



**Owidi v Republic (Criminal Appeal E054 of 2022)  
[2023] KEHC 21977 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E054 OF 2022  
RPV WENDOH, J  
AUGUST 23, 2023**

**BETWEEN**

**FELIX OWINO OWIDI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. H. Maritim – Chief Magistrate in  
Chief Magistrate’s Court Sexual Offences Case No. E 074 OF 201 delivered on 27/4/2022)*

**JUDGMENT**

1. This is an appeal by Felix Owino Owidi who was convicted by Resident Magistrate’s Court at Migori on April 25, 2022 for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#).

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).

The particulars of the charge were that on March 23, 2021 at [Particulars Withheld] in Migori County, unlawfully and intentionally caused his penis to penetrate the vagina of SAO a girl aged thirteen (13) years or that he touched the buttocks and vagina of SAO.

Upon conviction the appellant was sentenced to serve twenty (20) years impressment. The appellant is dissatisfied with the whole judgment filed this appeal complaining that:-

1. The court failed to comply with Articles 50 (2) (g) and (h) of [the Constitution](#) on his right to fair trial;
2. That the offence of defilement was not proved to the required standard.
3. That the appellant’s defence and mitigation were not considered.



2. He therefore prays that the conviction be quashed and sentence set aside. By the time of writing this judgment the appellant's submissions were not on record despite the fact that he had been given time to place them on record.

The Respondent opposed the appeal and the prosecution counsel filed submissions and urged that the age of the complainant was proved to be fourteen (14) by production of the birth certificate and PW2's testimony.

### **On the complainant's age**

3. As to penetration it was submitted that the complainant's explanation as to what happened to her amounts to penetration and that the appellant was known to the complainant and therefore he was not properly identified as the perpetrator.

As regards the appellant's defence, it was submitted that though he secured to raise a defence under Section 8(5) of the *Sexual Offences Act*, he failed to demonstrate the steps he took as envisaged under Section 8(6) of the *Sexual Offences Act*.

On the complaint that Article 50 (2) (g) and (h) were not complied with, it was submitted that the court did explain to the appellant his right to counsel and that under Article 50 (2) (h) the appellant did not demonstrate that he would suffer substantial injustice if counsel was not availed him at State expense. Counsel relied on the case of *Republic v Karisa Chengo and Another* where the superior court described what substantial injustice means.

4. The prosecution counsel supported the sentence meted and relied on the decisions of *R v Ruth Wanjuku Kamanda* Criminal Appeal 102 of 2018 where the court meted out the death sentence on the accused and was upheld by the Court of Appeal. The court was urged not to interfere with the conviction or sentence.

This is a first appeal and it behoves this court to examine all the evidence adduced before the trial court analyse and evaluate it afresh and arrive at this court's own conclusions. This court is guided by the decision in *Okeno v Republic* (1972) EA 32.

The prosecution called a total of five witnesses in support of their case. PW1 CAO, the complainant. PW2 AAO, mother to the complainant; PW3 GOO a brother to the complainant; PW4 Kosuri Dola, a clinical officer at Uriki Sub County Hospital; and PW5 PC(W) Emily Obonge, the investigating officer.

5. PW1 testified that she was fourteen (14) years old, in standard seven at [Particulars withheld] primary School. She recalled March 23, 2021, on a Tuesday, she went to [Particulars Withheld] market when the appellant whom she had known for about 1 ½ years called her while standing next to a car which he used to drive. He asked her to escort him somewhere. She declined because it was 4:00p.m but he promised that they would be back soon and she agreed. She got into the vehicle and they drove to the hostels of [Particulars Withheld] University; that he stopped at Canada Hostels went inside and came back to call PW1. They got into a room with one bed. The appellant closed the door. He asked to have sexual intercourse with her and she agreed. PW1 removed her own clothes and so did he. They slept on the bed. They left at 6:00p.m and she went back home where she stays with her brothers and then next day went where her mother stays. On 24<sup>th</sup> the father took her to hospital, her private parts were examined and urine samples taken and the mother took her to Oyani Massai Police Station. She heard the police were told that it is her who had gone away with the son of Brother. She said that the appellant's father is called Brother. Her mother told her that her teacher had seen her getting into the car with the appellant and she admitted. She was taken to police station, was booked, beaten and later taken to school; PW1 said that it was the first time they had sex though with the appellant he had been



asking her out. PW1 said that the appellant knew that she was a school child as he used to see her pass in uniform.

PW2 is the mother of PW1. PW2 said that PW1 who was born on 30/5/2007 as per the birth certificate that she produced. She recalled that on 23<sup>rd</sup> she was at her place when her daughter's teacher, L asked her where the daughter was and she explained that she left with her brother G and L, a teacher, came to inform her that he saw the complainant and appellant going towards Awendo in a vehicle. PW2 knew the appellant who used to drive the father's vehicle. PW2 went to Awendo junction with Joseph Akide but the complainant did not return and she reported at Oyani Police Station and police told her to wait; that PW1 did not return till 24<sup>th</sup>. PW2 took PW1 to hospital and after examination, she took her to police station and on interrogation, PW1 told her where they had been with Felix and what they did; that the police went to arrest the appellant but he could not be traced till 15/11/2021 when the Area Assistant Chief called her to inform her that the appellant had been arrested.

6. PW3 recalled that on March 23, 2021, he went to fix his shoes at Oyani Centre when he met Felix (Appellant) who told him to call PW1, PW3 went to call PW1 from home and that when he returned with PW1, Felix gave him 20/= and left them together. After repairing his shoes, he met the teacher L who asked him to call PW1 but found PW1 had left with Felix; that L went to tell the mother about it. PW3 said that PW1 returned home at 11:00p.m

PW4 examined PW1 on March 23, 2021 and found that she was fifteen (15) years old. He found that the hymen was broken but not freshly. He did a high vaginal swab and found visible spermatozoa. He opined that there had been penetration.

PW5 received a report from complainant's mother on 24/3/2021. She interrogated the mother and complainant and she recorded that PW1 was defiled by Felix; that the appellant went missing till November when he was arrested in Oyani in a bar for creating disturbance and was identified by PW2.

7. When called upon to defend himself, the appellant opted to give unsworn evidence. He denied having sent PW3 to call PW1 or having gone with the complainant to Rongo University Hostels. He denied knowing how to drive but was arrested, in a pub over false charges.

The first issue I need to deal with is whether the appellant's right to hearing under Article 50 were violated. 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.

8. By dint of Article 25(c) the right under Article 50 (2) (g) cannot be abrogated. Under the said Sub Article, the court is required to inform an accused of his right to be represented by counsel of his own choice, promptly. This is to enable an accused to make an informed decision whether or not he needs counsel to defend him. The court must record that it has informed an accused of the said right so that in the event the court is challenged, the record can speak for itself. In Criminal Appeal 44 of 2019 N. M. T. alias Aunty v Republic J. Mrima in considering Article 50 (2) (g) said in part at paragraph 12:-

“ In light of the foregone provision a consideration of the record is necessary ..”



In Republic v Karisa Chengo & A2 others (2017) eKLR the supreme court said:-

“...the right to legal representation under the said Article, is a fundamental ingredient of the right to a fair trial and is to be engaged pursuant to the constitutional edict without more.”

While emphasising the duty to inform an accused person squarely lies on the court, the South African court in S v Daniels and Another (1983) (3) 275 (A) at 299 G-H said:-

“... the accused rights were explained to him, must appear from the record in such a manner as and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation.”

In South African case of Mphukwa v S (CA& R369 / 2014 (2012), the court said:-

“... A general duty is on the part of the Judicial Officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding, a fair and just trial may not take place. It is therefore the duty of a magistrate to inform the Accused of the said right and in some cases where necessary, the accused may need to apply to the Legal Aid Board for assistance to get free legal Aid”.

See also Joseph Kiema Philip v Republic (2014) eKLR.

As to when the right should be explained to an accused, J. Nyakundi in the Kiema case, said:-

“I must emphasize that the accused person must be informed of this right immediately he / she appears before a court on the first appearance regardless of whether the plea would be taken at that point on time or later. Of importance in the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the onset and an accused person. A court should therefore not be in a hurry to take plea before ascertaining that it was fully complied with Article 50(2) (g) ...”

9. Having considered all the above decisions, it is clear from the court record that on 17/11/2021, when the appellant was arraigned before the court, before plea was taken, the court explained Article 50(2) (g) of *the Constitution* to the appellant. I am satisfied that the court complied with Article 50(2) (g) of *the Constitution*.

Article 50 (2) (h) requires that an accused be informed of the right to be assigned counsel at the State expense if substantial injustice would otherwise result. He is also supposed to be informed of this right promptly. From the record, the appellant was not informed of the said right. However, the said right is not absolute. One has to demonstrate that substantial injustice would result to him if the right is not complied with. The supreme court in Karisa Chengo considered the said Article 50 (2) (h). The court stated as follows at paragraph 94 :-

“In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether



substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *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;
- (vi) the complexity of the charge against the accused;

10. It therefore means that the said right is not in automatic one and an accused has to demonstrate that they will suffer substantial injustice as expressed in the Karisa Chengo case. In Kenya today only persons charged with murder or children in conflict with the law are entitled to automatic legal representative at State expense. Other people have to prove that they will suffer substantial injustice.

In David Njoroge Macharia (2011) eKLR, the Court of Appeal expounded on what substantial injustice entails when it said:-

“ Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”. Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses.”

11. In this case the appellant has not demonstrated that substantial injustice was occasioned to him due to the fact that he was not informed of the right and that no counsel was assigned to him at State expense. The appellant has not proved that Articles 50 (2) (g) and (h) were violated.

To prove a charge of defilement, the prosecution has to prove beyond any doubt that:-

1. That the complainant is a minor;
2. That penetration occurred;
3. The identity of the perpetrator.

### **Age of the complainant**

12. The complainant told that court that she was fourteen (14) years old, having been born on 30/8/2007. Her birth certificate was produced in evidence and the testimony of the complainant’s mother does confirm that she was thirteen (13) years when the offence occurred on 23/2/2021.



In the case, of *Mwalango Chichoro Mwajembe v Republic* (2006) eKLR, the court stated as follows on proof of age:-

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.”

13. In the Ugandan case of *Francis Omuroni v Uganda* Criminal Appeal No 2 of 2020, the Court observed as follows:-

In defilement cases, medical evidence is paramount in determining the age of the victim and 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...”

14. In this case, I am satisfied that the age of the complainant was proved to be thirteen (13) years, hence a minor.

### **Penetration:**

15. Penetration is defined in Section 2 of the *Sexual Offences Act* as follows:-

The partial or complete insertion of the genital organs of a person into the genital organs of another person.” While, “genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

The complainant narrated what happened between her and Felix “

he asked that (anataka tuungane na yeye kimwili) I understand as he met, he wanted us “tufanaye ngono” I didn’t do anything, I just agreed. I said ‘sawa’ he started removing his clothes, I removed my own clothes then we slept on the bed.”

16. What PW1 described does not amount to penetration. However, she was examined by PW4 on March 25, 2023, two days after the incident. Although PW4 did not find any injuries on the complainants genitalia, he found some visible spermatozoa after doing a high vaginal swab. This is evidence that the complainant had taken part in a sexual activity and in my view, it was evidence that penetration had occurred.

### **Identity of the perpetrator**

17. PW1 testified that she had known the appellant for about 1 ½ years and that he is also a neighbour. PW2 too, knew the appellant as a neighbour. PW3, PW1’s Brother testified that the appellant actually sent him to call PW1 on that day and the appellant and complainant then disappeared together. I find the appellant’s allegation that he was framed, to be far fetched and hollow a story because there is actually no reason why he could have been framed by PW1, PW2 and PW3. I find that the complainant and Appellant were together on March 23, 2021 and I believe the complainant’s narration to court as to what happened between them.

Though PW1 told the court that she agreed to engaging in a sexual act, there is no evidence that she held out herself as an adult in order to avail the Appellant a defence under Section 8 (5) of the *Sexual offences Act*.



18. One L was mentioned as the person who informed PW2 that he had seen the appellant drive off with the complainant. Though he was not called as a witness PW3 did confirm having called PW1 to go and meet the appellant and he did not find them where he left them. The allegation that the defence was not considered is not correct because at paragraph 17 of the judgment, the court indicates that it had considered the defence. The court found that the defence did not raise any reasonable doubt in the prosecution case.

Before sentence, accused was allowed time to mitigate when he stated that he lives with his grandmother.

In the end, I find that the prosecution proved its case to the required standard and the conviction is sound. I affirm it.

19. As regards sentence, it is my view that it is excessive in the circumstances. I hereby set aside the sentence of twenty (20) years, I substitute it with fifteen (15) years imprisonment. The sentence will commence on the date the appellant was sentenced by the trial court on April 27, 2022.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 23<sup>RD</sup> DAY OF AUGUST, 2023.**

**R. WENDOH**

**JUDGE**

**In presence of; -**

Mr. Kaino for the state

Appellant Present

Emma / Phelix –Court Assistant

