



**YOO v Republic (Criminal Appeal E008 of 2023)  
[2025] KEHC 199 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 199 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E008 OF 2023**

**DK KEMEL, J  
JANUARY 17, 2025**

**BETWEEN**

**YOO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of the Honorable S. W. Mathenge (S.R.M)  
delivered on 27th January 2023 in Bondo PMCC (S.O) No. E23 of 2022)*

**JUDGMENT**

1. The Appellant herein YOO was charged with the offence of sexual assault contrary to Section 5(1)(a) (i) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 3<sup>rd</sup> May 2022 at 1800 hours in Bondo Sub County within Siaya County, unlawfully and intentionally caused his fingers to penetrate the vagina of LC a child aged 12 years.
2. The Appellant denied the charge and upon a full trial, he was convicted and sentenced to 10 years' imprisonment.
3. Dissatisfied by the said conviction and sentence, the Appellant has now filed this appeal wherein he raised the following grounds:
  - i. That the trial magistrate failed to observe that nothing linked him with the alleged offence.
  - ii. The trial magistrate and the prosecution failed to comply with the provisions of Sections 144 and 150 of the Criminal Procedure Code.
  - iii. That the trial magistrate failed to observe that the prosecution failed to prove the element of penetration and that the P3 form was not corroborated.
  - iv. That the trial magistrate failed to observe that the prosecution's case was full of contradictions.



- v. That the trial magistrate failed to consider the sworn defence of the appellant.
4. The prosecution called four witnesses in support of its case.
5. The duty of this court is well settled. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Maurice Okello Kaburu & Another V Republic* [2022] eKLR, the court held as follows: -

“ 55. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336 and *Kiilu & Another v Republic* [2005]1 KLR 174.”

6. PW1 LC testified that she is 12 years old as per the birth certificate identified and marked as PMFI 1. She recalled on 3/5/2022 at about 6.00pm, YO, her uncle, had come from grazing cows. That she asked him for money to go buy books. That he requested her to follow him to his house. That while in his house, she stretched her hand to receive the money only for the appellant to grab her hand, put her on the bed. That he told her that he wanted to touch her private part then let her go. That she refused, and that the appellant put his hand inside her skirt and put his middle finger in her vagina. That it was very painful and that she informed him to stop. That her in-law C was outside washing dishes and that she heard her making noise. That her neighbor JA came and opened the curtain then the appellant let her go. That he gave her Ksh 150/= to buy books. Then C enquired from her as to what had happened and that she briefed her on what the appellant had done to her. That upon her mother returning at around 8pm, they went to C’s house and she briefed her mother about what had happened. That her mother took her to Bondo hospital that day and then to Bondo police the following day and recorded statements.

On cross examination, she stated that the appellant held both her skirt and the underwear she was wearing. That he was on top of her (she stands and kneels on the chair). That she was between his thighs and that the appellant had not closed the door but that the window was closed.

7. PW2 JAO testified that she was the mother to PW1, the complainant. That the minor was 12yrs and was born on 22/11/2009. That on 3/5/2022, she arrived at her home at 8pm. That one C called her and that she heeded the call whereupon she found her with her daughter (PW1). That C asked PW1 to tell her mother what had happened and she did. She then took her to Bondo hospital and the following day to Bondo police station. She identified the PRC form (PMFI- 2) and P3 form (PMFI- 3). She identified the Appellant as a brother to her husband.

On cross examination, she stated that on 22/2/2021 her husband got into an accident and that she left her children with the appellant and did not hear of any complaints. That she called the police to arrest the appellant after she had reported the incident.

8. PW3 John Okidi testified that he is a clinical officer at Bondo sub county hospital. That he attended and examined PW1 on 4/5/2022. That upon examination of her genitals, everything was intact. He concluded that there was no defilement but may be sexual assault. He produced the PRC form as P exhibit 2 and filled P3 form as P exhibit 3.

On cross examination, he stated that all tests were negative, vagina and cervix were intact. That he didn’t know if the appellant committed the offence.



9. PW4 No. 101835P.C. Julian Otieno testified that she was the Investigating officer. That on 4/5/2022 a case of defilement was reported by Pw1. She issued her with a P3 form which was filled at Bondo sub county hospital and returned. That four witnesses went to record their statements. That after Pw1 narrated what had happened, she realized that the offence ought to be sexual assault and not defilement. She thus charged the appellant with sexual assault.

On cross examination, she stated that the report was made on 4/5/2022. That she ascertained from PW1 that the appellant was actually the perpetrator and that the arrest was done by officers from Bondo police station.

10. That marked the close of the prosecution case.
11. The trial magistrate ruled that a prima facie case had been established against the Appellant who was subsequently placed on his defense. He opted to tender a sworn testimony.
12. DW1 YOO testified that on 13/5/2022 at 1pm some people came and arrested him and that he did not know the reason of his arrest. That he had never defiled PW1 as alleged and that she has never been in his room. That he has no grudge with Pw2 who had made the report. That the father of the complainant is his brother. That he was away at work when the alleged incident took place.

On cross-examination, he stated that he is the brother to JA's husband who is his elder stepbrother. That he has never bought books for PW1 and that he has never had sexual intercourse with her.

11. The appeal was canvassed by way of written submissions. The appellant submitted that the clinical officer gave contradicting evidence. Further, that PW1 stated that her neighbor JA came and opened the curtain, yet she further states that J (PW2) her mother came back at 8pm that day. So whose evidence ought to be believed? He further submitted that penetration was not proved and that his alibi defence was not considered by the trial magistrate.

On the other hand, the Respondent submitted that it tendered irrefutable evidence that directly linked the appellant to the offence of sexual assault. Further, that the appellant did not make an application to summon vital witnesses thus his ground on Sections 144 and 150 of the Criminal Procedure Code fails.

The Respondent further submitted that if there are any inconsistencies, gaps or contradictions in the evidence, the same are not substantial or fundamental. That the trial magistrate considered the appellant's defense and found the same to be wanting in truth and an afterthought. The Respondent urged the court to uphold the conviction and affirm the sentence.

12. I have considered the lower court record as well as the rival submissions. I find that the only issue for determination is whether the prosecution proved the offence of sexual assault against the Appellant beyond any reasonable doubt.
13. The offence of sexual assaulted is provided for under Sections 5 of the [Sexual Offences Act](#) as follows: -

- “ 5. any person who unlawfully –
- (1) (a) penetrates the genital organs of another person with –
- (i) Any part of the body of another or that person; or
- (ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;



(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this Section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

13. The offence of Sexual Assault is provided for in Section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against "any person." That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which causes penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.

15. From the record, the complainant (PW1) testified that on 3/5/2022 at about 6.00pm, YO her uncle had come from grazing cows. That she asked him for money to go buy books. That he requested her to follow him to his house. That while in his house she stretched her hand to receive the money when the appellant grabbed her hand, put her on the bed. That he told her he wanted to touch her private part then let her go. That she refused, and that the appellant put his hand inside her skirt and put his middle finger in her vagina.

16. On the need of corroboration, Section 124 of the *Evidence Act* provides thus:

"Notwithstanding the provisions of Section 19 of the *Oaths and Statutory Declarations Act*, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that Section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

17. The effect of the proviso to Section 124 was considered by the Court of Appeal in the case of Robert Kabwere Kiti V Republic [2012] eKLR, where the Court observed as follows:

"Turning to corroboration as a requirement for the minor's evidence as complained by the appellant, in the Mohamed Vs Republic [2005] 2 KLR 138 this Court made the following observations:

'By legal notice No.5 of 2005 which introduced the proviso to Section 124 of the *Evidence Act*, Parliament drastically qualified Section 124 of the *Evidence Act* to enable a court in a sexual offence case to convict on the sole evidence of a child of tender years if satisfied that the child was telling the truth so that corroboration was no longer required as a matter of law making it now settled that the courts shall no longer be hamstrung by requirements of corroboration



where the witness of a sexual offence is a child of tender years if it is satisfied that the child is truthful’.”

18. From the evidence on record, this court is satisfied that the complainant was truthful. She had no reason to frame up her uncle yet she and her family did not have any differences prior to the incident, It is also highly unlikely that the complainant’s parents would use their vulnerable daughter as a victim of sexual assault so as to frame the Appellant. Further, the Appellant’s alibi defence did not shake the evidence of the Respondent which was quite overwhelming against him. Again, the incident took place in broad daylight at about 6.00 Pm and that the complainant had no difficulty identifying the Appellant as the perpetrator. Further, the evidence of the clinical officer (PW3) confirmed that indeed the complainant had been sexually assaulted. Finally, as regards any inconsistencies in the evidence of the witnesses, I find that the same did not affect the weight of the evidence as a whole. I find that the evidence placed the Appellant at the scene of crime and that his alibi defence did not shake the evidence of the Respondent. In a nutshell, it is my humble view that the trial magistrate addressed herself correctly on the law and facts and hence, I see no reasons for interfering with the findings of fact by the said court. I am satisfied that the appellant was properly convicted of the offence of sexual assault contrary to Section 5 of the *Sexual Offences Act*.
20. Finally, as regards sentence, the Act provides for a minimum sentence of ten years’ imprisonment which can be enhanced to life imprisonment. It is noted that the Appellant took advantage of his young and vulnerable niece. The Appellant was someone the complainant looked up to for guidance and protection and that his actions have betrayed that trust. The Appellant was expected to offer protection to the minor but not to turn into a monster and a pervert. I find the sentence imposed was the minimum possible in law. However, it is noted that the Appellant remained in custody throughout the trial and thus the period spent in custody prior to the sentencing must be factored in line with the provisions of Section 333(2) of the Criminal Procedure Code. Hence, the sentence of ten years should commence from the date of arrest namely 13/5/2022.
20. In the result and save only that the sentence imposed of ten years’ imprisonment shall commence from the date of arrest namely 13/5/2022, the Appellant’s appeal lacks merit and is dismissed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 17<sup>TH</sup> DAY OF JANUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

YOO.....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant

