



REPUBLIC OF KENYA



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**Awinda v Republic (Criminal Appeal E028 of 2022)
[2023] KEHC 22796 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22796 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E028 OF 2022
RPV WENDOH, J
SEPTEMBER 21, 2023**

BETWEEN

STEVE OKOTH AWINDA APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence by Hon H. C. Maritim – Resident Magistrate in Migori Chief Magistrate’s Criminal Case No. E064 OF 2021 delivered on 6/4/2022)

JUDGMENT

- 1 Steve Okoth Awinda 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 Resident Magistrate Migori.,
- 2 The particulars of the charge were that on the night of 27/9/2021 in Nyatike Sub County, intentionally caused his penis to penetrate the vagina of LAS a child aged 14 years.
- 3 In the alternative, he was charged with committing an indecent act with a child but no finding was made on the alternative charge.
- 4 The prosecution called a total of four witnesses in support of its case. Upon conviction, the appellant was sentenced to serve ten (10) years imprisonment. He is aggrieved by the judgment of the court based on the following grounds:-
 1. That the court failed to comply with article 50 (2) (g) of [the Constitution](#);
 2. That the prosecution failed to prove its case to the required standard;
 3. That the prosecution failed to call crucial witnesses in this case;
 4. That there were glaring contradictions in the prosecution case.



- 5 The appellant's counsel Mr. Kiseru filled submissions in support of the said grounds. The appellant therefore prays that the conviction be quashed and sentence set aside.
- 6 On whether the charge was proved to the required standard, counsel submitted that from the prosecution case the complainant was defiled by two people on two nights at different places i.e. Jared Onyango on 20th September, 2021 at a relatives house and on 27th September, 2021 by the appellant herein at a guest house owned by one Gideon Onduso; that the prosecution failed to prove that it is the appellant who booked a room at the said guest house by producing records of the guest house or by the proprietor and workers at the guest house testifying. Further, it was submitted that the owner of the guest house developed interest in the complainant, interviewed her and found that she was waiting for her boyfriend, Jared Onyango on 28/9/2021 and the same was captured in the OB report on 14/28/9/8/2021 at Karungu Police Station; that the prosecution had the burden to prove that it was the appellant and not Jared Onyango who spent the night with the complainant at the guest house.
- 7 Relying on the case of *Bukenya vs. Uganda* (1972) EA 549, counsel submitted that the prosecution failed to call essential witnesses which was fatal to their case. For example the prosecution failed to call Gideon Onduso to confirm the identity of the person who checked into his guest house with the complainant and that his evidence must have been adverse to the prosecution case.
- 8 As regards glaring contradictions, in the prosecution case, counsel submitted that the complainant's birth certificate was never produced in evidence though it was marked for identification; that the exact age of the complainant is unknown as she gave contradictory ages, 14 ½ and 17 years.
- 9 As regards penetration, counsel submitted that the prosecution's evidence that the complainant was defiled by two people and a vaginal swab was taken confirming presence of spermatozoa but it was not established whose spermatozoa it was the Appellant's or Jared's; that the said evidence needed medical analysis which was not done.
- 10 Counsel also submitted that the culprit was not positively identified because the complainant did not tell the court whether she knew the appellant before she met him riding a motor cycle. This because the complainant was not with the police when he was arrested and it is not clear how the police officer's who arrested the appellant identified him; that the two arresting officers were not called as witnesses to confirm how they identified the appellant; that the complainant lied to the court when she stated that she asked the men at the lodging to look for the appellant and she asked him for her phone and fare because it is Onduso who called police and caused the arrest.
- 11 Counsel also pointed out that the report captured in the OB report at Karungu police station was one of attempted defilement but not defilement.
- 12 The prosecution counsel also filed brief submissions which this court did not comprehend. It was not clear whether counsel was conceding the appeal or opposing it.
- 13 This is a first appeal and it behoves this court to reexamine all the evidence on record, analyse and evaluate it and arrive at its own conclusions in line with the decision of *Okeno vs. Republic* (1972) EA 32.
- 14 PW1, the complainant LAS told the court that she was 14 years; that on 26/9/2021, she left school, met Jared who had asked her to be his girlfriend; they talked from 4:00p.m to 7:00p.m and that he forced her to go to his brother's house where he forced her to sleep and they engaged in sexual intercourse by him inserting his genital organ into hers. Next day, he took her to Alando but she wanted to go to her uncle's place in Sori; that she met the appellant who offered to help her after she told him her issue; that he took her to a house where he left her watching TV till 8:00 p.m, then removed her to a single room with a bed where he later forced her he inserted his genitalia in hers and engaged in sexual intercourse



with her against her will. She slept till next morning and she called her uncle to come for her but before she left, a police officer from Karungu questioned her and she explained; that both the appellant and Jared were arrested on same the day. She was also taken to police calls and then taken to hospital. Her parents were called, she was released while the two suspects were detained. It was PW1's testimony that she had sex with Jared on 26th night and with the appellant on 28th.

- 15 PW2 JAO is the mother of the complainant. She stated that complainant is 14 years old. She recalled that on 26/8/2021 a Sunday, she met the complainant while going to her place of business at 4:00p.m PW2 enquired if she had her phone but PW1 denied. Her husband later asked where PW1 was and PW2 did not know. PW1 was not found and on 28th, she received a call from Sori police station asking if her daughter was missing. She went to the police station next day where it was alleged that she was found with a boy. PW1 was treated at Karungu Sub County Hospital.
- 16 PW2 said that she found Jared arrested was at police station and that the appellant was arrested on 29th.
- 17 PW3 Leonard Omwami a senior clinical officer at Karungu Sub County Hospital. He examined PW1 on 29/9/2021. He found that she had lacerations to her genitalia, labia, majora vaginal walls, and hymen membrane was broken. Spermatozoa were seen in the high vaginal swab taken. PW3 formed an opinion that there was penile penetration of PW1. PW3 also examined the appellant. He could not determine whether the complainant had been defiled by two people.
- 18 PW4 PC Brenda (W) of Karungu Police Station was the investigating officer in the case which was assigned to her on 29/9/2021. PW4 found from PW1 that Steve Okoth defiled her on 27/9/2021 night and he was arrested at the Boda boda stage on 30/9/2020. PW4 explained that she also met Jared Onyango who is said to have defiled the complainant on 26th September but was found to be a minor and the charge was withdrawn and the matter referred to children's office.
- 19 When called upon to defend himself, the appellant denied defiling the complainant but admitted to having carried the complainant on his motor cycle as a passenger on 27/9/2021 from Alendo to Sori Town. He did not see her again till 29/9/2021 at Sori market stage; that was arrested for something he did not know till 30th September when he was informed that he spent a night with the girl at a guest house.
- 20 Having heard all the evidence tendered before the trial court, the grounds of appeal and submissions of counsel, I think that the first issue to consider is whether article 50 (2) (g) was complied with. Mr. Kisera counsel did not make any submissions on this ground. Article 50 of *the Constitution* guarantees an accused person's right to fair trial. Under Sub Article (2) (g), the court has the duty to inform an accused promptly of his right to choose counsel to represent him. The said right cannot be abrogated. A look at the court record shows that the appellant was arraigned in court on 1/10/2021. As soon as the charge was read to him, Mr. Mboya Advocate who seems to have been in court indicated that he wished to come on record for the accused person and applied for bond. Having been represented by counsel from the onset, there was no need for the court to explain to Accused the right to choose counsel. He had already exercised that right to choose counsel. That ground must fail.

Whether the prosecution failed to call crucial witnesses.

- 21 The law is settled that it is the duty of the prosecution to determine the witnesses they wish to call to ensure that the court arrives at a fair determination of the case. It is not required to call a superfluity of witnesses (See *Bukenya vs. Uganda* (1972) EA 549. In the same case the court held that failure by the prosecution to call essential witnesses raises an adverse presumption against the prosecution that



the evidence may have been adverse to the prosecution case. In *Juliua Kalewa Mutunga vs. Republic* Criminal Appeal No. 31 of 2005 the court held:-

“As regards principal of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

22 After appraisal of the evidence on record, I find that the evidence of the owner of the guest house one Gideon Onduso who questioned PW1 on finding her in the guest house was crucial to this case. It was necessary to clarify who was found with PW1 at the said guest house, Jared or the appellant. This is because the report made by the said Onduso, to the police (DEXNO. 1) indicates that the complainant was found with Jared Onyango. As properly submitted by the appellant’s counsel, the onus lay in the prosecution to prove that it is the appellant who spent the night with the complainant on the night of 27 and 28th September at September at Onduso’s guest house.

23 Further examination of the evidence indicates that the appellant was arrested on 30/9/2021 at Boda boda stage by PC Ndunga and PC Magati. The two arresting officers were not called as witnesses. Unfortunately, the prosecution did not adduce evidence on how the two officers were able to identify the appellant as the perpetrator. The complainant did not tell the court whether she knew the appellant before or that that was her first encounter with him. The complainant’s evidence seemed to suggest that the appellant was arrested while in her company which was not the case. The two officers would have cleared this discrepancy in the prosecution evidence. In my view failure, to call Gideon Onduso as a witness was fatal to the prosecution case in identification of who was found with the complainant at the guest house.

24 In a case of defilement, the following three ingredients must be proved beyond reasonable doubt, namely:-

1. Proof of age of the victim;
2. Proof of penetration;
3. Positive identity of the perpetrator.

Of Age

25 It is the appellants contention that age was not proved to the required standard because the complainant told police that she was 17 years, and the birth certificate shown to court was never produced in evidence as an exhibit.

26 In the case of *Mwalango Chichoro Mwanjembe vs. Republic* Criminal Appeal 24 of 2005 the Court of Appeal held as follows on proof of age:-

“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.”



27 In *Fappyton Mutuku Ngui vs. Republic* Criminal Appeal 296 of 2010 (Mombasa) the Court said:-

Proof of age is critically important in proving offences of defilement or attempted defilement as it is the age of the victim that determines the amount of sentence to be imposed on conviction.

28 Again in *Francis Omuroni vs. Uganda* Criminal Case No. 2 of 2000, 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..."

29 Guided by the above decisions it is trite that age is not necessarily proved by a birth certificate. It can be proved by the evidence of the parent, guardian or even common sense by observation. Although PW1 had told the owner of the guest house that she was 17 years, she told the court that she was actually 14 years. Her mother too confirmed that she was born in 2007. Even if the birth certificate was not produced in evidence. I am satisfied that the complainant's age was proved and she told the court the truth. In fact, the person who caused the complainant to be arrested must have observed and seen that she was a child before reporting to police.

Penetration

30 No doubt penetration was proved. The clinical officer PW3 found the labia minora and vaginal walls to have lacerations. The hymen was broken and spermatozoa were found in the vaginal swab.

Proof of the perpetrator

31 The appellant admitted to having transported the complainant on his motor cycle on 27th September, 2021 but denied having defiled her.

32 As earlier noted in this judgment, from the report made by Gideon Onduso to police on 28/9/2021 after he found PW1 at his guest house, the person who was arrested was Jared Onyango. The appellant was arrested later 30th September 2021. It is only Onduso who would have confirmed whether it is the appellant whom he found with the complainant at the guest house on the material day or not. Furthermore, had the police officer cared that PW1 had been defiled by two people, he should have taken the spermatozoa found in PW1 for further tests with the government Chemist to ascertain whose it was. I find that this case was half baked. The investigation officer did not cover all the necessary points to prove the offence. For that reason alone, I will give the Appellant the benefit of doubt and acquit him of the charge of defilement.

33 He is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 21ST DAY OF SEPTEMBER, 2023.

R. WENDOH

JUDGE

In presence of; -

Mr. Kaino Prosecution Counsel

Mr. Ouko holding brief for Mr. Kisera for Accused



Appellant Present

Ms. Emma/ Phelix –Court Assistant

