



**Kema alias Wabile v Republic (Criminal Appeal E020 of 2022)  
[2024] KEHC 2322 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2322 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E020 OF 2022  
RPV WENDOH, J  
MARCH 1, 2024**

**BETWEEN**

**GEORGE ODHIAMBO KEMA ALIAS WABILE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. R. K. Langat – Senior Resident Magistrate  
in Rongo Senior Resident Magistrate’s Court S.O. NO. 29 OF 2018 delivered on 30/01/2019)*

**JUDGMENT**

1. George Odhiambo Kema alias Wabile was convicted for the offence of defilement contrary to Section 8 (1) as read with 8 (3) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an indecent Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge are that on 28/10/2018 at, South Kanyajuok Location, intentionally inserted his penis in the vagina of S.A. O, a child aged ten (10) years or that he touched the vagina and buttocks of the a child S. A. O. aged ten years.
3. Upon conviction on the main charge, the appellant was sentenced to serve life imprisonment. The appellant is aggrieved by the whole judgment and filed this appeal through the firm of Odondi & Co Advocates.
4. The grounds of appeal are as follows:-
  1. That the trial court failed to appreciate the inconsistencies in the medical evidence;
  2. That the trial court erred when it found that the complainant was intelligent enough to give evidence when she was mentally challenged;
  3. The court erred by not conducting a voire examination on the child witness, PW2.



5. The appellant therefore prays that the conviction be quashed and sentence set aside. By the time of writing this judgment, the appellants submission were not on the file. The Respondents had however filed their submissions contending that the three requirements that need to be proved in a charge of defilement were proved; with regard to age, a birth certificate was produced (PEX2) indicating that the complainant was ten (10) years old having been on 19/10/2008; that penetration was proved through the complainant's evidence which was corroborated by PW3 and the medical reports and lastly that the appellant was known to the complainant and she merely recognised him. On sentence, Counsel submitted that it is a lawful sentence.

6. This being a first appeal it behoves this court to re-examine all the evidence tendered in the trial court afresh, evaluate and analyse it and arrive at its own determination. This court must however make allowance for the fact that it neither saw nor heard the witnesses testify. This court is guided by the decision of *Okeno v Republic* (1972) EA 32 where the court said:-

An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) 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. (*Shantilal M. Ruwala v R.*, [1957] EA 570). 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, see *Peters v Sunday Post*, [1958] EA 424."

7. In support of its case, the prosecution called a total of four (4) witnesses namely; PW1 J.A.O, mother to the victim; PW3 P.O.A, sister to the victim; PW3 S. A. O the complainant. PW4 Kennedy Omenda, the Clinical Officer from Ongo Health Centre; and lastly, PW5 CPL William Kurgat the investigating officer.

8. PW1 testified that S. A. O, is her daughter who is mentally challenged and by then was in standard 3 and was born on 19/10/2008; that on 28/10/2018, she was with her three children at PEFA Church where she remained as the children went home. Later, her child Purity called to tell her to go and see what Wabile had done to her child. She reached home to find that her daughter had been defiled while fetching firewood.

9. S. A.O (PW3), informed PW1 that it was Wabile who did it and that P had found him in the act as S. A. O. screamed. PW1 took PW1 to hospital and reported to Okumbo Police Post. She produced the birth certificate as PEX No. 2.

10. PW2 P.O, a sister to S. A. O. recalled that on 28/1/2018, her and her sisters left their mother at the Church and headed home; that S. A. O. walked ahead of her. At about 2:00p.m she heard S. A. O. screaming "niache, niache meaning "leave me alone" from the bush and she recognised the voice as that of S. A. O. She ran there and saw S. A. O, lying down as George, the appellant ran off. PW2 knew the appellant as a neighbour.

11. S. A. O. (PW3) underwent a voire examination and gave unsworn evidence. She recalled that on 28/10/2018 at 2:00p.m, she was fetching wood. The appellant whom she identified as George Odhiambo took her to the bush, removed her pant, he removed his trouser and inner wear, touched her breast and put his thing for urinating into hers; she screamed and Purity came to the scene and



took her home; PW3 identified the appellant as the offender and that he had given her 20/= to buy mandazi. The court observed that the complainant kept on breaking down during her testimony.

12. PW4 examined the complainant on the same day 24/11/2018 and found the hymen to be absent but the labia and minora were normal.
13. PW5 received a report of defilement from the PW1 and PW3. He interrogated PW3 and escorted her to hospital and recorded her statement.
14. In his sworn defence, the appellant stated that he was residing with a widow by name Maureen Atieno at Kanyanjuok when he was arrested on 29/10/2018; that PW1 was her sister in law and he had a dispute with J's son over land. He reported to the Clan Elder and Chief. On 27/10/2018 it was alleged that he defiled PW1's daughter and was arrested by the man who had inherited PW1.
15. DW2 Caren Akinyi told the court that the Appellant is her husband and was surprised when members of public came to arrest him.
16. I have now considered all the evidence tendered before the trial court, the grounds of appeal and submissions by the Respondent. The appellant was charged with the offence of defilement contrary to Section 8 (1) and 8 (3) of the Sexual Offences Act. To prove the said offence the prosecution had to establish the existence of the following:-
  - 1) Proof that the victim is a minor;
  - 2) That there was penetration;
  - 3) That the perpetrator was positively identified.

#### **Of Age:**

17. In the case of Mwalango Chichoro Mwanjembe v Republic (2006) eKLR, the Court said as follows in regard to proof of age:-

.... The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence among other credible forms of proof.

See also *Francis Omuroni v Uganda* Criminal Appal No. 2 of 2000.

18. Proof of age may be proved through documentary evidence or even by observation. In this case the complainant's birth certificate was produced in evidence as PEX No. 2. It shows that PW3 was born on 19/10/2008. As of 29/11/2018 when the incident occurred, the complainant was ten (10) years old and therefore a minor.

#### **Proof of penetration:**

19. Penetration is defined in Section 2 of the Sexual Offences Act as :-

The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."



20. In the case of *Mark Oiruri Mose v Republic* (2013) eKLR

Many times “... in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. 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....”

21. From the above decision, the penetration need not be complete. The slightest penetration amounts to proof penetration envisaged under Section 2 of the *Sexual Offences Act*.

22. In this case, PW3 vividly narrated how the appellant removed her pant, removed his trouser and inner wear and inserted his thing for urinating into hers and she started screaming only for PW2 to arrive at the scene and the appellant ran off. PW3’s narration of the events is partially corroborated by PW2’s testimony on what she found on hearing her sister’s screams. PW4 did not find injuries to the labia majora but saw a whitish discharge which he suspected was sperms. Further the narration of PW2 and PW3, it is evident that the perpetrator was caught and fled before he could complete the act.

23. PW1 described PW3 as being mentally challenged. However, she went to school and was in standard 3. A voire dire was conducted by the trial court and PW3 was found to be intelligent enough to give unsworn evidence. Her evidence was quite clear as to what happened to her and her testimony was interrupted by her cries, evidence that she was reacting to the trauma she underwent as she recalled the events. She was cross examined and answered questions intelligently. So far, there is no medical evidence to support PW1’s contention that PW3 is mentally challenged so far there is no evidence that PW3 was so mentally challenged that she was unable to explain what happened to her. The court did not bother to have PW3 examined to ascertain her mental capacity but from what is on record, even if PW3 has any incapacity, it is minor or she is merely slow in learning and that is why she was still in class 3 at ten (10) years. She explained herself very clearly.

24. On identity of the appellant, there is no doubt that the complainant knew him. The appellant confirmed that they are neighbours with PW1, complainant’s mother. The incident occurred during the day at 2:00p.m PW2 found the complainant with appellant in the act and the appellant fled. I have no doubt that the appellant was caught red handed as the saying goes. His defence was all confused. He claimed to have disagreed with PW1’s sister’s son over ploughing. He never put any such question to PW1, PW2, or PW3. In fact his defence contradicted DW2’s testimony. The appellant claimed he was arrested in Maureen’s house while DW2 said he was in their house. Only them or both were lying. The defence is an afterthought and not believable.

25. The appellant raised the issue as to why PW2 was not subjected to voire dire examination yet she was a minor. Not all minors are subjected to voire dire examination. Minors of tender age will be subjected to voire dire or on the court’s observation. Though her age was not discussed. PW2 said she was in Form II and obviously she is elder than the complainant who was ten (10) years. The court must have observed and decided that she was old enough to testify without undergoing voire dire examination. Failure to conduct that examination did not prejudice the defence. PW2’s testimony is consent and she clearly answered the questions put to her. The court’s decision cannot be faulted on that basis. I find that the prosecution proved its case beyond all reasonable doubt. I affirm the conviction.

26. The appellant was sentenced to life imprisonment. The said sentence is lawful. The complainant was a child of tender age. The appellant was given the maximum sentence. The complainant’s reaction during her testimony demonstrates what trauma she suffered. Her innocence was violated at a tender



age and in exercise of this court's discretion, I hereby set aside the sentence of life imprisonment. I hereby substitute it with 25 years imprisonment. The sentence commence on 30/10/2018 when he was first arraigned in court.

27. The appeal succeeds to that extent only.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 1<sup>ST</sup> DAY OF MARCH, 2024.**

**R. WENDOH**

**JUDGE**

In presence of; -

Ms. Wainaina for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant

