



**Aseno v Republic (Criminal Appeal E015 of 2022)
[2023] KEHC 1856 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E015 OF 2022
TA ODERA, J
MARCH 15, 2023**

BETWEEN

ALFRED OGUTA ASENSO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against both the Conviction and Sentence dated 23.09.2021 in Criminal Case No. 59 of 2020 at Migori Law Court before Hon. H.C. Maritim - RM)

JUDGMENT

THE CHARGE

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on diverse dates between May 15, 2020 to June 6, 2020 in Uriri Sub County within Migori County he wilfully caused his penis to penetrate the Vagina of JAO a girl child aged 15 years.
2. He 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 particulars were that on diverse dates between May 15, 2020 to June 6, 2020 in Uriri sub county within Migori County he wilfully touched the vagina buttocks and breasts of JAO a girl child aged 15 years

Evidence Before The Trial Court

3. On or about May 14, 2020 PW1 JAO a girl aged 15 was informed by a relative going by the name Otieno that he wanted to take her on a journey. Otieno then travelled with PW1 to Kanyamkago where they met the Appellant. PW1 testified that Otieno then left her at the house and on the second night of her visit the Appellant removed her clothes and had sex with her. That thereafter he stayed at the house for three weeks during which the Appellant slept with her for the entire period. It was her further



testimony that on the June 6, 2020 her mother came and took her to Ndhiwa police station and then to a medical facility.

4. PW2 BAO PW1's mother testified that on May 14, 2020 she arrived home and found her daughter missing. She then looked for her within the neighbour but couldn't find her. She later got information that her daughter had been taken to a preacher by Otieno. On the June 6, 2020 Otieno took her to the residence, where after a while her daughter was brought. It was her testimony that her daughter was supporting herself on the wall while walking. She then took her back to Ndhiwa where she reported the matter to the police.
5. PW3 POO a village elder testified that on the August 15, 2020 he received a report that the Appellant was with a school girl. It was his testimony that the Appellant was thereafter brought to his house together with PW1's parents after which he took them to the police station whereupon he recorded his statement.
6. PW4 Monica Mbugua the investigating officer herein on her part stated that on August 17, 2020 while performing general duties at Uriri police station received a report from two officers from Ndhiwa who reported a defilement case. She then interrogated PW1 who narrated how the Appellant had defiled her on numerous occasions between May 15, 2020 to June 6, 2020. She then preferred defilement charges against the Appellant.
7. PW5 Stephen Kerago a Clinical officer at Rangwe Sub-County hospital produced the P3 form with regard to PW1. It was his testimony that the vaginal walls were bruised which was an indication of vigorous penetration.
8. DW1 the Accused gave an unsworn testimony in which he denied ever committing the defilement. It was his further testimony that he did not even know PW1.
9. Upon conclusion of the hearing and via a judgment dated September 23, 2021 the accused was found guilty of defilement contrary to Section 8(1) as read with Section 8(4) of the [Sexual Offences Act](#) no 3 of 2006 and sentenced to 15years imprisonment.

The Appeal

10. Aggrieved by the court's judgment the Appellant has now proffered this appeal on the following grounds.
 - a. That he pleaded not guilty to the charges.
 - b. That the trial court erred in both law and fact by failing to comply with article 50(2) (g) of the [Constitution](#) 2010.
 - c. That the trial court erred in both law and fact by not observing that the ingredients of the offence herein were not proved as required in law.
11. He called for the conviction to be quashed and sentence set aside.
12. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on November 15, 2022 while the Respondent filed theirs on January 6, 2023.

Appellant's Submissions

13. In his submissions the Appellant contended that his constitutional right to representation was infringed before the trial court, resulting in an inadequate defence. It was his further submission that PW1's evidence was incredible since she was not subjected to *voire dire*.



14. It was his further contention that by failing to call the person who took PW1 to Ndhiwa and by not visiting the scene of crime the Respondent had failed to prove the crime to the required standard. Based on the above he called for the conviction to be quashed and the sentence set aside.

Respondent's Submissions

15. Vide submissions dated January 4, 2023 the Respondent averred that all the ingredients for defilement had been met. In respect of the victim's age it was their contention that as per the birth certificate the victim was 14 years 10 months 10 days, at the time of the commission of the offence. In view of this age it was their submission that the trial court should have convicted the Appellant under Section 8 (3) of the [Sexual Offences Act](#).
16. Regarding penetration it was their averment that PW1's testimony to the effect that she slept with the Appellant for 3 weeks coupled with the testimony of the clinical officer and the P3 form showing vigorous penetration was sufficient.
17. As regards identification it was their contention that the same was a foregone conclusion since PW1 spent considerable time with the Appellant.
18. As for the issue of *voire dire* not being conducted it was their contention that it did not vitiate the conviction herein. They argued that the victim being 14 years she was not a child of tender years and was of sufficient intelligence to understand the nature of the oath. They urged that in the presence of sufficient independent evidence to support the charge *voire dire* could be done away with as was held in the case of *Athumani Ali Mwinyi vs R*.
19. With respect to non-compliance with Article 50(2)(h) the Respondent was of the opinion that the right to legal representation at the state's expense was not automatic but qualified. It was their averment that the Appellant had not demonstrated substantial injustice as elucidated in the Supreme Court case of [Republic vs Karisa Chengo & 2 Others \[2017\] eKLR](#). They stated that the Appellant had not exemplified the complexity of the case, seriousness of offence, and inability to conduct his defence to warrant the need for counsel.
20. Regarding the sentence they urged this court to resentence the Appellant under Section 8(3) of the [Sexual Offences Act](#) given that the victim was less than 15 years old.

Issues For Determination

21. Before enumerating the issues it is important to note the duty of the first appellate court which as was held in the case of [Mark Oiruri Mose vs R \(2013\) eKLR](#) is to revisit the evidence tendered before the trial court, evaluate it afresh, analyse it and come to its own independent conclusion bearing in mind that it did not hear and observe the demeanour of the witnesses first hand.
22. With this out of the way the following issues arise for determination.
- a. Whether Article 50(2)(g) of the [Constitution](#) was infringed during the trial?
 - b. Whether the ingredients of defilement were proved?

a. Whether Article 50 (2)(g) of the [Constitution](#) was infringed during the trial?

The provision states as follows: -

50(2) Every accused person has the right to a fair trial, which includes the right-

(g) To choose, and be represented by an advocate, and to be informed of this right promptly.



Additionally, The [Legal Aid Act](#), 2016, at section 43, sets out the duties of the court when interacting with an unrepresented person, and states:

' "A Court before which an unrepresented accused person is presented shall:

- a) Promptly inform the accused of his or her right to legal representation;
- b) If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and
- c) Inform the service to provide legal aid to the accused person."

23. A cursory look at the proceedings herein clearly shows that the Appellant was not informed of his rights under Article 50(2) (g) of the [Constitution](#). In their submissions the Respondent mainly dealt with the Appellants rights under Article 50(2) (h) of the [constitution](#). However, the right under Article 50(2) (g) is distinguishable from the right under Article 50(2) (h) in that the former only deals with informing an accused person of his/her right to be represented by an Advocate, while the latter deals with instances where the State must assign an Advocate to an accused person.
24. The Respondent went to great lengths to submit on Article 50(2)(h) which was not what was contained in the petition of appeal.
25. In respect of the need for informing the Appellant of his right to representation Lord Denning had this to say in *Pett vs Greyhound Racing Association (1968) 2 All ER 545*

' It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.'

26. Similarly, in the Supreme Court case of Republic -vs- Karisa Chengo & 2 Others [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of the [Constitution](#) stated as follows: -

' The right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.'

27. From the totality of the above it is plain to see that the principles of a fair trial were not observed.
28. The consequence of that was that the trial was compromised.
29. Having found that the Appellant's rights under Article 50(2)(g) were infringed there would be no need to delve into the merits of the appeal.
30. On whether the conviction and sentence should be quashed, I note that this was a 2020 case and it was decided in the year 2021, there was no suggestion that the witnesses cannot be found. There was no mistake on the part of prosecution but the court while failed to explain to appellant his Right to counsel. In view of the evidence adduced herein and the fact that appellant was not informed of his Right to counsel, no injustice will be occasioned to appellant. It is in the interest of justice that a re-trial



be held. This decision is guided by Court of Appeal case of *Samuel Wabini Ngugi v R (2012) eKLR* where the Court stated as follows:

'The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person.'

31. In view of the foregoing the Appellant's conviction and sentence is hereby quashed and the matter sent back for retrial before a magistrate other than Hon HM Maritim. Mention on March 20, 2023 before the Senior Principal Magistrate Migori for Plea.
32. Orders accordingly.

T. A. ODERA - JUDGE

15.3.2023

DELIVERED VIA TEAMS PLATFORM IN THE PRESENCE OF;

Appellant present in person.

Owuor for Respondent,

Court Assistant; Nyaoke.

Language: English/Luo

Luo interpreter.

T.A ODERA - JUDGE

15.3.2023

