled the complainant and said he would sleep with her and covered her with a sheet. Counsel submitted that there was corroborative evidence placing the appellant at the scene.
10. On the age, the clinical officer assessed the age at 8 years (P.Exhibit 5) and the complainant’s grandmother also stated that the minor was 8 years old.
11. On penetration, counsel stated the case of Mark Oiruri Mose V Republic (2013)eKLR and Erick Onyango Ondengo V Republic (2014)eKLR. Court of Appeal defined penetration to mean even the slightest penetration of a female sex organ by the male sex organ. Counsel further submitted that upon examination of PW4 after 72 hours, PW1 found that she had no hymen, there were bruises and lacerations and PW1 made a finding that there was penetration of PW4.
12. Counsel urged the court to uphold the conviction and enhance the sentence to life imprisonment.
13. This being a first appeal, it behoves this court to re-examine all the evidence tendered in the lower court, analyze and evaluate it and arrive at its own conclusions. This court should however make allowance for the fact that it did not see or hear the witnesses testifying, an opportunity which the trial court had. This court is guided by the decision in Okeno V Republic (1972) E.A 32.
14. Briefly, the evidence tendered before the trial court is as follows;
15. PW1 Dr Timothy Limo testified on behalf of his workmate Dr Enock Kipchirchir who examined the complainant. PW1 produced the P3 form and X-Ray on the complainant’s age assessment which indicated that the complainant was 8 years old. The complainant was found to have difficulty walking, that there was bilateral bruises to the upper limbs, pain and tenderness to back, limbs; that the hymen



- was absent, bruises and lacerations to the labia minora, majora and whitish discharge that was smelly. PW1 said that Dr Kipchirchir found that there was evidence of penetration.
16. PW2 CL recalled that on 1/4/2023 she saw her granddaughter C walking strangely. PW2 asked the child what was wrong and the child said her private parts were painful. That the child explained that the person who had visited the home had defiled her. PW2 checked the girl's private parts and observed the child's private parts and saw blood and a whitish discharge. PW2 reported to police station and took her to hospital on Monday, whereas the incident had occurred on a Thursday.
 17. PW3 GC identified the complainant as her step child who lives with her. That on 30/3/2023, her husband came back home with his friend. After they ate, he showed the guest where to sleep in the children's room. She did not see the guest leave the next day, a Friday. That on Sunday, PW2 came home and saw the child walking strangely. That the child had earlier told her that a thorn had pricked her; that PW2 then inspected the child.
 16. Due to age PW4, RC, a (child of tender age) gave unsworn evidence to the effect that the appellant promised to give her 50/- in the morning and did bad manners to her as she pointed at her vagina; that it was dark and she did not know the person before but she saw him the next morning as he left.
 17. PW5 RL, the father of the complainant (PW4) recalled that the appellant went to his home on 30/3/2023 about 9.00pm and asked for a place to sleep and he allowed him to sleep in the children's room and left early at 6.00am; That on Sunday, his mother inspected PW4 and that is when he learnt that the appellant had defiled the complainant. PW5 went in search of the appellant, found him and took him to the police station.
 18. PW6, Y, a minor who did not know his age gave unsworn evidence. He recalled that indeed a guest went to his uncle's home on 30/3/2023 and he was allowed to sleep where the children slept; that the visitor pushed PW6 away, grabbed PW4's hand and said he would sleep with her and put a sheet over himself and PW4 and slept.
 19. PW7 PC Hildah Sortum received a report of defilement on 4/4/2023. She escorted the minor to hospital. After recording statements, the evidence pointed to the appellant, who was arrested by PW5.
 20. When placed on his defence, the appellant testified on oath and denied committing the offence he was charged with. He admitted to having slept at the home of PW5 and he was given a place to sleep and that the children came to the house after he had slept- 2 small boys and a girl. That the next morning he left after having breakfast with PW5; That the next day, PW5 went to his home and asked to go to [Particulars Withheld] police station because of what happened in his home. He was locked up for allegedly defiling the girl. That he would have ran away if he had done such a thing.
 21. The appellant faced a charge of defilement and it is the duty of the prosecution to prove beyond any reasonable doubt the following ingredients;
 - a. That the complainant was a minor.
 - b. That there was penetration.
 - c. That there is proof of the identity of the perpetrator.

Whether the complainant was a minor;

22. Under Section 2 of the Children's Act, a child is a human being under the age of 18 years. An age assessment was done on the complainant (PW4) and she was found to be 8 years old. Although PW5, the complainant's father did not produce any documentary evidence, he confirmed that the



complainant was 8 years old. A voire dire examination was done on the complainant by the court, which evidence that she was a child of tender age and did not understand the meaning of the oath. It is now settled law that age may be proved in various ways including the testimony of the parents or guardians, birth certificate, birth notification or even by common sense. In Francis Omuroni V Uganda, Criminal Appeal No.2/2000, the Court of Appeal of Uganda had this to say

"In defilement cases, medical evidence is paramount in determining the age of the victim. The doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

23. In Mwalongo Chichoro Mwajembe V Republic Mombasa Criminal Appeal No.24/2013 the Court said;

".....The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child, if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

24. Guided by the above decision, I find that the prosecution proved that the complainant (PW4) was 8 years at the time of the offence and there was no contradiction in the evidence.

Whether penetration was proved;

25. Penetration is defined under Section 2 of the *Sexual Offences Act* as

"The partial or complete insertion of the genital organ of a person into the genital organ of another person".

26. PW4's testimony is that bad manners were done to her vagina which she testified to by showing the court. It was corroborated by the findings of the Doctor who examined the complainant. She was examined about 4 days after the ordeal but she still had bruises and lacerations to her labia minora and majora with a smelly white discharge. The Doctor was of the view that there was penetration. In Mark Oiruri Mose V Republic (Supra) the court stated this;

"Penetration to mean even the slightest penetration of a female sex organ by the male sex organ."

26. In Erick Onyango Odenyo V Republic (2014)eKLR the court said that even the slightest penetration of the female organ amounts to commission of an offence. It means that penetration does not need to be complete.
27. Having considered the medical evidence, the evidence of PW2 who first examined PW4 and PW4's testimony, this court is satisfied that the act of penetration was proved to the required standard.

Whether the perpetrator was identified;

28. It is an undisputed fact that on 30/3/2023, the appellant spent the night at PW5's house. It is also not in dispute that he spent the night in the children's room or house where the complainant also slept. The appellant admitted those facts.



29. The incident was not discovered immediately because PW4 did not tell anyone till PW2 noticed PW4 walking strangely.
30. The evidence of PW4 was unsworn because of her tender age. PW6 Y, despite being of tender age, vividly narrated that the appellant insisted on sleeping with the complainant, took a sheet and covered himself with PW4. This evidence has not been dislodged or shaken by the defence.
31. Even though corroboration is important in such a case, it is not mandatory in sexual offences. The provision in Section 124 of the *Evidence Act* clearly states that corroboration is not mandatory in sexual offences, if the trial court is satisfied on the credibility of the complainant. This position was affirmed in *J.W.A V Republic (2014)eKLR*. Section 124 of the *Evidence Act* provides;

"Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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."

32. Although PW6 did not see the appellant's face, his evidence sheds light on what happened in the room in which he slept with the appellant and PW4. PW6 stated that he covered PW4 in the same sheet and therefore had the opportunity to defile PW4. The other children who slept with PW4 in same room are said to have been smaller than PW4 hence they could not commit the offence. The trial court believed the complainant's evidence that she saw the offender's appearance next morning. Infact the appellant confirmed that PW4 was the one who helped prepare breakfast hence she saw him in the morning. This court is satisfied that the appellant was at the scene of the crime, even though the act of defilement took place in the darkness, PW4 saw the appellant in the morning and once the incident was discovered PW5 started to look for the appellant. That is why she was examined 4 days later.
33. The appellant argued that the medical evidence did not link him to the offence. There is now a wealth of decisions in which the courts have stated that the offence of defilement is not proved by way of D.N.A in *A.M.L V Republic (2012)eKLR*, the court held that a fact of defilement unlike say paternity, is not proved by D.N.A test but by evidence. The same view was held in *Geoffrey Kionji V Republic Criminal Appeal 270/2010* as follows;

"Where available medical evidence arising from examination of the accused and linking him to the defilement would be welcome; we however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the provision to Section 124 of the *Evidence Act* Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief.

34. In the end, this court is satisfied that the prosecution proved that it is the appellant who defiled the complainant. The conviction is sound and I affirm it.



Whether sentence is excessive;

35. Under Section 8(2) of the *Sexual Offences Act*, upon conviction one is liable to life imprisonment. The appellant was only given 25 years after the court considered the Judiciary Guidelines on sentencing. In the recent decision from the Supreme Court, Petition E018/2023, Rep. VS. Joshua Gichuki Mwangi, the court observed that there has been no amendment to Section 8 of the *Sexual Offences Act* on mandatory sentences, hence mandatory sentences are lawful; that the issue on mandatory sentences must be considered in the hierarchy of the courts till Supreme Court determines the issue. The Supreme Court's decision binds this court. The sentence of 25 years therefore is too lenient. Had the prosecution given notice to the appellant before the appeal was heard, this court would have enhanced the sentence. Since none was given, the court will not interfere with the sentence.
36. In regard to the complaint that Article 49 of *the Constitution* was infringed, the said Article guarantees the rights of arrested persons. Arrested persons are under the care of the police before they are brought to court for plea; If any rights are breached at that time the appellant has the right to sue the police for damages. Breach of Article 49 cannot be a ground of appeal.
37. In sum, the appeal lacks merit and is dismissed in its entirety.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 31ST DAY OF OCTOBER, 2024

R. WENDOH

JUDGE

Judgment delivered in the presence of-

Mr. Majale – Prosecution Counsel

Juma/Hellen – Court Assistants

Appellant – present virtually

