



REPUBLIC OF KENYA



**Otieno v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 24488 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E016 OF 2021
RPV WENDOH, J
OCTOBER 31, 2023**

BETWEEN

FRED OTIENO OTIENO ALIAS ONGA'RO 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 22 OF 2019 delivered on 3/3/2021)

JUDGMENT

1. By the Memorandum and Notice of Appeal filed in court on 10/3/2021, the Appellant Fred Otieno Otieno alias Onga'ro appealed against the judgment of Senior Resident Magistrate's Court Rongo. The grounds of appeal are as follows:-
 1. That the court erred in making a finding that the offence of defilement was proved;
 2. That the court failed to give due regard to the appellant's defence;
 3. That the court failed to consider the contradictions in the prosecution evidence.
2. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(2) of the *Sexual Offences Act*.
3. In the alternative he faced a charge of committing an indecent act with a child contrary to Section 11(a) of the *Sexual Offences Act*.
4. The particulars of the charge were that on 6/7/2019, at [Particulars Withheld], Location, unlawfully and intentionally caused his penis to penetrate the vagina of MA a child aged eight (8) years or that he touched the genital organ of MA with his penis.



5. After a full trial the appellant was convicted on the main charge and sentenced to serve thirty (30) years imprisonment on 3/3/2021. No finding was made on the alternative charge.
6. In support of the grounds of appeal, the appellant filed submissions to the effect that there was no conclusive evidence that it is the appellant who defiled the complainant; that there was no proof of penetration; that the complainant was not truthful because she did not inform anybody about her ordeal though it had been done to her five (5) times; that it has not been explained why the complainant was not examined on 10/7/2019 and instead was examined on 13/8/2019 and that the complainant's allegation that she was walking with her legs apart was not supported by that of her mother PW3; that the age of the injuries the complainant sustained was contradictory. He urged the court to quash the conviction and set aside the sentence.
7. The appeal was opposed by the prosecution counsel who submitted that the Clinical officer (PW1) produced the P3 form and post rape Form which clearly indicated that the complainant sustained injuries to her genitalia and hence evidence of penetration; that the complainant clearly narrated how the appellant inserted his thing for urinating into hers and that was proof of penetration; that the complainant identified the appellant by his alias name Ong'aro throughout her testimony because he was well known to her as he often went to her home; that the prosecution evidence was consistent that the appellant was their neighbour and the appellant did acknowledge that fact.
8. On his defence, it was submitted that it was shallow and did not dislodge the prosecution evidence and that there was no reason why the complainant could frame the appellant.
9. As to sentence, that though the complainant was eight (8) years old the court did not sentence him to the mandatory sentence of life imprisonment but instead exercised its discretion and sentenced him to only thirty (30) years imprisonment. He urged this court to dismiss the appeal.
10. This being the first appeal, this court has a duty to exhaustively examine all the evidence tendered in the trial court, analyse it and come to its own conclusions. The court must however 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.
11. The prosecution called a total of five (5) witnesses., PW1 Maureen Maramba a clinical Officer at Macalda Sub County Hospital recalled that. She examined MA on 13/7/2019 and filled both the PCR form and the P3 Form . She stated that the complainant had pain in passing urine, walked with legs apart and had bruises on the labia minora, lacerations on the vaginal walls, hymen was broken. PW1 treated M. A. and found evidence of penetration. She produced the treatment reports and the complainants P3 Form as exhibits.
12. PW2 MA recalled that on 6/7/2019, she went to fetch firewood; that Onga'ro, the appellant, called her to go to his house to be given money. He took her inside the maize plantation, removed her clothes, removed his trouser and inserted his thing for urinating into hers. PW2 identified the appellant as Onga'ro their neighbour.
13. PW3 JAO, the mother of the complainant identified the appellant as her neighbour; that on 10/7/2010 ,when washing clothes, she found the complainant's pant stained with blood and a mucus like substance. She enquired from PW2 why the pant was stained. On 13/7/2019, PW3 interrogated MA and she narrated to her how Fredrick Ongaro defiled her on 6/7/2019. PW3 took PW2 to hospital after reporting the incident to the police.
14. PW4 DOO, father to the complainant and a Community Worker based at Mariwa Health Centre, identified the appellant as a neighbour. He was at home on 13/7/2019 when the complainant M. A.,



- went home, looking disturbed. When he interrogated PW2, she told him that the Appellant usually calls her, gives her 5/= to buy sweets and that he would touch her private parts which had done five times. He went with PW3 to take the complainant to Mariwa Health Centre where she was examined.
15. PW5 PC Caroline Kemunto was the investigating officer in this case who took over from PC Kiarie. She produced PC Kiarie's statement who received a report of defilement from the complainant's father, one Daniel Ogot (PW4) and that appellant had been charged.
 16. When called upon to defend himself, the appellant in his sworn statement confirmed that the complainant is a child of the neighbour. He denied seeing PW2 on 6/7/2019 but that he was arrested on 15/7/2019 when at a hotel on allegation that he defiled Daniel's daughter; that the complainant's parents had never told him that he defiled the daughter.
 17. I have duly considered the evidence on record, grounds of appeal and the oral submissions. This being a charge of defilement, the prosecution has to establish beyond reasonable doubt that the following ingredients exist;
 1. That the victim is a minor;
 2. That penetration occurred;
 3. The identity of the perpetrator is proved.

Proof of Age

18. Courts have held that age of a victim of sexual offence may be proved through medical evidence, birth certificate, by evidence of a parent / guardian or even common sense.
19. In the case of *Mwalango Chichoro Mwajembe vs. Republic* Criminal Appeal No. 24 of 2015 the court stated thus:-

.... The question of proof of age has finally been settled by a recent decision 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.
20. It has even been held in a long line of decision from the High Court that age can also be proved by observation and common sense (See *Denis Kinyua vs. Republic* Criminal Appeal No. 19 of 2014).
21. In *Fappyton Mutuku Ngui vs. Republic* (2012)EKL the Court of Appeal said as follows:-“

”..... that ‘conclusive’ proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”
22. In the Ugandan case of Ugandan case *Francis Omuroni vs. Uganda* Criminal Appeal No. 2 of 2000 the Ugandan Court of Appeal reiterated what the Kenyan courts said when it said:-

“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...”
23. In the instant case, PW2 the complainant, stated that she was aged eight (8) years and in grade 3. After a voire dire examination, the court found that she was intelligent, but she would give unsworn evidence



meaning she was a child of tender age. PW3, the complainant's mother stated that she was born on 2/5/2011 and produced a birth certificate to that effect PEX NO. 2. The complainant's age was proved to be eight (8) years.

Penetration

24. Section 2 of the *Sexual Offences Act* defines penetration 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.”

25. The complainant narrated vividly how the appellant took her to the maize plantation, removed her pant removed his and inserted his thing for urinating into hers. The incident was not known immediately and she did not disclose it till PW3, the mother, noticed blood stains and mucus like substance in PW2's pant on 10/7/2019. Although PW2 talked of one incident, PW4, the complainant's father testified that after interrogating PW2, she said that the appellant had done that to her five times and had given her 5/= every time it happened. When PW1, the clinical officer examined PW2 on 13/7/2019, she found that the complainant had injuries to the labia minora, lacerations to the vaginal walls and the hymen was broken. The findings were was consistent with penetration. I am satisfied that PW1's testimony was corroborated by the findings of PW1. I find that penetration was proved.

26. In *Mark Oiruri Mose vs. Republic* (2013) eKLR the Court thus said of penetration;

“Many times ... 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....”

Proof Of Identity Of The Perpetrator

27. PW2 was not a stranger to the appellant. They are neighbours. PW2 and PW3 and PW4 attested to that fact. PW2 kept referring to the appellant by the alias name of Onga'ro which means she know him well. Even that appellant admitted that fact. The incident happened during the day time and the complainants' testimony was not shaken at all. The appellant also admitted that they had no grudge between them hence no reason for the complainant or her parents to frame him. Besides, the complainant was a child of tender age and the possibility of there existing a grudge between her and the appellant was very remote.

28. The court considered the appellant's defence. It was shallow and did not at all controvert the prosecution evidence.

29. Though the appellant alleged that there was various contradictions, I find none to exist. As to why PW2 was examined on 13th July 2019 and not earlier, the complainant did not disclose when the incident occurred and being a child of tender age, it was unlikely that she would be exact details as to the date. PW1's testimony that the offence had been committed four days earlier was an estimate of the time not the exact.



30. In the end, I do find that there is overwhelming evidence that the appellant defiled the complainant. I affirm the conviction.
31. The appellant was sentenced to thirty (30) years imprisonment. Section 8(2) of the *Sexual Offences Act* provides for a sentence of life imprisonment but the court exercised its discretion and sentence the appellant to thirty years imprisonment. The appellant did not contest the sentence. The court will not interfere with it. In the end, I find the appeal unmerited and I dismiss the appeal in its entirety.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 31ST DAY OF OCTOBER, 2023.

R. WENDOH

JUDGE

In presence of;

Mr. Kaino for the state

Appellant Present

Ms. Emma –Court Assistant

