Ogolla alias Kilo v Republic (Criminal Appeal E010 of 2022)
[2025] KEHC 1809 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E010 OF 2022

DK KEMEI, J

FEBRUARY 14, 2025

BETWEEN

JOSEPH MANYASA OGOLLA ALIAS KILO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon C.I. Agutu (SRM) delivered on 4/3/ 2022 in Ukwala SRM (S.O) E011 of 2021)

JUDGMENT

1. The Appellant herein Joseph Manyasa Ogolla Alias Kilo was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars W that on 25th March 2021 at Siaya County, unlawfully and intentionally caused his penis to penetrate the vagina of S.A.O. a child of 10 years. He was likewise charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*. The particulars W that on 25th March 2021 at Siaya County, unlawfully and intentionally touched the buttocks and vagina of S.A.O. a child of 8 years.

2. The Appellant also faced a second count of deliberate transmission of life threatening sexual transmitted diseases contrary to section 26(1)(9) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 25th March 2021 at Siaya County, having actual knowledge that he was infected with syphilis, a life threatening sexual transmitted disease, intentionally and knowingly had unprotected sexual intercourse with SAO which infected SAO a child of 8 years with the said disease.

3. The Appellant denied the charges and that after a full trial, he was convicted and sentenced to life imprisonment.

4. Dissatisfied by the trial court's conviction and sentence, the Appellant has now filed this appeal wherein he has raised the following grounds:

   i. That the trial magistrate failed to observe that the sentence was manifestly harsh and disproportionate.

   ii. That the trial magistrate failed to observe that the ingredients forming the offence W not proved beyond reasonable doubt.

   iii. That the court be pleased to consider that the investigations W shoddy.

   iv. That this Honorable court be pleased to reduce the sentence to a proportionate one as enshrined in Article 50(2) of *the Constitution*.

5. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent finding and conclusion. (See Okeno vs. Republic [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in Ajode v. Republic [2004] KLR 81.

6. The prosecution called a total of four witnesses in support of its case while the defense called three witness.

7. PW1 testified that her name is SA aged eight years old and a pupil at [Particulars Withheld] Primary School. After a voire dire examination, the trial court found the minor truthful and understood the meaning of an oaths. The witness went on and stated that she was in class one. That on 25/3/2021 at 6.00pm she was at home with her grandmother. That she took a bath then proceeded together with Eand M to N's home to get milk. That on their way back home, they W racing and that Eand M raced ahead of her. That a man known to her as KO who stayed near N's home, held her hand and took her to his house. That he removed her pant and he removed his trouser and underpants too. That he placed her on his bed facing upwards and he then lay on top of her then took his organ that he uses for urinating and inserted it in her organ several times. That she screamed until Baba MP came and pulled her out. That Joseph Manyasa Ogolla Alias Kilohad defiled her earlier and had given her two avocados. That on that 2nd occasion, he did not give her anything. That her uncle reported him to her grandmother who hit his head on the wall. That they went to Sigomere Hospital. That the person who defiled her was well known to her and that she positively identified him in court.

   On cross examination, she stated that Eand M had run ahead of her and that she was the one that had the milk. That Baba MP came to her rescue and that her grandma hit the appellant's head on the wall in the presence of other people (watu wakubwa).

8. PW2 Sylvester Omondi Adhiambo testified that he was the Assistant Chief. That he knew the appellant as Joseph Manyasa Ogolla Alias Kiloand that his father was OM. That he knew S when the incidence occurred. That on 25/3/2021 he was at a chief's welfare meeting at Yuaya market when a village elder Eunice from Ukalama went to his office. That she was not settled. She informed him that her grandchild had allegedly been defiled the previous evening. He advised her to take the minor to the hospital and then referred her to officer Lena. He added that the Appellant had already relocated and was found at Sundisia at W M's home. That he then recorded his statement. There was no cross examination.

9. PW3 No. 104729 PC Lena Ngemu stated that she was based at Sigomere police station doing basic crime duties. That a defilement case was reported at the station on 27/3/2021. That the girl S aged 10 years had been defiled by her uncle. Her grandmother made the report. She had sought medication.

That as per the victim's testimony, on 25/3/2021 at 6.00pm, she was with other siblings when they saw Joseph Manyasa Ogolla Alias Kilo from behind. That he took S by the hand to his house then locked the door from inside and then removed her pant as he also removed his trouser and underpant. That Joseph Manyasa Ogolla Alias Kilo dislodged his penis and penetrated her two times without a condom. That one Baba A, S's uncle who is the Appellant's brother rescued the child. That she did not record Baba A's statement because he refused to do so. That the matter was initially being resolved at home, so she recorded statements for available witnesses. That she took S for further medical tests at Sigomere sub county hospital. That she marked and produced the following documents: P3 form (PMFI 1), treatment notes (PMFI 1(b), Post Rape Care form-(PMFI 1c), birth certificate Exhibit 2. That the minor was 10 years old and that the Appellant was arrested by the chief.

On cross examination, she stated that she was not an eye witness. That there was a report on defilement and that she had to use the Assistant chief.

10. PW4 Hesbon Odhiambo testified that he was a clinical officer from Sigomere hospital. That he attended to the minor on 27/3/2021, two days after the incident. That on examination, he established from the minor that it was not the 1st episode of defilement by the Appellant. Physical examination showed that the hymen was absent and that there was whitish discharge. Laboratory examination showed VDRL –positive, HIV/AIDS-negative. He produced the P3 form as P exhibit 1, treatment notes as P exhibit1b, Post Rape Care form as-P exhibit 1c. There was no cross examination.

11. At the close of the prosecution's case, the trial court established that the prosecution had made out a prima facie case against the Appellant who was subsequently put on his defense. He elected to tender unsworn evidence and called two witnesses.

12. DW1 JOO gave unsworn statement and stated that on 25th March to 28th March, 2021 he was away attending a ceremony. That that he did not defile the minor. There was no cross examination.

13. DW2 AW testified that she stays at Kakamega and a farmer. That the Appellant is her neighbor. That on 10th March she went with him to his mother's memorial in Tingare. That the Appellant used to go and work and return back home and that on 25th March he was still working. There was no cross examination.

14. DW3 MOO, stated that he saw the Appellant at the memorial on 26th, 27th and 28th. That she did not know what happened on 25th. There was no cross examination.

15. The appeal was canvassed by way of written submissions. The Appellant submitted inter alia; that the evidence tendered was insufficient to warrant a conviction; that penetration was not proved as there was no tears, no lacerations and no blood; that identification was not proper and that he raised an alibi defence.

16. The Respondent submitted that they had sufficiently proved their case to the required standard and thus the trial court's conviction should be upheld. It was further submitted that the sentence imposed was proper in that the Appellant had also infected the minor with a sexually transmitted disease namely syphilis.

17. I have considered the evidence tendered before the trial court and the rival submissions on this appeal. I find the issue for determination is whether the Respondent's case was proved against the Appellant beyond any reasonable doubt.

18. It is noted that the Appellant was charged in count with defilement under Section 8(1) (2) of the *Sexual Offences Act* as follows:

(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.

17. In the instant case, PW3 the investigation officer produced the victim's birth certificate as Exhibit 2 which showed her date of birth to be 21/1/2011. Thus, the minor was aged 10 years at the time of the incident. In the case Omuroni *versus Uganda Criminal Appeal No. 2 of 2000*, the court held that a birth certificate was a prima facie proof of age. I find that the same was sufficient as proof of age.(see also Mwalango Chichoro vs. Republic MSA C. Appeal No. 24 of 2015) The ingredient of age was proved by the Respondent beyond any reasonable doubt.

19. The second ingredient to be proved is penetration. The victim testified that on 25/3/2021 at 6.00pm she was at home with her grandmother. That she took a bath then proceeded together with Eand M to N's home to get milk. That on their way back home, they W racing and that Eand M raced ahead of her. That a man known to her as KO who stayed near N's home, held her hand and took her to his house. That he removed her pant and he removed his trouser and underpants too. That he placed her on his bed facing upwards and lay on top of her. That he took his organ that he uses for urinating and inserted it in her organ several times. That she screamed until Baba MP came and pulled her out. That Joseph Manyasa Ogolla Alias Kilo had defiled her earlier and had given her two avocados. That on the second occasion, he did not give her anything. This testimony was corroborated by that of PW4 the clinical officer who stated that on examination, he found the victim's hymen was absent and that VDRL was positive. This meant that penetration was proved. The Appellant contended that the same was not proved as the examination by the clinical officer showed no tears, no lacerations and no blood. It is trite that medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. The Court of Appeal has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the oral evidence tendered by the victim. In the case of Kassim Ali vs Republic [2006] eKLR the Court of Appeal observed as follows:

> "So, the absence of medical examination to support the fact of rape or defilement is not decisive as the fact of rape or defilement can be proved by oral evidence of a victim of rape or circumstantial evidence."
>
> I am therefore satisfied that penetration was sufficiently proved by the minor's testimony and that of the clinical officer.

20. The third and final ingredient to be proved is that of the identity of the perpetrator. On this aspect, PW1 testified that Joseph Manyasa Ogolla Alias Kilo is the person who defiled her and that it was not the first time but the second time by the Appellant. PW3 likewise testified that the minor had been defiled by the uncle. This testimony was not controverted by the Appellant on cross examination. Based on this evidence the allegation by the Appellant that identification was not established does not hold water. Indeed, the Appellant was found atop the complainant (in flagrant delicto) and that he was apprehended soon afterwards and handed over to the police. The complainant was his niece who had known him for long. She had no difficulty identifying him as her uncle.

21. 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."

22. The effect of the proviso to Section 124 was considered by the Court of Appeal in the case of Robert KabW 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 versus Republic case (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'."

23. Based on the foregoing, it is clear that the complainant told the court the truth about the defilement by the Appellant. I find that the Appellant's alibi defence did not shake the evidence of the Respondent which was quite overwhelming against him. The Appellant was placed at the scene of crime as he was found in flagrant delicto and apprehended soon thereafter. I find the Respondent proved the first count beyond any reasonable doubt.

24. As regards the second count of deliberate transmission of life threatening sexual transmitted disease, it is noted that even though both the complainant and the Appellant W examined and found to have a venereal disease, the Respondent did not avail watertight evidence that the Appellant knew or had knowledge that he was suffering from such disease and went ahead to infect the complainant deliberately. The issue of knowledge is a key ingredient to be proved. I find that this was not proved by the Respondent beyond the requisite threshold of proof. Consequently, the finding by the trial magistrate on the second count was in error. The same must be interfered with. It is noted that the trial court did not eventually sentence the Appellant on this count.

25. On the issue of sentence, it is noted that the trial court sentenced the Appellant to life imprisonment. By dint of section 8(2) of the *Sexual Offences Act* No. 3 of 2006:

> 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.

26. The Appellant in his grounds of appeal stated that the sentence was harsh, disproportionate and in contravention with Article 50(2) of *the Constitution*. In addressing this, I am guided by the landmark case by the Supreme Court in Republic vs. Stephen Mwangi Gichuki & 3 Others (Amicus Curie) (Petition No.E018 [2024] eKLR where the Supreme Court stated that all minimum mandatory sentences under the *Sexual Offences Act* No. 3 of 2006 are lawful unless otherwise amended.

The circumstances of the offence herein showed that the Appellant aged about fifty years old took advantage of his young and vulnerable niece and stole her innocence yet he was supposed to protect her. The complainant was therefore psychologically scarred for the rest of her life. The sentence imposed is not harsh but was within the law. The Appellant's ground of appeal in this regard must fail.

27. In the result, the appeal partly succeeds. The trial court's finding on conviction regarding the second count is hereby quashed and substituted with an order acquitting the Appellant therefor. However, the conviction and sentence on count one is hereby upheld.

Orders accordingly.

DATED SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE.

In the presence of:

Joseph Manyasa Ogolla Alias Kilo .Appellant

M/s Kerubo.....for Respondent

Ogendo.....Court Assistant