



**Leariwala v Director of Public Prosecutions (Criminal Appeal  
E068 of 2023) [2024] KEHC 7035 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7035 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E068 OF 2023  
TW CHERERE, J  
JUNE 6, 2024**

**BETWEEN**

**NENEI LEARIWALA ..... APPELLANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

*(An Appeal from conviction and sentence in Isiolo MCSO No.  
E001 of 2022 by Hon.L.K.Mutai (CM) on 14th April, 2023)*

**JUDGMENT**

1. Nenei Leariwala (Appellant) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of *Sexual Offences Act* No.3 of 2006. Appellant 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. The offences were allegedly committed 03<sup>rd</sup> September, 2022 against AL a child aged 9 years.
2. Complainant stated that Appellant was his uncle. He explained how Appellant tricked him to go to his house and collect a charger to deliver to one Lengemya and when he got there Appellant locked the door and sodomised him. Complainant informed his aunt and mother who escorted him to report the incident to the police.
3. Treatment notes tendered as PEXH. 2 (a) reveal that upon examination on the date of the offence, Complainant was found to walk with difficulty and his anal area was wet, slippery with a clear discharge. The anal area was also greatly inflamed and anal tissue was red in colour from which an opinion was formed that there was sign of excessive friction arising from sodomy. The P3 form PEXH. 2 was filled on the basis of the diagnosis in the treatment notes.
4. Appellant was arrested on 04<sup>th</sup> September, 2022 which was a day after the incident and was subsequently charged.



5. In his sworn defence, Appellant raised the defence of alibi that he was in school when the offence was allegedly committed at about 02.00 pm.
6. The trial magistrate having heard the case for the prosecution and the defence rejected the defence, convicted and sentenced Appellant to serve life imprisonment.
7. Dissatisfied with both the conviction and sentence, Appellant lodged the instant Appeal and by amended grounds of appeal raised 5 grounds which I have summarized into 4 grounds that:
  - i. Appellant was not accorded a fair hearing
  - ii. Appellant's age was not considered
  - iii. Appellant was sentenced to maximum sentence
  - iv. Appellant's defence was not considered
8. Ms. Rotich for the DPP opposed the appeal on the ground that the prosecution case was proved to the required standard.
9. This being a first appeal, the court is expected to analyze and evaluate afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno vs. Republic* [1972] EA 32, *Pandya -vs- Republic* [1957] EA 336 and *Kiilu & Another vs. Republic* [2005]1 KLR 174.
10. An accused is innocent until the prosecution proves its case beyond any reasonable doubt. In the English case of *Woolmington vs. DPP* 1935 A C 462 in *Miller v Minister of Pensions* {1947} 2 ALL ER 372, the Court held at page 373:

“Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability”.
11. Before I delve into the issues of whether or not defilement was proved, I will address grounds 1 and 2 of the appeal.
12. Concerning legal representation, *the Constitution* of Kenya recognises and protects the right to state funded legal representation by all accused persons in Kenya. The *Legal Aid Act* espouses on this right by setting out the procedures, terms and institutions to offer legal aid services to persons who cannot afford them.
13. The Supreme Court in *Petition No 5 of 2015 Republic -vs- Karisa Chengo & 2 others* [2017] eKLR stated as follows concerning legal representation: -

“In the above context, it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expenses specifically. Inevitably, there will be instances in which legal representation at the expense of the State will be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether



substantial injustice will be suffered, a court ought to consider, in addition to the relevant provision of Legal Aid Act, various other factors which include:-(i)the seriousness of the offence;(ii)the severity of the sentence;(iii)the ability of the accused person to pay for his own legal representation;(iv)whether the accused is a minor;(v)the literacy of the accused; and(vi)the complexity of the charge against the accused.”

14. The trial court availed legal representation to Appellant albeit at the tail end of the hearing. Whereas the Appellant faced a serious charge that attracted a life imprisonment, it was not demonstrated that he did not understand the issues or that the case was complex or that he was not able to defend himself. The appellant did not demonstrate that he suffered injustice for proceeding without counsel.
15. Concerning Appellant’s age, an age assessment report tendered before the court revealed that he was 19 years old and was thus rightly tried as an adult.
16. Concerning prove of the prosecution case, it is trite that the age of a minor is a critical component of a defilement charge and that it is an element which must be proved by the prosecution beyond reasonable doubt. (See Kaingu Kasomo vs. Republic Criminal Appeal No. 504 of 2010).
17. Proof of the age of a victim of defilement is crucial because the prescribed sentence is dependent on the age of victim. (See Hadson Ali Mwachongo vs Republic Criminal Appeal No. 65 of 2015 [2016] eKLR & Alfayo Gombe Okello vs. Republic Cr. App. No. 203 of 2009[2010] eKLR.
18. A certificate of birth tendered in evidence reveals that complainant was born on 03<sup>rd</sup> April, 2013 and was therefore a minor aged 9 years at the time of the commission of the offence.
19. Concerning penetration, Section 2 of the Act defines penetration to entail: -

“partial or complete insertion of a genital organ of a person into the genital organ of another person.”
20. Treatment notes tendered as PEXH. 2 (a) reveal that tat at the time of examination a day after the offence was committed, he walked with difficulty, the anal area was wet, slippery with a clear discharge and was also greatly inflamed and tissue were red in colour. Medical evidence demonstrated there was penetration and the trial magistrate’s finding that penetration was proved was well founded.
21. Concerning Appellant’s culpability, I have considered the case of Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal had this to say regarding reliance on Section 124 of the Evidence Act to convict:

“as a general rule of evidence embodied in Section 124 of the Evidence Act, an accused person shall not be liable to be convicted on the basis of the evidence of the victim unless such evidence is corroborated. The proviso to that section makes an exception in sexual offences and provides as follows:

“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.”
22. The trial court rejected the Appellant’s defence of alibi on the ground that complainant was telling the truth



23. Concerning the defence of alibi, the Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held:
- “An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.” (Emphasis added).
24. In the case of *Victor Mwendwa Mulinge vs Republic* [2014] eKLR the Court of Appeal held that -
- “Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with Section 309 of the Criminal Procedure Code to rebut the appellant’s defence”. (Emphasis added).
25. Indeed, Section 309 of the Criminal Procedure Code provides that: -
- “If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
26. Accused stated he was in class 6 at [Particulars Withheld] Primary School and was at school on the date and time that the offence was allegedly committed. That far, his duty was discharged when Prosecution failed to rebut his defence of alibi,
27. I have considered the judgment of the trial court and I find that the Appellant’s defence of alibi was not appropriately considered. I am of the considered opinion that the alibi cast a reasonable doubt on the prosecution case and the learned trial magistrate ought to have given the Appellant the benefit of the doubt.
28. From the foregoing, I find that Appellant was entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.
29. In the end, it is hereby ordered:
1. The appeal succeeds
  2. The conviction is quashed
  3. The life sentence is set aside
  4. Unless otherwise lawfully held, Appellant shall be set at liberty

**DELIVERED AT MERU THIS 06<sup>TH</sup> DAY OF JUNE 2024**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistants - Kinoti/munene



Appellant - Present in person  
For DPP - Ms. Rotich (PC-1)

