IAO v Republic (Criminal Appeal E016 of 2024)
[2025] KEHC 6874 (KLR) (2 April 2025) (Judgment)

Neutral citation: [2025] KEHC 6874 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E016 OF 2024

JN ONYIEGO, J

APRIL 2, 2025

BETWEEN

IAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon. Lemayan R. (R.M.) delivered on 18.03.2024 in Sexual Offences Case No. E002 of 2024 at Dadaab (SPM's Court))

JUDGMENT

1. The appellant herein 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 were that on 22.02.2024 at around 1200hrs at [Particulars Withheld] in Dadaab sub county within Garissa County, he intentionally and unlawfully caused his penis to penetrate the vagina of A.L.T., a child aged 7 years.

3. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on 22.02.2024 at [Particulars Withheld] in Dadaab sub county within Garissa County he intentionally touched the vagina of D.M.Y. a child age 7 years.

4. After denying the charge, the matter proceeded to full trial with the prosecution calling five witnesses while the appellant gave sworn testimony in defence. Consequently, he was convicted and sentenced to serve a term of Thirty (30) years in prison.

5. Being aggrieved by the said conviction and sentence, he filed in person an undated petition of appeal citing eight grounds summarized as follows:

i. That the trial court erred in law and fact in denying the appellant the right to fair trial as the trial proceeded without the appellant being provided with statement proceedings or afforded legal representation.

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

iii. That the trial court erred in law and fact by convicting the appellant yet the prosecution failed to avail crucial witnesses.

iv. That the trial court held the trial in a rush hence denying the appellant adequate time to prepare

v. That the trial court erred in law and fact by failing to consider his defence and mitigation.

6. At the hearing of the appeal, parties filed written submissions to canvass the appeal herein.

7. The appellant through the firm of Mno Advocates LLP, filed submissions dated 20th November 2024 thus contending that the prosecution did not prove its case to the required standards. That it is critical that in defilement cases, the prosecution ought to lead evidence to show that the key ingredients of the offence are established. It was urged that the age of the complainant was not disputed but the element of penetration and proper identification of the perpetrator, were not conclusively established.

8. On penetration, the appellant submitted that there existed notable material contradictions on whether the complainant was penetrated. That the prosecution's evidence did not clarify whether the appellant had a trouser or a kikoi and whether PW1 was asked by the appellant not to make noise while her mouth was held tightly; or whether PW1 told the appellant to stop and he did not.

9. In was further contended that the prosecution's evidence was not clear as to how the complainant found herself with the appellant in a room and further, why other siblings left the said room. Counsel submitted that the said contradictory evidence did not support the charge to sustain a safe conviction. In that regard, the court was referred to the case of DNN vs Republic (2013) KEHC1405(KLR) in which the court with approval made reference to the case of Kiilu and another v Republic (2005) 1 KLR 174 where it was held that a witness upon whose evidence it is proposed to rely on should not form an impression in the mind of the court that such witness is not straight forward or raise suspicion about his trustworthiness or do something which raises questions about his integrity and therefore unreliable.

10. That the prosecution ought to have availed more evidence to strengthen its case. Counsel opined that, the prosecution's case was too weak to enable a conviction. On identification, it was urged that the medical evidence did not prove that the appellant was responsible for the offence herein as DNA testing was not carried out. That the complainant only mentioned the appellant as he was not only a relative but also a person who frequented their home.

11. On whether the appellant's rights to representation were violated, it was submitted that on 29.02.2024, the appellant pleaded not guilty yet it was not recorded whether he was informed of his right to legal representation as provided for in article 50(2)(g) of *the constitution*. The appellant relied on the case of Patrick Oduor Ochieng' *vs Republic, Criminal Appeal No. 49 of 2020* where it was emphasized that it should be standard practice in every criminal trial for the accused person to be informed on the need for legal representation. In the end, this court was urged to quash the conviction and set the appellant free.

12. On its part, prosecution counsel, Mr. Kihara adopted his written submissions dated 14.10.2024, thus supporting both the impugned conviction and sentence. While relying on the case of Hudson Ali Mwachongo vs Republic [2016] eKLR counsel emphasized on the importance of proof of age; the

court was further referred to the case of Francis Omuroni vs Uganda Criminal Appeal No. 2 of 2000, where the Ugandan Court of Appeal held that in defilement cases, medical evidence is paramount in determining the age of the victim...apart from medical evidence, age may also be proved by a birth certificate, the victim's/ parent's or guardian's evidence and or by observation or common sense. Counsel urged that the complainant's age was determined to be 7 years old.

13. On penetration, counsel relied on the case of Eric Onyango Ondeng' vs Republic [2014] eKLR where it was held that it is not necessary that for penetration to be determined, the hymen must be ruptured. That in this case, the complainant testified that the appellant defiled her, an allegation that was corroborated with PW2, a medical officer. On identification, it was urged that the appellant was a person well known to the complainant and therefore, all the elements that the prosecution was expected to prove were met.

14. On sentence, Counsel contended that the same was not only legal but also appropriate bearing in mind the circumstances of the case. This court was therefore urged to dismiss the appeal herein and uphold the finding of the trial court.

15. This being a first appeal, I am mandated to re-analyze and re-evaluate the evidence afresh 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 court 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". [Also see Pandya vs Pandya (1957) EA (336].

16. Briefly, PW1, D.M.Y. testified that on 22.02.2024, she was at their home alone when the appellant arrived and requested her to assist him look for money within the compound. That the appellant sent her(pw1) siblings and friends away and then asked her to get into the house and continue with the said search. While there, the appellant locked the door, removed her panties and then defiled her.

17. According to her, she tried to stop the appellant in vain. That upon her mother returning home, her elder sister S informed her of the incident. Subsequently, the mother reported the matter to Ifo Police station. She further stated that she knew the name of the appellant as Ibrahim through her mother. She stated that the appellant was someone who was well known to her as they were distant relatives and that he used to frequent their home.

18. PW2, Mercy Jepkorir, a registered clinical officer testified that she examined the complainant when she was presented at the hospital. That on physical exam, she was in fair general condition and the approximate age of the injuries was a week. According to her, the probable cause of the injuries was a penis penetration. She described the injuries as harm. She further stated that the labia minora and cervix were intact, there was no vaginal discharge and that the hymen was broken. In conclusion, she established that there was penetration. On urology, there was evidence of infection and on vaginal swap, neither spermatozoa nor epithelial cells were seen.

19. PW3, WMI stated that on the material day, she had taken her younger child to Red Cross Hospital and left the complainant and her two siblings at home. That upon returning, she found clothes scattered all over and that the house was in disarray. It was her evidence that upon asking the complainant, she narrated to her what had ensued. Her niece and a neighbour also informed her that the appellant had visited her house. She admitted reporting the matter to the police station after a period of one week for

the reason that the matter was being handled at home but the appellant's family declined the said talks. She stated that the appellant was well known to her as he was like a grandfather to the complainant.

20. PW4, S IA, a cousin to the complainant stated that on the material day, she saw the appellant with the complainant within the compound. That she later heard two women making noise that the appellant had misused the complainant. She stated that it was not the first time that the appellant was seen in the said compound as they are related.

21. PW5, 110286 PC Allan Onyango, the investigating officer testified that he was instructed to investigate the case by the OCS. That in the process of his investigations, he established that the appellant went to the complainant's home and forced PW1 to the house and thereafter defiled her. He reiterated the evidence of the other prosecution witnesses stating how the appellant defiled the complainant. That he also escorted the minor to the hospital for treatment.

22. Upon being put on defence, the appellant in his sworn testimony denied committing the offence. He stated that he was a taxi driver and on the material day, he was transporting milk from Abdisugu when his car developed a mechanical problem. That he had to look for another job as he a waited for spare parts that had been ordered for to be availed. That he went back to his brother's home and upon reaching the following day, his nephew requested him to go home for supper where he found many people who manhandled and thereafter locked him in a house.

23. He stated that he was surprised to be told that he had defiled a girl. On cross examination, he confirmed that the complainant's family was in the habit of giving him food as he was the complainant's grandfather.

24. I have considered the record of appeal, grounds of appeal and submissions by both parties. The main issues for determination are; whether the prosecution proved its case beyond reasonable doubt; whether the appellant was entitled to legal representation and; whether the sentence meted out was excessive.

25. As already noted above, the appellant was charged with the offence of defilement contrary to section 8(1) (2) of the *Sexual Offences Act* No. 3 of 2006. To prove the offence of defilement, the prosecution must establish; the victim's age; penetration and; identification of the perpetrator.

26. On the age of the complainant, the *Sexual Offences Act* defines "Child" within the meaning of the Children's Act of 2022 as "...any human being under the age of eighteen years."

27. The importance of proving age in a Sexual Offence case cannot be gainsaid. In the case of Kaingu Kasomo vs Republic, Criminal Appeal No. 504 of 2010, the Court of Appeal stated as follows:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

28. In the instant case, the appellant did not contest the age of the complainant. Moreover, a birth certificate was produced showing that the complainant was aged 7 years hence a child. Therefore, I am in agreement with the trial court's finding that the complainant was a minor at the material time.

29. As 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.

30. In the case of Alex Chemwotei Sakong v Republic [2108] eKLR the court went to a great extent in expressing what penetration entails in a sexual offence as follows;

> " Penetration is defined under section 2 of the *Sexual Offences Act* to mean the partial or complete insertion of the genital organ of a person into the genital organs of another person. This position was explained by the court of appeal (Onyango Otieno, Azangalala & Kantai JJ A) in the case of Mark Oiruri vs Republic Criminal Appeal 295 of 2012 [2013] eKLR in which they opined thus:
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> "...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..."

31. In the instant case, PW1 testified how the appellant arrived at their home and asked her to help him look for money within the compound. In the process, the appellant sent her siblings and friends away and then asked her to get into the house and continue with the said search. While there, the appellant locked the door, removed her panties and then defiled her.

32. According to pw2 the clinical officer, on 28-2-2024, she examined the victim and in her finding, the Labia majora and minora, and vagina cervix were all intact with no bruises. She went further to state that the hymen was broken. The clothes were not soiled as she had changed. However, there was no indication whether the broken hymen was fresh or not. There was no evidence of any recent tear, laceration nor bruises. In other words, there was nothing to connect the alleged sexual assault with the missing hymen.

33. According to the evidence of pw1, after the appellant left, her mother arrived. That she feared telling her mother what had happened but her sister S informed her what had transpired. However, S (pw4) said that on the Material day, she saw pw1 with the appellant in pw1's compound and that she later heard from some two ladies saying that the appellant had misused pw1. This is contrary to the testimony of pw1 who stated that it was S who informed pw3 what had happened. In other words, S did not witness anything hence she could not ascertain whether pw1 was sexually assaulted or not.

34. According to pw5 the investigating officer, pw3 reported the incident to him on 28-2-24. That pw3 discovered of the sexual assault on 28-2-24 when pw1 displayed signs of sickness and upon inquiry, the victim told her what happened. This is contrary to pw1's testimony that S informed her mother about the incident the same day it happened. This is also contrary to pw3's evidence that she was informed the same day but could not report immediately as she a waited for some compensation talks to be concluded but in vain. From these contradictory evidence, one is left wondering as to who was telling the truth.

35. It is trite that where there is contradictory evidence, the same must be held in favour of the accused. Assuming the evidence of pw5 is true, how come, the victim did not disclose the sexual assault the same day to the mother? These are not minor contradictions. They are substantial and fundamental hence must be held in favour of the appellant. See MTG v Republic (criminal appeal E067 of 2021) (2022) KEHC 189 (KLR)(15 March 2022)(Judgment) where the court held that;

> "...the correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in

question before the court that they can necessarily create some doubt in the mind of the trial court that an accused person is entitled to benefit therefrom"

36. Besides, although the court stated that the complainant had no reason to frame up the case, it did not caution itself on the dangers of relying on the evidence of a single witness to convict. I am aware that under section 124 of the *evidence Act*, a court can in sexual offences safely convict based on the evidence of a single witness as long as it is satisfied of the truthfulness of such witness. See Lumbasi v Republic (criminal Appeal 17 of 2016)(2016)KEHC 2942(KLR)(18August 2016)(Judgment) where the court held that;

> " A proper reading of the whole Section 124 of the *Evidence Act* showed that corroboration was still required on evidence by minors, but not mandatory in sexual offences as long as the witness was truthful and reasons were recorded..."

37. In view of the contradictory evidence tendered by the prosecution witnesses and further considering that the evidence of pw1 was not sufficiently corroborated by any independent witness, and further considering that the court did not properly apply its mind to the applicability of Section 124 of the *evidence Act*, it is my finding that penetration was not proved to the required degree.

38. As to identification, the appellant was known to pw1. The question is whether the appellant was the perpetrator of the offence in question on the material day. The appellant gave an alibi defence which the trial court dismissed on grounds that the appellant had failed to prove the same by calling witnesses. It is trite law that it is not the duty of an accused person to prove his a libi defence. See Erick Otieno Meda v Republic Cr.Appeal No. 55 of 2015 where the court of Appeal affirmed that the burden of proving falsity if at all, of an alibi defence lay on the prosecution.

39. Similar position was held in the case of Kiarie v Republic (1984)KLR where the court held that an accused person who tenders an a libi defence does not assume the burden of proving the same. In the circumstances, the prosecution had a duty to rebut the alibi defence which they did not do.

40. Given the contradictory testimony of the witnesses and lack of corroboration of the evidence of pw1 and pw4 both minors, I am convinced that the accused may not have been at the scene at the material time hence the reason why no action was taken until after one week. No wonder pw5 was told by pw3 mother to the victim that disclosure was only made after six days after the incident upon noticing that pw1 was unwell.

41. As to the question of rushing the case, it was not fatal. It is constitutional to expedite hearing of cases hence nothing wrong. As to lack of legal representation, the same is not mandatory. The trial court had an option of requiring legal representation if satisfied that gross injustice would have arisen if none was provided. I do not think in the circumstances it was fatal not to have been represented.

42. Having held that the evidence of penetration was not established nor was there proof of any indecent assault by the appellant, I am inclined to conclude that the prosecution did not prove its case beyond reasonable doubt. To that extent, it is my finding that the appeal herein is merited and the same upheld. Accordingly, the conviction is quashed and the sentence set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 2ND DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE