



**Etyang v Republic (Criminal Appeal 103 of 2021)
[2023] KEHC 23722 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 103 OF 2021
REA OUGO, J
SEPTEMBER 21, 2023**

BETWEEN

JOB ETYANG ALIAS WINO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the judgment of A.A Odawo, Senior Resident Magistrate
at Bungoma delivered on 14th October 2021, Criminal Case No. 78 Of 2019)*

JUDGMENT

1. Job Etyang alias Wino, the appellant, herein was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 30th September 2015 at about 0230hrs at [particulars withheld] location in [particulars withheld] sub county within Busia County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of W.O a child aged 2 years and 4 months.
2. The appellant faced an alternative count to the main one, of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 30th September 2015 at about 0230hrs at [particulars withheld] location [particulars withheld] sub county within Busia County, willfully and unlawfully touched the vagina of W.O a child aged 2 years and 4 months.
3. The appellant pleaded not guilty to the charges before the trial court and a full trial was conducted. The prosecution called three (3) witnesses.
4. This being a first appeal, it is the duty of this to reconsider, re-evaluate and reanalyze the evidence afresh and come to its own conclusion bearing in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (See *Okeno v Republic* [1972] E A 32.) The evidence of the prosecution witnesses before the trial court was as follows:



5. JE (Pw1), testified on oath on 15th October 2020. She testified that she was the complainants' mother and only came into contact with the appellant on the day of the incident. She recalled that on the material day at around 7:30 pm, she left to go to her cousin's funeral and left the complainant asleep. She stayed at the funeral for one hour and then went home. However, when she returned home, she found the door unlocked, the lights switched on and she thought her sister had come to the house. She proceeded to call out her name but did not get any response. Immediately the lights in the house went off and she switched on the torch on her phone. She then heard her child screaming in pain and immediately pushed the door open. She was shocked to discover the complainant uncovered from the blanket she had used to cover the child. The minor's dress was pulled up, her inner panty pulled down. The complainants' vagina appeared to be having sperms, whitish in colour. The complainant was lying across the bed and the appellant was on her side lying on the bed as well and his zip on the trouser was open. Pw1 asked the appellant what he had done to her child and he attacked her. Pw1 raised an alarm, the two struggled but she was overpowered by the appellant who then ran out of the house leaving behind his slippers and helmet. She then took the complainant to her step mother and proceeded to return to the funeral to find out who knew the appellant well. She went to his cousin, and explained what had happened and he accompanied her to the appellant's home near Kabukara area. They did not find him in his home but were directed to check the neighbour's house where they found him hiding. The appellant then got out of the house and ran but they chased him down and caught him. They took him to Changara AP Camp and were then referred to Moding Police Post and again to Malaba Police Station. Pw1 gave the police her statement and was then referred to Kocholia Hospital (Teso North Hospital) where the complainant was treated.
6. On cross examination she affirmed that she neither knew the appellant prior to the incident nor that her sister had an association with him. She testified that they did not use electricity but the light was bright enough to see. She said that the appellant left helmet and slippers but was not sure whether the appellant drove a motorcycle. She said that she could not state what the appellant was wearing as she didn't concentrate on his outfit/clothes.
7. No. 2007111713 PC David Okello (Pw2) previously attached to Changara AP Post stated that on 30th September 2015 he was at the station with Corporal Joseph Busienei when several people came with the appellant claiming he had defiled a minor. They proceeded to interrogate the appellant who admitted that he had defiled the complainant. They then proceeded to record witness statements and interrogated the mother, Pw1, and other members of the public. They referred them to another patrol base and called the officers to come and take the appellant. He testified that pair of slippers and a motorbike helmet were also brought as exhibits. During cross examination, Pw2 testified that it was the duty of the investigating officer to any forensic evidence.
8. David Olunga, a clinical officer, testified as Pw3 on behalf of Caleb Barasa. He told the trial court that he was a Clinical officer at Chwele Sub-County Hospital. The complainant was brought to the hospital on 30th September, 2015 around 7:00 pm with a history of having been defiled. She had been defiled on the same date at 2:30 am. Her mother, Pw1, was the one who made the report and stated that she found the complainant being defiled by a person known to her. On examination he found that her hymen was missing, she had laceration in the vagina, was in a lot of pain when touched and her urine test was fine. Her dental examination showed that she was 2 years and 4 months. She was then given antibiotics and PEP. He also attended to the accused the same day, who had been escorted by police officers from Malaba Police Station. He found him to be HIV Negative and urine test showed signs of an infection. He filed P3 form for both the accused and the complainant which was put in evidence. On cross-examination he testified that bacterial infection in the accused urine test was normal in men and that he could have passed it to the minor. He explained that the complainant could have tested



negative for infection due to the incubation period of infection as she was taken to hospital 11/2 days after the incident. He said the report did not indicate how fresh the lacerations were or if the broken hymen was fresh.

9. At the close of the prosecution case, the appellant was put on his defense. He testified that he is also called Wino and he comes from Kibindoi B, Bungoma –West, Sirisia Sub-County. He testified that on 30th September 2015 around 2:30 am he was at home with his wife. He denied knowing the complainant, her mother (Pw1) and their village, Changara, Teso North. He further denied the evidence and allegations made by the complainant’s mother Pw1. He stated that he was taken for medical examination at Kocholia Hospital where he was tested for HIV as well as a urine test. He admitted that he had an STI at the time and was on medication before his arrest. He testified that no identification parade was done to identify him as the complainant’s mother, Pw1, never identified him. He recalled that he woke up on that morning heading to work but was summoned to the village elders’ office and then taken to Changara Police Post in Busia County. At the Police post he was put in the cells and beaten by the police officers who demanded Kshs 20,000/- He was transferred to Bulin Police Station, then Amagoro Police Station and finally Malaba Police Station. He testified that someone used his name as the perpetrator yet the complainant’s home was far from his home.
10. The trial magistrate after reviewing the evidence the trial court convicted the appellant of the main charge and sentenced him to life imprisonment. The appellant being dissatisfied with the conviction and sentence, the appellant filed a petition of appeal on 27th October 2021 on grounds that:
 1. The appellant pleaded not guilty to the said charges
 2. The learned trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant.
 3. The trial magistrate failed in rejecting the alibi evidence adduced by the appellant.
 4. The learned trial magistrate erred in law and fact in arriving at a decision based on evidence that were full of contradiction and without analyzing the same.
 5. The trial magistrate erred in law and fact in considering extraneous factors in the decision making.
 6. The appellant did not get a chance to air his mitigation as provided for in law, the same was not considered at sentencing.
 7. The court reviews the conviction and sentence when the same comes for hearing as it was too harsh.
 8. He wishes to raise more grounds of appeal at hearing.
11. On 28th October 2021, the appellant filled further grounds of appeal. He contends that:
 1. The learned trial magistrate erred in law and fact when she held that the identification of the accused had been proved.
 2. The Honourable trial magistrate erred in law and in fact when she held that the appellant was found at the scene of crime and that Pw1 knew him.
 3. The Honourable trial magistrate erred in law and in fact when she failed to hold that the real culprit was the person whose helmet and sandals remained at the scene and not the accused appellant.



4. The Honourable trial magistrate erred in law and in fact when she held that the accused appellant tried to run away from home yet there was no evidence or credible evidence to support that finding.
 5. The Honourable trial magistrate erred in law and in fact when she failed to hold that penetration by the accused was not proved.
 6. The Honourable trial magistrate erred in law and in fact when she failed to hold that the accused appellant was absolved by non-cross infection of the victim with the sexually transmitted disease which the accused appellant was suffering from.
 7. The Honourable trial magistrate erred in law and in fact when she failed to notice that Pw1 was entirely mistaken.
12. The appellant urges the court to quash the conviction and review or set aside the sentence. The appeal was canvassed by way of written submissions. The appellants in his written submissions argued that the ingredients of defilement were not proved. The age of the complainant was not disputed by the appellant. However, he submitted that on the issue of penetration, Pw3 testified that according to the P3 and Medical reports the appellant had an infection while the complainant exhibited pain on examination and a broken hymen. Pw1 also testified that the complainant had sperms but no blood in her genitalia. Section 2 of the *Sexual Offences act* defines penetration to include partial or complete insertion of a genital organ of a person into the genital organ of another person. Based on this definition the prosecution failed to establish without a doubt that there was penetration. According to PW3 the complainant's urine was fine which should not have been the case as the appellant urine test showed that he had an infection and he further testified that he had been undergoing treatment for an STD.
13. On the issue of identification, he submitted that it was necessary for the trial court to have tested the reliability of the alleged recognition of the appellant by Pw1 at 2:00 am in a remote village with lighting challenges. He urged the court to note that Pw1 testified that it was her first time seeing the appellant on the day the incident occurred. Her alleged recognition of the appellant does not satisfy the principle in *Anjononi & others v R (1980) KLR*, Madan JA stated that:
- “..... this however, was a case of recognition of the assailants is more satisfactory, more assuring, more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other...”
14. The appellant submits that PW1 could not describe how the accused was dressed or any special markings or features that would have enabled tracing and arrest of the accused. The appellant testified that he was presented to the village elder in Kabukara village and was described as one “Omuse” and it was only later that his identity became known as he passed through various authorities. He argued that there is no evidence that places the appellant at the scene of the crime as the blue slippers and helmet handed over to the police as exhibits were not proven beyond reasonable doubt to be owned or used by the appellant. The prosecution did not produce any DNA recovered from the exhibits or fingerprints that would have placed the accused at the scene of the crime.
15. The prosecution opposed the appeal. They submitted that the appellants' rights as per Article 50 of *the Constitution* were adhered to the latter. From the proceedings at the trial court, the appellant was properly informed of the charges in a language he understood and at all times was represented by an advocate.
16. In response to the appellant's 3rd and 4th grounds of appeal, the prosecution submits that the trial court rejected the alibi defence adduced by the appellant because the evidence was marred with a lot



of contradiction. The prosecution called a total of 3 witnesses as the complainant was of tender age. According to Pw3 the complainant had lacerations in the vagina and was in pain when touched. Both the complainant and appellant were taken to the hospital on the same day and nothing was tampered with. Pw1 identified the appellant as he was in her house and also wrestled her up until he managed to escape. Although the appellant alleged that he was sleeping in his house with his wife, he did not call any witness to support his alibi including his wife. The prosecution further submits that the appellant was arrested on the same day the offence was committed by members of the public and taken to Changara AP Post. He had legal counsel who mitigated on his behalf and the same was considered by the court in its final decision. It was the prosecution's submissions that the appellant was charged with defiling a child contrary to section 8(1) as read with 8(2) of the *Sexual offences Act* which provides that any person who commits an offence of defilement with a child of eleven years or less is liable to a life imprisonment upon conviction. The sentence is provided by law as the child was 2 years and 4 months.

Analysis And Determination

17. The main issue in this appeal is whether the prosecution established its case beyond reasonable doubt, that is, whether the prosecution proved that the complainant was a child, that there was sufficient proof of penetration and the appellant positively identification as the assailant.
18. On the issue of age of the complainant, this court is guided by the decision of the Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic (2016)* eKLR which stated:

“ ... 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 documents, 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”
19. Pw1 produced the complainant's clinic book in which it was indicated that the child was born on 18th June 2013 and was therefore 2 years and 4 months at the time the offence was committed. Pw1 who was the mother of the child also testified that W.O was 2 years 4 months at the time. The clinical officer, Pw3 who produced the complainant's age assessment report, Pexh1, testified that the child was 2 years 4 months old. In light of the evidence of the age assessment form, the child's clinic book and the evidence of the child's mother, I find that the prosecution proved that at the time of the offence, the complaint was 2 years, 4 months old.
20. I now turn to consider whether the prosecution established penetration. The appellant in his submissions argues that there was no proof of penetration as he had an STD at the time that he had been treating yet the child had not infection. However, this was explained by Pw3 who testified the child was taken to hospital 1 ½ days after the incident and the child tested negative for infection due to the incubation period of infection.
21. The testimony of Pw3 satisfies the element of penetration. He testified the complainant had lacerations in the vagina and was in a lot of pain when touched. He also noted that the hymen was missing. According to the P3 form the complainant had sustained laceration on the labia minora with tenderness on palpation and had no hymen membrane. The evidence of Pw3 is corroborated by the testimony of Pw1 who testified that when she entered the house, she found the child crying in pain and her panty pulled down and the vagina had whitish substance resembling sperms.



22. The prosecution evidence on penetration and age of the complainant was therefore proved beyond reasonable doubt. The determination of the appeal therefore lies on identification.
23. Pw1 was the only direct witness that identified the appellant after she testified that she found him with the complainant immediately after he had defiled her. In *Maitanyi Vs Republic (1986) KLR* the Court of Appeal said:

“It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into.”

24. Pw1 testified that when she got back home, she realized that the door was open and the lights were switched on. However, after calling for her sister whom she thought was in the house, the lights were switched off. She then turned the torch of her phone on and saw the appellant on the bed with the zip of his trouser on. While the light from the torch on Pw1’s phone may have been sufficient lighting, her evidence during examination in chief was that she had never met the appellant before the incident. The assailant was therefore a stranger. I also note that the trial court who saw and heard Pw1 stated as follows, ‘From the evidence it is clear that there is some missing evidence, that would explain more on her knowledge of accused’. In *Cleophas Otieno Wamunga vs Republic (1989) KLR 424*, the court stated:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification”.

25. Pw1 testified on cross examination that she did not know the appellant before the incident. She also testified that she could not remember what the assailant was wearing when she found him in her house. It is therefore not clear that when Pw1 set out to look for the perpetrator of the offence on the material night, how she arrived at the conclusion that the offence was committed by the appellant considering that the assailant was a stranger to her. It can only be deduced that it is after Pw1 had a discussion with Steve, who was the appellant’s cousin, that she concluded that the assailant was the appellant. Steve was not called as a witness. Pw1 in her testimony explained that the appellant’s cousin was her sister’s boyfriend but she did not know of this relationship at the time she found the assailant in her house. In my view, the visual identification of the appellant was shaky.
26. The appellant in his defense also testified that he is not called ‘Obuse’ which was the name that was used to identify him at the time of his arrest. I have also considered that the appellant was not arrested within the locus in quo as Pw1 testified that it took them 3 hours walk to reach the appellant’s house. Although the prosecution availed a helmet that was of the assailant, it was not clear whether it belonged to the appellant, or whether the appellant had a motor cycle at the time of the incident. There are



glaring uncertainties in regards to the identification of the appellant and in my view, I find that the appellant was not positively identified as the assailant.

27. In conclusion, I am not convinced that the prosecution proved its case to the required standard, I set aside the conviction and sentence and I direct the appellant, Job Etyang alias Wino be set at liberty unless lawfully detained.

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

R.E. OUGO

JUDGE

In the presence of:

Job Etyang alias Wino/Appellant- Present

Mr. Ayekha For the Respondent

Okwaro C/A

