



**Mboya v Republic (Criminal Appeal 21 of 2022)
[2023] KEHC 970 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL 21 OF 2022
RPV WENDOH, J
JANUARY 26, 2023**

BETWEEN

FELIX OTIENO MBOYA ALIAS KAMBOYA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Felix Otieno Mboya alias Kamboya, the appellant herein, was charged in the Principle Magistrate's Court Rongo in Criminal Case No E02 of 2020 for the offence of Defilement contrary to section 8 (1) as read with Section 8 (3) of the *Sexual Offence Act*. He also faced an alternative charge of committing an Indecent Act with a child contrary to section 11 (1) of the same Act.
2. The particulars of the charge are that on September 15, 2020 at Ofwanga North Kamwango Sub Location in Migori County, intentionally caused his penis to penetrate the vagina of CFO a girl aged 12 years. In the alternative, he is charged to have intentionally and unlawfully touched with his penis the vagina of CFO a girl aged 12 years.
3. The prosecution called a total of five (5) witnesses in support of their case while the appellant gave a sworn statement in his defence and called two witnesses.
4. The appellant was convicted and sentenced to serve twenty (20) years imprisonment. He is disatisfied with the said conviction and sentence and which has given rise to this appeal which is based on the following grounds;-
 1. That the court failed to comply with the appellants right under Article 50 (2) (g) and (h) of the *Constitution*.
 2. That the offence as charged was not proved.
 3. That the sentence meted on the appellant is illegal and excessive.



4. That the alibi defence was not considered.
5. The appellant filed written submissions on October 31, 2022 while the prosecution filed theirs on November 16, 2022. He submitted that the prosecution evidence was basically hearsay save for PW1s testimony; that PW1 was coached to frame the appellant, that the testimony of PW1 left many gaps unanswered questions, the appellant questioned why the complainant did not report the incident to her moter immediately. He urged the court to treat PW1s testimony with care. The appellant also complained that he was not allowed to mitigate.
6. The appellant also submitted that the prosecution documents i.e P3 form, treatment cards and other were unprocedurally produced in evidence and the authors were not called and that the court ignored the appellants defence. He urged that court to quash the conviction and set aside the sentence.
7. The appeal was opposed. Mr Mulama, the prosecution counsel submitted that the prosecution proved the three ingredients that are required to prove an offence of defilement ie age of complainant, penetration and identity of the perpetrator. As regards age, the complainant's age was assessed at 12 and the court took her through voire dire examiantion meaning that she is a minor. Counsel relied on the decision of *Mwalango Chichoro Mwanjembe =vs= Republic (2016)*.
8. As for penetration counsel relied on the decision of *Mark Oiruri Mose =vs= Republic (2013) eKLR* on what constitutes penetration; that PW1s testimony was corroborated by that of PW4, Clinical Officer who examined PW1.
9. As to whether the defence was considered, it was submitted that the defence was considered and that his alibi defence was contradictory and the court found that the prosecution evidence was overwhelming. Lastly, the alibi defence was made as an afterthought.
10. On sentence, the appellant was given the minimum sentence under Section 8 (3) of the Sexual Offences Act. Counsel relied on the decision of *Onesmus Safari Ngao =vs= Republic CRA 5 of 2020* where the court confirmed the death sentence. He submitted that the *Francis Karioko Muruatetu =vs= Republic (2021) eKLR* case did not do away with all provisions of the law relating to mandatory and minimum sentences. Counsel argued that the sentence is lenient considering the age of the complainant and the fact that he was a married man with two wives. Counsel urged the court to dismiss the appeal.
11. This being a first appeal , this court is required to exhaustively examine all the evidence tendered in the trial court, anayse it and arrive at its own independent conclusions.
12. However, this court has to bear in mind that it neither saw nor heard the witnesses testifying in order to assess their demeanor.
13. This court is guided by the decision of *Okeno =vs= Republic (1972) EA 32*.
The prosecution case was as follows;-
14. The complainant CFO a minor, she gave unsworn evidence in which she identified the appellant, Otieno Mboya as a neighbour ; that on September 15, 2020, she was at home while her mother had gone to the market; that about 1.00pm, the appellant went to their home with Sunking Solar light, left it there and promised to come back. He returned at 2.00pm, told her that the memory for the solar light had broken and demanded the memory or she gives him 600/=; that he pushed her to the floor, removed her pant, pushed her dress to the chest, removed his trouser and boxer and insertd his thing for urinating into hers. She screamed but he held her neck, dressed and left. Her mother came back at 2;00pm but she did not inform her of what had happened but did so on the day she saw the appellant



- coming to their home. She was taken to hospital for examination and reported to Kamagambo police station.
15. PW2 CAO, mother to the complainant stated that PW1 was 13 years old. She recalled on September 25, 2020, she saw accused passby, greeted her and the complainant told her that the appellant did bad manners to her and explained what had happened. She repeated the same story to one Martha and a Social Service Officer, Euniter. They took PW1 to hospital at Lwala Health Centre but were referred to Rongo Sub County Hospital. They were issued with P3 form at Rongo Police Station.
 16. PW3 Euniter Adongo, Community Health worker recalled that on September 25, 2021, she went to the home of PW2 after she learned that PW1 had been defiled. She interviewed PW1 who confirmed having been defiled by Otieno Kamboya and referred PW3 to hospital.
 17. PW4 Lilian Nyaboke, a Clinical Officer at Rongo Sub County Hospital recalled that on December 15, 2021, she examined CFO and found that she had extended genitalia, hymen was broken, had healing tears on the perineal region of the vagina and healing tear on the labia minora. She also filled and signed post rape form dated September 26, 2020 which she produced as an exhibit together with the P3 form. She assessed the complainant's age to be about 12 years.
 18. PW5 PC Dennis Nyarago, the investigating officer, received a report of defilement and referred the complainant and the mother to hospital. He arrested the appellant on October 2, 2020.
 19. When called upon to defend himself, the appellant testified on oath and called two witnesses. DW1 generally denied committing the offence and said that he was at home with his second wife and that he was framed; that the complainant used to fetch water from their well. In cross examination, he stated that between September 13, 2020 and September 27, 2020 he had gone for prayers at Legio Maria Church but later claimed to have seen the complainant fetching water on September 15, 2020.
 20. DW2 LA told the court that on the date the appellant allegedly defiled the complainant, he was not at home but he had gone for prayers. DW2 Kevin Otieno also stated that the appellant had gone for prayers on September 13, 2020 and returned home on September 27, 2020.
 21. I have now considered the grounds of appeal, the evidence on record and submissions by both sides. The first ground of appeal is that the appellant's rights under Article 50 (2) (g) and (h) of the Constitution were violated. However, the court notes that the court complied with the requirements of the said provisions. Article 50 (2) (g) and (h) provides as follows;-
 - 50(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 his right promptly.
 22. When the appellant was arraigned before the trial court on October 5, 2020, after he had been asked what language he understood, it is recorded as follows;-

'Accused Person: English / Kiswahili / Dholuo

Court: You have the right to legal representation of your own choice. You are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the Legal Aid board for assistance should you so desire.



Accused Person: I will act in person. I will not require an advocate'.

23. It is clear from the record the trial court complied with the constitutional provisions and no right to fair trial was violated.

Whether the offence of defilement was proved;-

24. The appellant was charged with the offence of defilement contrary to Section 8 (1) and (3) of the Sexual Offence Act.

25. The said section provide as follows;-

(1) 1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

8(3) 'A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.'

25. The key ingredients that form the offence of defilement are :-

- a. Proof of Age of the complainant;
- b. Proof of penetration;
- c. Positive identification of the assailant.

Of Age:-

26. PW1 told the court that she was 12 years old and in class 5. The court after conducting a voire dire examination, did not find PW1 sufficiently intelligent to give sworn testimony. She gave unsworn testimony. The court therefore observed that she was a minor. PW2, the complainant's mother told the court that PW1 is 12 years old. PW4 assessed the complainants age as 12 years old.

27. In the case of Mwalango Chichoro Mwanjembe =vs= Republic (2016) eKLR, the Court of Appeal when dealing with issue of proof of age stated as follows;-

28. 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 documentary 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.

29. The testimony of PW1, PW2, and PW4 sufficiently proved the age of the complainant to be 12 years.

Of Penetration

30. PW1 graphically narrated in detail what was done to her. After she was pushed to the floor, she said that the assailant inserted his male organ for urinating into hers. Section 2 of the Sexual offences Act defines penetration as follows;-

'The partial or complete insertion of the genital organs of a person into the genital organs of another person.'



31. In the case of *Mark Oiruri Mose vs= Republic* (2013) the Court of Appeal elaborated on what penetration entails. The court said :-

'In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration on the need not be deep inside the girl's organ..'

32. PW4 corroborated PW1's testimony. She found that PW1's hymen was broken and there were injuries to the vagina walls and labia minora. There was overwhelming evidence to prove penetration. Though PW4 seemed to confuse the dates, she examined PW1, the documents produced are corroborated by the evidence of PW1, PW2 and PW3.

Who is the perpetrator.

33. The appellant is not a stranger to the complainant. They are neighbours. The appellant admitted it in his evidence, that the complainant used to draw water from well. Although the appellant claims to have been framed, he did not tell the court the reason why he could have been framed.
34. The appellant purported to raise an alibi. An alibi defence is raised by an accused when he claims to have been in a different place other than then the scene of crime. Even when an accused person raises an alibi defence, the burden always remains on the prosecution to prove its case beyond any reasonable doubt. The onus does not shift to the person raising the alibi as a defence. In *Ssentale vs= Uganda* (1968) EA 36, the Ugandan Court of Appeal held that the prosecution always bears the burden of disproving an alibi and proving the appellant's guilt. In *R V Sukha Singh s/o Waziri & others* (1939) 6 EACA, Court of Appeal 145, the former East African Court of Appeal stated as follows;

'If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped'.

35. Again in *Festo Androa Asenua vs= Uganda CR Appeal 1998*, the court said as follows of an alibi defence;

'We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.'

36. Firstly, the appellant raised the alibi for the first time in his defence. In his testimony, he totally contradicted himself. At first, without mentioning the date, he said that he was at home on the date of the alleged offence. In cross examination, he changed the story and said that he had gone for prayers at Legio Maria Church between September 13, 2020 to January 27, 2020. Further in cross examination,



he changed his story again and said that in fact, he saw the complainant fetching water on September 15, 2020, the date the offence was committed.

37. DW2 on her part said that the appellant went for prayers on September 13, 2020 while DW3 said it was between September 13, 2021 and September 27, 2021. The alibi was totally contradictory and it is therefore outrightly unbelievable. The trial court considered the alibi and found the testimony contradictory and unbelievable. The alibi defence did not at all dislodge the prosecution evidence which I found to be cogent and consistent. The appellant then confirmed seeing the complainant on September 15, 2020, the date the incident occurred. The offence occurred in broad day light. The court is satisfied that the appellant was properly identified as the perpetrator. The conviction is well founded and I affirm it.
38. The appellant was sentenced to 20 years imprisonment. Under Section 8 (3) of the Sexual Offences Act, when one is convicted of defilement of a child aged between 12 years and 15 years, he is liable to imprisonment for a term not less than 20 years. The appellant was handed the minimum sentence. The court exercised its discretion judiciously and within the law. There is no reason why this court should interfere with the sentence.
39. In the end, I find the Appeal without merit. It is hereby dismissed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 26TH DAY OF JANUARY 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Maatwa for the state

Accused Present

Ms. Nyauke –Court Assistant

