



REPUBLIC OF KENYA



KENYA LAW
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**Aziras v Republic (Criminal Appeal E046 of 2021)
[2022] KEHC 14005 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E046 OF 2021
RPV WENDOH, J
OCTOBER 19, 2022**

BETWEEN

HUMPREY AZIRAS APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Humprey Aziras was convicted for the offence of defilement Contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* by Resident Magistrate's Court Migori on 6/8/2021.
2. The particulars of the charge are that on December 26, 2020, at Bondo Nyironge Trading Centre in Suna West of Migori County, unlawfully caused his penis to penetrate the vagina of MAO a child aged 13 years.
3. In the alternative, he faced a charge of committing an indecent Act with a child Contrary to Section 1 (1) of the *Sexual Offence Act*. No finding was made on the said charge.
4. After conviction, the appellant was sentenced to serve 20 years imprisonment.
5. The appellant is dissatisfied with the Judgment of the court and filed the petition of appeal based on the following grounds:-
 1. That the offence of defilement was not proved;
 2. That his alibi defence was not considered;
 3. That the sentence was harsh and excessive.
6. The appellant therefore prays that the conviction be quashed and sentence set aside. He filed submissions which was a reputation of the grounds of appeal.



7. The appeal was opposed. Mr. Omooria, the Prosecution counsel, filed submissions in which he urged that the offence of defilement was proved in that the complainant was confirmed to be 13 years, there was proof of penetration and the appellant was known to the complainant.
8. As regards the appellants alibi defence, counsel urged that the appellants unsworn defence was of no probative value, and though he produced receipts in attempt to prove that he travelled to Kakamega during that period, yet the said evidence could not be interrogated in cross examination. As to the sentence, counsel submitted that under Section 8 (3) of the Sexual Offences Act, the minimum sentence is 20 years and hence the sentence is legal.
9. This is the first appeal and it behoves this court to exhaustively analyse all the evidence tendered before the trial court, arrives at it's own independent conclusions. The court is guided by the decision in *Okeno vs= Republic* (1972) EA 32.
10. In the trial court, the prosecution called a total of four witnesses in support of their case. PW1 MAO a child aged 13 years having been born in 2008, recalled that on December 26, 2020 about 7:00am, she was at home with her siblings. Her mother was not home. When going to throw trash, the appellant who lived near her home called her to go to his house because he wanted to send her. When she went to his house, he locked the door, pushed her to the bed, removed her innerwear. He also removed his innerwear, inserted his penis in her vagina. He later released her. She went back home. Later when her mother came back home she informed her. PW2, FAO, the mother of the complainant confirmed that she had left home on December 26, 2020 to visit her brother and returned on December 27, 2020 when PW1 informed her what the appellant had done to her. PW2 went in search of the appellant whom he knew but could not trace him. She reported Pinyoiye Police Station and the complainant was referred to the hospital. She was examined and found to be pregnant. PW2 later found the appellant and had him arrested.
11. PW3 PC Samson Adalo of Pinyoiye Police Station, is the investigating officer. On 7/2/2021, he called the complainant and the mother following a report made in the OB. He confirmed that the complainant was 13 years old as per her birth certificate produced as an exhibit. PW3 sent them to hospital with a P3 form and examination confirmed that she was pregnant. PW3 found accused had been arrested.
10. Justus Magati a Clinician at Migori County Referral Hospital examined the complainant on 17/2/2021. He found that the hymen was broken, but not freshly and pregnancy test was positive with estimate date of birth being 22/8/2021. He produced the P3 Form as an exhibit.
11. When called upon to defend himself the appellant opted to give an unsworn statement. He denied the Offence and told the court that on December 26, 2020 he was in his home in Kakamega and returned on December 27, 2020. He had travelled home in December 24, 2020.
12. He produced receipts to the effects he said he was framed after he broke up with his girlfriend Lizie Akinyi.
13. DW2 Ann Kanuli Amunayi an aunt to the appellant, told the court that on December 24, 2020, the appellant travelled to Kisumu and returned on December 27, 2020.
She admitted that they do not live together; that police demanded kshs. 100,000/= from the appellant which he did not have. DW2 admitted that she does not live with appellant. He lived at the Centre while she lives in the village.
14. I have now reviewed all the evidence on record and the rival submissions



15. To establish an offence of defilement, the prosecution has to prove beyond any doubt, the following ingredients:-
1. That the complainant was a minor
 2. That there was penetration
 3. The identity of the perpetrator

Age

16. There is overwhelming evidence that as of December 26, 2020 the complainant was thirteen (13) years old. The complainant's mother availed the complainant's birth certificate (PEXNO1) which showed that the complainant was born on 18/8/2008. As of December 26, 2020, she was just over twelve (12) years old. It was rounded off to thirteen (13) years old. In *Mwalango Chichoro vs. Republic* MSA Criminal Appeal 24 of 2015 the court held that the complainant's age can be proved through Birth certificate, Baptism Card etc. The court said:-

The question of proof of age has fondly been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as birth certificate, Baptism Card or by any evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardians or medical evidence among other credible forms of proof."

17. No doubt the complainant was a minor.

Penetration:

18. Penetration is defined in Section 2 of the *Sexual Offences Act* as:-

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

19. The complainant narrated in details what took place between her and the appellant. The appellant removed her innerwear, removed his and inserted his penis in her vagina. Penetration is said to be proved whether or not there is full penetration. PW1 was examined by the Doctor about 2 ½ months later on 18/2/2021 and therefore there was no evidence of injury to the complainant's genitalia. She was however found to be pregnant. There is no doubt that there was proof of penetration.

Identity of the perpetrator

20. The appellant denied the offence and raised an alibi defence that between December 24, 2020 and December 27, 2020 he was in Kakamega. He raised the alibi for the first time during his defence. In an alibi defence, the accused person claims to have been at a different location other than the scene of crime. It is trite law that when one raises an alibi as a defence, the burden of proof does not at all shift to the defence. The burden always remains on the prosecution to prove the truth or falsity of the alibi. In the case of *Charles Anjare Mwamusi vs. Republic* criminal appeal 226 of 2002 stated:-

"An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and is not unreasonable (*Kiarie vs. Republic* (1954)KLR page 745).

21. It is trite law that an alibi should be raised at an early stage so that the prosecution can have an opportunity to rebut it. In this case, the appellant gave an unsworn evidence in his defence. The receipts



he produced in evidence could not be challenged or tested because he could not be cross examined on them. The said evidence was of very little probative value.

22. DW2, the applicant's aunt who testified to the appellant being in Kakamega did not disclose how she came to know about it. She admitted that she does not live with the appellant. She lives in the village while the appellant lives at the Centre. Her evidence was of no value at all.
23. The appellant then alleged that he was framed by a former girlfriend, Lizie Akinyi but he did not tell the court who she was or how she was related to PW1 and PW2. That was also an afterthought.
24. In *R. vs. Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA 145, the former East African Court of Appeal said:-

"If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

25. In this case the accused raised his alibi defence six months after arrest during his defence. In *Festo Androa ASenua v. Uganda*, Cr. App. No. 1 of 1998 the Court made the following:

"We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence."

26. Having found that the alibi defence was raised late in the day and was of little value, it did not dislodge the testimony of PW1.
27. The credibility of the defence is questioned. PW1's evidence was consistent and remained unchallenged. The appellant whom she knew and lived in the neighbourhood defiled her in broad daylight. I find that the offence of defilement was proved to the required standard.

Whether the sentence is excessive.

28. Under Section 8(3) of the *Sexual Offences Act*, where the victim is between thirteen (13) to fifteen (15) years, upon conviction, one is liable to sentence of not less than twenty (20) years. The trial court meted out the minimum sentence. However, the courts are moving away from minimum sentences which curtail the court's discretion. In exercise of my discretion, I hereby set aside the sentence of twenty (20) years and substitute with fifteen (15) years imprisonment. The sentence will commence on 23/8/2021, the date he was sentenced.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 19TH DAY OF OCTOBER, 2022

R. WENDOH

JUDGE

Judgment delivered in the presence of



Mr. Mulama for the Respondent.

Appellant present.

Nyauke Court Assistant.

