



**Lomwai v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 13420 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E004 OF 2023
RPV WENDOH, J
OCTOBER 30, 2024**

BETWEEN

RANGI LOMWAI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Rangi Lomwai was convicted by Principal Magistrate Kapenguria, for the Offence of Defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act. (SOA)
2. The particulars of the charge are that on 7/2/2023 at Orwa Location Pokot Central Sub-County, intentionally and unlawfully caused his penis to penetrate the vagina of D C a child aged fourteen (14) years or that he caused his genitals to come in contact with those of D C, a child aged fourteen (14) years,
3. The court made no finding on the alternative charge and upon conviction on the main charge, the appellant was sentenced to life imprisonment.
4. Dissatisfied with both conviction and sentence, the appellant filed this appeal on 26/7/2023 complaining that,
 1. That the sentence is harsh and excessive;
 2. That the trial court failed to consider the appellant's defence;
 3. That the offence was not proved to the required standard;
 4. That the court violated Article 50(2) (c) by denying the appellant adequate time to prepare his defence;



5. that the prosecution failed to serve him with witness statements and exhibits to enable him prepare his defence.
5. The appellant prays that the conviction be quashed and sentence set aside and he be released. The appellant also filed submissions in which he urged;
6. That he was only served with a charge sheet but not any other evidence;

that the appellant was not allowed sufficient time to prepare for his defence in that the plea was taken on 9/2/2023 and the hearing of the case commenced on 9/4/2023, only forty-five (45) days to prepare; that being illiterate, forty (45) days were too few; that the translation of the charge and evidence for appellant was not clear as the Clinical officer used difficult terms (words).
7. The appellant also submitted that the Clinical Officer's qualifications were not disclosed; that he only mentioned his names but did not disclose where he trained, gazette number. It was also the appellant's contention that the charge was defective because the complainant claimed to have been fourteen (14) years old and the age assessment report confirmed that she was fourteen (14) years yet the court convicted him under Section 8(2) of the Sexual Offences Act.
8. Mr. Desmond Majale, the Senior Principal Prosecution Counsel filed submissions on 7/10/2024 in opposition to the appeal.
9. On the question of age of the complainant, Counsel submitted that the age assessment report corroborated the complainant's testimony and that of PW3 that she was fourteen years old.
10. On penetration, Counsel submitted that the complainant clearly narrated her ordeal at the hands of the appellant who diverted the route from taking her to school into the thicket; that PW3 first examined her daughter's private parts and saw some mucus; that the complainant had lacerations on the labia minora, the cervix and epithelial cells which are consistent with Sexual activity.
11. On identify of the perpetrator, it was submitted that PW3 had known the appellant for long as Rangiri who was a motor cycle rider and that he was arrested soon after the report with a motor cycle and that PW1 identified the appellant as the person who had been called to give her a ride to school.
12. As to whether the trial court was fair, Counsel submitted that the same has not been substantiated because, plea was taken, hearing took place, the appellant cross-examined witnesses and he gave his defence.
13. On sentence, the Prosecution Counsel urged the court to take into account the aggravating circumstances of the case.
14. This is a first appeal and it behoves this court to reexamine all the evidence tendered before the trial court, analyze and evaluate it and come up with its own conclusions. The court must however, bear in mind that this court neither saw nor heard the witnesses testify, whereas the trial court did. This court is guided by the decision in *Okeno Vs. Republic* (1972) EA 32.
15. The prosecution lined up four (4) witnesses to prove their case. PW1 the complainant, D C, a minor gave sworn evidence after the court conducted a *voire dire* examination on her, PW2 Jairus Ruto, is the Clinical Officer, PW3 AE is the complainant's mother, PW4 is PC Musa, the Investigating Officer in the case. PW1 recalled that on 7/2/2023 at 10.00a.m., her mother called a motor cycle rider to take her to school and gave her 5,000/= for shopping; that the rider took a short cut as the rider claimed to be going to change clothes but instead took her to where alcohol is sold and began to take alcohol.



Despite her requests that they proceed to school, he did not heed, till evening. He took a different route from the one to school into a thicket, stopped, swept her off her feet undressed her, raped her, took her money and rode away.

16. PW1 walked to the main road, got a ride to the next centre then walked back home, reported to her mother (PW3) and reported to the police after which she was taken to hospital.
17. PW2, Jairus Ruto a Clinical Officer, at Sigor examined the complainant on 2/2/2023 and found stains and lacerations on the labia minora and cervix with presence of epithelial cells which is evidence of a forceful sexual encounter, and that there was full penetration because the orphic of the vagina was open.
18. PW3 the complainant's mother recalled the 7/2/2023 about 10.00.a.m., she prepared the daughter (PW1) to go back to boarding school, gave her money Kshs.5000 and called a rider whom she knew; that the daughter came back at 8.00p.m. crying that the rider had raped her and abandoned her in the thicket. She reported to Marich Sigor police station next day. PW3 knew the appellant as a motor cycle rider (boda boda) Rangi, and that he was arrested in possession of the motor cycle.
19. PW4, the Investigating Officer in this matter, on 8/2/2023, received a report from the complainant's mother; that the complainant narrated what had befallen her at the hands of the rider; that the complainant was a known motor cycle rider and was taken to police station after sometime.
20. On being called upon to defend himself, the appellant gave an unsworn statement in which he denied committing the offence; that he used to herd goats and was arrested at a drinking den when others with him ran on seeing the police.
21. I have now considered all the evidence tendered in the trial court, the grounds of appeal and the rival Submissions.

The issues that arose are

1. Whether the appellants rights under Articles 50(2) of the constitution were violated.
2. Whether the offence of defilement was proved beyond reasonable doubt
3. Whether the sentence was harsh and excessive
4. Whether the charge was defective.

Whether the appellant's rights were infringed; -

22. The appellant lamented that there was a delay in the prosecutor giving him witness statements and therefore his rights were infringed because he did not have ample time to prepare his defence. A perusal of the record of appeal reveals the contrary. Article 50(2)(c) provides as follows; -

“2 every accused person has the right to a fair trial, which includes the right,
(c) to have adequate time and facilities to prepare a defence”.

23. Plea was taken on 9/2/2023 and the matter was listed for mention on 24/2/2023 for pre-trial. On that day, the appellant confirmed that he had been issued with witness statements and the case was fixed for hearing on 4/4/2023 over one and half months away.
24. On 4/4/2024, he never complained that he had not had enough time to prepare his defence but was ready to proceed. Unless for good reason, the Constitution under Article 159 of the Constitution



enjoins the Judiciary to administer justice without delay. The court finds that no right was infringed by the court because the appellant had ample time to prepare his defence.

25. The appellant was charged with the offence of defilement under Section 8(1) and (2) of the Sexual Offences Act. To prove the said charge, the prosecution has the duty to prove beyond any reasonable doubt the following ingredients;
1. That the victim was a minor.
 2. That there was penetration
 3. That the culprit was positively identified.
26. A minor is described in section 2 of the Children’s Act as a human being below 18 years. There is now a host of decisions which have pronounced themselves on how age can be proved in Sexual Offences. In the Ugandan case of Francis Omuroni VS. Uganda CR.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.”
27. In Mwalongo Chichoro Mwajembe Vs. Republic MSA.CR.A 24/2023, the court said;-
- Age may be proved by Medical evidence, documentary evidence, oral evidence of parents or guardian, baptism card, birth notification or even common sense by observation.
28. In the instant case, PW1 was intelligent enough to know her age. She was in standard 8 at the time. She said she was fourteen (14) years old, so did her mother, PW3 and the Clinical Officer who examined her testified to the same. This court has no doubt the age of the complainant was proved to be fourteen (14) years, therefore a minor.

Of Penetration-

29. Penetration is defined in Section 2 of the Sexual Offences Act as
- The partial or complete insertion of the genital organs of a person into the genital organs of another person”.
30. As is usual in most sexual offences, the only witness to the offence is PW1, PW1 did not exactly state what happened between her and the appellant but merely stated that the appellant swept her up her feet, undressed her then raped her. Rape is a technical term that should be explained. The above notwithstanding upon reporting to her mother (PW3) on the same day, she was examined by the Clinical Officer, the next day found that she had stains, and lacerations on the labia, minora and cervix, the vaginal orphic was open epithelial cells which was evident of full penetration and sexual encounter. This court is satisfied beyond doubt penetration was proved.
31. The appellant challenged the qualifications of the Clinical Officer (PW2) were unknown. PW2 had an opportunity to cross examine the witness but never questioned his qualifications. He also produced a P3 form and Post Rape Care (PRC) forms bearing the stamp of Sigor County Hospital. The appellant did not challenge it. I find the challenge to be untenable.



Identity of the Perpetrator; -

32. Although PW1 did not know the appellant before, this incident happened during the day, The appellant rode with PW1 on his motorcycle for a while, he then spent most of the day with her till evening when he came into even closer contact with PW1 when he defiled her. It is PW3 who called the appellant to take PW1 to school. PW3 was adamant, that she knew the appellant as a rider very well she had interacted with him before. PW3 knew his name as Rangi. This was a perfect case for the police to conduct an identification parade. However, the evidence of PW1 and 3 was sufficient identification of the appellant. The appellant was arrested on 8/2/2023, only one day after the ordeal. The incident was still very fresh in PW1's mind. The appellant's defence was above denial. There is no reason why strangers would pick on the appellant and frame him with such a serious charge. This court is satisfied that the appellant was properly identified as the perpetrator.
33. Whether the charge was defective. A charge sheet is supposed to be drawn as provided in section 134 of the CPC. The said section provides as follow; -
- "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."
34. In this case, the charge complied with the requirements of Section 134 of CPC since that though it indicates that he was charged under Section 8(1) as read with Section 8(2). Section 8(2) Sexual Offences Act determines the sentence of a person found guilty of defiling a child aged eleven years and below. The evidence on record was clear, that the complainant was fourteen (14) years old, but not below eleven (11) years, yet the court went ahead to sentence the appellant based on section 8(2) of the Sexual Offences Act. I find that the court erred in sentencing the appellant under Section 8(2) of the Sexual Offences Act but that does not render the charge defective. The Magistrate was negligent in not ascertaining cruelty which he should have sentenced in light such clear evidence. The omission by the trial court cannot however, initiate the conviction because all the elements of defilement were proved. The sentence under section 8(2) is therefore set aside. The court will go ahead to sentence and sentence the appellant under Section 8(3) of the Sexual Offences Act which provides that when the victim of defilement is aged between twelve and fifteen years. One is liable to imprisonment for a term of not less than twenty years.
35. In the instant case, the appellant was treated as a first offender. He was not remorseful. He abused the trust placed on him to deliver the complainant to school. He took advantage of a vulnerable child, one who was disabled. He held her captive in a drinking place for the whole day and after defiling her, abandoned her in a thicket, knowing her condition. The complainant was traumatized, injured emotionally, physically and psychologically by the appellant's acts. The Probation Officers report was not favourable to him and from his conduct, and that calls for a deterrent sentence.
36. In the end, I find the appeal on conviction lacks merit and I hereby dismiss it. On sentence however, I set aside the sentence under section 8(2) of the Sexual Offences Act. I sentence him pursuant to section 8(3) of the Sexual Offences Act to thirty-five (35) years imprisonment. The appeal succeeds to that extent. It is so ordered.

DELIVERED, DATED, AND SIGNED AT KAPENGURIA THIS 30TH DAY OF OCTOBER, 2024

R. WENDOH

JUDGE.



Judgment delivered in the presence of -

Mr. Majale for State -

Appellant – present virtually

Juma/ Hellen - Court Assistants

