



REPUBLIC OF KENYA



**Anyim v Republic (Criminal Appeal E056 of 2022)
[2023] KEHC 1671 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1671 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E056 OF 2022
TA ODERA, J
FEBRUARY 17, 2023**

BETWEEN

CHARLES OKINYI ANYIM APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against both the Conviction and Sentence dated 20.04.2022 in
Criminal Case No. E 091 of 2020 at Migori Law Court before Hon. H.C. Maritim - RM)*

JUDGMENT

The Charge

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on diverse dates between 1st October 2021 to 15th day of December 2021 within Suna west subcounty, Migori County he intentionally caused his penis to penetrate the Vagina of LAO a girl child aged 13 years. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the alternative charge were that on diverse dates between 1st October 2021 to 15th December 2021 within Suna west subcounty, Migori County he intentionally touched the vagina buttocks and breasts of LAO with his penis a child aged 13 years with his penis.
2. The hearing proceeded at the trial court on various dates and via a judgment delivered on 5/05/2022 the accused was found guilty of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) no. 3 of 2006 and sentenced to 20 years imprisonment.
3. Aggrieved by the conviction and sentence the appellant filed this appeal setting out the following grounds of appeal: -
 - a. That he did not plead guilty to the charge.



- b. That the court erred in both law and fact by failing to comply with Article 50 (2)(g) (h) of the [Constitution](#) 2010
 - c. The trial court erred in both law and fact by failing to observe that the ingredients of the defilement were not proved as required in law.
4. The appellant urged the court to set aside the conviction and sentence. Additionally he sought the court's leave to be allowed to adduce more grounds upon receipt of lower court proceedings.

Appellant's Submissions

- 5. In his submissions filed on 19/1/2023 the Appellant contended that the prosecution had failed to prove the charges beyond reasonable doubt. It was his averment that he was the victim of a set up on account of the victim's mother who had coached the victim. It was his argument that the victim's mother was a jilted lover out on a revenge mission.
- 6. He further contended that evidence that could lead to his acquittal was disregarded by the trial court. He submitted that the court was barking up the wrong tree since the victim himself had stated that she had previously had sexual relations with a man known as Ochieng David.
- 7. He called for the conviction to be quashed and the sentence set aside.

Respondent's Submissions

- 8. It was their submissions that the ingredients of defilement as set out in [Kyalo Kioko v Republic](#) (2016) eKLR i.e. age of the complainant, proof of penetration and positive identification of the assailant had been met in this case.
- 9. On the issue of the age of the victim, it was their submission that the birth certificate (PEXH1) showed that the victim was aged between 12 and 13 years on the diverse dates the offences were committed. This therefore set her well within the age delimitation prescribed by Section 8(3) of the [Sexual Offences Act](#). They urged the court to consider the cases of [PMM v Republic](#) [2018]eKLR and [Mwalango Chichoro Mwajembe v Republic](#) (2016) eKLR where it was held that a birth certificate is sufficient proof of age.
- 10. With regards to penetration, it was their submission that the absence of spermatozoa did not disprove penetration as was held in the Court of Appeal case of [Mark Oiruri Mose v Republic](#) (2013) eKLR. In further proof of penetration, the Respondent submitted that PW1 the victim testified that she was 'married' to the Appellant and slept with him as a husband and wife during the period of the offence. That she was also found to be HIV positive. PW2 on her part testified that she found the Appellant sleeping with the minor in his house.
- 11. Additionally, the Respondent submitted that PW3 the Clinical Officer observed that the hymen was broken and the victim had cervical pain, a clear indication that penetration had occurred. It was the Respondent's assertion that the minor's use of the euphemisms 'we used to participate in marriage practices on many occasions' and 'we slept together as husband and wife' coupled with independent evidence on record was sufficient proof of defilement. This they urged was in due consideration of the stigma faced by minors who testify before court. They relied on the Court of Appeal decision of [Muganga Chilejo saba v Republic](#) [2017] eKLR.
- 12. In respect of non-compliance with Article 50(2) (g) of the [Constitution](#) it was the Respondent's contention that the same was complied with by the trial court on the date of the plea. It was their further contention that by electing to proceed without counsel the Appellant cannot be heard to allege that his rights had been infringed, this is due to the fact that the right to legal representation at the



state's expense is not automatic. It was their further averment that the Appellant had to prove that he will be subjected to substantial injustice as put under the lens of the tests provided for in the Supreme Court case of *Republic v Karisa Chengo & 2 others* [2017] eKLR, i.e;

- i. The seriousness of the offence
 - ii. The severity of the sentence
 - iii. The ability of the accused 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.
13. They urged the court to dismiss that ground of appeal.
14. As regards the sentence it was the Respondent's submission that the implication of Section 8 (3) of the *sexual Offences Act* was that only a mandatory sentence would ensue upon conviction.
15. That further the seriousness of the offence warranted the imposition of the mandatory sentence due to the fact that he infected the victim with a chronic disease. They relied on the Court of Appeal case of *R v Ruth Wanjiku Kamande* Criminal Appeal 102 of 2018 where the court held that mandatory sentences are not illegal. They urged the court to set aside the sentence and impose the mandatory sentence in line with the sentencing guidelines outlined in *Francis Muruatetu & Anor v Republic* Petition No. 15 of 2015.

Issues for Determination

16. From a thorough and extensive analysis of the record of appeal and the submissions the following issues for determination arise.
- a. Whether the trial court complied with Article 50 (2) (g) (h) of the *Constitution* 2010?
 - b. Whether the ingredients of defilement were proved?

Whether the trial court complied with Article 50 (2) (g) (h) of the *Constitution* 2010.

17. Article 50(2) (g) and (h) of the *Constitution* provides 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;”

18. With regard to Sub-article (2) (g) the Appellant did not proffer any submissions in support of any miscarriage of justice. However, a look at the proceedings of the trial court on the 20/12/2021 when



plea was taken show that the Appellant was duly informed of his rights under Article 50. To quote the court verbatim; -

“ Article 50(2) of (g) of the Constitution of Kenya gives a right to choose and be represented by an advocate. You are encouraged to exercise the said right. You are hereby informed that you are enlisted to apply to the legal aid board for assistance should you so desire.”

19. The appellant proceeded to answer that he was duly informed of the right.
20. There Appellant has in no way refuted having been informed of his rights. His allegations on this head are therefore baseless.
21. In respect of Sub-article (2) (h) the trial court is enjoined to decipher whether substantial injustice would arise if the accused is not represented by counsel and if so, inform the accused promptly.
22. In this regard it was the Respondent’s contention that the Appellant had failed to prove that substantial injustice would be meted on him on account of non-representation by counsel.
23. They stated that the case was neither complex nor serious and the Appellant had not demonstrated inability to conduct his own defence.
24. From the proceedings of the trial court on 20/12/2021 the Appellant was informed that he could apply to the legal aid board for assistance. There is no indication from the Appellant whether he followed up on this. The Appellant has clearly not articulated the kind of injustice he suffered due to his non-representation. In that regard therefore this court would agree with the Respondent that no miscarriage of justice was occasioned on the Appellant.

Whether the ingredients of defilement were proved

25. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the sexual Offences Act No. 3 of 2006 and must each be proven for a conviction to ensue. (See *George Opondo Olunga v Republic* [2016] eKLR.)
26. The first element is age. The Court of Appeal in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... 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.”
27. In this case the birth certificate of the victim produced as PEXH 1 shows that she was born on 23/11/2008. This would bring the victims age as at the time the offence was committed to 13. The treatment notes and hospital card equally show indicate that the victim was 13 years of age. The victim herein has equally demonstrated sufficient intelligence during the trial. This dispenses off the first ingredient as being adequately proven.



28. The second ingredient is penetration. Penetration is defined under Section 2 of the [Sexual Offences Act](#) as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

29. On Penetration, this is usually proved through the evidence of the victim and medical evidence PW1 the victim herein testified that the Appellant had placed her in the family way and they were arrested together with the Appellant while sleeping. PW2 equally testified that the Appellant used to sleep with the victim and on the material day, he was arrested she was the one who alerted the police. PW3 the clinical officer testified that the hymen was broken which confirmed penetration. The fact of penetration was not disputed what appellant denied is being responsible for the same. In view of the foregoing it is this court’s considered view that penetration was proved.

30. On the issue of identification of the Appellant all the evidence points to him being well known to the victim. PW 1 testified that she was introduced to the Appellant by her mother who thereafter took her to his house. She even recounted in court that she was the Appellants wife. PW2 equally testified that the Appellant who was her lover used to go with the victim everywhere. . On cross examination, PW1 was emphatic that appellant was her husband and he told her she was his wife. On re-examination she used to call him father and then she later became his wife. Appellant submitted that PW1 testified that PW2 gave her to him as a wife while PW2 said that appellant who was her lover defiled the child and that on the day he was arrested she found them locked in his house at 11.00pm. On cross examination PW2 denied that she caused a commotion in the house of appellant and denied that she made him chase away his wife. Appellant contended that he was not at home on the material day and that he left work at 5pm and he stayed till 9pm and left home till the next morning when he arrived and went home and prepared to leave for work but he was arrested . That the victim said she was defiled by one David and that the case was fabricated against him by the mother of PW1 (PW2) who was his 2nd wife as she had a grudge against him as he took in his 1st wife whom he had differed with. This is a defence of *alibi* and fabrication. It is trite law that even where an accused person raises defence of *alibi* the burden placed on prosecution to prove their case beyond reasonable does not shift to accused. The issue of fabrication was neither put to PW1 nor PW2 and PW2 denied differing with appellant over his bringing in his 1st wife back home, an issue arose in PW’1 testimony that it is her mother who gave her pout for marriage to appellant. PW2 vehemently denied this and told this court of the concerns she had raised with appellant for being close to PW1 and always going out with her from October 2021 to the material date. It is clear to me that PW1 was bitter for being taken away from the appellant and was trying to protect ‘her husband ‘, she was aged 13 at the material time and thus had no capacity to consent to any marriage. Most importantly, PW1 was firm in her testimony that appellant had sexual intercourse with her severally as his wife and the mother found them sleeping in the house of appellant on the material day. I dismiss the defence of appellant as an afterthought. The appellant was properly placed at the scene by PW1 and PW2.

31. From the evidence on record it has emerged that the Appellant defiled the victim severally. On sentencing, the Appellant herein was given the minimum sentence prescribed by the law upon mitigating. In as much as minimum sentences were considered unconstitutional on the ground that they deny the trial court the discretion to determine the appropriate sentence to impose, it did not take away the court’s liberty to impose Minimum sentences as prescribed in the [sexual offences Act](#) in befitting cases. (see the case of [Maingi & 5 others v Director of Public Prosecutions & another](#) (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022). In my considered view, given that appellant had sexual intercourse with the child severally, the age of the victim, the fact that appellant had sexual



intercourse with the minor and her mother, I am satisfied that these are aggravating circumstances that warrant imposition of the minimum sentence. I uphold the conviction and Sentence of 20 years imposed by the Trial Magistrate.

32. The upshot of the foregoing is that this appeal is dismissed in its entirety.

T.A ODERA – JUDGE

17.2.2023

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

The appellant,

Miss Rotich for Prosecution and

Court assistant Yudis.

T. A. ODERA - JUDGE

17.2.2023

