



**JOA v Republic (Criminal Appeal 112 of 2022)
[2023] KEHC 19484 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 19484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL 112 OF 2022
RPV WENDOH, J
MAY 18, 2023**

BETWEEN

JOA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. S. N. Mutva, Senior Principal Magistrate in Rongo Magistrate's Criminal Case No. E027 of 2021 delivered on 26/7/2021)

JUDGMENT

1. JOA, the appellant, was charged in the Principal Magistrate's Court Rongo for the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*.
2. In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.
3. The particulars of the charge are that on 26/7/2021 at Awendo Sub County, in Migori County, unlawfully and intentionally caused his penis to penetrate the vagina of VA a girl aged nine (9) years. In the alternative, the appellant is alleged to have intentionally and unlawfully touched the vagina of VA girl aged nine years with his penis.
4. The case proceeded to full hearing with the prosecution calling a total of four (4) witnesses whereas, upon being called upon to defend himself, the appellant called two other witnesses in support of his case.
5. The appellant was convicted and sentenced to serve thirty (30) days years imprisonment. Aggrieved by the court's judgment, the appellant preferred this appeal through the firm of Abisai and Co Advocates who cited 26 grounds of appeal which were summarised into four issues in the submissions as follows:-
 1. Whether the offence of defilement was proved;



2. Whether PW2 was a competent witness;
3. Whether the alibi defence was considered;
4. Whether the sentence was harsh and excessive.

The appellant therefore prays that the conviction be quashed and sentence set aside.

6. In the submissions, filed by Abisai & Co Advocate for the appellant, it was urged that the complainant who is a minor gave unsworn evidence; that the minor said that the incident occurred in the evening and though she pointed at the grandfather, as the perpetrator, she named the perpetrator as O. It was submitted that nobody else witnessed the incident and it was never established who 'O' was; or whether the appellant has an alias 'name' or not. Counsel urged that the identification of the appellant was not full proof and relied on the case of *Maitanyi vs. Republic* (1986) KLR 198 and *Abdalla Bin Wendo vs. Republic* (1953)20 EACA 166 where the court stated that the testimony of a single identifying witness in difficult in circumstances had to be tested with great care.
7. The 2nd issue was the competence of PW2 as witness under Section 127 (3) of the *Evidence Act*, because she us a wife of the appellant. Though it was not denied that PW2's evidence was admissible. However, it was submitted that the defence witnesses indicated that PW2 and the appellant have always been at loggerheads and that the couples children had never heard of allegations of sexual harassment against the appellants'; According to the appellant, the problem between PW2 and the appellant provided an opportunity for PW2 to frame the appellant and that PW2 must have coached PW1.
8. Counsel also submitted on Section 19 of the *Oath and Statutory Act* and Section 124 of the *Evidence Act*. It was submitted that though the court can rely on unsworn evidence of a child in sexual offences, yet the trial court did not make a finding; that the child was truthful and if so why?
9. The appellant also contended that the sentence was harsh and excessive and relied on the decisions of *Patrick Ateta Andika vs Republic* (2014) eKLR and *Rvs. Scott* (2005) MSWA 152 where the courts ignored the minimum sentence and gave the appellants lesser sentence.
10. The appeal was opposed and the prosecution counsel filed submissions on 13/1/2023.
11. Whether the offence of defilement was proved; Counsel urged that the complainant's age was assessed at nine (9) years of age by PW3; Counsel relied on the decision of *Mwalango Chichoro Mwanjembe vs. Republic* (2016) eKLR. Counsel urged that the court relied on the case of *P.M.M VS. Republic* (2018) eKLR where the age assessment was found to be among the credible forms of evidence under Rule 4 of the *Evidence Act*, Counsel also relied on *Musyoki Mwakavi vs. Republic* 172 of 2012.
12. As to penetration, counsel relied on the case of *Mark Oiruri Mose vs. Republic* (2013) eKLR which defined penetration under Section 2 of the *Sexual Offences Act*. According to counsel, the complainant after undergoing voire dire examination, narrated clearly how the appellant who is her grandfather got hold of her, inserted his genital organ into hers; that the complainant was examined by PW3 who found that the complainant had fresh injuries to her genitalia and blood and hence proof of penetration. Counsel argued that there was no requirement for DNA in such case and relied on *A.M.L. vs. Republic* (2012) eKLR and *Flappyton Mutuku Nguu vs. Republic* (2014) eKLR
13. Counsel argued that the issue of the name of 'O' mentioned by the complainant is of no consequence because she recognised the appellant.
14. On the competence of PW2 as a witness, counsel argued that she was a competent and compellable witness by virtue of Section 127 (3) of the *Evidence Act*.



15. Counsel submitted that the court considered the appellant's alibi and that the same could not stand in view of the overwhelming evidence on record; that the same was an afterthought and nothing about cutting grass was mentioned till the appellant was placed on his defence.
16. In respect to the sentence, counsel urged that the same is lawful and legal; that the Muruatetu case did not hold that all mandatory sentences were unconstitutional. Counsel further relied on the case of *R VS. Ruth Wanjiku Kamande* Criminal Appeal No. 102 of 2018 where the court sentenced the accused to death after considering the facts and circumstances of the case meaning the death sentence is still lawful.
17. This is a first appeal and it behoves this court to re-examine all the evidence that was tendered before the trial court, analyse and evaluate it and arrive at its own findings. The court is guided by the decision of *Okeno vs. Republic* (1972) EA 32.
18. In brief, the prosecution case was that PW1, a child who after undergoing voir dire examination, gave unsworn evidence, stated that she lives with her grandmother whose name she did not know. She identified her grandfather as JOA. She recalled having been sent by her grandmother to fetch water. After she got water, somebody by the name 'O' grabbed her by the hand, put her down and slept on her; took his genital organ (for urinating) and put in her genital organ (her thing for urinating) four times. She went to inform her grandmother and she was taken to the hospital and the grandmother called the police. She pointed at her grandfather as the culprit.
19. PW2 MO, the complainant's grandmother recalled that on 20/7/2021, she sent PW1 to fetch water at 11:00a.m; that upon return, she claimed that a man had grabbed her and took her to the banana farm. PW2 said the child identified the appellant as the person who had defiled her. She reported to the police station and the police took the minor. According to PW2, this was the fourth time it was happening and she decided to take it up; that the appellant had defiled the complainant in May, June, July. In cross examination she stated that even their six (6) children are aware of what the appellant had been doing and had even defiled his own daughter.
20. PW3 Peninah Otaigo, a clinical officer, from Awendo Sub County Hospital recalled that police took the complainant to the facility for examination on 27/7/2021. On examination, she found the child to have bruises to her vagina, hymen was freshly broken with visible blood. She formed the opinion that there was penetration.
21. PW4 PC (W) Caroline Kemunto, recalled that on 26/7/2021 the minor was taken to the police station where she was reported to have been defiled by the appellant in a banana plantation. She escorted PW1 to the hospital for examination.
22. In his defence, the appellant (DW1) gave a sworn statement denying committing the offence. He claimed that the case is based on lies because he had had problems with PW2; that on 17/7/2021, he found the wife ploughing the pathway and when he questioned her and reminded her that he had given her a kitchen garden, she insulted him, hit him with a stone and threatened to ensure that he was imprisoned. He admitted to have heard of the allegation of defilement but denied having committed the offence.
23. DW2, COO, the appellant's son stated that on 26/7/2021, he was at home about 10:00a.m when the appellant went to cut grass for the cow and found PW2 ploughing on the pathway; that PW1 was sent to call him but he refused. He later heard that the appellant was arrested on 1/8/2021.
24. DW3 GOO a son to the appellant also confirmed that his parents have been having problems but he was not present when the alleged defilement occurred.



25. I have now considered the grounds of appeal, the evidence on record and submissions of both parties. The appellant faced a charge of defilement contrary to Section 8(1) [Sexual Offences Act](#).
26. To prove the said charge, the prosecution has to establish that the following ingredients exist:-
1. Proof that the victim is a minor;
 2. Proof of penetration;
 3. Proof of identity of the perpetrator.

Proof of Age:

27. No doubt the complainant was a child. The court took her through *voire dire* examination. She told the court that she is in grade 1, but did not know her age. PW1's uncle, DW2 confirmed that PW1 was nine (9) years old and in grade 1.
28. The manner in which to determine the age of a victim of defilement is now settled. In [Mwalongo Chichoro Mwanjembe vs. Republic](#) (2016) eKLR the court stated thus:-

The question of proof of age has finally been settled by recent decisions 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.”

29. In [Francis Omuroni vs. Uganda](#) Criminal Appeal No. 2 of 2000 the court stated

In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence, apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”

See also [Musyoki Mwakavi vs. Republic](#) Criminal Appeal No. 172 of 2012.

30. Guided by the above decisions, age may be proved by the parents, guardian, medical evidence or even by common sense.
31. In this case, DW2 is one of the complainant's uncles and knew her to be nine-year-old. The complainant's age was also assessed by the clinical officer as nine (9) years. PW1 underwent a *voire dire* examination and I am satisfied that the complainant's age was proved and even by common sense considering the court's observation.

Proof of penetration:

32. 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.”

In the case of [Mark Oiruri Mose vs. Republic](#) (2013) eKLR, the Court of Appeal defined penetration as follows: -

... 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....”

33. The complainant vividly narrated how somebody grabbed her hand, took her to the shamba and inserted his genital organ (for urinating) into hers. The complainant was examined on 27/7/2021, a day after the incident. PW3 found that PW1 had fresh bruises to her vagina walls and the hymen was freshly torn. The court is satisfied that there was overwhelming evidence of penetration.

Identity of the perpetrator:

34. PW1 told the court that this offence occurred in the evening. However, PW2 said that she sent PW1 to the river about 11:00a.m. Section 143 of the *Evidence Act* provides that a fact may be proved by the testimony of one witness unless the law requires otherwise. The court in *Abdalla Bin Wendo vs. Republic* (1953) 20 EACA 166 reiterated the said position when it said:-

Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonable conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility.”

35. As held in the above case, the court has to take great care when relying on evidence of a single identifying witness especially where the conditions are not favourable to identification.
36. In the instant case, PW1 said that she was coming from the river in the evening. However, PW2 said that she had sent PW1's about 11: 00a.m It is unlikely that PW2 would sent the child to the river at night. The incident occurred during day time and the conditions must have been favourable to identification,
37. PW1 in her testimony, when asked whether she knew JOA, the appellant, who was in the dock, she identified him as her grandfather. She then went on to state:-

...then someone grabbed my hand. I had come from fetching water. I was on the road. O is the one who caught me. O is the accused , (Minor pointed at the accused person at the dock) he put me to the ground and slept on top of me. I was facing up.”

38. The court finds it interesting that instead of addressing the appellant as the one who grabbed her, she referred to him as someone. PW1 went on to refer to ‘O’ as the one who caught her and later pointed at O as the appellant. Unfortunately, the prosecution never asked PW1 to clarify whether the appellant is also known as ‘O’. Surprisingly, the court totally ignored this very important aspect of PW1's testimony. The court should have addressed the issue of who ‘Op’ is before finding that the appellant was the culprit. Was O an alias name of the appellant or did the word O have a meaning? If PW1 could not clarify, even PW2 or the defence witnesses would have explained who O was. I find that the trial court erred in not establishing who O was. Could there have been another man by the name of O?. Those questions go to raise doubt in the identification of the appellant as the culprit.
39. Having found as above, it follows that the third ingredient of the offence of defilement was not proved to the required standard.



40 In passing, I wish to address the issue of PW2's competence to testify as a witness against the appellant. Section 127 (3) of the Evidence Act provides for circumstances under which a spouse is considered a competent and compellable witness for the prosecution. It reads as follows Section 127 (3) and 4.

- (3) In criminal proceedings the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of such person, in any case where such person is charged:-
 - (a) with the offence of bigamy; or
 - (b) with an offence under Chapter XV of the Penal Code (which relates to certain offences against morality); or
 - (c) in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them, and not otherwise.”
- (4) In this Section “husband” and “wife” mean respectively the husband and wife of a marriage, whether or not monogamous, which is by law binding during the lifetime of both parties unless dissolved according to law, and includes a marriage under native or tribal custom.”

As provided in Section 127 (3) (b) PW1's is a competent witness in an offence under the Sexual Offences Act.

41. I do not think that I need to go into considering the other grounds of appeal. Though the court is not convinced by the theory of the appellant being framed, yet it was the duty of the prosecution to prove their case against the appellant beyond reasonable doubt. There is a doubt lingering in my mind as to who “O”. Was he the appellant or another. For that reason, I give the appellant the benefit of doubt and quash the conviction, I acquit him of the charge of defilement as charged and set aside the sentence. The appeal succeeds and the appellant is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 18TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

In presence of; -

Ms. Kosgei for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant

