Abiero v Republic (Criminal Appeal E018 of 2024)
[2025] KEHC 10135 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E018 OF 2024

DK KEMEI, J

JULY 11, 2025

BETWEEN

MARK OTIENO ABIERO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Conviction and sentence of 15 years' imprisonment by Hon. T.K. Nambisia (RM) in Ukwala Principal Magistrate's Court Sexual Offences Case No. E020 of 2023 dated 22/4/2024)

JUDGMENT

1. The appeal herein relates to the sentence imposed by the learned Resident Magistrate Hon. T. K. Nambisia (RM) in Ukwala Principal Magistrate's Court Sexual Offences Case No. E020 of 2023 wherein she sentenced the Appellant herein Mark Otieno Obiero to fifteen (15) years' imprisonment for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 dated 22/4/2024.

2. Aggrieved by the said conviction and sentence, the Appellant filed his Petition of appeal dated 2/5/2024 wherein he raised the following grounds of appeal namely:

    i. That the trial magistrate failed to observe the fact that he was not given an opportunity to prepare for his defence pursuant to Article 50(2) (c) of *the Constitution*.

    ii. That the trial magistrate failed to observe that the sentence imposed upon the Appellant was harsh and excessive in nature.

    iii. That the trial magistrate failed to observe that the victim was aged 17 years old while the Appellant was aged 19 years old.

    iv. That the Appellant is a first offender and remorseful.

v. That the trial court failed to put into consideration the period spent in remand custody under Section 333(2) of the *Criminal Procedure Code*.

vi. That the evidence was not conclusive against the Appellant regarding the offence in question.

The Appellant therefore prayed that the appeal be allowed and that the sentence be set aside and he be granted a lesser sentence or a non-custodial sentence.

3. This being a first appeal, this court is enjoined to evaluate the evidence tendered before the trial court and subject it to an independent analysis and arrive at an independent conclusion as to whether or not to uphold the decision of the trial court. In carrying out this task, the court has to take into account the fact that it did not have the benefit of observing the demeanour of the witnesses and hence it has to make an allowance for that. See Okeno Vs. R [1972] E 32.

4. The Appellant had been charged with a main charge of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 16th day of August 2023 in [Particulars Withheld], Uyundo sub Location, Uyunya Location in Ugenya Sub-County within Siaya County, intentionally caused his penis to penetrate the vagina of M.A.O, a child aged seventeen years.

The Appellant also faced an alternative count of committing and indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006 with the particulars being that on the 16th day of August 2023 in [Particulars Withheld], Uyundo Sub Location, Uyunya Location in Ugenya Sub-County within Siaya County, intentionally touched the vagina of M.A.O, a child aged seventeen years with his penis.

5. Collins Otieno (PW1) testified that he is a clinical officer at Ukwala Sub County Hospital. That he examined the Complainant on 16/8/2023 and noted slight bruises on the labia majora as well as whitish discharge from her vagina which was foul smelling. He produced the P3 form and Post Rape Care form as exhibits.

On cross examination, he stated that there were lacerations on the labia majora which is around the genital area. That the whitish vaginal discharge was indication of an infection.

6. MCAO (PW2) was the Complainant. She testified that on the material date, she had been sent to Aboke Centre to buy medicine for her grandmother and while on her way back, she met the Appellant herein who requested her to go with him to his house to which she agreed as she had known his sister who was her friend. That the Appellant then forcefully defiled her and that after the ordeal, she went to the police station at Aboke where she lodged a complaint against the Appellant and was advised not to take a shower or change clothes until the following day when she would be escorted to hospital. That she was later examined and treated at the Ukwala Sub County Hospital.

7. CA (PW3) testified that she is a grandmother to the Complainant. That she had sent the Complainant to the trading centre to buy medicine for her and was later alerted by the area chief that her granddaughter had been defiled. That she rushed to Aboke police station where she found the Complainant who informed her that she had been defiled by the Appellant.

8. No. 51817 Cpl Christopher Some (PW4) testified that he investigated the incident. That the Complainant arrived at the police station at 6.50 PM while crying. That he learnt that the girl had been defiled. That he issued her with a P3 form the following day and had her escorted to Ukwala Sub-County hospital. That he obtained the Complainant's birth certificate which he produced as exhibit 3. That he later caused the Appellant to be arrested and charged. That the Complainant identified the Appellant as the person who had defiled her.

9. The trial court later established that the Respondent had made out a prima facie case against the Appellant who was subsequently placed on his defence. The Appellant opted to tender a sworn testimony.

10. Mark Otieno Obiero (DW1) testified that on the material date, he was at Aboke Trading Centre selling water and later went home at 6.30 pm and later visited his friend Michael who lives near Aboke police station. That he later met the Complainant at a Chemist and that they spoke since he knew her as a friend. That he later left her after 15 minutes and went to Usenge with Michael. That the following day, he received a report that police were looking for him. That he was arrested four days later. That he did not have sex with the Complainant as alleged.

    On cross examination, he stated inter alia; that he had known the Complainant since childhood; that he does not know why the complainant raised the complaint of having been defiled; that he met the complainant on the material date when she had gone to buy medicine; that he was with Michael on the material date.

11. The appeal was canvassed by way of written submissions. Both parties duly complied.

12. I have considered the record of the trial court and the rival submissions. I find the issues for determination are firstly, whether the Respondent had proved its case against the Appellant beyond any reasonable doubt and secondly, whether the sentence imposed was appropriate.

13. It is noted that the Appellant was charged with a main charge of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006 which provides as follows.

    8(1) A person who commits an act which causes penetration with a child is guilt of an offence termed defilement.

    8(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

    It is trite that the burden of proof in all criminal cases lies upon the prosecution to discharge and that the standard of proof is one of beyond any reasonable doubt. See Miller Vs Minister of Pensions [1947] 2ALL ER 372 and Woolmington Vs. DPP [1935] AC 462.

    The essential ingredients required to be proved by the Respondent over the charge are age of the victim, penetration and the identity of the Appellant as the perpetrator.

14. As regards the aspect of age, the complainant testified that she was aged 17 years at the time of the offence. Her grandmother, CA (PW3) confirmed this fact and further the production of the birth certificate by the investigating officer (PW4) as exhibit 3 confirmed the age as 17 years. The date of birth is indicated as 31/12/2006 and hence by the time of the incident (16/8/2023), the Complainant was aged 16 years, three months and 15 days. Hence, the age is below 18 years and thus the Complainant was a minor at the time of the incident. The ingredient of age is a very critical component as the subsequent sentences to be imposed upon conviction will heavily be pegged on it. The Court of Appeal in the case of Kaingu Elias Kasomo Vs Republic Criminal Appeal No. 504 of 2010 (UR) held 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 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."

As the complainant's age fell within the age bracket of 16-18 years old, I find that the Respondent proved the ingredient beyond any reasonable doubt.

15. As regards the aspect of penetration, Section 2 of the *Sexual Offences Act* defines the same as the partial or complete insertion of the genital organs of a person into the genital organs of another person. In the case of Mark Oiruri Mose Vs Republic Criminal Appeal No. 295 of 2012 [2018] eKLR, the Court of Appeal held that he law does not require the proof of spermatozoa in the genital organ of the victim and that as long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and that the penetration need not be deep inside the girl's organ.

    It was the evidence of the Complainant that the Appellant wrestled her onto his bed and managed to subdue her and later inserted his penis into her vagina and that after the ordeal she rushed to Aboke police Station to lodge report whereupon she was advised to come the following day and further advised not to shower or change clothes. She was later examined at Ukwala Sub County Hospital by Collins Otieno (PW1) who produced the P3 form and post rape care form as exhibits. It was the evidence of the clinical officer that there were bruises and lacerations on the labia majora and that there was a whitish foul-smelling discharge from the vagina. It is clear from the evidence of the Complainant and the clinical officer plus the exhibits produced that there was penetration of the Complainant's genitalia. I find this ingredient was proved beyond any reasonable doubt by the Respondent.

16. As regards the identity of the Appellant as the perpetrator, it was the evidence of the Complainant that she had known the Appellant quite well as he was a brother to the Complainant's friend one A and that they all hail from [Particulars Withheld], and that she had known him for a long time. It is instructive that the complainant rushed to Aboke police station soon after the incident and lodged a complaint against him and that she gave out the name of the Appellant to the police who then swung into action and had him arrested a few days later. There was no dispute about the identity of the Appellant. The Appellant in his defence confirmed that he had known the Complainant since childhood and that he had met her on the material date at a certain Chemist in Aboke Centre. The Appellant also confirmed that he had no dispute with the complainant or her family and hence, I find that there was absolutely no reason to frame him up. I am satisfied that the identity of the Appellant as the perpetrator was not in doubt and that the same was proved beyond any reasonable doubt.

17. An analysis of the entire evidence of the Respondent and Appellant leaves no doubt that the Respondent's evidence was quite overwhelming against the Appellant and that the Appellant's defence did not shake the Respondent's evidence. I find the ingredients of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* were proved against the Appellant beyond any reasonable doubt. Hence, the finding on conviction by the trial court was quite sound and must be upheld.

18. The Appellant in his grounds of appeal has contended that his rights were violated as he was not accorded an opportunity to conduct his defence. A perusal of the court record shows that the Appellant robustly participated in the trial from start to finish and that he cross examined all the witnesses. The Appellant upon being placed on his defence duly presented his evidence on 19/2/2024 and thereafter, closed his case. I find the Appellant's claim that he was not given sufficient time to tender his defence lacks basis and must be rejected.

19. As regards sentence, Section 8(4) of the *Sexual Offences Act* provides for a minimal sentence of fifteen (15) years' imprisonment upon conviction. The Appellant was ordered to serve a sentence of 15 years' imprisonment by the trial court. Indeed, it is trite that sentencing is at the discretion of the trial court

and that an appellate court will be slow to interfere with the same unless it is shown that the trial court took into account an irrelevant factor or that a wrong principle was applied or that the sentence was harsh and excessive so as to suggest that an error of principle has occurred. I find the sentence imposed by the trial court was the minimal possible in law. It is also noted that the Appellant ambushed the complainant and defiled her and which action has psychologically affected her. The action by the Appellant was abhorrent and calls for deterrent sentence. It is also noted that the Appellant posted bail and hence did not remain in custody during the trial and thus the application of Section 333(2) of the *Criminal Procedure Code* does not arise.

20. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed. The trial court's conviction and sentence is upheld.

DATED AND DELIVERED AT SIAYA THIS 11TH DAY OF JULY 2025.

D. KEMEI

JUDGE

In the presence of

Mark Otieno Obiero.....Appellant

M/s Kerubo.....for Respondent

Okumu.....Court Assistant