Arigi v Republic (Criminal Appeal E029 of 2023)
[2025] KEHC 7234 (KLR) (23 May 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E029 OF 2023

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

PHILIP MARTIN ARIGI ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was in Winam Principal Magistrate's court charged with and convicted of offence of defilement of a child of 11 years contrary to Section 8(2) of the *Sexual Offences Act*. He also faced an alternative count of having an indecent act with a child contrary to Section 11(1) of the same Act. The trial court found that the prosecution had proved the main count beyond any reasonable doubt and sentenced the appellant to serve a jail term of thirty years and held the alternative count in abeyance hence this appeal.

2. I start with reproducing the evidence produced in the trial court in an abridged manner. The prosecution called three witnesses. PW1 was the child (MAO) who started by telling the court that she lived in Kona Legio with her mother, father and siblings. She stated that on 5-06-2022, she was playing with her friends, Mano and Rose Anne when Philo (the appellant) called his brother and asked the brother to call her. She went to the appellant's house which was not far from the complaint's house where the appellant gave her 50/= and told her to get 20/=. When she entered the appellant's house, he closed the door and when she started screaming, the appellant warned her that if she screamed, he would kill her together with her mother.

3. MAO described the way she was dressed in a skirt, blouse and panty which the accused removed and inserted his 'dudu' into hers. After he was done, the appellant gave her 50/= and told her not to tell her mother. She went home and told her mother who took her to Migosi hospital after which they went to report at Car Wash police station. It is recorded that the complainant identified the appellant in court. She added that the appellant had earlier defiled her twice.

4. PW2 was the complainant's mother who told the court that she was a security officer at Migosi hospital. She stated that the complainant's date of birth was December 2013 meaning she was nine years at the time of the testimony. She added that on 5-06-2022, she was at home at 8.00 from church when MAO returned to the house looking unwell and disturbed and was crying. Her temperature was high and when she asked her what the problem was, she continued crying. She eventually opened up and told the mother that the appellant had been having sex with her and she wasn't well. The stated that the appellant was their neighbour. She went with the complainant to the police to report and they later went to hospital. She stated that the appellant had defiled the complaint three times and that she was told by her teacher that she had not been going to school for two weeks. The appellant was arrested on 20-06-2022.

5. In cross examination, PW2 said that she knew the appellant who was their neighbour and they didn't talk. She added that she used to go to work at 6 pm until 6 am and prepared the children to go to school. The children would walk to school. She claimed that the teacher called and informed her that the child had not been in school for two weeks. She stated further that she was informed that MAO would be in the appellant's home for the two weeks she missed school. When she was shown the P3 form, she stated that the child went to hospital on 9-06-2022 and that she did not know the doctor who treated the child as he was new and worked during the day.

6. When she was shown PRC form, she stated that the doctor filled it after interrogating the complainant. She added that on 5-06-2022, 6-06-2022 and 7-06-2022 she was not at home and she never spoke to the child between 5-06-2022 and 8-06-2022. She could not tell the exact date the child was defiled. She added that the complainant did not take bath on 5-06-2022 because it was raining and cold.

7. The prosecution's third witness was one Millicent Atieno Ndai, a clinical officer working in Migosi Sub-County hospital. She testified that MAO went to the clinic on 9-06-2022 accompanied by her mother having been sexually assaulted by a neighbour called Philip on three occasions including 5-06-2022.

8. On examination, the complainant was found to be well kempt, well oriented, not intoxicated, with no injuries on the head and neck, no tenderness on the thorax and abdomen and the upper limbs were normal. The cause of injury was not ascertained. She was given medicine and the injuries classified as harm. PW3 went on to state that the genital examination showed no lacerations, no bruises but hymen was absent. Further, there was no presence of blood and discharge in the vagina. She also added that the child was not comfortable for digital examination. According to the witness, the appellant was not examined. She produced P3 form as exhibit 2.

9. Further tests showed negative for syphilis and pregnancy while urine analysis showed pus cells and yeast infection. She explained that pus cells show infection of urine in the bladder while yeast cells show infection of the vagina. The complainant was shocked and traumatised and was referred for counselling. She also produced PCR form as exhibit 1 and treatment notes as exhibit 3.

10. On cross-examination, she stated that she was not a psychiatrist and she based her findings on assessment of the child's mental instability. She confirmed that UTI can be brought by either STI and PH. She added that she was not the first person to see the complainant and that she saw her on 9th and 10th while the alleged incident occurred on 8th. The child had at the time of seeing this witness changed clothes and taken bath which could affect the result. The clothes were not brought to her and the history of defilement came from the child. She at the end of the cross-examination changed her testimony and said that the appellant was also examined and P3 form filled.

11. The fourth witness was PC Lilian Kesimba attached to Migiso police station who confirmed that she was the investigations officer. On 9-06-2022 when at the police station, PW2 came with PW1 to report that PW1 had been defiled. The investigations officer stated that according to the statements recorded by PW1 and PW2, PW2 saw PW1 with mandazi and snacks and she got concerned and when she spoke to her, the child told her that a neighbour would give her money to buy sweets. The child opened up that the accused would defile her and in return give her money the last incident being on 8-06-2022. The following day, the mother took MAO for treatment and examination at Migosi Sub-County hospital. She added that the doctor established that the child had been defiled. PRC and P3 forms were filled.

12. The witness added that the child told her that the appellant called her and sent her for credit to the shop and when the child returned with the airtime to the appellant, the accused closed the door, took a knife, held her hand and defiled her. The accused gave the child 100/- which she bought sweets.

13. The officer added that she took the child to JOOTRH for counselling and appellant was arrested on 21-06-2022 together with colleagues at his house. She visited the scene and took a panty and shirt which she forwarded them to government chemist for analysis but she was still waiting for results. She stated that the age assessment of the complainant was done on 4-06-2022 and confirmed that she was 11. She produced the age assessment report as exhibit prosecution 5.

14. When she was cross-examined, she told the court that the child was brought by her mother on 9-06-2022 and statement recorded on 10-06-2022. She insisted that she was testifying on the incidence of 8-06-2022 and that the mother had told her that the child was 9 years. She confirmed that the assessment report showed 11 years while the amended charge sheet showed 11 years. She clarified that the panty and the shirt were recovered from the complainant's house.

15. With the above evidence, the prosecution applied for adjournment in order to call a government chemist analyst to produce report but that bever happened. The prosecution after some few adjournments closed its case and the court returned a verdict of a case to answer.

16. The appellant gave a sworn statement and called one witness. He told the court that he did not know the complainant and that he only saw her next to where his mother lived in Kona Legio. He was not at home on 8-06-2022 as he had taken his mother to hospital on 2-06-2022 and he was in the said hospital between 3-06-2022 and 8-6-2022. He identified treatment notes from JOOTRH as DMFI 1 and others from what is recorded as Kisumu specialist as DMFI 2. He maintained that he was with his father in the said hospital trip. He alleged that he knew the child's mother as he was in a relationship with the sister with whom he had a misunderstanding and he chased her away from his house. He denied having a house in Kona Legio

17. In cross examination, he confirmed that he was Philip and he was referred to as Philo and that he did not see the complainant on 8-06-2022. He added that it was his mother being treated on the dates he mentioned and not him.

18. Apollo Siso was the appellant's witness who told the court that he was from Yimbo and does not live in Kona Legio. He stated that he knew the appellant who was his son. He added that the appellant lived in Kisumu and on 8-06-2022, they had been referred to a Kisumu specialist for his wife's treatment one Rita Akinyi Achando. He confirmed that he was with his wife and the appellant on 8-06-2022 from 8.00 am to 5.00 pm. On cross-examination he stated that on the said date, the appellant went home after 5 pm and he did not see him that evening. He knew the victim who was their neighbour and he was aware that she referred to him as Philo.

19. The appellant has raised the following grounds of appeal;

1. That the trial learned Magistrate erred in both law and fact by failing to consider the provisions of section 107 (1) of the *evidence Act* thus rested the burden of proof to me by occasioning a miscarriage of justice.

2. That the trial Magistrate erred in both law and fact by failing to prove the three (3) ingredients of the offence in question i.e identification, age and penetration.

3. That the trial learned Magistrate erred both in law and fact by delving into a realm of belief that the offence was committed without considering the discrepancies, omissions from the P3 form, charge sheet and the date the report was made.

4. That the trial learned magistrate erred in both law and fact by inextricably i.e 9 years, 11 years and 15 years old respectively.

5. That the trial Magistrate erred in both law and fact by failing to consider that there was no requisite CORROBORATION thus single identifying witness evidence (PW1).

6. That the trial learned Magistrate erred in both law and fact by wholly relying on the prosecution evidence without considering the ALIBI statement of defence raised by the Appellant.

7. That the learned trial Magistrate erred in both law and fact by deliberately neglecting the Appellants mitigating factors that prayed for leniency hence a first offender and sole breadwinner.

8. That the trial learned Magistrate erred in law by failing to issue and/or apply for his discretion in sentencing where the end goal was harsh, excessive and arbitrary sentence of 30 years without considering the conduct of the proceedings.

9. That I wish to be present during the hearing of this appeal and/or be supplied with the trial Court record for a preparation of more substantial grounds.

20. This is a first appeal and the law requires me as an appellate court of the first instance to re-evaluate and re-analyse the evidence produced before the court and come to my own independent conclusion but also consider that I did not have the advantage of taking the evidence first hand or observe the demeanour of the witnesses and give due allowance for that. Honourable Lady Justice Asenath Ongeri held in **Yusuf Mohamed v Republic (2017) KEHC 51 (KLR)** that;

> 'An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.'

21. The appeal was heard by way of written submissions. The appellant urged me to consider his set of submissions dated 23-11-2024. The had respondent filed submissions dated 29th April 2024. I have read through the submissions of both parties and the petition of appeal. I do understand the appellant's

grounds as raising the issues of consistency of the testimony of the witnesses, lack of corroboration of the victim's testimony and lack of proof of penetration and his defence of alibi.

22. The ingredients of an offence of defilement are identification of the perpetrator, the age of the victim and proof of penetration. These ingredients must of course be proved with support of corroborative and believable evidence. It is true that Section 124 of the *Evidence Act* states that corroboration of evidence is not mandatory in sexual offences where the victim is the only witness. However, in my opinion, it will be obviously dangerous and wrong to assume that any story from a child who is said to be a victim of a sexual offence should be believed without establishment of the truth. What I mean is that where such testimony is shown to be inconsistent with the other pieces of evidence produced by the prosecution, the court must give the accused person the benefit of doubt.

23. Having said the above, I now go into the inconsistencies pointed out by the appellant and determine whether the same were material as to create a reasonable doubt as regards the appellant's guilt. I say so because not every inconsistency should beget a doubt which would entitle an accused person to an acquittal. The inconsistency must be material and relevant to the innocence of the accused that it leaves the court with a reasonable doubt as to whether the act complained of was committed by the accused person.

24. The appellant has argued that the complainant's evidence was not believable because she claimed to have been defiled on 5-06-2022 whereas the charge sheet spoke of 8-06-2022. It has been held and I think it is a good law that inconsistency between the date of the act as shown in the charge sheet and as told by the witness is not material as long as there is proof of defilement and all other factors point to the appellant's guilt. In any event in this mater, the complainant said that she had been defiled three times and she was taken to hospital after she reported the matter to her mother. The treatment notes produced as prosecution exhibit 3 are clear that she was treated on 9-05-2022 and the history therein indicates that the third incident occurred on the previous day (8-06-2022). In that case, whether the complainant was defiled on 5-06-2022 or 8-06-2022 does not change the fact that the offence was committed.

25. The appellant argues that there was no corroborating evidence as there was nobody else who witnessed the complainant being defiled. According to him, the medical evidence produced did not corroborate the evidence of the complainant on penetration but showed more contradictions. He argues that the fact that PW3 testified that UTI could be caused by factors other than the defilement and that hymen could be broken in ways other than penile penetration should be construed to his advantage noting that there was no direct evidence from an eye witness.

26. The proviso to Section 124 of the *Evidence Act* states;

> '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.'

27. The above makes it clear that testimony of a single witness in sexual offences need not be corroborated. As long as the court finds truth in the testimony of the complainant, it would be justifiable to return a verdict of conviction. This position is sound in accepting the reality that sexual offenders do not ordinarily attack the victims in public and such offences are often committed with the offender and the victim alone.

28. In the case before me, the complainant explained in coherent manner, how the appellant restrained her in his house and defiled her. She was categorical that he did this three times. The complainant was

eleven years and knew the appellant as Philo, a moniker the appellant admitted referred to him in the area. The proceedings show that the complainant identified the appellant in court. The identification was clearly by recognition as the appellant was known to the complainant. There was no reason for the complainant or her mother to frame the appellant for such a heinous act. Going through the evidence and looking at the treatment notes, I have no hesitation to return the same verdict on the issue of corroboration as the Honourable Magistrate did.

29. The appellant claims that the findings of the doctor who attended the complainant did not connect him to the act. True, the witness who produced the P3 form and PCR form told the court that presence of pus and yeast in the child's genitals does not necessarily mean that she was defiled. However, in my opinion, the fact that the pus and the yeast found in the complainant's genitals were not proved to have been caused by or connected to the act or the appellant does not exonerate the appellant from the act.

30. The other contradiction the appellant points out is in the complainant's evidence before the court that the appellant gave her 50/= after the act while she told the investigations officer that she was given 100/=. I do not find this a major contradiction that should create a reasonable doubt in the mind of the court. The complainant is said to have been defiled on three occasions and each time she would be given money. In my view, the contradiction in the amount the appellant gave is not material. Actually, it would not even matter whether any money was given.

31. The other contradiction the appellant talks about is in the testimony of the mother where she talked of not being at home between 5-06-2023 and 8-06-2022. It is clear from the testimony of PW2 that she discovered the defilement on 8-06-2022 when she questioned the complainant and she opened up. So, whether she was home on the three previous days or not is not material to this case. The act which the appellant was under trial for happened on 8-06-2022 and there is no inconsistency of the evidence as it relates to the period between that date and the date of the appellant's arrest.

32. The appellant also complains that the complainant's friends who were playing with her on the date she was called by the appellant were not called as witnesses, and that should be construed as adverse to the prosecution's case. There is no minimum number of witnesses required in order to prove a case. As long as there are enough witnesses to prove the ingredients of the offence, the prosecution need not call everyone who was near or in the chain of the events unless the omitted witness breaks the chain in a way that would be fatal to the prosecution's case.

33. The other issue raised by the appellant is that of age. The complainant's mother said that she was nine while the age assessment report produced as exhibit 5 indicated that she was 11. The appellant also talks of a report which indicated that the complainant was 15 years. This report was not produced in evidence and it appears nowhere in the proceedings but the record of appeal at page 52 has a report to that effect dated 30-06-2022. This court may not be able to tell where the report came from or how it found its way to the record of appeal but since the same was not part of the evidence in the lower court, this court will not consider or give weight to it. What matters is that the victim was under 18 so whichever case, it will remain a defilement unless the appellant would be relying on it in his submissions on sentence.

34. The other issue raised by the appellant is the defence of alibi. It is an established principle of law that a defence of alibi should be raised on the earliest possible opportunity preferably at a time of

investigations or the early stages of the case to give the prosecution time to investigate the same. In **Kimaku & 4 others v Republic (2024) KEHC 8720 (KLR)** it was held that;

> 'It is trite that the defence of alibi should be raised early enough to enable the prosecution to challenge it in evidence. Such a defence when brought to late leads to the inevitable conclusion that it is an afterthought and fabrication.'

35. The appellant in this matter raised the defence of alibi during his testimony which I consider too late in the day. He claimed to have been in Kisumu between 3-06-2022 and 8-06-2022 when the act is said to have been committed. I find the defence an evasive attempt because the appellant began his testimony with denying knowing the victim then he goes on to say that he was in a relationship with her mother's sister who he chased after they disagreed which according to him was their reason to frame him. He did not give the name or identity of the victim's mother's sister. His father who appeared as his witness and claimed to have been with him on 8-06-2022 confirmed that the complainant's family were their neighbours. I do not see truth in this defence and as the Magistrate held, it was a mere denial and I would add, an afterthought.

36. The appellant claims that the sentence was severe and did not take into account his mitigation. I note that the appellant was sentenced to serve jail term of 30 years. Section 11(1) of the *Sexual Offences Act* provides that anyone who defiles a child of 11 years or less shall be convicted to serve life imprisonment. I say no more about this since the respondent has not cross appealed or proposed a more severe sentence.

37. In the end I find that this appeal lacks merits and it is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT

Judgment delivered online in presence of the appellant (from Kisumu Maximum Prison) and in absence of the respondent.