



**Abshiro v Republic (Criminal Appeal E025 of 2023)
[2024] KEHC 3445 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E025 OF 2023
JN ONYIEGO, J
MARCH 8, 2024**

BETWEEN

ALI SIYAT ABSHIRO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence by Hon. Otuke (R.M.) in Cr. Case No. 35 of 2020 in the CM Court at Garissa, judgement delivered on 24.05.2023)

JUDGMENT

1. The appellant herein was charged with the offence of defilement contrary to section 8(1)(4) of the [Sexual Offences Act](#) No. 3 of 2006. Particulars were that on 08.08.2020 at around 1300hrs within Tana-River County intentionally and unlawfully caused his penis to penetrate the vagina of HSY, a female child aged 11 years.
2. He was also charged with 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 being that, on 08.08.2020 at around 1300hrs within Tana-River County intentionally and unlawfully touched the buttocks/breast/vagina of HSY, a female child aged 11 years with his penis.
3. The prosecution called six witnesses in support of its case while the defence called two witness. The trial court upon considering the law and facts in the case reached a determination that the appellant was guilty of the main charge and therefore sentenced him to twenty-seven years and 3 months' imprisonment. The appellant being aggrieved by the conviction and sentence of the court filed on 23.10.2023 an amended petition of appeal on the following grounds:
 - i. That the trial court erred in law and fact by failing to observe that his right to fair trial was infringed upon.



- ii. That the learned trial magistrate erred in law and fact by failing to observe that the *voire dire* conducted was unprocedural.
 - iii. That the learned trial magistrate erred in law and fact by finding that the prosecution proved its case beyond reasonable doubt.
 - iv. That the learned trial magistrate erred in law and fact by failing to look at the contradictions, inconsistencies and incoherence that marred the prosecution's case.
4. When the matter came up for directions, parties agreed to canvass the appeal through written submissions.
 5. The appellant through his written submissions filed on 23rd October 2023 submitted that the trial court failed to note that the evidence by the prosecution was insufficient to form the basis of a conviction. That he was not accorded an advocate during the trial contrary to the provisions of *the constitution* and the finding in the case of Joseph Ndungu Kagiri v Republic [2016] eKLR.
 6. He contended that the trial was conducted in a language that he did not understand and as such, the same led to a mistrial. He further submitted that despite informing the court that he was not ready to proceed with the hearing, the trial magistrate insisted that hearing would proceed nevertheless.
 7. On the second ground, it was alleged that the manner in which *voire dire* examination was conducted was not in accordance with the law as the witness was not asked pertinent questions that would have helped the court reach a proper determination as to whether the witness appreciated the importance of telling the truth and that she was intelligent.
 8. On the ground that he was convicted on insufficient evidence, he submitted that his identification was not conclusive. He faulted the investigating officer for presenting substandard evidence leading to his conviction. That the prosecution witnesses did not state how they knew him and further, some of the members of the public who were allegedly involved in arresting him were not presented as witnesses in court.
 9. He argued that the trial magistrate returned a conviction by filling in the gaps of the prosecution's case. He relied on the case of R v Kabogo s/o Waguyu, 23 (1) KLR 50 where the aspect of identification was stated that the same ought to be beyond doubt. On penetration, he contended that the same equally was not conclusive. That the complainant did not at all state whether there was contact between her genitals and that of the appellant. That all that she stated before the court was only in relation to the separation of her legs.
 10. On inconsistencies, he urged that the vital witnesses were not called to testify in the matter. He thus urged this court to quash his conviction and set aside his sentence as the same was not safe.
 11. The appeal was opposed by Mr. Kihara, the Learned Prosecution Counsel who relied on his submissions dated 25.09.2023 thus contending that the appeal was devoid of merit and therefore should be dismissed. The respondent further submitted that all the ingredients of the offence of defilement were proved. Reliance was placed in the case of Hudson Ali Mwachongo v Republic [2016] eKLR where the court held that proof of age of a victim in a defilement case was critical.
 12. On sentence, learned counsel submitted that the same was appropriate and that the trial magistrate did not err in any way. He urged this court to uphold both conviction and sentence against the appellant.
 13. Having considered the record of appeal, grounds of appeal and submissions by both parties, this court being the 1st appellate court, has a duty to re-consider, re-evaluate and re-assess the evidence before the



- trial court a fresh and reach at an independent determination bearing in mind that it did not see nor witness the witnesses testify so as to be able to assess their general demeanour.
14. In the case of *Okeno v Republic* [1972] E.A. 32 and *Kiilu and another v R* [2005] 1 KLR 174 both courts held that a first appellate court should subject the evidence tendered before the trial court to a fresh and exhaustive examination and thereafter draw its own conclusions. That in so doing, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.
 15. However, the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles. See *Gunga Baya & another v Republic* [2015] eKLR).
 16. Brief facts of the case are that, on a date, she could not remember, HSY (pw1) the complainant herein was looking after their goats when one Siyat (appellant) a person she knew before confronted her. She told the court that she was in court because Ali Siyat did something wrong to her as she was taking care of little goats. It was her testimony that the appellant approached her secretly, removed her clothes as he removed his too and thereafter spread her legs by tying one leg at one end and the other on another end before defiling her.
 17. She recalled that she bled from the vaginal area after Siyat defiled her. That she screamed but no one came to her help since it was in the forest. That she went home and informed her relatives what had happened and thereafter she was taken to hospital in Garissa where she was treated. On cross examination, she reiterated that she was defiled by the appellant at around 1pm after the afternoon prayers. On recall for cross examination the witness reiterated that indeed it was the appellant who defiled her.
 18. PW2, RY testified that on 08.08.2020, while at Elhare, he was called by his neighbour who broke the news to him that his niece(pw1) had been defiled. That when he got home, he found women at the homestead, who examined and found the child had injuries on her private parts. Among the women who examined her was H, the mother of the complainant. That they took the girl to Bangale dispensary where she was treated before being referred to Garissa referral Hospital.
 19. He went further to state that, they reported the matter to Bangale police station where the victim was issued with a P3 form which they took to Garissa Hospital for filling. He told the court that the complainant did disclose to them that it was the appellant who defiled her. On cross examination, the witness told the court that he was the one who came with the vehicle and took the girl to hospital. On further cross examination, he reiterated the position that the appellant was named by pw1 as the perpetrator.
 20. PW.3, SY, father to PW1 stated that he was at Yarit at the time of the incident and that it was PW2, who informed him that his daughter had been defiled. That he took a bodaboda and met the rest of the group at the police station. According to him, the girl was unresponsive and her clothes were stained with blood. He testified that at the time of the incident the girl was aged 11 years. On recall for cross examination, the witness said that he didn't witness the incident although he saw blood stains on the complainant's clothes and that it was pw1 who named the appellant as the perpetrator.
 21. PW4, Jeremiah Mosbei, a reproductive clinical officer testified that on 08.08.2020 one H.S.Y who was 11 years old was referred to the hospital from Bangale police station on allegation that she had been defiled by a person known to her. On examination by Mr. Koech, a clinical officer, it was noted that she had fresh blood stains on her trouser. On genitalia examination, it was further noted that she had



- multiple tears on the labia minora and majora and that the hymen was freshly torn and blood oozed from the vaginal canal.
22. He went further to state that urinalysis results showed multiple red blood cells in as much as no spermatozoa was seen. That a higher vaginal swab was done where blood was seen with numerous epithelial cells. He thus concluded that the complainant was defiled. The witness filled a P3 form to which he appended his signature and produced the same as exhibit 3 and also the treatment notes as exhibit 1.
 23. PW5, 113815 PC Boniface Omondi recalled that on 15.08.2020, he was asked by the OCS to join his fellow officers PC Bawati, PC Hamdi and PC Sima to go arrest a suspect who had been arrested by members of the public at a place called Roka. That later, the accused person was booked at the Bangale police station for the offence of defilement.
 24. PW6, 116966 PC Josephat Kipche Israil, attached to the Bangale police station testified that he was assigned to take over the matter upon transfer of the previous I.O. That the complainant was an 11-year-old juvenile. He bonded the witnesses after the court ordered the matter to proceed under section 200 of the CPC. The witness said that during his investigations he was able to ascertain the age of the victim. He acquired the birth certificate with s/no. 57xxxx which he produced in court as exhibit 4.
 25. DW1, Ali Siyat Abshiro testified that he didn't know the complainant and that he was arrested having fought with PW2, Roble Yusuf whom he had a grudge with. That a tussle ensued due to an argument on whose camels were to drink water first at the water point. He alleged that PW2 used an abusive term 'kuma ya mama yako' against him leading to the fight which is the genesis of this case.
 26. DW2, Ismail Shide Abshiro corroborated the testimony of Dw1 to the effect that on the material day, there was a disagreement that led to a fight between PW2 and DW1 over whose animals were to drink water first. Later the PW2 threatened DW1 that he would take him to a place he would not return. That on 15.08.2020 while at the grazing field, the appellant was sent to buy sugar from Ruka but was arrested instead. On cross examination, he stated that upon visiting the appellant in prison, the appellant informed him to come to court to testify in support of his case.
 27. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court.
 28. This being a criminal case, the burden to prove its case purely lie with the prosecution. Under Section 107(1) of the *Evidence Act*, the burden of proof is on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This was well buttressed in the case of *Woolmington v DPP* 1935 AC 462 and *Miller v Minister of Pensions* 2 ALL 372-273.
 29. In the instant case, the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. It was therefore incumbent upon the prosecution to prove the salient elements of the offence which includes; age; proof of penetration and the perpetrator. See *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where it held that;

“The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.”
 30. The question therefore is whether the above elements were proved to the required standards and that the burden of proof lies with the prosecution.



31. It is not disputed that the complainant at the time of the commission of the offence was a minor as the same could be ascertained from the evidence produced before the trial court by PW6 who produced the complainant's birth certificate showing that she was born on 13.04.2009. It therefore follows that the complainant was aged 11years and about 4 months at the alleged time of perpetration of this offence. See *Fappyton Mutuku Ngui v Republic* [2012] eKLR] where the birth certificate was relied on to establish the age of the victim.
32. Regarding the question whether there was penetration, Section 2 of the *Sexual Offences Act* defines the same to mean; 'partial' or complete insertion of the genital organs of a person into the genital organs of another.
33. In the instant case, the complainant testified how the appellant ambushed her while grazing goats, tied her legs apart and thereafter defiled her. The same was corroborated by the evidence of PW4, the clinical officer who produced the P3 Form and treatment notes confirming that the complainant had indeed been defiled as her hymen was freshly torn thus bearing multiple tears at the labia minora. Besides, pw2 and pw3 confirmed that when they saw the victim on the material day, she had blood stained clothes and was unable to walk. From the said evidence, am convinced that pw1 was defiled on the material day and that she could not have self-inflicted injuries on her genitals.
34. On identification of the perpetrator, PW1 testified that it was the appellant who defiled her. The appellant on the other hand testified that he did not know the complainant but only her father. That there existed a grudge between him and the father of the complainant. From the evidence of the complainant, she knew the appellant before.
35. The offence took place during day time at 1.00pm hence recognition was positive. Upon reporting home, she named the perpetrator in this case the appellant. It is trite that identification by recognition is more reliable. Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger - See the Court of Appeal case of *Reuben Taabu Anjononi & 2 others vs. Republic* [1980] eKLR.
36. Although there was no eye witness, a court can convict based on the evidence of a single witness after warning itself of the dangers of relying on such evidence. Further, Section 124 of the *evidence Act* does empower a court to convict an accused person based on the evidence of a single witness in sexual related offences so long as it is satisfied that such witness is truthful. See In *Nyamai Mutia & Musee Katee vs. Republic Criminal Appeal 623 of 2010* [2017] eKLR, the Court of Appeal (Makhandia, Ouko & M'noti JJ.A) where the court observed thus:

“The proviso to section 124 of the *Evidence Act* was introduced by the Statute Law (Miscellaneous Amendments) Act No. 5 and further modified by the Statute Law (Miscellaneous Amendments) Act No. 3 of 2006. The effect of those amendments is that in a prosecution involving a sexual offence, the trial court can convict the accused person on the evidence of the victim alone if it believes the victim was truthful and recorded the reasons for that belief.”
37. The learned magistrate did express himself that pw1-pw4 appeared reliable witnesses and consistent in their testimony. He made reference to the application of section 124 of the *evidence Act*. Upon independent assessment of the prosecution evidence, am convinced that the evidence of the prosecution witnesses was reliable and consistent. The claim that there was a grudge between the victim's father and the appellant is a cover up and an after-thought. Am persuaded by the testimony of pw1 which even in the absence of any other evidence could safely be relied on under section 124 of the *Evidence Act* to convict. It is my finding that the appellant was positively identified.



38. The appellant argued that he was not afforded an advocate during the hearing of the matter herein and therefore the same infringed into his rights.
39. This is a tricky aspect to which courts have had an opportunity to pronounce themselves on the applicability of Article 50(2)(h) in the case of *Karisa Chengo & 2 others vs Republic No. 44, 56, 76 of 2014* where it stated: -

“It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia* case (*supra*) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result” and to include all situations where an accused person is charged with an offence whose penalty is death.

This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.”

40. In the instant case, the offence with which the appellant was charged did not carry a death sentence. However, I take note that, the appellant participated robustly during the hearing more so in cross examining the witnesses and seeking for some of the rights provided by the law. I therefore find that it would be insincere for the appellant to allege that he did not appreciate the outcome of the court proceedings. In any event, the appellant had a right to appoint an advocate of his own choice. It is not practically possible for the state to give free legal representation to every accused person regardless of the nature of the offence.
41. On the question that he did not understand the language used in court, the record shows that translation was done in Somali. In any event, how did he manage to cross examine witnesses. In my view, this claim is baseless and misguided.
42. Regarding the claim that *voire dire* examination was not properly conducted, the court has perused the record. Indeed, the law requires that when a child is due to testify, the court ought to conduct a *voire dire* examination to be satisfied that; such child is possessed of the requisite intelligence to be able to follow the proceedings; he or she understands the nature of an oath and the importance of telling the truth.
43. However, there is no standard format of examination provided in law. It is left upon the court to satisfy itself that the witness is competent to give evidence either on oath or not. In this case the court did conduct the examination albeit sketchy. However, the court was satisfied that the witness was competent to testify on oath.
44. Generally speaking, *voire dire* examination is a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror (See Duhaime, Lloyd. “*Voir Dire* definition” Duhaime’s Legal Dictionary). With specific regard to the testimony of children, *voire dire* examination is essential to enable the court satisfy itself that the child is conscious of the truth. The purpose of *voir*



dire was explained by the Court of Appeal in the case of in Johnson Muiruri vs Republic [1983] KLR 445 as follows:

1. “Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a *voire dire* examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child’s ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction.”
45. In this case, a perusal of the record reveals that prior to receiving the testimony of PW1, the learned trial magistrate went on an enquiry on whether the witness understood the meaning of telling the truth and the consequences of lying. Having satisfied himself that the minor understood the importance of telling the truth, the court went on to record her evidence.
46. Concerning the issue of inconsistencies, the appellant did not show how the prosecution evidence was inconsistent. To the contrary, the appellant submitted that the prosecution did not bring forth all the witnesses more so the chief and others who wanted to lynch him at the time of arrest.
47. Despite the appellants’ allegations that there were material contradictions in the witnesses’ testimony, he did not demonstrate or point out the alleged inconsistencies. As to the prosecution’s failure to call certain witnesses, it was upon the prosecution to prove its case depending on the relevance of the witnesses to be relied on. There is no fixed number of witnesses to call. In this case the witnesses called were sufficient to prove the prosecution case. See Joseph Mwangi Kariuki vs Republic [2022] eKLR].
48. The appellant further submitted that the trial court meted out a harsh and excessive sentence. The legal position on sentencing was stated succinctly by the Court of Appeal for East Africa in the case of Ogola S/O Owoura vs Reginum (1954) 21 270 as follows: -
- “The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a



somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R.*, (1950) 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

49. The appellant did not submit on this head but it is not lost to this court that sentencing is a discretion by the trial court and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.
50. The appellant was charged with the offence under section 8(1)(4) yet the age of the minor was 11 years. He ought to have been charged with the offence under 8(1)(2) which provides that 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.
51. The trial court sentenced the appellant to serve 27 years and 3 months' imprisonment in place of life imprisonment.
52. The above notwithstanding, it is my humble view that in deciding what sentences to impose, a court must ensure that whatever sentence is imposed upholds the spirit of *the constitution* and further, regard to the surrounding circumstances fully taken into consideration. [See Court of Appeal decisions in *Dismas Wafula v Republic* [2019] eKLR and *Eliud Waweru Wambui v Republic* [2019] eKLR].
53. Considering the mitigation on record and the age of the appellant who is 20 years old, it is my conviction that the appellant needs an opportunity to reform and be allowed to come back to society to pick up from where he left. Accordingly, the appeal against conviction is dismissed and sentence of 27 years and 3 months' imprisonment substituted with 20 years' imprisonment to run from the time of arrest.

ROA 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF MARCH 2024.

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J. N. ONYIEGO

JUDGE

