



**WO alias A v Republic (Criminal Appeal E059 of 2022)  
[2023] KEHC 21975 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E059 OF 2022  
RPV WENDOH, J  
AUGUST 23, 2023**

**BETWEEN**

**WO ALIAS A ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. R. K. Langat – Principal Magistrate in Rongo Principal Magistrate’s Sexual Offences Case No. E 32 OF 2019 delivered on 27/4/2022)*

**JUDGMENT**

1. WO alias A was convicted by the Principal Magistrate Rongo for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#).
2. 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 are that in the month of May, 2019 at [Particulars Withheld], Location, he intentionally and unlawfully caused his penis to penetrate the vagina of MA a child aged fifteen (15) years or that he touched the vagina of a girl aged fifteen (15) years old.
3. The case proceeded to full hearing by the prosecution calling a total of five (5) witnesses while the Appellant gave a sworn statement in his defence and did not call any witness.
4. Upon conviction, he was sentenced to ten years imprisonment.
5. He is aggrieved by the whole judgment of the court and preferred this appeal based on the following grounds: -
  1. That the charge was not proved to the required standard;
  2. That the appellant’s defence and mitigation were not considered.



6. He prays that the conviction be quashed and sentence set aside. The appellant filed submissions in support of the appeal in which he urged that the age of the complainant was not proved and that if indeed the complainant was defiled in May, 2019, the child who was born would have been one month old when she testified on October 14, 2020; that the evidence of PW3 was totally misleading as regards the complainant's age and that the sentence was arrived at was not supported by any evidence.
7. The prosecution opposed the appeal and the prosecution counsel filed submissions which are that, the offence was proved to the required standard. Counsel tried to explain the complaint's evidence that the child was one month at the time she testified; that PW1 testified that she was sixteen (16) years and hence 15 years old at the time of the offence which evidence was corroborated by the age assessment report; that penetration was proved because it resulted in a pregnancy.
8. This being a first appeal, it behoves this court to re-examine all the evidence tendered in the trial court, analyse and evaluate it and arrive at its own independent findings but making allowance for the fact that it neither saw nor heard the witnesses testify. This court is guided by the decision of *Okeno vs Republic* (1972)EA 32.
9. The prosecution witnesses were PW1 MA the complainant; PW2 EAO, a niece to the complainant; PW3 Dancun Nyaboke, a clinical officer from Awendo Sub County; PW4 David Otieno Onyango, Assistant Chief [Particulars Withheld] Sub Location and PW5 Lenoline Kerubo, the investigating officer in the case.
10. PW1 testified on oath, that she was born in 2004 and was residing at [Particulars Withheld] with the elder brother. She recalled that on April 5, 2019, she met the appellant at the river where she had gone to fetch water; that the Apepllant requested her to be his girlfriend but she declined; that on April 7, 2019 they met again where the appellant lived; that he called and she went where he was; that though he lived with other men, they were not there on that day; that the appellant took her to his bedroom, removed her pant, his inner wear made her to lie down on the bed and inserted his penis in her vagina. When she tried to resist, he threatened her. After he finished, he opened for her. In August 2019, she felt unwell, was taken to hospital by PW4 and was found to be pregnant and PW4 chased her from home. PW1 went to the Chief (PW3) who took her to Ebenezer Children's home. She gave birth to a son JO in January 2020, fathered by the appellant.
11. PW2 who described himself as a niece to PW1 recalled that in May, 2019, the complainant fell ill and she took her to hospital at Ranen and she was found to be pregnant; that when asked who the father was she did not disclose but later learnt that it was Walter, the appellant who was a neighbour; that she is the one who told the complainant to leave her home. She added that in 2000, the complainant was 2 ½ years having been born in 1998 but she had never seen the birth certificate.
12. PW3 the clinical officer examined PW1 on September 26, 2019. She was five month pregnant, the hymen was broken with no visible injuries. He also assessed her age which he approximated at fifteen (15) years, but there were no other documents relating to age . Age assessment report was done by his colleague.
13. PW4 the Assistant Chief of [Particulars Withheld] Sub Location recalled that in the year 2019, a school girl, PW1 went to his home complaining that she had been chased away by the wife of her step brother because she was pregnant and he took her to the Children's Office.
14. PW5, the investigating officer recalled September 25, 2019 she was allocated a case of defilement. He recorded statements of the Chief who took PW1 to station, where the suspect had been arrested at Oyere police post, was brought to the station and she charged him; PW5 did not get any record of PW1's age and that the guardian PW2 did not know her age.



15. In his defence, the appellant testified on Oath denying the offence and stated that he was framed.
16. The appellant having been charged with offence of defilement, the prosecution had a duty to prove:-
  1. That the complainant was a minor;
  2. Penetration;
  3. Identity of the perpetrator.

### **Proof of Age**

17. In the case of *Mwalango Chicboro Mwanjembe vs Republic* (2016) eKLR the Court gave some guidance on how age can be proved in a defilement case when it said:-
18. 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.”
19. In the Uganda case of *Francis Omuroni vs 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...”
20. In this case PW2 the complainant’s guardian did not know the complainant’s age. Although she said that the complainant was 2 ½ in 1998, she admitted that she had never seen the birth certificate. Besides, the investigating officer confirmed that PW2 did not know PW1’s age. It is only PW1 who told the court that she was fifteen (15) years at the date of the offence. PW1 also underwent an age assessment and was found to be about fifteen (15) years old. Though the guardian did not know complainant’s age, the complainant knew her age and her testimony was corroborated by the age assessment. In Omuroni’s case, the court observed that age can be ascertained through common sense. The complainant was still in primary school and the court must also have observed the complainant. This court is satisfied that the complainant’s age was proved to be about fifteen (15) years old.

### **Proof of Penetration**

21. Penetration is defined under Section 2 of the *Sexual Offences Act*.
22. 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.”
23. In the case of *Mark Oiruri Mose vs Republic* (2013) eKLR the court explained what penetration entails when it 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 the 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 need not be deep inside the girl's organ....”

24. The complainant was examined a month after the ordeal. Even if there had been injuries, they could not have been visible because of the time taken. The hymen was however missing and PW1 narrated clearly that it is the appellant who had penetrated her genitalia using his penis. Though it was not ascertained whether the child born by PW1 belonged to the appellant, yet PW1 told court that she only had sexual contact with the appellant once. Her evidence has not been controverted and this court is satisfied that the appellant penetrated PW1 which resulted in a pregnancy and birth of a child.

#### **Who is the Perpetrator**

25. The complainant narrated how the appellant first accosted her requesting to be her boyfriend and two days later they met and got intimate. The incident took place during the day and the appellant is a neighbour to the complainant which fact he admitted. Though the appellant claimed to have been framed, there is no reason why the complainant could have framed him. This court is satisfied that the appellant is the perpetrator. Though the appellant claimed that his defence was not considered, yet his defence was a mere denial captured in three short sentences and which the court disbelieved.

#### **Whether The Evidence Was Contradictory:**

26. In the typed proceedings, Record of appeal, at page 6 the complainant is quoted as saying:-
27. I have a child. He is called JO. He is a month old,” I have had a look at the original handwritten record by the trial court and it is clear that there was a typographical error. The original draft reads, “He is eight months old”.
28. Having established that there was a typing error, the ground that the evidence was contradictory lacks basis.
29. In the end, I find that the trial court correctly arrived at the finding that it is the appellant who defiled the complainant and impregnated her. The conviction is sound and I affirm it.
30. The appellant was sentenced to ten (10) years imprisonment. Under Section 8 (3) of the *Sexual Offences Act*, upon conviction, one is liable to not less than twenty (20) years imprisonment. In this case, the court exercised its discretion and sentenced the Appellant to only ten (10) years imprisonment. I find that the trial court was very lenient and there is no basis for the court to interfere. That ground must fail.
31. In the end, I find no merit in the appeal. It is dismissed in its entirety.

**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

