



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**FO alias A v Republic (Criminal Appeal E066 of 2022)
[2023] KEHC 3380 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3380 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E066 OF 2022
RPV WENDOH, J
APRIL 20, 2023**

BETWEEN

FO ALIAS A APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. H. C. Maritim, Resident Magistrate in Chief Magistrate's Sexual Offence Case No. E092 of 20221 delivered on 30/3/2022)

JUDGMENT

1. This is an appeal by FO alias A. He is aggrieved by the judgment of the Resident Magistrate Migori, which was delivered on 6/4/2022.
2. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*.
3. The particulars of the charge are that on 15/12/2020, in Migori County, willfully and unlawfully caused his penis to penetrate the vagina of LAO, a child aged four (4) years.
4. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. It was alleged that on 15/12/2020 at [Particulars Withheld] village, willfully and unlawfully caused his penis to come into contact with the vagina of LAO a child aged four (4) years.
5. The appellant was found guilty of the main charge of defilement and sentenced to serve twenty (20) years imprisonment. The conviction and sentence provoked this appeal.

The grounds of appeal are as follows:-



1. That the trial court failed to comply with Articles 53 (i)(f) 19(3)(a), 20 (ii) and (2) 28 (i) (g) of *the Constitution*;
 2. That the court failed to comply with Articles 50 (2) (g) (h) of *the Constitution*;
 3. That trial court erred by failing to comply with Sections 2, 18 and 19 of the Children's Act;
 4. That the court erred by failing to comply with Sections 186, 190 and 191 of the Borstal Institution Act;
 5. That the prosecution failed to prove its case to the required standard;
 6. That the prosecution failed to prove the appellant's age.
6. The appellant therefore prays that the conviction be quashed and sentence set aside.
 7. The appellant filed submissions in support of the appeal. He argued that the ingredients that make the offence of defilement were not proved i.e. age, penetration, and identification of the perpetrator.
 8. In respect of the age, the appellant went on to argue about his own age, that he was a minor at the time of the alleged offence. He never addressed the complainant's age.
 9. As to identification of the appellant as the perpetrator, the appellant argued that the complainant was first stood down so that she could be coached and that the complainant exonerated the appellant from blame and that the evidence given through the intermediary was inadmissible because the intermediary was the child's mother but not an independent person.
 10. It was the appellant's contention that the testimonies of the prosecution witnesses PW1, PW2, PW3 and PW4 were contradictory especially as regards the time PW1 went missing and when she was found. He also pointed out that PW2 and PW5's testimonies were contradictory when it was alleged that the complainant was bleeding from the mouth and had strangle marks on her neck but that PW4 denied that the complainant bled from her private parts; that PW5 who examined PW1 never saw the blood or injuries.
 11. The appellant claims to have been aged sixteen (16) years eight (8) months at the time of the offence and should have treated as a child and that the court erred in disregarding the probation officers report on how to sentence the appellant.
 12. The Respondent filed their submissions belatedly on 16/3/2023. The prosecution counsel identified several issues arising from the grounds of appeal.
 13. On whether the plea was properly taken, counsel submitted that the Record of Appeal bears witness that the court complied with Section 207 of the Criminal Procedure Code.
 14. As to whether the appellants rights under Article 50 (2) (g) and (h) of *the Constitution* were violated, counsel observed that the Appellant was informed of his right to counsel before plea was taken. As regards Article 50(2) (h) Counsel relied on the case of Thomas Alugha Ndegwa vs. Republic (2016) eKLR where the appellant had been charged with a similar offence and challenged the conviction present to Article 50 (2) (h) and the Court of Appeal held that the said right to representation by counsel at State expense is not an automatic right. Counsel also relied on the decisions of Karisa Chengo & 2 Others vs. Republic Criminal Appeal 44, 45, and 76 of 2014 where the same issue was considered. Counsel also referred to the case of S vs. Halgryn 2002 (2) Sacr 211 (SCA) where the Court held that the said right is not absolute and can sometimes be limited . The same provision was considered in



Sheria Mtaani Na Shadrack Wambui vs. Office of the Chief Justice & Another Office of Director of Public Prosecutions & Another (Interested Parties) (2021)eKLR, where J. Mrima held inter alia that:-

“(i) Legal representation is a qualified constitutional right.”

15. The court added that the said right is not limited to “unrepresented accused persons charged with the offence of murder and children in conflict with the law continue to be entitled to legal representation at State’s expense.....
16. Counsel urged that the appellant was found to be eighteen (18) years of age and hence the case did not meet the ‘substantial injustice’ threshold; that the appellant could have applied to the legal Aid Committee for legal services which he did not do.
17. On proof of the offence of defilement, it was the respondent’s submission that the prosecution produced in evidence the complainant’s birth certificate which indicated that she was four (4) years eight (8) months. On penetration, the complainant clearly stated that the appellant put his genital organ into hers and the medical evidence did prove penetration. As to identification of the perpetrator, the complainant was adamant that it is the appellant who took her to the sugar cane farm and defiled her.
18. The appellant alleged that the prosecution evidence was full of inconsistencies but that he failed to establish any substantive inconsistencies. On the medical report, counsel clarified that the complainant was examined on 12/1/2021, twenty-eight (28) days after the incident and it was not possible to find fresh bruises or blood, but that the medical notes captured the complainant’s status on the date the complainant was sexually assaulted.
19. Counsel found no serious inconsistency with the time that the complainant’s parents found her missing and rescuing her. Counsel argued that the parents noticed the complainant missing at different times. The appellant also complained that PW1 was stood down to be coached but the child being of tender age, was uncomfortable in court and that is why an application was made that she be stood down, she testified through an intermediary.
20. Counsel relied on Section 124 of the Evidence Act which provides that the court can rely on the evidence of a victim of the offence of defilement if the court believes the minor and the court gives reasons why it believes that the child is saying the truth.
21. This being a first appeal, this court is duty bound to examine the evidence tendered in the trial court, analyse and evaluate it afresh and arrive at its own independent findings. This court is guided by the decision in *Okeno vs. Republic* (1971) E. A. 32.
22. In support of this case, the prosecution called a total of five (5) witnesses. The complainant LAO (PW1); a child aged about four (4) years was unable to testify being of tender age and testified through an intermediary who was her mother EA PW2. The complainant told the court that the appellant Afili, found her behind the house, took her to the sugarcane plantation; that he removed her clothes, and placed his genitalia into hers, and after beating and strangling her, he left her and later her mother found her and took her to hospital.
23. PW2 EA told the court that the complainant is her child and on 15/12/2020, she left to go to look for firewood and returned at 12:30p.m but did not find PW1. PW2 enquired from her other daughter Brenda aged seven (7) years but she did not know PW1’s whereabouts. She cooked, fed the children and went in search of the complainant. She searched for her till 5:00p.m and started calling out her name loud and heard a voice from the sugarcane / maize plantation. She followed the sound and found PW1 lying down naked in the sugarcane and on enquiring, PW1 told PW2 that Afili took her there,



- undressed her, beat her up and strangled her inserted his genitalia into hers. PW2 said that PW1 was bleeding from the mouth and nose and had strangle marks around the neck. PW2 started to scream on hearing the complainant's narration and her husband and other people arrived where she was. She took the child to Uriri hospital but doctors were on strike and they ended up at Ombo Mission Hospital where PW1 was admitted for three (3) days. PW2 told court that she knew 'Afili' as their neighbour,
24. the appellant, and on returning home they found that he had disappeared. PW2 stated that the complainant and another frequented the appellant's house.
 25. PW3 PC (W) Luciana Akoth Moses of Uriri Police Station received a report of defilement from the parents of the complainant. The father left to go and arrest the suspect 'Afili' but found he had fled. PW3 interrogated the complainant, while in hospital and she narrated to PW3 what had happened. In January, 2021 PW3 went to look for the appellant at his school but was informed that he had not reported back to school. PW3 asked the Clinical Officer to examine PW1 and filled the P3 form; that on 19/12/2021, PW3 was informed by the complainant's father that the appellant had been spotted at his home. She visited the appellants' home and found the appellant locked up in a house and had a bandage on the head and looked sick. PW3 arrested him; that the appellant claimed to be seventeen (17) years old while the mother produced a birth certificate indicating that he was ten (10) years old but upon his age being assessed, he was found to be over eighteen (18) years old.
 26. PW4 POO, the father of the complainant asked for the complainant at about 5:30p.m but the mother did not know where she was; that he also heard a voice from a far and PW2 went for PW1. PW4 observed that she had strangle marks on the neck and blood oozed from her private parts. She was admitted at Ombo Mission Hospital for three (3) days ' they reported to Uriri Police Station. PW4 said that when he enquired from the complainants what had happened to her, she named "Afili" as the perpetrator.
 27. PW5, Moindi Justus Magati a clinical officer examined the complainant on 12/1/2021 and found that she had healed bruises on the right and left side of the neck, visible lacerations on the labia majora and hymen was freshly broken and tender. He also noted that the patient had been treated at Ombo Mission Hospital and considered the treatment notes.
 28. The appellant (DW1) gave unsworn testimony and called his mother RA (DW2) as a witness. DW1 told the court that he is a student at [Particulars Withheld] Secondary School, and is eighteen (18) years old having been born in 2003. He denied having been home on 15/12/2020 because he had travelled to Kisumu on 12/12/2020 and returned home on 16/12/2020. He also denied knowing complainant or her parents.
 29. DW2 admitted to knowing the complainant and her parents who were her neighbours. In fact, she recalled that on 12/12/2020 she came back home at 6:00p.m and found the complainant's mother called the minor; that the minor came from the sugarcane farm and was scratched by thorns on her nose and PW1 took her towards the road; that later, PW4 attacked them and they ran away to report to police; that the son was in school and returned and went to police station on 19/12/2021. She also admitted that the appellant is also known by the alias name 'Afili'. In cross examination she admitted that the appellant was at home in December, 2020.
 30. I have duly considered the evidence tendered in the trial court, the grounds of appeal and submissions of the parties. The issues that arise from the grounds are as follows:-
 1. Whether the appellant's fundamental rights were breached;
 2. Whether the prosecution established the ingredients that form the offence of defilement;



3. Whether the prosecution evidence was contradictory as alleged;
 4. Whether the appellant was a minor and should have been sentenced under the Children's Act.
31. When one alleges breach or threatened breach of his fundamental rights, it is trite law that he should plead with specificity the Article of *the Constitution* that is breached, particulars of breach and the nature of the breach, as was held in *Anarita Karimi Njeru vs. AG (1979) 1KLR 154*.
 32. Though the appellant had alleged breach of his fundamental rights in the grounds of appeal, he did not expound on the said allegations in his submissions. Article 50 of *the Constitution* guarantees an accused persons' right to fair trial. Article 50 (2) (g) & (h) provides 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.
 - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.
 33. As regards Article 50 (2) (g) the Court is required to inform an accused of his right to choose on advocate to represent him and that information has to be given promptly, that is, before plea is taken or soon thereafter to enable the accused seek legal advice or seek Legal Aid. See *Chacha Mwita vs. Republic Criminal Appeal 33 of 2019 (J. Mrima)*.
 34. In this case, before plea was taken on 21/12/2021, at the first appearance in court, the court informed the appellant of his right under Article 50(2)(g). The said Article was complied with.
 35. As regards Article 50 (2) (h) though the said right was not explained to the appellant, it is not absolute. An Advocate can only be assigned to an accused at State expense if 'substantial injustice' otherwise result. In *Thomas Alugha Ndegwa vs. Republic (2016)eKLR*, the Court of Appeal in considering the said Sub Article urged that the guiding principle is substantial injustice and held that the right was not automatic and there are instances when the right can be denied. The Court of Appeal also considered the said provision in *Karisa Chengo & 2 Others vs. Republic Criminal Appeal 44, 45 & 76 of 2014* where it held:-
 - “...a person would be entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation.... Substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death...”
 36. The said court cited the case of *S. vs. Halgryn (2002) (2) Sacr 211 (SCA)* where the court said:-
 - “..... Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute.....”
 37. As was held by the Court of Appeal in *Julius Kamau Mbugua vs. Republic Criminal Appeal 50 of 2008*, the appellant should demonstrate that he was inhibited in the prosecution of his case. The appellant has not demonstrated that he was inhibited in the prosecution of his case due to lack of understanding or language. He was able to cross examine witnesses and actively participated in the hearing.



38. The appellant also urges that he was a child at the time to of his trial. In Kenya today, only persons charged with offence of murder and children in conflict with the law are entitled to be provided with counsel at State expense. They are automatically entitled to legal representation at State expense. In *Sheria Mtaani Na Shadrack Wambui vs. Office of the Chief Justice & Another; Office of the Director of Public Prosecutions & Another (Interested Parties)* (2021) eKLR; J. Mrima held that:-
- 39.
- (i) Legal representation is a qualified constitutional right.
 - (iii) Unrepresented accused persons charged with the offence of murder and children in conflict with law continue to be entitled to legal representation at State expense.”
40. When the appellant was arraigned before the trial court on 21/12/2021, he alleged that he was 17 years and an Age assessment was done on 22/12/2021. He was said to be above eighteen (18) years old. The age assessment was done at Migori County Referral Hospital. The person who assessed the age used the dental formular which is more accurate. The appellant testified that he was born in 2003. He did not specify the date of birth. He then purported to produce a birth certificate which shows that he was born on 20/4/2004 which is contradictory. In addition, the investigating officer (PW3) told the court that the appellant’s mother showed him the appellant’s birth certificate, indicating that the appellant was ten (10) years old, having been born on 20/4/2011. One can only have one birth date and one birth certificate. The production of contradictory birth certificates is evident that the appellant was trying to conceal his actual age. The court will find that the age assessment using the dental formula done by a neutral person was the accurate one. The offence was allegedly committed at the end of 2021 i.e. 20/12/2021. Whatever the case, the appellant was already eighteen (18) years old, He was an adult and Article 50(2) (h) of *the Constitution* would not automatically cover him. As for the other rights under Article 53, 20, 28 and 19, the appellant did not make any reference to that.
41. I find that the trial court did not violate any of the appellants rights. It also follows that the court did not need to invoke the provisions of the Children’s Act and the Borstal Institution Act because the appellant is not a child.

Whether the offence of defilement was committed:

42. To prove defilement, one has to establish, the existence of the following; penetration, age of the complainant and the identity of the perpetrator.

On age:

43. The complainant’s parents PW2 and PW4 testified that she was three (3) years old. PW2 produced the complainant’s birth certificate which shows that she was born on 22/2/2016. By 15/12/2020, PW1 was four (4) years old. The age still falls under the age bracket in Section 8(2) of the *Sexual Offences Act*. The complainant was a child of tender age.

Proof of penetration:

44. 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.”



45. When PW2 first found the complainant, she said that the complainant narrated to her what the appellant did to her, that he first undressed her and put his 'dudu in her dudu' that he put his genital organ in hers. 'Dudu' is a common word used by children when referring to their genital organs. PW2 noted injuries to the complainant's neck and bleeding from the nose and mouth. PW3, the investigating officer, also said that the complainant narrated to her the same story. Of how 'Afli' took her to the sugarcane plantation, slapped and strangled her when she cried as he put his genital organ in hers. PW5 examined the complainant on 12/1/2021. He confirmed that there were lacerations to the complainant's labia majora, hymen was freshly broken and tender and had bruises on the left and right side of the neck. The complainant was first admitted and treatment notes to that effect were produced in evidence. This witnesses also complained that the Doctors were on strike and so it took about twenty eight (28) days before PW1 was examined. That explains the healing lacerations and why PW5 could not have seen any blood on PW1. PW1 testified through an intermediary and her testimony was corroborated by that of PW2, PW3 and PW5. No doubt penetration was proved.
46. Proof of the identity of the perpetrator: The complainant a young child of about four (4) years, she testified through an intermediary who is her mother.
47. Though PW1 was alone, once found by the mother PW2, she narrated that Afli who defiled her. The matter was reported to the police station the same day and Afli was named as the suspect. In fact DW2, the appellant's mother confirmed that on the same evening, the complainant's father (PW4) attacked her family. PW4 must have attacked DW2, after the compliant appellant was named as the perpetrator.
48. The appellant complained that the complainant (PW1) was stood down and was recalled after she was coached. The complainant is a child of tender age i.e. four (4) years and hence a vulnerable witness. Section 2 of the *Sexual Offences Act* also defines a vulnerable person as a child, a person with mental disabilities or elderly person. From the record, the court observed that the complainant was terribly scared and kept glancing at the Appellant. It is after that the prosecutor decided to apply to take her evidence through an intermediary. The use of an intermediary is a right to fair trial under Article 50 (7) of *the Constitution* which provides as follows:-

“In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court;

Section 31 (2) of the *Sexual Offences Act* provides:-

“The court may, on its own initiative or on request of the prosecution or any witnesses other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of-

- (a) age;
- (b) intellectual, psychological or physical impairment;
- (c) trauma;
- (d) the possibility of intimidation;
- (f) race;
- (g) religion;
- (h) language;



- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

Section 2 of the *Sexual Offences Act* defines an intermediary to mean

“A person authorized by a court, on account of his or her expertise or experience, to give evidence on behalf of a vulnerable witness and may include a parent, relative, psychologist, counselor, guardian, children’s officer or social worker.”

- 49. Section 31 (7) *Sexual Offences Act* provides for the role of the intermediary which is to convey the substance of any question to the vulnerable witness, inform the court at any time that the witness is fatigued or stressed.
- 50. The Court of Appeal in Criminal Appeal No. 41 of 2013 MM vs. Republic, observed that the procedure for appointing an intermediary should precede the appointing of the intermediary.
- 51. In this case, once the prosecutor noted that the witness could not be able to communicate well and by her conduct of being scared, quickly applied to have the witness stood down . From the testimony of PW1 given through, the intermediary, I am satisfied that the witness was not coached and the mother of PW1 was properly appointed as an intermediary.
- 52. In the case I have referred to MM vs. Republic, the Court of Appeal had this to say of victim of sexual attack:-

“It is difficult for a child or indeed a victim of sexual attack to publicly relate the most traumatic and humiliating experience of their lives in order to get justice; more so, if they have to be subjected to the rigors of daunting and intimidating cross examination. The thinking behind the enactment of Section 31 was in our view to moderate these traumatic effects in criminal proceedings”

Section 31 (1) provides that the:-

“A court shall not assist an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary”

- 53. In the instant case, there was overwhelming evidence that the complainant was defiled, supported by the injuries found in her genitalia. She named the appellant who she knew very well as a neighbour as soon as she was found in the sugarcane farm and maintained that narration to the parents and the investigating officer.
- 54. Even DW2 confirmed that the complainants father attacked her soon after the incident, meaning the complainant had named the appellant soon after PW1 was found assaulted. The appellant by his conduct confirmed it all. He disappeared from his home, till he was arrested a year later.
- 55. I am satisfied beyond any doubt that the evidence of the intermediary was properly taken and the complainant recognized the appellant because the offence took place in broad day light and PW1 named the culprit soon thereafter.



56. Although the appellant in his unsworn statement denied knowing the complainant or her parents, yet his own mother totally contradicted his story when she admitted that the families are neighbours and that the complainant was known to Afili; the appellant.
57. The appellant purported to raise an alibi defence, that he had left for Kisumu on 12/12/2020 and returned on 16/12/2020. Though he raised an alibi defence the appellant did not bear any burden to prove the truth or falsity of the alibi because the onus always remains with the prosecution to prove their case beyond reasonable doubt. In *Ssentale vs Uganda* (1968) EA 36. The East African Court of Appeal held that the burden to disprove an alibi and prove the appellants guilt always lies throughout on the prosecution.
58. In any event in this case from the prosecution case DW2's evidence totally dislodged the appellants' alibi thus confirming that the appellant was at home and had an opportunity to commit the offence and did commit the offence. There was no reason why a child of PW1's age could have lied about the appellant committing the offence. Besides, PW1 was very consistent from the time she was found in the sugarcane farm that it is 'Afili', who assaulted her. She repeated the same narrations to the investigating officer, PW3. DW2 confirmed that the appellant is known by the alias name "Afili" at home.

Of contradictions:

59. As to whether there were glaring contradictions in the prosecution evidence, PW2 was clear that she noticed the child missing from her home but after doing her chores, she started to look for PW1 about 5:30p.m till about 8:30p.m when she found PW1. PW4 stated that PW1 was found about 5:30 p.m while DW2 said it was about 6:00p.m. PW3 told the court that a report was made at the police station about 10:19 p.m (22:19), it is unlikely that witnesses looked at their watches to ascertain the exact time the child was found. Most of the time, it is an estimation of the time and sometimes some people get it all wrong. I am satisfied that the complainant was found sometime on the evening of 15th December, 2020 and a report was made at police station by 10:19 p.m. on same day. The contradictions in relation to the time would not go to vitiate the substance of the prosecution evidence or affect its credibility.
60. In the end, I find that the grounds of appeal are not merited. The appellant was accorded a fair trial. He was positively identified as the perpetrator. There is sufficient to evidence to prove that the complainant was defiled. I agree with the trial court's finding that the prosecution proved its case against the appellant to the required standard of beyond reasonable doubt. I affirm the conviction.
61. The appellant was sentenced to twenty (20) years imprisonment. Under Section 8(2) of the *Sexual Offences Act*, he should have been sentenced to life imprisonment because the complainant was a child aged only four (4) years. She was strangled and beaten. She must have been totally traumatized by the appellant's beastly and heinous actions. The appellant was lucky to get away with only twenty (20) years imprisonment a pat on the wrist. The appeal is unmerited and is dismissed in its entirety.

DELIVERED, DATED and SIGNED at MIGORI this 20th day of April, 2023.

R. WENDOH

JUDGE

In presence of; -

Ms. Kosgei for the state

Appellant Present

Ms. Nyauke –Court Assistant

