



REPUBLIC OF KENYA



KENYA LAW
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**Idris v Republic (Criminal Appeal E017 of 2021)
[2022] KEHC 10601 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E017 OF 2021**

**A ALI-ARONI, J
MAY 26, 2022**

BETWEEN

ADAN ABDIKHER IDRIS APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal from the conviction and Sentence delivered by Hon.
Mugendi Nyaga on 4th May 2021 in Wajir S/O Number E008 of 2021))*

JUDGMENT

1. Adan Abdikher Idris, the appellant herein was charged, convicted and sentenced to forty, (40) years imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on the 10th Day of March 2021 at Habaswein Subcounty within Wajir County, the appellant caused his penis to penetrate the anus of HAA a child aged 7 years.
2. Being aggrieved by the trial court's decision the appellant filed a petition of appeal dated May 19, 2021 raising five (5) grounds of appeal as follows; -
 - a. The learned Magistrate erred in both law and fact by commencing the trial without ensuring that the appellant was furnished with witness statements the prosecution had sought to rely on hence infringing my right under article 50 (2) of *the Constitution*.
 - b. That the learned Magistrate erred in both law and fact by failing to consider that the arresting officers did not inform the appellant of his right under article 49 of *the Constitution*.
 - c. That the learned magistrate erred in both law and fact by convicting the appellant on inconsistent and contradictory evidence raised by the prosecution.



- d. That the trial magistrate erred in both law and fact in failing to give the appellant the benefit of doubt.
3. Both parties canvassed the appeal through written submissions. In his submissions the appellant reiterated the grounds in his petition of appeal and further submitted that the proceedings in the trial court were conducted in Somali language that he does not understand as he speaks Kiborana language, he therefore did not understand what transpired in court.
4. The respondent on its part submitted that all the ingredients of the offence of defilement were proved as;

The Age of the complainant was not contested; his birth certificate was produced as an exhibit; he was 7 years at the time of the incident. On Penetration, the complainant testified that the Appellant placed him on a bed, removed his shorts, came on top of him and inserted his penis in the complainant's anus and sodomised him. PW1, a clinical officer on examining the Complainant found the complainant had lacerations and blood on the anal region. He also observed that the complainant was in pain and could not go for a long call. He formed the opinion that there had been penetration.

As to the identity of the perpetrator, the complainant informed the court that he knew the appellant who was a neighbour.

5. On the ground that the appellant's rights under article 50 of *the Constitution* were violated, the prosecution submitted that the trial court had directed that all the witness statements be supplied to the appellant and if indeed this was not done, the appellant should have raised the issue at the earliest which he did not. The prosecution urged further that the appellant was supplied with the prosecution's evidence granting him the ability to cross-examine the witnesses, therefore the allegation is baseless. Further the prosecution submitted that the appellant's defence was duly considered by the court alongside the evidence of his witnesses.

On whether the Appellant was convicted of the offence he was charged with, it was submitted that he was correctly charged with the offence of defilement under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The prosecution urged for the appeal to be dismissed as it lacked merit.

Analysis and Determination

6. This being the first appeal the court must reconsider, evaluate and analyze the evidence afresh so as to arrive at its own conclusion. In the often-cited case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated the duty of the court on a first appeal to be:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”



7. The evidence placed before court by the prosecution is as follows; PW1 Abdimeli Ibrahim Abdi, a clinical officer at Habaswein Sub-County Hospital testified that on March 10, 2021 at around 11:00 a.m. he examined the complainant (PW4) at the hospital. He gave the approximate age of the complainant as 7 years. Upon examination of the complainant, he found lacerations, bruises and blood on the anal region. He concluded that there was penetration.

8. PW2 NN, mother to the complainant testified that on March 9, 2021 her son the complainant lost his shoes and on March 10, 2021, she asked him to go look for the same. When he took long to return she went to look for him but he did not find him. She later sent the complainant's brother to look for him but the complainant returned carrying his shorts; was naked from the waist downwards. She asked him where he had come from and he responded that felt like an urgent long call but could not relieve himself, the complainant also narrated how the appellant had taken him to a house and done bad things to him.

She then went to the appellant's house but she did not find him when she informed the appellant's stepfather about the incident and proceeded to reported the matter to Habaswein police station after which she took the child to the hospital where he was examined and treated. On learning that the accused had returned to their home she informed the police who went o the said home and arrested him.

9. PW3 ZAA brother to the complainant confirmed being sent by their mother to look for his younger brother, the complainant. On not finding him he returned home when he learnt of the incident from his mother.

Later he escorted his mother as she went to look for the appellant at his home.

They thereafter reported the matter to Habaswein Police station. The complainant was taken to the hospital after which they took the police to the home of the appellant where many people had gathered. The police arrested the appellant on the same date. He testified further knowing the appellant for over 3 years before the incident.

10. Upon The conduct of voir dire examination PW4, HAA (the complainant herein) gave an unsworn testimony as follows; that he had been sent by his mother to go to look for his lost shoes. When going home after looking for his shoes he passed by the appellant's house when the Appellant grabbed him, covered his mouth and took him to a house where he removed his pair of shorts, came on top of him and inserted his penis into his anus. That after committing the offence, the appellant washed his anus using water, told him to go play with the child outside and offered to give him money after his appellant's mother returned.

He did not join the child to play but took his shorts, went home and informed his mother, PW2 what had happened. PW2 took him to the hospital where he was treated. He was in pain for four days. He also told the court that he knew the appellant before the incident. The appellant's home was two (2) houses from theirs. He identified the appellant in court.

11. In cross-examination, he testified that the appellant was alone when he committed the offence which was a Saturday. On the said day the Appellant wore a black and white kikoi and a shirt.

12. PW5 Cpl Jackson Kazungu the investigating officer, narrated the course of the investigation. He told the court that upon receiving the report from PW2 they escorted PW2 and PW4 to the hospital. They visited the scene the following day and where the complainant identified a bedsheet that was on the bed where the offence was committed and the water container the Appellant used to wash him after the act. He identified the accused in court as the person they arrested. He also produced the bedsheet and jerrican as exhibits.



- In cross-examination, he told the court that they did not find the appellant escaping.
13. After the close of the prosecution's case, the appellant was found to have a case to answer and he was placed on his defence.
 14. DW1, the appellant herein testified that he was born on 21st February, 2004 and was 17 years old when he first appeared in court. He denied having committed the offence. He further told the court that on the material day he had gone to school at around 6:30 a.m. He was alone when going to school. He admitted to knowing the complainant for 2 years before the incident.
 15. DW2 Kamiro Ore mother of the appellant testified that she left their home at around 7:00 a.m. on the material day to graze goats. She returned at about 8:00 a.m. and found the appellant had gone to school. Further she testified at around noon her husband called asking for the whereabouts of the appellant. That soon thereafter there was a fight as there were persons who were seeking to kill the appellant. She made noise and the police came and arrested the appellant. Being illiterate, she did not know her son's age.
 16. DW3 Issack Hussein Adan, stepfather to the appellant testified that on the material date he left the home at 7:00 a.m. and at the time the appellant and his sister were in school uniform. That at around 8:30 a.m. PW2 went looking for the appellant, she left to return with the complainant and informed him that the appellant had defiled the complainant. He advised her to report the matter to the appellant's uncles.

DW2 called him later in the day and informed him that some people wanted to kill the appellant. He called and urged the relatives of the complainant to settle the issue, however, he appellant was arrested thereafter and the following day, the police searched his home and went with some items.

In cross-examination, he gave the age of the appellant as 19 years though he stated that had never seen the appellant's birth certificate.
 17. Having considered the evidence on record this court finds that the age of the complainant was not contested and there was adequate proof that he was aged 7 years at the time of the incident. Secondly the court finds that the element of penetration was prove by the clear, consistent and impressive account of the incident as narrated by the complainant. He appeared honest and truthful in his testimony and like the trial court stated the proviso to section 124 of the *Evidence Act* allows the court to convict on the sole evidence of a victim of sexual offence if it is satisfied with the evidence of the said victim. See *John Bundi Kinyua v Republic* (2017) eKLR.
 18. As it were, the evidence of PW1 corroborated the complainant's evidence and fortified the same as concerns penetration.
 19. With the same breath and clarity in the evidence of the complainant the court believes the complainant when he pointed out at the Appellant as the perpetrator. The Appellant was a neighbour, he was known him and the incident took place in broad day light. The evidence pf recognition cannot be faulted.
 20. The record shows that on March 16, 2021 the court directed the prosecution to supply the appellant with the copies of the documents they sought to rely on. The matter proceeded on April 29, 2021; the appellant having indicated that he was ready to proceed with the hearing. The claim that witness statements were not supplied appears to be an after thought and cannot be taken seriously
 21. The court record from the start indicates the language used was English translated to Kisomali. The plea was taken in Kisomali. The appellant denied the charge and at the hearing proceeded to cross



examine the prosecution witnesses fully in the language without raising a complaint. Is this claim an afterthought? It appears so as the appellants parents appeared too as his witnesses and gave evidence in Kisomali and he too testified in kisomali in his defence. At what point then did Kisomali become a strange language? The record also shows that the Appellant grew up in Habaswen and his clan given as Ajuran. Against the above background this court is not convinced that the Appellant did not follow court proceedings as he alleges as he did not understand the proceedings. Indeed, the appellant informed this court that he understands kisomali.

This court, therefore finds that the appellant was accorded a fair hearing in this ground fails.

22. The allegation on infringement of article 49 of *the Constitution* was not canvassed nor expounded and the same must equally fail.
23. As to inconsistencies in the prosecution witness's testimonies the court finds that generally the evidence of the prosecution witnesses was cogent and consistent. Inconsistencies if any were too minor as to affect the substance of the evidence.
24. This court has also considered the appellant's defence. The appellant raised a defence of alibi. He alleged that he was in school but did not call any witnesses from the school to corroborate this averment. The evidence of DW2 and DW3 has also been considered they too do not assist in the alibi as they both stated that they saw the appellant in his school uniform but did not see him go to school. This court, therefore, agrees with the trial court's determination that the prosecution managed to rebut the appellant's alibi defence.
25. The charge sheet makes reference to sections 8(1) as read with 8(2) of the Sexual offence Acts. Section 2 of the *Sexual Offences Act* makes the following definitions inter alia,

“Genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus;”

“penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;”

The above definitions read together with section 8(1) & 8(2) of the Act squarely fits the act committed by the appellant against the complainant herein and the 5th ground of appeal must fail.

26. All in all, this court finds the conviction safe.
27. The appellant stated in his grounds of appeal that he is equally dissatisfied with the sentence. Section 8 of the *Sexual Offences Act* provides as follows;
 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

28. With the recent findings on the concept of mandatory/minimum sentence, taking due consideration of the serious nature of offence, the age of the complainant, aggravating and mitigating factors, also considering that the appellant is aged 23 years; a young person the court notes that sentences meted out are meant to punish, deter and reform persons who find themselves in conflict with the law, but not meant to destroy lives. If the sentence of 40 years meted out to this appellant is retained the Appellant will spend a whole lifetime in jail. His youth and entire life will be wasted. With this in mind this court



finds the sentence herein was excessive in the circumstances. The same is set aside and in its place the Appellant is jailed for a term of 15 years from the time of his arrest.

DATED DELIVERED AND SIGNED IN GARISSA THIS 26TH DAY OF MAY 2022.

ALI-ARONI

JUDGE

