**Silunye alias Boyo v Republic (Criminal Appeal E007 of 2021)**
**[2022] KEHC 10225 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10225 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAROK**

**CRIMINAL APPEAL E007 OF 2021**

**F GIKONYO, J**

**JUNE 30, 2022**

**BETWEEN**

**BERNARD SILUNYE ALIAS BOYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the conviction and sentence of Hon. H. Ng'ang'a (S.R.M) in Narok SOA No. 39 of 2017 on 4th October 2017)***

## JUDGMENT

1. This appeal is against the appellant's conviction, and sentence to life imprisonment imposed on 4th October 2017 for defilement of the complainant- a girl aged 5 years.

2. The appellant filed a Memorandum of Appeal received in court on 9/10/2017. However, on 10/02/2022, the appellant sought leave to amend the grounds of appeal pursuant to provisions of Section 350 (2) (v) of the CPC as follows;

    i. That the learned trial magistrate erred in law by imposing the provided mandatory sentence of life imprisonment but failed to note that the appellant was a first offender, was a young man thus the court could have awarded a definite sentence in consideration of the provisions of Sections 216 and 329 of the Criminal Procedure Code and Article 50 (1) (2) (2) (p) of *the Constitution* and policy sentencing guidelines (2016).

    ii. That learned trial magistrate erred in law by convicting the appellant in a prosecution case but failed to note that the age of the appellant was in doubt he was still a minor thus he could have been sentenced under the Children's Act 2001.

iii. That that learned trial magistrate erred in law by failing to note that the charge of defilement was not proved as against the appellant yet he concluded by awarding a conviction and sentence of life imprisonment.

iv. That learned trial magistrate erred in law by convicting the appellant but failed to note the appellant's defence that there was an existing grudge between him and PW2 thus this brought about doubt on the credibility f the evidence of PW2.

3. He also filed a supplementary ground of appeal that the totality of the prosecution evidence creates doubt as to the veracity of the evidence and that such doubt should have been resolved in favour of the appellant.

4. The appeal was canvassed by way of written submissions.

**Appellant's submissions.**

5. The specific submissions shall be considered in the analysis by the court. The appellant relied on the following authorities;

i. Section 216 and 329 of the *Criminal Procedure Code*.

ii. Articles 50(2) (q), 48, 260, 50(2), (4), and 53(1) (f) (i) (ii) of *the Constitution*.

iii. Sentencing policy guidelines 2016.

iv. *Sammy Wanderi Kugotha v Republic* [2021] eKLR

v. Section 73(d) (iv) of the Children's Act 2001

vi. Section 77 (1) (3) of the *Evidence Act*.

vii. *Juma Kalio vs Republic* Criminal Appeal No. 71 of 2000.

viii. *Samson Tela Akute vs Republic* [2006] eKLR Criminal Appeal No. 844 of 2004.

ix. Samwel Chege Njeri Vs Republic

x. *R vs Dennis Kirui Cheruiyot* [2014] eKLR

xi. *JKK Vs Republic* [2013] eKLR

xii. *Kaingu Alias Kasomo v Republic* [2013] eKLR

xiii. PKW vs Republic

xiv. *Victor Mwendwa Mulinge vs R* [2014]

xv. *MLN V R* [2019] eKLR

xvi. *Okeno vs Republic* [1972] EA 32

xvii. *Ann Ekimat v Republic* [2014] eKLR

xviii. *Joseph Ndungu Kimanyi v Republic*[1979] eKLR

xix. *Folks v Chadd*[1782]

xx. *R v Turner* [1975] 1 All Er 70

xxi. *Philemon Koech v Republic* [2021] eKLR

xxii. *State of Punjab v Jagir Singh* [1974] 3 S.C.C 277

xxiii. *Crowcher v Crowcher* [1972] 1WLR 425, 430

xxiv. *Nguku v Republic* [1985] eKLR

xxv. *Okethi Okale v Republic*[ 1965] EA 558

**The respondent's submissions.**

6. The specific submissions shall be considered in the analysis by the court. The appellant relied on the following authorities;

   i. Section 2 (1) and 36 of the *Sexual Offences Act*.

   ii. *Abdinsir Gulad Bore v Republic* [2014] eKLR High Court Criminal Appeal No. 74 of 2012 [2014] eKLR

   iii. *Charles Karanja Somba v Republic*, Malindi High Court Criminal Appeal No. 141 of 2010, [2012] eKLR

**Analysis and Determination.**

**Court's duty**

7. As a first appellate court, I shall re-evaluate the evidence and make own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32

8. I have considered the grounds of appeal, evidence adduced in the lower court and the respective parties' submissions. I find the main issues for determination to be;

   i. Whether the prosecution proved its case beyond reasonable doubt.

   ii. Whether the appellant's alibi defense was considered and whether there was a grudge.

   iii. Whether the appellant was a child at the time of commission of the offence.

   iv. Whether the sentence was manifestly harsh and excessive

**The charge**

9. 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* No. 3 of 2006. It was alleged that on 7th June 2017 at [Particulars Withheld] Village, Eoro- ngure Location in Narok East Sub-County Narok County unlawfully and intentionally caused his penis to penetrate the vagina of SL a child aged 6 years old.

10. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section11 (1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that 7th June 2017 at [Particulars Withheld] Village, Eoro- ngure Location in Narok East Sub-County Narok County intentionally and unlawfully touched the vagina of SL a child aged 6 years.

11. He was convicted and sentenced for defilement.

**Elements of defilement**

12. Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* establishes the offence of defilement as follows:

> "8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8(2) a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."

13. The appellant submitted that ingredients of the offence were not proved as against the appellant. That the prosecution witnesses' testimony was not conclusive that PW1 was defiled.

14. What are the essential elements of defilement?

15. The specific elements of the offence defilement arising from Section 8 (1) of the *Sexual Offences Act* which the prosecution must prove beyond reasonable doubt are:

    1) Age of the complainant;

    2) Proof of penetration in accordance with Section 2(1) of the *Sexual Offences Act*; and

    3) Positive identification of the assailant.

**Age of the complainant**

16. Defilement is a sexual offence committed against a child- a person below the age of 18 years (*Children Act*). Therefore, age of the victim must be proved beyond reasonable doubt. Notably also, age is an essential element in sentencing- age of the child has been used as an aggravating factor for purposes of determining the sentence to be imposed; the younger the child the more severe the sentence.

17. The appellant states that age of the complainant was not proved. The prosecution submitted that age of the complainant was proved beyond reasonable doubt. What does the evidence showeth?

18. Upon voir dire examination, the trial court was satisfied that PW1 was of sufficient intelligence, but due to her tender age, she could not understand the consequences of taking oath, thus she gave unsworn evidence.

19. PW1 told the trial court that she was 5 years old and was in a baby class.

20. PW2 -SK (PW1's mother) stated that PW1 was 5 years old.

21. Age assessment was also carried out at Narok County Referral Hospital on 15th June 2017. It showed that she was 5 years old. Age assessment report was produced as P Exh 8.

22. Proof of age is not necessarily certificate. Other evidence may be adduced to prove age (*Fappyton Mutuku Ngui vs. Republic* [2012] eKLR )

23. On the basis of evidence adduced by the prosecution, I find the age of the victim was 5 years at the time of the offence.

**Penetration**

24. The next hurdle; whether there was penetration. Penetration is defined in Section 2(1) of the *Sexual Offences Act* as:

> " The partial or complete insertion of the genital organs of a person into the genital organ of another person."

25. Penetration in the sense of the law above was succinctly explained by the Court of Appeal in the case of *Mark Oiruri Mose v R* [2013] eKLR thus:

> " 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." (Emphasis added).

26. The prosecution submitted that it proved penetration through viva voce evidence and medical evidence produced in court.

27. PW1 testified that on the material day she was home with the appellant when he held her and removed her trouser. The brown dotted and torn trouser was produced as P Exh1. She stated that the appellant did 'tabia mbaya' to her while pointing to her private parts.

28. PW1 stated that her mother came and found the appellant in the act. The appellant told PW1 that if she cries he will cut her throat. She narrated that when he did 'tabia mbaya' to her she was standing and the appellant was also standing.

29. The appellant was given food to eat and thereafter he left. PW1 identified the red maasai shuka (P Exh 2) that belonged to the appellant that he left at their house.

30. PW1's evidence was corroborated by PW2. PW2 stated that she had left the victim and her baby sister in the house as she had gone to her neighbour's house to charge her mobile phone's battery at around 7.00p.m. When she returned to the house she found the appellant in the house sitting on the chair and had placed the victim on his thighs and he had spread her legs. When the appellant saw her, he covered himself with the maasai shuka as he also began to pull back the trouser of the girl and also began to pull back his trouser.

31. It was PW2's evidence that she pretended not to have seen anything so as not to scare the appellant for her own safety as well as the children's as her nearest neighbour is far.

32. When the appellant left she noted that the victim was sitting with one side. She asked her what was wrong, PW1 revealed that the appellant had done tabia mbaya on her private parts. She then examined the child and noted that her trouser had blood.

33. The trial court noted red stains on the inner side of the trouser.

34. PW2 further noted that PW1's private parts were bleeding. In the morning the next day, PW2 notified Margaret her neighbour and some elders. Together they proceeded to the appellant's employer's residence where the appellant was arrested and taken to Eor-Ekule AP camp. PW1 was then taken to Ntulele sub-county hospital for treatment.

35. PW3-Mary Chesang a clinical officer stated that he examined the child. She noted that the child was limping while walking. She observed blood and white discharge in her vagina. She noted that PW1 felt pain on being touched on her private parts. Her hymen was partially broken. She concluded that PW1 had been defiled. She produced P3form, treatment notes, and the PRC form as P Exh 4, 3, and 5 respectively.

36. PW3 was very clear that penetration did occur. The inevitable conclusion from the analysis of the evidence is that there was penetration of the genitalia of PW1. I accordingly find that the prosecution proved beyond reasonable doubt that there was penetration of PW1- a child. But by whom?

**Was the appellant the perpetrator?**

37. The appellant denied causing penetration with PW1. The prosecution submitted that there is no doubt that the appellant herein is the perpetrator of the offence of defilement upon PW1.

38. The prosecution further submitted that section 36 of SOA is couched in discretionary terms and there is no legal duty that requires the court to order for DNA testing. This requires the court to be moved. The court did not call for DNA sampling does not affect the credibility of the overwhelming prosecution evidence that connected the accused to the heinous crime.

39. PW1 testified that the offence was committed at night but there was a lamp light. She saw the appellant who was well known to her. The appellant was a person well known to the victim and PW2. PW1 identified the appellant as Boyo. PW1 stated that the appellant stayed at Mama Lucy's.

40. PW2 stated that the appellant was well known to her as he was employed by her neighbour Margaret.

41. On cross examination, the appellant confirmed that he knew the victim and mother very well. He also confirmed that the neighbours know him as Boyo.

42. PW3 testified that there was no spermatozoa seen to link the appellant to the girl. Therefore, DNA was not conducted. This court takes the view that lack of spermatozoa is not a negation of penetration. Put differently, it is not necessary that spermatozoa must be present in order to connect the appellant to the act of penetration herein. The answer provided in the case of Mark Oiruri Mose v R [supra] proves this hypothesis true, that:

> "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." (Emphasis added).

43. Accordingly, it is not necessary that there be DNA testing in order to prove that the appellant caused penetration with a child-PW1. Other evidence as long as is cogent enough to prove beyond reasonable doubt that the appellant caused the penetration will suffice.

44. The evidence of PW1 and PW2 was identification by recognition. I do note that the appellant in his defence confirmed that the neighbours call him Mr. Boyo. He also admitted that he knew the two well. Further, the appellant also admitted that the maasai shuka was his. But before I conclude on identification, was his alleged alibi defence and existence of a grudge considered?

**Alibi defense and alleged grudge.**

45. The appellant submitted that his defence that the case was fabricated due to unpaid debt was not considered.

46. The prosecution submitted that the trial court rightly saw through the smoke and dismissed the defence as hogwash.

47. The appellant gave sworn evidence. The appellant alleged that PW2 and her husband conspired to deny him his pending wages. He asserted that he was employed by PW2's husband.

48. The appellant submitted that the learned trial magistrate did not consider the appellant's defense by failing to advance any cogent reason for not believing his defense and went on to convict him on the strength of the prosecution's case

49. The appellant did not cross examine PW1 or PW2on the allegation of pending wages. It was the appellant's testimony that on 7/6/2017 at 7.00p.m. He was demanding his payment of herding sheep from Joseph Kutingara. He was demanding Kshs. 14,000/= but on that particular day Joseph was not there. He contended that they framed him for asking for his money.

50. On cross examination, the appellant stated that PW1 did not have a grudge against him.

51. I have noted that the issues which was raised by the appellant in his defence were never raised during cross examination.

52. I do not find anything which show that there was a grudge between the complainant's mother or complainant's family and the appellant. The defence is mere afterthought. I therefore find that the trial court considered the defense of the appellant. I reject this ground of appeal.

**Back to identification**

53. The pieces of evidence analyzed herein prove that there was no mistaken identity of the appellant as the perpetrator of the offence in question. The evidence by the prosecution leaves no doubt that the appellant caused penetration of the complainant.

54. In the upshot, I find that the Appellant was positively identified as the assailant herein; there was no mistaken identity or error. Accordingly, I find that the prosecution proved their case beyond reasonable doubt and that the trial court properly convicted the appellant for defilement of PW1. The appeal on conviction therefore lacks merit and is hereby dismissed.

**Was the appellant a child at the time of commission of the offence?**

55. The appellant submitted that trial magistrate erred in convicting the appellant without considering that he was a child at the time of commission of the offence. He urged that his age was proved by the production of an age assessment report produced by a police officer who was not an expert in that field.

56. The court notes that age assessment report dated 20/06/2017 by Koyie S. Amos indicated that the appellant was 18 years.

57. PW4-PC Simon Mwaura testified that the appellant was taken for age assessment and he was found to be over 18 years. The core and integrity of the age assessment has not been impeached. Similarly, although the appellant testified that he was in class 7 at [particulars withheld] School, there was nothing to show that he was a child at the time of the commission of the offence so as to benefit from the provision of the *Children Act* on conviction and sentence.

58. I reject the ground.

**On sentence**

59. The appellant submitted that the learned trial magistrate convicted and sentenced him to life sentence without exercising discretion.

60. The prosecution submitted that the sentence passed by the honourable court was just and fair considering the circumstances of this case.

61. The trial court applied Section 8 (2) of the *Sexual Offences Act* to convict. The section provides:

> 8(2) a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life."

62. The offence is serious. I take into account that the accused is first offender. I also take into account that the appellant was an adult when he committed the offence. It seems from the judgment of the trial court that the trial magistrate believed only one sentence is prescribed in law; life sentence and to which he condemned the accused. He stated, thus: -

> ' .... I sentence the accused to serve life imprisonment as provided by the law.

63. In so far as the trial court felt it did not have, and did not exercise discretion in sentencing the appellant, there is lawful justification to inquire whether the sentence passed was appropriate sentence.

64. This is a serious sexual assault of a small girl of the age of 6 years which took away her innocence. In addition, sexual offences ordinarily cause trauma to, and compromises the integrity of the victim as a human being. Future references to or flash-back of the incident of the sexual assault, either in the memory of the victim or by others or by whatever circumstances reminds of the trauma, shakes the very foundation of the life of the victim. It is such an offence with dire post traumatic consequences. Nonetheless, whereas the applicant should pay for his crime, and act as a deterrent for such debauchery, I should also give the appellant an opportunity to be re-integrated back into society and be a productive citizen. Life sentence may not achieve these purposes. Accordingly, I set aside the life sentence and in lieu thereof sentence him to 25 years' imprisonment.

**Section 333(2) CPC.**

65. The appellant urged this court to take into consideration the time spent in custody prior to conviction.

66. I have perused the trial court record and found that the appellant was first arraigned in court on 9/6/2017. The sentence will run from the date he was first arraigned in court; 9/6/2017.

**Conclusion and orders**

67. The appellant is hereby sentenced to serve 25 years' imprisonment.

68. The sentence will run from the 9/6/2017 when he was first arraigned in court.

69. It is so ordered.

70. Right of appeal explained.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 30TH DAY OF JUNE, 2022**

**F. GIKONYO M.**

**JUDGE**

**IN THE PRESENCE OF:**

1. The appellant

2. Ms. Torosi for DPP

3. CA – Mr. Kasaso