SMO v Republic (Criminal Appeal E006 of 2024) [2025] KEHC 1391 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1391 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E006 OF 2024

JN ONYIEGO, J

FEBRUARY 20, 2025

BETWEEN

SMO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. S. Otuke R.M. and delivered on 07.02.2024 Sexual Offences Case No. E032 of 2022 CM's Court at Garissa)

JUDGMENT

1. The appellant, SMO 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.
2. Particulars of the offence were that on the 27th day of September, 2022 at around 2300 hours at Garissa township within Garissa County, he unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of A.M.A. a child aged 11 years old.
3. In the alternative charge; he was charged of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
4. Particulars were that on the 27th day of September, 2022 at around 2300 hours at Garissa Township within Garissa County, he willfully and intentionally touched the anus of A.M.A a child aged 11 years old with his genital organ namely penis.
5. The trial court upon considering the law and facts in the case, reached a determination that the appellant was guilty and sentenced him to serve a term of 25 years imprisonment. Aggrieved by the conviction and the sentence of the court, filed an undated petition of appeal citing the following grounds:

i. That the trial court erred in law and fact by holding and finding that the prosecution proved its case.

ii. That the trial magistrate erred in law and error when he dismissed the appellant's alibi defence without any prosecution's evidence to counter the same.

iii. That the trial magistrate erred in law and fact in convicting the appellant while relying on the prosecution's witnesses who were unreliable.

iv. That the trial court erred in law and fact by imposing a manifestly harsh and excessive sentence in the given circumstances.

6. Despite directions for parties to file submissions, only the appellant filed written submissions to canvass the same.

7. The appellant in his submissions dated 23.10.2024 submitted that the prosecution did not prove its case to the required standards. That the trial court convicted him and thereafter sentenced him yet the evidence by the prosecution did not meet the required threshold of beyond any reasonable doubt. That the elements of penetration and identification were in doubt and further, the prevailing circumstances at the time when the offence was allegedly committed could not allow the appellant to commit the offence. He argued that the said room where the complainant was defiled was at the moment in question congested as other children were at the same time sleeping in the said room. Additionally, that there were multiple persons who were adversely mentioned in connection with the offence and it was the prosecution's duty to not only thoroughly investigate but also prove its case beyond reasonable doubt that he was the one who was responsible.

8. On the defence of alibi, he urged that the trial magistrate did not exhaustively analyze the same as provided for under Section 169 of the CPC. That the same was made worse by the fact that the police did not investigate and analyze his defence despite the appellant having overwhelming evidence in support of his case. To that end, reliance was placed on the case of Adedeji vs State [1971] 1 All N.L.R 75 where it was held that failure by the police to investigate and check the reliability of alibi would raise reasonable doubt in the mind of the tribunal and lead to the quashing of the conviction imposed. That noting that his defence on alibi was cogent as the same was not misplaced by the prosecution, this court should therefore find in his favour.

9. On sentence, it was submitted that noting his health, a sentence in the nature imposed by the trial court is akin to slow death. In that regard, reliance was placed in the case of Julius Ndung'u vs Republic, Murang'a High Court Criminal Appeal No. E052 of 2022, where the Court stated that the harsh sentences in sexual offences fail to ventilate the rehabilitation test of the offender. He urged this court to allow his appeal as prayed.

10. The respondent did not file any submissions.

11. This being a first appeal, I am mandated to analyse and re-evaluate the evidence afresh and make my independent verdict in line with the holding in the case of Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that: -

> " On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour". [See Pandya v Pandya (1957) EA (336].

12. PW1, A.M.A (the victim) was said to be aged 11 years and in class two (2) at the material time. She knew the accused as her father in as much as he was not her biological father. On 27/9/22 at around 9pm, together with her sister, they went to sleep in a separate bedroom albeit on the same bed. At around 11pm, she heard the appellant knock the door and her mum opened. That the appellant chose to sit on the verandah to chew miraa.

13. According to her, her bedroom was near the verandah and therefore, she could see the appellant well with the aid of the electricity light. Her mother told the accused not to chew miraa at the verandah but he refused and so, her mother left for her bedroom. After a few minutes, the appellant entered her bedroom and pretended to be tucking her net on her bed. At that time, she demanded to know whoever was in the room when the appellant affirmed that he was tucking her net.

14. Thereafter, the appellant left but later, she felt like using washrooms and so, she told the appellant who advised her that since it was dark, she ought not visit the washrooms. She therefore went back to bed and within no time, the appellant visited her room again. That he removed her pant and started caressing her thighs. It was her case that she tried to scream but the appellant threatened that he would kill her.

15. She went further to state that, despite rejecting his advances, the appellant proceeded to insert his penis in her vagina. That she tried to scream but the accused blocked her mouth and nose thus warning her not to talk as he would kill her.

16. She stated that despite the appellant defiling her, she kept quiet and attended her classes the following day but when she went back home, she informed her mum of the discomfort that she felt and that she had been defiled by the appellant. In the same breadth, her mum asked her why she had not seen her menses that month. That she was consequently taken to Garissa police station where a report was made and later, she was taken to Garissa County Referral Hospital for examination and treatment.

17. On cross examination, she stated that on 27/9/22 seven people were in the house. That her bedroom had two beds and one mattress on the floor. She averred that no man came to their house that night. That in as much as she slept with H together with other children, they were heavily asleep during the material time when the appellant.

18. PW2, HAS, mother to the complainant testified that on 28.09.2022 at around 6 p.m., she was in her house with her children and husband. Her daughter A.M.A had left for duksi but later returned home. That her son told her that her daughter A.M.A was sick and she had not had lunch. According to her, the daughter looked sick and unsettled and so, she asked her what the problem was. That she narrated to her what had happened. She asked her why she had not seen her menses on 23rd of that month as usual. Her daughter told her that the appellant was in the habit of going to her bed to disturb her. It was her testimony that pw1 revealed to her how the appellant used to touch her breasts and whenever she tried to shout the appellant would block her mouth but on a given date, he proceeded to defile her in as much as she could not remember that day. That she left the house and went to sleep in a lodge but later reported the matter at Garissa police station and thereafter took PW1 to Garissa County Referral Hospital for examination and treatment. It was her evidence that all her children used to sleep together in the same room and her eldest son A told her that he used to see the appellant tuck the net on the bed at night.

19. On cross examination, she stated that there were 6 children in the house. A used to visit but on 27/9/22 he was not present in the house. That whenever A visited, he used to sleep in the sitting room. She stated that she had previously quarreled with the appellant but the duo had reconciled. That the appellant's nephew came at midnight on 28/9/22 and slept in the sitting room. She went further to state that the

appellant did not come to the house on the night of 27/9/22 and 28/9/22 but instead arrived home at 4.30 am of 28/9/22 when she informed him that she was bereaved. According to her, that is the exact date PW1 told her about the incident after she refused to go to school.

20. PW3, Shaffie Omar, a clinician at Garissa County Referral Hospital testified that on 29/9/2022, a child aged 10 years was brought by her mother and that she had a history of being repeatedly defiled by the father. According to him, there were no injuries on head, neck and thorax but upon examining her genitalia, there was a slight swelling on upper vagina, bruises on labia minora, broken hymen with freshly cut with slight bleeding at the site where the tear was. He did some tests PDT, urinalysis and HIV tests. On high vaginal swab there was blood stains and epithelial cells seen under microscope. He thus opined that indeed, the minor ad been penetrated.

21. PW4, No. 95716 Cpl. Hawa Ahmed, the investigating officer recalled that on 29/9/22 the in charge OCS minuted a case of defilement by OB No. 2/29/09/22 of a minor aged 11 years. The report was made at night and in the morning she escorted the victim and the mother to Garissa County Referral Hospital for examination and filling of P3 form. Later, she recorded PW1 and PW3' statements and in the process, the complainant informed her that the appellant was responsible for sexually assaulting her. She thus arrested the appellant and charged him with the offence herein. She produced a letter from the school and a birth certificate as exhibits.

22. DW1, H.S. a juvenile adult aged 13 years recalled that on the material night, she was at home and therein, they used to live 8 people among them; her father, aunt, AA, AA, A and A. The house had two bedrooms; one room their dad could spend with H and A and the other, herself, A, A, A and A. She stated that, she could sleep with A in one bed and A and A on the other bed. A and A could sleep on the floor. That on 27/9/22 they were all in the house at night and nothing occurred. She did not hear anybody on her bed that night. Her father was not in the house. He came when she had woken up at 6.40 am on 28/9/22.

23. DW2, SMO, a businessman testified that on 27/9/22 he was at Bula East District at work. His vehicle had been hired by an NGO (Save the children) between 23/9/22 to 27/9/22. That he left Bura East at 9 pm on 27/9/22 and went to check his livestock near Kamune/Daabilah. His wife called him at 3 am on 28/9/22 and told him she had a funeral at home. He left with his colleague for home and reached at 5am in the morning. At his home there was his nephew, IDS whom he found sleeping in the sitting room. His wife was taken to the funeral by ID as he remained with the children. That at the time of the alleged incident there were 7 children in the house.

24. DW3, ID, a nephew to the appellant stated that on 27.09.2022, he boarded a bus from Nairobi to Garissa whereby he arrived at 3.00 a.m. He stated that earlier on, while at Mwingi, he had called the appellant who sent him Kes. 300.00 as fare. It was his testimony that upon reaching the appellant's house, he slept in the sitting room noting that the bedroom was congested.

25. He further stated that in the house, there was A who was sleeping in the children's room on the same bed as A. That sleeping on the other bed were two small boys while another bed had two girls. Upon reaching 5.00 a.m., the appellant woke him up telling him to go sleep in the bedroom as the children had already left for school. On cross examination, he stated that he travelled on 27.09.2022 and prior to that, he had called the appellant who told him that he was not at home as he had travelled.

26. DW4, MOM, father to the appellant recalled that on 28.09.2023, he was informed that the appellant had been arrested and taken to Garissa police station. In his testimony, he denied the possibility of the appellant defiling the minor for the reason that the appellant had lost his sexual feelings. That there had been disagreements between the appellant and his wife when he advised the appellant to divorce PW2. It was his testimony that it was agreed that the appellant be taken to the hospital and later, be read the

Quran. He doubted the possibility of the appellant defiling the minor when he could not fulfill his conjugal obligations to his wife.

27. That initially there was a disagreement between him and his wife in relation to A who was to sleep in the sitting room but he did not want. That A used to sleep in the children's bedroom on the floor to chat with his phone. He averred that when he developed diabetes, he lost his sexual feeling to his wife which made her suspect that he had another woman and that's why she was framing him.

28. Having considered the evidence and the law as is required of me, I find that the main issue for determination is; whether the prosecution proved its case beyond reasonable doubt by establishing; the age of the complaint; penetration of the complainant's vagina; the identification of the perpetrator and whether the sentence meted out was excessive.

29. As already noted above, the accused was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. Section 8(1) of the *Sexual Offences Act* provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." As was correctly held in Charles Wamukoya Karani vs Republic, Criminal Appeal No. 72 of 2013, "The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

30. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act 2022 as "...any human being under the age of eighteen years." [Also see the case of Martin Okello Alogo vs Republic [2018] eKLR].

31. In the instant case, the complainant testified that she was in class two at [particulrs withheld] Primary School but that notwithstanding, a birth certificate belonging to PW1 was also produced in court which showed that PW1 was born on 20.02.2012 while the offence herein was allegedly perpetrated on 27.09.2022. It therefore means that the complainant was aged approximately 10 years 7 months old at the time when the offence herein was allegedly perpetrated.

32. In regards to whether there was penetration, Section 2 of the *Sexual Offences Act* defines penetration to mean the 'partial' or complete insertion of the genital organs of a person into the genital organs of another. [Also see the Court of Appeal decision in the case of Sahali Omar vs Republic [2017]e KLR]

33. In the instant case, the complainant narrated how the appellant allegedly defiled and threatened to kill if she disclosed to anyone. In the same breadth, PW3, a clinician at Garissa County Referral Hospital also added his voice by corroborating the evidence by PW1. He stated that upon examining PW1's genitalia, he found that there was a slight swelling on the upper vagina, bruises on labia minora, broken hymen which was freshly cut with slight bleeding at the site where the tear was. According to him, the minor had been defiled.

34. In regards to identification, this court has fully interrogated the evidence of the complainant that the accused person herein was the one who perpetrated the offence. In so doing, I adopt the finding of the East African Court of Appeal in the case of Abdalla Bin Wendo vs R [1953] 20 EACA 166 that requires a court to seek corroboration of the identification of a single witness, as follows:

> " Subject to certain well-known exception it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of

identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility."

35. In the same breadth, it is not lost to this court that in sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, without corroboration, lead to a conviction. [See section 124 of the *Evidence Act*].

36. The above notwithstanding, PW3 who examined the complainant confirmed that the complainant had been penetrated but the question is by whom?

37. A review of the evidence in this case depicts a family living in a self-contained house which has an indoor toilet. Further, on the very night when the appellant was supposedly chewing khat, the complainant felt like visiting the toilet but the appellant advised her otherwise. Additionally, there were two bedrooms, one was used by the parents while the other by the children of the house. The complainant proceeded to testify that she shared a bed with one H, a teenager aged 14 years' old who was also present on the night in question but did not hear anything. A question that I grapple with is how possible persons could engage in a sexual activity on the same bed shared by another sibling and in the very room that holds other children without any of the children getting to notice or hear the same.

38. Additionally, PW1 testified that on the fateful night, one A did not spend in their bedroom but what this court finds unresolved is the reason why the said A was never allowed to sleep in the children's bedroom.

39. The above notwithstanding, PW2 in her testimony stated that on 28.09.2022, she had a talk with her daughter and in the process, asked her why she had not seen her menses on 23rd of that month. That the daughter opened up and told her that the appellant used to touch her breasts and on a specific day that she could not remember, the appellant defiled her. The question that I ask myself at this point is, noting that the alleged offence was perpetrated on 27.09.2022 and the mother-daughter talk happened on 28.09.2022, could it be possible that the complainant could have easily forgotten the beastly act that was perpetrated against her to state that the appellant defiled her on a date she could not remember?

40. Further, the appellant in his defence, presented an alibi to wit that on the very night, he was away and therefore, there was no way he could be responsible for the alleged act.

41. It is always important to note that the appellant has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi. It is trite that once an accused person discharges the evidential burden of adducing evidence of alibi, it is the duty of the prosecution to disprove it. The duty of the court is to test the evidence of alibi against the evidence adduced by the prosecution and if there is no doubt in the mind of the court, the same is resolved in favour of the accused. [See Mativo J. (as he was then) in the case of JMN v Republic, (Criminal Appeal E017 of 2021) [2022] KEHC 279 (KLR)].

42. From the record, the appellant produced work tickets from Save the Children showing that on the material night, he was working. On cross examination, the prosecution brought a possibility of the same having been forged but interestingly, did not go deeper to establish whether the same was a forgery or not. In my view, at that time, the burden was shifted to the prosecution and it was only proper that the prosecution surmounts the evidence of the appellant by viable evidence. Unfortunately, the same was not the case. The prosecution should have sought leave to call further evidence from save the children to rebut or dislodge the alibi defence.

43. The above notwithstanding, and still in relation to the alibi, PW2 stated that: 'the accused did not come to the bedroom on the night of 27.09.2022 and 28.09.2022. That he came at 4.00 a.m., on 28.09.2022',

could it be safely assumed that in as much as the appellant was not in the bedroom, he was at his work place or which part of the house could he have been at that time?

44. DW3 in his testimony stated that on his way to Nairobi, he called the appellant who told him that he had traveled and that he reached at 3.00 a.m. in the morning. The same was corroborated by PW2 who stated that upon DW3 reaching, she was the one who opened the door for him.

45. The appellant apart from his defence of alibi, urged that he was diabetic and therefore, had lost his sexual desire but his wife was of the view that he was seeing another woman and that the charges herein were simply pasted on him. In my view, even if the same could be true that he had diabetes, it was incumbent upon him to adduce evidence to support the same. [See section 107 (1) of *Evidence Act*].

46. The investigating officer on her part regurgitated the evidence of other prosecution witness without stating whether she investigated the matter as was expected of her and if so, whatever results she generated thereafter. In my considered view, there remained unresolved possibilities that ought to have been properly investigated in order to help this court reach a logical conclusion. The same having not been done, this court is left at cross roads for the reason that in as much as it sympathizes with the complainant, in any criminal case, any doubt must always be resolved to the benefit of the accused person.

47. I am alive to the fact that a court can convict based on the evidence of a single witness in asexual offence pursuant to Section 124 of the *evidence Act* as long as the court is satisfied that the victim is truthful. Although the trial court properly warned itself, the circumstances under which the alleged offence took place do not place the appellant at the scene of crime. It was not possible that the appellant could have committed the act without attracting the attention of the rest of the children in the same bed and others in the same room and the wife in the next room. Prosecution evidence does not add up.

48. I have cited enough reasons for my disbelief that in as much as the complainant herein was penetrated, the prosecution failed to execute a duty placed on it and that is proving a charge against the appellant beyond any reasonable doubt. In my view, so many gaping holes and loose ends were left unattended to. Those lose ends must go to the benefit of the appellant.

49. In the end, I find that there were reasonable grounds for creating a reasonable doubt that the appellant was the person responsible for the offence herein. The upshot of it all is that the appeal succeeds and consequently, the appellant is set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY 2025

J. N. ONYIEGO

JUDGE