



**Awiti v Republic (Criminal Appeal E003 of 2023)  
[2023] KEHC 19916 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19916 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E003 OF 2023  
RPV WENDOH, J  
JULY 11, 2023**

**BETWEEN**

**GODFREY OTIENO AWITI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence by Hon. D. O. Onyango – Chief Magistrate in Migori Chief Magistrate’s Sexual Offences Case No. 23 ‘A’ OF 2020 delivered on 10/11/2022)*

**JUDGMENT**

1. Godfrey Otieno Awiti was convicted for the offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences act* by the Hon. D. Onyango Chief Magistrate Migori on 8/11/2022.
2. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary Section 11(1) of the *Sexual Offences Act*.
3. The particulars of the charge were that on diverse dates between February, 2019 and 3<sup>rd</sup> May, 2020 in Suna West Sub County, wilfully and unlawfully caused his penis to penetrate the Vigna of EA, a child aged thirteen (13) years or that he touched the buttocks, breasts and Vagina of EAO a child aged thirteen (13) years.
4. The prosecution called a total of five witnesses in support of their case whereas the accused made an unsworn statement in his defence.
5. Upon conviction, the appellant was sentenced to eight years imprisonment.
6. No finding was made on the alternative charge.



7. The appellant is aggrieved by the courts' judgment and preferred this appeal based on the following grounds: -
1. That the trial court failed to comply with Article 50 (2) (g) and (h) of the Constitution;
  2. That the offence was not proved to the required standard;
  3. That the appellants defence was not considered;
  4. That the charge was defective;
  5. That the conduct of the complainant availed the appellant a defence under Section 8 (5) and (6) of the Sexual Offences Act.
8. The appellant also filed submissions on 3/5/2023 in which he urged that the charge sheet was ambiguous because the exact dates on which the offence was committed were not stated to enable the appellant respond; that the exact place where the offence was committed was also not stated as [Particulars Withheld] village is big. The appellant also submitted that the complainant claimed to have been his girlfriend and that she willingly went to meet up with him and hence he believed she was an adult and enjoyed sex. Therefore the appellant echoed the decision of HCCRA 32 of 2015 Martin Charo vs. Republic (2016) eKLR and HCCRA 28 of 2016, Wycliffe Chaku Mchoki vs. Republic (2017) eKLR where the Court held that where a victim of defilement exhibits adult behaviour, the court should consider such behaviour as a defence under Section 8(5) and (6) of the Sexual Offences Act. It was also the appellant's submissions that penetration was not proved because absence of hymen is not in itself evidence of penetration (See Migori HCCRA E041 of 2021 Samuel Muchozi Ludenyo alias Shaggy vs. Republic. He also asked the court to find that the case was a frame up because of the time taken by the complainant to report and reliance was made on the case of Terekali & Another vs. Republic (1952) E.A.
9. The appeal was opposed and the prosecution counsel Ms. Kosgei filed submissions. As regards the non-compliance with Article 50 (2) (g) and (h) of the Constitution, Counsel argued that the appellant was represented by counsel from the date of the first hearing till the judgment was read. Counsel relied on the decision in Charles Maina Gitonga vs. Republic 2018 eKLR where the court held that right to legal representation is not an inherent right and that one has to make a choice which the appellant did.
10. As to whether the offence of defilement was proved to the required standard, it was submitted that it was proved that the complainant was a minor by production of the birth certificate which was not objected to; that it was proved by an expert that there was penetration and the identity of the appellant was not in issue because he was the complainant's neighbour and her 'boyfriend'. Counsel also urged that the victim gave sworn evidence and that there is no requirement for corroboration in such a case.
11. This being a first appeal, it is required of this court to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusions but making allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See Okeno vs. Republic (1972) EA 32.
12. After the trial court took the complainant EAO (minor) (PW1) through voire dire examination, the court found that she understood the meaning of the oath and was intelligent enough and was therefore sworn. PW1 told the court that she is fourteen (14) years and knew the appellant as her boyfriend and he lives about 1 ½ kilometres from her home. She knew him in 2019 and they started having sex in 2019 in the bush where he would ask her to remove her underpants, would unzip his trouser and insert



his penis in her vagina; that it happened six (6) times. PW1 said that sometimes he used protection (condom), that sometimes the appellant gave her his cell phone to go home with it because he had two phones, and would even go to visit her home when there was nobody; that the appellant would call her through the phone he had given her; that the appellant once went to her home and pretended to be looking for her father and that is when the family members became suspicious and informed her father. PW1's mother reported to Pin Oyie Police Station where they were advised to go to hospital at Nyamanga. She denied there being any land dispute between her family and that of the appellant.

13. PW2 EAO, is the mother of the complainant. She recalled that a neighbour called to inform her that her daughter was getting spoilt and she called PW1 and asked her to visit her in Migori. PW2 enquired from PW1 what her problem was and she said that it was being alleged that she had an affair with the appellant, Otieno Awiti; PW2 went home and neighbours informed her how they had found the complainant in compromising situations with the Appellant. The matter was reported to the Chief who summoned PW2 to go to the Chiefs office on 16/5/2020. The appellant also arrived there but was sent away. PW1 was interrogated and admitted to having had sex with the appellant from February 2019 to 3<sup>rd</sup> March 2020. The complainant was escorted to hospital for examination. The appellant was arrested at the children's office.
14. PW3 Philip Obonyo Ngare a ward Manager of Wasweta II is also a board member of [Particulars Withheld] Primary School. He recalled that on 3/5/2020, he was in a barber shop at Nyamuli market when he saw a pupil from the school watching pornographic material on a cell phone. He informed her parents to investigate the source of the phone. The phone was found to belong to Godfrey Otieno, the appellant who hails from his village. He said that it is one Oliver who he had seen with the phone.
15. PW4 PC Samson Ndolo of Pin Oyie police station is the investigating officer having taken over the file as the investigating officer from one who was transferred.
16. PW5 Boke Rael Chacha is the Clinical Officer at Nyamanga Sub County Hospital. She produced the P3 Form filled by her colleague Tiberius who had gone for further studies. The clinical officer found that there was a missing hymen with healed membrane flaps and he concluded that there was repeated penetration of the vagina.
17. When called upon to defend himself, the appellant gave unsworn evidence. He denied the charge and recalled the month of May 2020, he had come from Bondo Nyironge when he met one Elder Ooko Odero who asked him if he was aware of his affair with the complainant. He said that the charges are false; that when questioned the complainant denied the allegations. He said that in May 2020, an elder called him to enquire if he was aware of the affair with the complainant but he denied. He also denied having given the minor his phone; that on 8/11/2020, he went to caution the complainant's step mother about selling chang'aa to his father and she threatened him and that this case emanates from the threats; that his family members have had differences over land with the complainant's and that she threatened him and he believes this case is out of the family dispute over land.
18. I have carefully considered the grounds of appeal, submissions of both sides. The first issue I will deal with is whether the charge was ambiguous and hence defective. Section 134 of the [\*Criminal Procedure Code\*](#), spells out the contents of a charge sheet. It reads as follows:-

“Every charge or information shall contain and shall be sufficient if it contains a statement of that specific offence, or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charge.”



19. In *Sigilani vs. Republic (2004)* 2 KLR 480, the court stated this:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

20. The charge sheet in the trial court stated the correct sections creating the offence of defilement and the penalty which were Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The complaint is that the dates on which the offence were committed was not Stated. However, it is clear from the testimony of PW1 that this is an offence that was committed over a period of time culminating on 3/5/2020 when the crime was found out. PW1’s testimony is that the Sexual encounters between her and the appellant were over a period of time, February, 2019 to 3<sup>rd</sup> May, 2020. As regards where the offence was committed, it was sufficient to State that it was in Nyamilu village. There is no better way that the charge sheet could have been drawn. PW1 was specific that it happened six times. I think the complainant was candid because she could not have come up with false dates. The charge sheet was properly drawn with sufficient particulars and detail to enable the appellant prepare his defence and there is no defect that could vitiate the charge.

21. The second issue is whether Articles 50(2) (g) and (h) were violated. Article 50 of *the Constitution* guarantees right to fair trial. Article 50 (2) (g) and (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.

22. The right under Article 50 cannot be derogated by dint of Article 25 (c ) of *the Constitution*. Under Article 50 (2) (g) the court is under a duty to inform an accused of his right to counsel of his choice, promptly. Promptly has been held in Joseph Kiema Philip vs. Republic (2019) eKLR to be at the time of plea or before the hearing. In this case, plea was taken on 18/5/2020 and the case was fixed for hearing on 22/6/2020. Before the hearing commenced on 22/6/2020, Mr. Gembe Advocate came on record as appearing for the accused and applied for an adjournment so that he could be supplied with witnesses statements and other documents. The same were supplied by the prosecutor on the same day and the case was adjourned to 16/7/2020 for hearing. Having engaged counsel before the hearing, it was not necessary for the court to explain the right to the appellant.

23. As regards Article 50 (2) (h) which requires the court to inform an accused of the right to counsel to be provided at State expense, that right is not absolute because it has to be demonstrated that one would suffer substantial injustice if counsel is not provided. In this case, no substantial injustice was suffered by the appellant because he already had counsel appearing for him. He was able to engage counsel by himself and counsel at State was not necessary. The said right was not violated.

### **Was the offence of defilement Proved?**

24. To prove on offence of defilement, the prosecution has to establish the existence of the following ingredients: -



- 1) That the victim is a minor;
- 2) That there was proof of penetration;
- 3) The perpetrator was positively identified.

### **Proof of Age**

25. The complainant told the court that she was 14 years old. Her evidence was corroborated by PW2, the complainant's mother who produced a birth certificate confirming the age. In *Francis Omuroni vs. Uganda Criminal Appeal No. 2 of 2000*, the court explained how age can be proved. The court said

“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...”

26. Production of the birth certificate (PEXO1) and the testimony of PW2 are proof that the complainant was aged thirteen (13) years at the time of alleged defilement. She was a minor.

### **Whether penetration was proved**

27. 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.”

28. In *Mark Oiruri Mose vs. Republic (2013)* eKLR the Court of Appeal stated as follows as being proof of penetration:-

“... 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....”

29. In this case, PW1 told the court that it is something that had been ongoing from February, 2019, till May 2020, over a year. That they would meet in the bush and the appellant would insert his penis in her vagina. When she was examined on 13/5/2020, she was found to have healed membrane flaps and a missing hymen. He concluded that there had been penetration. PW1 graphically narrated how they used to have sex with the appellant because he was her boyfriend. Her evidence was not controverted in anyway. PW1 testified on oath and was cross examined. The appellant alleged to have been framed by the complainant's mother over a land dispute. As held by the trial court, the alleged dispute over land was not substantiated. The court found that the said allegation was not believable. The court believed the testimony of the complainant. PW1 having testified on oath, there would have been no requirement for corroboration. The court gave reasons why it believed the complainant, that is, because she gave an elaborate account as to what transpired between her and the Appellant; that her narration was in detail and that she knew the appellant well. This court is satisfied that from the narration of the incident there is no reason to depart from the findings of the trial court that the appellant was a truthful witness



and hence believable. This court is satisfied as the trial court did, that PW1 took part in sexual activities with the appellant. There is totally no reason as to why the complainant could frame the appellant.

30. The appellant was the complainant's neighbour whom she knew and was also her boyfriend. The appellant was positively identified. PW1 testified on oath and corroboration was not necessary as was held in *J. W. A. vs. Republic (2014) eKLR*.

31. The allegation by complainant that the appellant's defence was not considered is untrue. The court said at page 40 line 20 – page 41 line,

“The statement by the accused that he has been framed because of a disagreement with PW1's step mother and unsubstantiated land dispute is totally unconvincing and unable to displace the evidence of the prosecution which clearly implicate him with the charge in Count 1, PW1, PW2 or any other prosecution witnesses did not strike me as those who has been couched to lie and frame the accused. The mother to PW1 was not even a key witness in this case. I have no plausible reason to doubt the credibility of PW1 or any of the prosecution witnesses.”

32. Clearly the defence was considered.

33. The appellant claimed that the complainant's conduct earned the appellant a defence under Section 8 (5) of the *Sexual Offences Act*. The said section provides as follows:

“It is a defence to a charge under this section if-

- a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- b) the accused reasonably believed that the child was over the age of eighteen years.”

34. First the appellant never alluded to the said defence in the trial court. There is no evidence that PW1 held out herself as an adult or demonstrated to the appellant as such. PW1 was only thirteen (13) years at the time. He cannot raise afresh defence on appeal. The said defence cannot be available at this stage. I find that the conviction is sound. I affirm it.

35. The appellant was sentenced to eight (8) years imprisonment. Under Section 8 (3) of the *Sexual Offences Act*, the minimum sentence thereunder is twenty (20) years imprisonment. The Appellant got a slap on the wrist. There is no ground to warrant interference with sentence.

36. In the end, I find no merit in the appeal. It is dismissed in its entirety.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 11<sup>TH</sup> DAY OF JULY, 2023.**

**R. WENDOHO**

**JUDGE**

**In presence of: -**

Mr. Kaino Prosecution Counsel

Appellant Present

Ms. Emma/ Phelix –Court Assistant

