Aruisi alias Kili v Republic (Criminal Appeal 67 of 2022)
[2023] KEHC 20980 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL 67 OF 2022

RPV WENDOH, J

JULY 19, 2023

BETWEEN

CLIPHAS OTIENO ARUISI ALIAS KILI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Principal Magistrate in Rongo Magistrate's Court Sexual Offence No. E011 of 2020 delivered on 13/06/2022)

JUDGMENT

1. The appellant, Cliphas Otieno Aruisi alias Kili has appealed against the judgment of Senior Principal Magistrate Rongo, where he was charged and convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. 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*.

   The particulars of the charge are that on November 26, 2020 in Awendo sub county unlawfully and intentionally caused his penis to penetrate the vagina of CA a child aged ten (10) years.

   Upon conviction, the appellant was sentenced to serve life imprisonment. Aggrieved by the trial court's judgment, the appellant filed this appeal through the firm of Kevin-Andego Advocate.

   The appellant identified eight grounds of appeal as follows:-

   1. That the trial magistrate erred in fact and in law when he held that the prosecution had established its case against the appellant beyond reasonable doubt;

   2. That the trial magistrate erred in fact and in law when he held that the prosecution had established the fact of penetration beyond reasonable doubt;

3. That the trial magistrate misdirected himself by misapplying the law of recognition;

4. That the trial magistrate erred in fact and in law by relying on the evidence of the minor as proof linking the appellant to the commission of the offence;

5. That the trial magistrate erred in fact and in law by relying on the testimony of the minor without warning himself as to the weight of such uncorroborated testimony;

6. That the trial magistrate erred in fact and in law when he sentenced the appellant to life imprisonment on the weight of the uncorroborated testimony of a minor;

7. That the trial magistrate erred in fact and in law when he sentenced the appellant to life imprisonment without considering the best evidence;

8. ' That the trial magistrate erred in fact and in law when he sentenced the appellant to life imprisonment without requiring the production of the appellant's DNA.

2. This being a first appeal, this court is required to re-examine all the evidence tendered before the trial court, analyse and evaluate it and arrive at its own conclusion but bear in mind that this court neither saw nor heard the witnesses testify. See *Okeno v Republic* (1972) EA 32.

   The prosecution called a total of five (5) witnesses while the appellant, upon being called upon to defend himself, gave unsworn evidence.

   PW1 CA a girl aged 12 years gave sworn evidence after the court conducted a *voire dire* examination. PW1 recalled that she had been send by her mother (PW2) to buy sugar at Awendo. After taking the sugar home, she went to her friend A home; that A is the daughter of the appellant. When at A home, the appellant sent A to go buy mandazi; that the appellant locked the door, asked PW1 to remove her clothes but she refused. The appellant forcefully removed her clothes, warned her not to scream, inserted his 'dudu' for urinating into her 'dudu' for urinating. After the act, she was injured in the private parts and was unable to walk; she crawled out, was seen by two people who called the mother. The chief was called and she was taken to police station then to hospital. Her age was also assessed.

3. PW2, LA, the complainant's mother recalled that, on November 26, 2020, she was busy washing clothes and sent CA (PW1)for sugar; that she brought the sugar and informed her that she was going to get a book from a neighbour who had borrowed it; that she took long to return; that later, a village elder enquired from her if she was CA's mother and told her to rush to see a child who was injured on her private parts. PW2 examined PW1, found her injured on the vagina and could not walk. PW2 took her to Awendo Sub County Hospital where she was treated and was stitched. The matter was reported to Awendo Police Station whereby PW1 was issued with a P3 form and age assessed. PW2 said that the complainant named Cliphas as the perpetrator. PW2 denied having known the appellant.

   PW3 Lilian Okeyo a clinical Officer recalling filling a P3 Form on November 26, 2020. He examined the complainant and found lacerations to the complainant's labia minora and majora and confirmed that there was evidence of penetration; that his colleague did the age assessment, estimating the age of the complainant to be about 10 – 11 years.

4. PW4 CO, a village elder at Awendo knew both the complainant and the appellant. He recalled on November 26, 2020 when he was asked to proceed to Rongo where the appellant lived. He found a child lying down, interrogated both complainant and the mother (PW2). He found that the child had injuries to her vagina and was bleeding. They took her to the police station then to hospital. Later she was involved in arrest of the appellant.

PW5 PC (W) Sarah Gimisu received a report of defilement on November 26, 2020 and took PW1 to hospital and charged the appellant after he was arrested by members of public.

In his unsworn statement, the appellant admitted that the complainant went to his house and he gave her 20/= but he denied committing the offence, instead he claimed that his son was a friend to the girl.

5. The appellant's counsel filed submissions in support of the appeal. Counsel submitted on two issues, the first being that the offence was not proved to the required standard. Counsel submitted that despite the fact that PW2 alleged that the complainant was found bleeding and was stitched, the clinical officer did not make such finding after examining the complainant; that the injuries found by the clinical officer were contrary to what the complainant and mother alleged. Counsel relied on the case of *PKW v Republic* cited in *David Mwingirwa v Republic* (2017) eKLR . That the lacerations found on the labia minora are not evidence of penetration; that the injuries may be due to urinary tract infection or a process called staining; that there was no evidence to prove presence of spermatozoa. Counsel submitted that section 124 of the *Evidence Act* should come into play and relied on the decision of *Moses Mutahi Mugo v Republic* (2022) eKLR, and urged that there should have been corroboration; that the trial court did not give reasons for believing PW1's testimony as required.

6. Counsel also argued that the prosecution erred by not calling A to testify to confirm whether PW1 was at the appellant's home. Although the prosecution asked for time to file submission, they did not file any.

In my view the issues that the court will require to consider are:-

1. Whether the crucial witnesses were not called;
2. Whether the offence of defilement was proved to the required standard.
3. Whether the sentence is excessive.

1. Failure to call crucial witness:

7. Section 143 of the *Evidence Act* provides that a fact may be proved by the testimony of one witness unless a specific law requires otherwise. The above provision was aptly was ably captured in the case of *Abdallah Bin Wendo & Another v Republic* (1953) 20 EACA 166.

> " 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 *Bukenya v Uganda* (1972) EA 549 the court stated:-

> " It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called

evidence to show that reasonably exhaustive enquiries had been made to trace them without success..."

8. Guided by the above decisions all that the prosecution is required to do is to call such number of witnesses as it thinks sufficient to prove its case. Although PW1 said that she had gone to see A and the appellant sent A away, the said A did not witness the incident. Besides, the accused did admit in his defence that the complainant went to his house and he even gave her 20/=. It was therefore unnecessary to call A just to tell the court that PW1 went to their home that day. Failure to call A as a witness was not fatal to the prosecution case because she was not a primary witness.

2. Whether the offence of defilement was committed:

To prove a charge of defilement, the prosecution has to establish the following ingredients beyond reasonable doubt.

1. That the complainant was a minor;
2. That penetration occurred
3. Proof of the identity of the perpetrator.

Of age:

9. In the case of *Mwalango Chichoro Mwanjembe v Republic* (2016) eKLR the court gave guidelines on how age can be proved in a defilement case when it said:-

> " 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."

In the Ugandan case of *Francis Omuroni v Uganda* Criminal No. 2 of 2000, the court observed:-

> " 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..."

10. In this case, PW1 told the court that she was twelve years, that is at the time she testified on November 26, 2021 and in grade 4 in school. PW2, PW1's mother also testified that PW1 was twelve years, at the time of her testimony. Although PW2 did not state when the child was born, her evidence was corroborated by the age assessment report produced in evidence and which was not controverted. Besides, the court took the complainant through voire dire examination, which is evidence that the court observed that the complainant is a child of tender age. I am satisfied that as of November, 2020 the complainant was aged about 10 – 11 as assessed by the clinical officer (PEX3).

Proof of Penetration:

Section 2 of the *Sexual Offences Act* defines penetration 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 v Republic* (2013) eKLR the Court of Appeal considered what amounts to penetration when it stated that:-
>
> " ... 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...."

11. PW1 told the court that she was injured in her private parts because of the act of the appellant putting his 'dudu' for urinating into hers. PW2 and PW4 who saw the complainant after the ordeal claimed that she was bleeding from the private parts, a fact that the clinical officer who examined her on the same date did not see. I have looked at the treatment notes and the clinical officers' findings. In the treatment notes (PEX1) it was observed that there were lacerations on the labia minora and majora and there was no bleeding. Though the clinical officer did not see any bleeding at paragraph 2 (b) she observed that there was no discharge, from the vagina though there were stains on the labia majora. In my view, PW2 and PW3 tended to exaggerate the state of PW1's injuries but there was evidence of injuries to the labia minora and majora. At the time of first examination, it was observed that the complainant was not able to sit upright and walked with legs apart. The court is satisfied that the prosecution proved that there was penetration. The theory advanced by the appellant's counsel of staining has no basis and I doubt that the complainant or her parents were so sophisticated as to apply such unorthodox methods and besides there is no reason why they would do that and expose their child PW1, to such trauma in order to frame the appellant who had no grudge or dispute with the complainant's family.

    Counsel relied on the decision of *Daniel Mwingirwa* (supra) but that decision can be distinguished from the instant case in that the court relied on the evidence of a broken hymen without any other physical evidence. A hymen could have been broken through other means other than penetration. In this case however, there were injuries to the labia majora and minora and the complainant had problems walking. In my view, there was proof of penetration.

Proof of identity of the perpetrator:-

12. PW1 identified the appellant as the father to her friend A whom she had visited on the date she was subjected to this unfortunate ordeal. In fact, the appellant did admit in his defence that the complainant went to his home and he even gave her twenty shillings. In cross examination of PW1, the appellant seemed to be alleging that the complainant stole his phone but he did not pursue that line of defence. As properly pointed out by the trial court, the appellant's allegation that the complainant had a relationship with his son was an afterthought. He never even mentioned who the son was.

    His defence was hollow a mere denial that he had committed the offence. The offence was committed in broad day light. There is totally no reason alluded to as to why the complainant, a child of ten years could have framed the father of friend. PW2 denied having known the appellant in her testimony and that fact was not controverted.

As regards the complaint that the appellant's DNA was not established, the law is settled that the offence of defilement is not proved through medical evidence or DNA. In *Kassim AG v Republic* criminal appeal No 84 of 2005, the court held: -

> " The absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.
>
> In *Fappyton Mutuku Ngui v Republic* (2012) EKLR, the Court of Appeal held :-
>
> " in our view such evidence was not necessary and in any event, the trial court found there was sufficient medical evidence in support of PW2's testimony which was trustworthy as to the person who defiled her.
>
> In *AML v Republic* (2012) EKLR (Mombasa) the court upheld the view that:
>
> The fact of rape or defilement is not proved by way of DNA test but by way of evidence."

13. The appellant also complained that the prosecution relied on the complainants' evidence without any other corroborative evidence. section 124 of the *Evidence Act* provides as follows:-

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other evidence in support thereof implicating him."
>
> "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."

14. It therefore follows that corroboration is no longer mandatory in sexual offences provided that the trial court believes the testimony of the minor and records reasons for so believing. Although the trial court did not specifically allude to provisions of section 124 of the *Evidence Act*, it recognised the fact that it had to record the reasons for relying on the complainant's evidence. The court said:-

> " There was no eye witness in this case. The court is thus mandated to interrogate evidence on record to establish if the minor was telling the truth for reasons to be recorded. In this case the complainant knew the perpetrator so well. They were neighbours and she knew him as baba A – Father to A, her friend whom she was studying together. She vividly described how the accused person sent away her friend and immediately closed the door and defiled her. It suffice to reproduce what she told the court thus:-

Cliphas sent A to go and purchase Mandazi. I remained in the house. He told me to remove my clothes. I declined. He removed my clothes and placed a knife on my neck. He did tabia mbaya to me. He removed his clothes. He inserted his 'dudu' in my 'dudu' ... after that I was unable to walk. I crawled out".

The effect of the proviso to section 124 *Evidence Act* was aptly captured by the Court of Appeal in *Mohamed v Republic* (2006) 2 KLR 138 when it stated:

> "It is now settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

The court recorded the reasons for believing the complainant. This case is distinguishable from the decision of *Tyberius Nyatogo Ongoro v Republic* (2021) eKLR, where the court said:-

> "It, therefore, follows that the trial court could rely on evidence of PW1 after complying with the proviso under section 124 of the *Evidence Act*. In this instant case, the trial magistrate conducted a voire dire examination and directed that the child gives unsworn testimony. Although the trial court relied on the evidence by PW1 it failed to give any reasons why it believed that the child was telling the truth."

15. In the *Tyberius case* (supra) , the complainant gave unsworn evidence. However, in this case the complainant was subjected to voire dire examination, was found to understand the meaning of oath and was intelligent enough and gave sworn evidence and was subjected to cross examination. The testimony of PW1 carried much more weight that the unsworn statement in the case relied on.

I am satisfied that the trial court properly directed itself when relying on the testimony of PW1.

The defence was unbelievable, properly and rejected by the trial court.

I find that the conviction is sound and I affirm it.

3. As regards sentence:

16. The complainant was ten (10) years old at the time the offence was committed. Under section 8(2) of the *Sexual Offences Act*, one is liable to life imprisonment upon conviction the sentence is legal and lawful. However, though the minimum sentence is provided as life imprisonment from, the Supreme Courts decision of Francis Karioko Muruatetu, the courts are tending to move away from minimum sentences which tends to interfere with the court's discretion. I hereby set aside the sentence of life imprisonment. I hereby sentence the appellant to twenty five (25) years imprisonment. The sentence to commence on the date of sentence on June 13, 2022.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 19TH DAY OF JULY, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino for the state

Mr. Choni for Appellant

Ms. Emma/ Phelix –Court Assistant