



**JAO v Republic (Criminal Appeal E066 of 2021)
[2023] KEHC 1578 (KLR) (Crim) (8 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E066 OF 2021
JM BWONWONG'A, J
MARCH 8, 2023**

BETWEEN

JAO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. P. Mutua, S.P.M, delivered on 14th July 2021 in Kibera Chief Magistrates Court in Sexual Offences Case No. 62 of 2015 Republic vs Jerry Atuya Onchwari)

JUDGMENT

1. The appellant filed his appeal against the conviction and sentence of thirty (30) years imprisonment in respect of the offence defilement contrary to section 8 (1) as read with 8 (2) of the [Sexual Offences Act](#), No 3 of 2006.
2. The grounds raised in his petition are as follows. The learned trial magistrate erred in law and fact in failing to comply with the provisions of section 200 (3) of the [Criminal Procedure Code](#) (Cap 75) Laws of Kenya, upon taking over the proceedings from his predecessor. The learned trial magistrate erred in convicting the appellant, when important prosecution witnesses were not called to testify. The learned magistrate erred in law in relying on hearsay evidence, innuendos and conjectures in reaching the decision to convict the appellant. The learned magistrate further erred in allowing the trial to proceed without according the appellant the right to legal representation. The learned magistrate erred in law admitting documentary and secondary evidence to be tendered by the prosecution without due regard to evidential and procedural safeguards. The learned trial magistrate erred in law in relying on a defective charge sheet. The learned magistrate further erred in law in failing to consider the appellant's defence. Finally, the learned magistrate erred in law in imposing a harsh sentence.



3. As this is the appellant's first appeal, the role of this appellate court of is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oiruri Mose vs R [2013] e-KLR* that this court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.
4. DMO (name withheld) (PW 1) told the court that in 2015, he used to live with his father in Nairobi, while his mother lived in Mombasa. The house had one sitting room, one bedroom and a kitchen. In April 2015, his father (the appellant) herein called him to sleep with him in the bedroom. During the night, he wore a condom and inserted his penis into his anus. This happened several times. He informed their houseboy of this incidents.
5. The houseboy (K) told his mother's friend, who took him to Nairobi Women's Hospital and Meridian Hospital for treatment in the company of the school director. His mother was also informed and travelled from Mombasa. At the hospital, he explained what had happened and was treated. In cross examination, he denied accusations that it was K who had defiled him. She was also informed that he had been taken to hospital and proceeded to travel to Nairobi.
6. JNH (PW 2) testified that she is the mother of the complainant, who was born on June 29, 2007. She testified that she is the former wife of the appellant. In April 2014 the appellant had been staying with the complainant as their other children were in boarding school. It was her testimony that on October 22, 2015 she received a call from K who informed her that PW 1 had been defiled and the appellant was responsible.
7. In cross-examination, she testified that when the complainant was in hospital, she did not tell the appellant the whereabouts of PW 1. She told him that he was missing. When the appellant went to make missing person report at the police station, he was arrested.
8. Simon Nzambu (PW 3), a clinical officer from Nairobi Women's Hospital was called to testify but was stood down. This is because he was not the maker of the document he wanted to produce as an exhibit in court.
9. George Mugo (PW 4) a director of [Particulars Withheld] testified that the complainant was a pupil in his school. He gave evidence that on October 19, 2015, he was in the office when one of the parents (Mama M) told him that he had been informed by K that the complainant was being sexually abused. He called PW 2 who was the known parent, who directed them to take the child to hospital. That in the company of Mama M and K, they took the complainant to Meridian Hospital, where he was treated. The incident was also reported at Ngong' Children's Office and Kiserian Police Station.
10. KT (PW 5) testified that he was hired by the appellant as a houseboy from 2015. He testified that on October 22, 2015, after the appellant had already left, he found the complainant crying. Upon inquiry, the complainant told him that the appellant had defiled him. He escorted him to school but the complainant had difficulties walking. He informed Mama M of the incident, who in turn informed PW 4 of the incident. They took the complainant to Meridian Hospital and Nairobi Women's Hospital for treatment.
11. He told the court that when they reported the incident at the police station, the police told them to inform the appellant that the child was missing. That the appellant was arrested when he went to make a report of a missing person. In cross-examination, he testified that he had never asked for money from the appellant to withdraw the statement made at the police station.



12. No xxxx CPL Jared Osumba (PW 6) gave evidence that in 2015 he was deployed at Kiserian Police Station. On October 23, 2015, a case of defilement was reported by PW 4. The appellant had also gone to the station to make a report of a missing person and had been arrested. He proceeded to record statements from the complainant, witnesses and the appellant. A P3 form was filled. He proceeded to charge the appellant with the offence he is convicted of.
13. Dr Kizzie Shako (PW 7) told the court that on October 26, 2015, she examined the complainant who was a victim of an alleged sexual assault. Upon examination, she found healing wounds on the back, healing lacerations on the anus, tear on the anus, low muscle tone and he could not hold stool due to loose muscles around the anus. She concluded that the incontinence of stool can be caused by injuries on the anal region.
14. She told the court, that she also examined the appellant but everything was normal. She produced the complainant's and the appellant's P3 forms.
15. John Njuguna (PW 8) a clinical officer at Nairobi Women's Hospital produced a PRC report dated October 24, 2015 on behalf of Sospeter Mwangi, who was not available. He indicated it was his colleague, who had examined the complainant on October 23, 2015 after a reported case of defilement. The findings were as follows. There was pemnoal tenderness at the anal region towards the penis, tear at the anus at 3.00 O'clock and towards the back and reduced ability to hold stool. HIV tests, syphilis and hepatitis tests conducted were negative. He was treated and discharged.
16. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he gave sworn testimony and called one witness. In his defence, he testified that he was married to PW 2 with whom they were blessed with three (3) children with the complainant, being the youngest. On October 23, 2015 he woke up and went on his normal routine duties. At around 5. 00 pm, he received a call from the houseboy, who informed him that the complainant had not arrived home. He inquired from neighbours but no one had seen the complainant. He went to the police station, where he was arrested. He blamed his woes on his estranged wife (PW 2), whom he accused of setting him up after a disagreement in 2014. He denied ever defiling his child. He told the court that the complainant was coerced by his mother to give false evidence against him.
17. In cross-examination, he testified that he was shocked by the findings of the medical examination in respect of the defilement of his son.
18. Bishop O (DW 2) told the court that the appellant is his friend and workmate having known him for 20 years. He testified that he did his own fact finding and found that the case against the appellant was baseless. In cross-examination, he testified that he was not with the appellant, when the alleged incident took place.
Analysis and determination.
19. In ground 1 the appellant argued that the trial court did not comply with the provisions of section 200 (3) of the Criminal Procedure Code upon taking over the proceedings from his predecessor.
20. The previous learned trial magistrate (Hon Mutuku, SRM) fixed the case for hearing on February 6, 2020. The succeeding learned magistrate (Hon Mutua, SPM) took over the trial of the appellant from February 6, 2020. When the succeeding learned magistrate took over the trial of the appellant's case, he did not comply with the mandatory provisions of section 200 (3) of the Criminal Procedure Code. These provisions required the succeeding learned trial magistrate to explain to the appellant that he had a right to recall witnesses, who had previously testified. This was not done. It therefore follows that



the appellant did not have a fair trial. I find it is moot or academic to consider the remaining grounds of appeal and I hereby decline to do so. Put differently this was a mistrial.

21. It is on the foregoing ground alone, that the appeal succeeds with the result that the conviction and sentence are hereby quashed.
22. The only issue that falls for consideration is whether I should order a re-trial of the appellant pursuant to this court's powers under section 354 (3) (a) (i) of the Criminal Procedure Code. I find the appellant was charged in the lower court on October 26, 2015. The trial was concluded on July 14, 2021, which translates to a period of over seven years. Some witnesses may not easily be traced. Memories of the witnesses may have lapsed. In the circumstances, I find that a re-trial may not serve the interests of justice.
23. I therefore decline to order a re-trial of the appellant by a court of competent jurisdiction.
24. The appellant is hereby set free unless he is held on other lawful warrants.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Mr. Nyaberi for the appellant

Ms Oduor for the respondent

The appellant in person.

