



**DOM alias M v Republic (Criminal Appeal E031 of 2021)  
[2023] KEHC 21974 (KLR) (23 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E031 OF 2021  
RPV WENDOH, J  
AUGUST 23, 2023**

**BETWEEN**

**DOM ALIAS M ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon R. K. Langat –  
Senior Principal Magistrate in Rongo Senior Resident Magistrate’s  
Sexual Offence Case No. E009 OF 2021 delivered on 14/6/2021)*

**JUDGMENT**

1. DOM alias M was charged before Rongo Senior Principal Magistrate’s Court with offence of defilement contrary to section 8 (1) as read with section 8 (4) 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](#).
2. The particulars of the charge are that on 13/1/2021, in East Sakwa Location, Awendo Sub County, unlawfully and intentionally caused his penis to penetrate the vagina of SAM a child aged seventeen years or that he touched the vagina of SAM a girl aged seventeen (17) years with his penis.
3. After a full trial the appellant was convicted on the main charge and sentenced to serve twenty (20) years imprisonment.
4. The appellant is dissatisfied with the judgment of trial court and preferred this appeal based on the following grounds:-
  1. That the court erred in finding that the offence was proved;
  2. That articles 50 (2) (g) and (h) of the [Constitution](#) were not complied with;



3. That the appellant's defence was not considered
4. That the sentence is excessive and harsh.
5. He therefore prays that the conviction be quashed and sentence set aside . Though the court directed that the appeal be canvassed by way of submissions, the appellant failed to file submissions but the Respondent counsel did.
6. The respondent opposed the appeal and urged that article 50 (2) (g) and (h) were not violated because the court informed the appellant of his rights to have counsel of his choice; that the three ingredients necessary to prove the offence of defilement were established in that the age of the complainant was proved by production of the birth certificate which indicated that the complainant was born on 28/8/2003.
7. As regards penetration, it was submitted that the complainant's evidence was corroborated by that of PW1 the clinical officer and PW3, the mother who saw the complainant enter the appellant's house and found the complainant and appellant in the sexual act whereby the appellant had lowered his trouser.
8. On identity of the perpetrator, the appellant and complainant are both relatives and neighbours and it was a case of recognition and further they were found in the act.
9. As for the defence, it was urged that the court considered it and found that the complainant's evidence was solid.
10. As for the sentence, it was submitted that it is legal. The Prosecution counsel urged the court to dismiss the appeal.
11. This is a first appeal and this court is duty bound to reexamine all the evidence tendered before the trial court, evaluate and analyse it and come to its own conclusions. However, this court has to make 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.
12. The prosecution called a total of four witnesses, PW1 Joseph Otieno Onjira a clinical officer based at Awendo Sub County Hospital; PW2 SAM, the complainant; PW3 BAB, the complainant's mother and PW4 PC Sarah Kimisi the investigating officer in this case.
13. PW2 told the court that she knew the appellant as a neighbour and that on 13/1/2021 about 5:00p.m, she was on her way to the grandmother's home when the appellant grabbed her hand and led her to his house, removed her clothes took her to his bedroom, laid her on the bed, removed her under pant, removed his trouser and inserted his penis in her vagina. While in the act, her mother entered the house and took her home while the Appellant fled. She went to her grandfather's home where she stayed for a week from where her mother took her to Awendo hospital, then to the police station. PW2 stated that the appellant had sex with her several times even when she refused and he would give her Kshs. 50 – 200/- which she used to buy madazi. PW2 stated that they had had sex since she was in class seven (7) and that she used to go to school with his children.
14. PW1 examined the complainant on 15/1/2021 at Awendo Sub County Hospital while in company of the mother PW3; that PW1 Admitted to have had sex with the appellant for long. He found a broken hymen (old), the genitalia had a foul smell and he put her on treatment. He also filled the post rape case form. He opined that there was possibility of defilement.
15. PW3 produced the complainant's birth certificate which shows that she was born on 28/8/2003. PW3 identified the appellant as her relative; that on 13/1/2021 the appellant's brother found her in the farm



and informed her that he had seen the complainant going to the appellant's house; that the appellant's house is only 20 metres away from theirs. She found the door open and she heard the appellant asking the complainant if she had finished the money he had given her. PW3 entered and found them on the bed in the act of intercourse. She closed the door and called PW1's father who came pushed the door and both appellant and complainant ran out. PW3 reported to Awendo police station and learned that the complainant was at her grandmother's home where she went next day and reported at Awendo police station and they were referred to hospital. She was examined and Post rape forms and P3 were filled.

16. PW4 recalled that on 14/1/2021, about 6:00p.m, she received a complaint from the complainant's parents. Next day, the complainant was taken to hospital (15/1/2021). PW4 later arrested the appellant at his house.
17. When called upon to defend himself, the appellant opted to give sworn evidence. He denied knowing about the charge; that he left home on 13/1/2021, 4p.m found the complainant and his mother outside his house; that the complainant asked for maize and he told her to get it from the mother and when leaving, she met her parents who told him that they were arresting him; that the complainant's father who had a panga hit him on the hand, cut him and closed the door from outside and he fell unconscious. His child opened for him and the brother took him to hospital where he was admitted for three days.
18. In cross examination, he admitted that he is a brother to complainant's grandmother and they lived peacefully. He did report to the investigating officer About the source of the injuries inflicted by complainant's father.
19. DW2 MA, the recalled 11/3/2021, that her grandchild came from school and took maize to the appellant and she followed him to his house; that the complainant's mother came with a stick and complainant ran away and that complainant's father cut deceased. She denied knowing what happened in appellant's house nor did she see him being cut.
20. DW3 V O came from school and met his father Bena and complainant; that he had a panga and stick. He opened the door and found the father bleeding and he was taken to hospital. He did not know how the father got injured.
21. Having considered the evidence tendered in the trial court, the grounds of appeal. I think it is prudent to consider the ground on alleged violation of article 50 (2) (g) and (h) of the *Constitution*. Article 50 guarantees an accused person's right to fair hearing and by dint of article 25 (c) the said right cannot be abrogated. 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. Under Sub article 2 (g) the court has a duty to inform an accused at the earliest opportunity of his right to make a choice of counsel to represent him if he so wishes. The court should record that the said



provision has been explained to the Accused. See the case of *Chacha Mwita v Republic* (2019) eKLR and *Joseph Kiema Philip v Republic* (2019) eKLR where J. Nyakundi said:-

“.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....”

23. In this case, the court record shows that on 8/2/2021, after the appellant told the court that he understood, the Luo language, the court explained to him the right to legal representation of his choice or if he could not afford, seek legal aid. The appellant confirmed that he had been informed. Though the court did not specifically indicate that it was complying with article 50 (2) (g) it did comply with these provisions.
24. As regards article 50 (2) (h) it places a duty on the State to assign and advocate to an accused person at its own expenses if substantial injustice will not result. The right is therefore not automatic because it has to be demonstrated that substantial injustice will result. Substantial injustice was discussed by the Supreme Court in *Karisa Chengo v Republic* (2017) eKLR where the court listed instances when substantial injustice may arise to include;
  1. Severity of sentence;
  2. Ability of Accused person to pay his own counsel;
  3. Complexity of the case etc.
25. The appellant never demonstrated that substantial injustice would result nor has it been demonstrated that he suffered any injustice for failure by the State to avail him with counsel. In Kenya today, only persons charged with murder and children in conflict with the law are entitled to legal counsel at State expense. The appellant has not demonstrated that he suffered any injustice because he was not assigned counsel.

#### **Whether the offence of defilement was proved:-**

26. To prove a charge of defilement, the following ingredients must be proved:-
  1. Age of complainant, must be a minor;
  2. Proof of penetration;
  3. Positive identity of the perpetrator.

See *Charles Wamukoya Karani v Republic* Criminal Appeal No. 72 of 2013.

#### **Proof of Age**

27. The complainant told the court that she was seventeen (17) years old. The complainant's mother PW3 produced the birth certificate as PEX NO. 4. It indicates that the complainant was born on 28/8/2003. In the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR, the court said:-

“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.”

28. Again in the Ugandan case of *Francis Omuroni v Uganda* Criminal Appeal no. 2 of 2000 the court observed:-

“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...”

29. It is therefore settled that age in defilement cases may be proved by medical evidence, birth certificate, victims parents or guardian and observation and common knowledge. In this case, apart from the complainant’s mother PW3, there is proof of the age by the birth certificate. As of January 2021, the complainant was seventeen (17) years about to turn 18 years. There is sufficient proof that the complainant was a minor at the time the offence was committed.

### **Proof of penetration**

30. 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.” While, “genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

31. The complainant stated that on the said date, the appellant grabbed her as she passed by his house which was about 20 metres from them. PW2 graphically narrated how the appellant removed her clothes inserted his genitalia into hers and that they had been engaging in such acts since she was in standard seven (7). When she was about fifteen (15) years. PW1 on examining PW2 found an old perforation to the hymen and she had a foul smell for which she was put on medication. Further to the above, the appellant and complainant were found in the act by PW3.

32. PW2 and PW3 testimonies were not at all shaken by either the cross examination or defence. Because of the long involvement in sexual activity injuries could be found. The court is satisfied that there was proof of penetration.

### **Identity of the perpetrator**

33. The appellant is not a stranger to the complainant. They are related. PW2 told the court that the complainant’s, her grandchild while, the appellant is his son. It means that the appellant is an uncle to the complainant. According to the complainant, and PW3, the incident took place during the day and hence no possibility of confusion. Secondly, it is something that had been on going for two years. The court agrees with the trial court’s finding that the appellant was properly identified. PW2 and PW3 did not know what had happened between the appellant and complainant. DW2 was aware that the complainant had been found in the appellants’ house. I find that the prosecution proved beyond doubt that the appellant is the culprit. The appeal on conviction has no merit and is hereby dismissed.

### **Of Sentence**

34. The appellant was sentenced to twenty (20) years in prison. The court considered that the appellant took advantage of the mental status of the complainant, (had epilepsy). However, no medical report or evidence was produced to prove that the complainant had epilepsy and was therefore mentally



incapacitated. Under section 8 (4), upon conviction, one is liable to a term of imprisonment of not less than fifteen (15) years.

35. In my view, the fact that courts are tending to exercise their discretion and are not bound by the minimum sentence, I will exercise my discretion in this case and reduce the sentence.
36. I hereby set aside the sentence of twenty (20) years imprisonment and substitute it with twelve (12) years imprisonment. The sentence to run from the date of sentence on 14/5/2021. The appeal succeeds to that extent.

**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

