



REPUBLIC OF KENYA



**Guyo v Republic (Criminal Appeal E014 of 2023)
[2023] KEHC 23076 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E014 OF 2023
JN NJAGI, J
SEPTEMBER 20, 2023**

BETWEEN

BORU ALI GUYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by
Hon. S.K. Arome, Principal Magistrate, in Marsabit PM's Court
Sexual Offence Case No.E004 of 2022 delivered on 30/5/2023)*

JUDGMENT

1. The Appellant herein was convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No.3 of 2006 and was sentenced to serve 10 years imprisonment. The particulars of the offence were that on the 6th day of June 2022 in Marsabit Central Sub County within Marsabit County he intentionally and unlawfully caused his penis to penetrate the anus of ADW (herein referred to as the complainant), a child aged 17 years.
2. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are:-
 1. That the learned trial magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witnesses was un-collaborative and contradictory.
 2. That the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.
 3. That the learned trial magistrate erred in law and fact by failing to note that the sentence is harsh and excessive in the circumstances of this case.



4. That the learned trial magistrate erred in law and fact by failing to note that the charges were framed by the complainant and his witnesses.
5. That the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.
3. The case for the prosecution is that the complainant is mentally challenged. He gave unsworn evidence in court as PW1 in the case and was cross-examined by the Appellant. His evidence was that he was on the material day grazing his father's livestock in the bush. The Appellant found him there. He proceeded to remove his (complainant's) trousers and inserted his penis into the complainant's anus. A person called Halkano arrived there and saved him from the Appellant.
4. It was the evidence of Halkano Bonaua PW4, that on the material day at around 3pm he found the Appellant sodomizing the complainant who is mentally challenged. Both of them did not have their trousers on. The Appellant was lying on top of the complainant and was inserting his penis into the complainant's anus. He asked the Appellant why he was doing such an act to person who is mentally challenged. The Appellant rose up. PW4 went and informed the complainant's father who happens to be blind. He led the complainant's father to the place he had left the Appellant and the complainant but they found the Appellant having gone away. They followed the Appellant on a motor cycle. They found him. They met with some village elders and informed them of what had happened. The case was reported to the police and the appellant was arrested. In cross-examination the witness said that the Appellant was a person who was known to him before that date.
5. The case was investigated by PC Khadija Aila Maalim PW5 of Marsabit Police Station. She testified that the report was made at the police station on 6/6/2022 at 9:58 pm. That she found the Appellant in the police cells on the morning of 7/6/2022. She called the complainant and escorted him to Marsabit County Referral Hospital where he was examined and treated. She recorded the statement of the complainant and noted that he was mentally challenged. She issued a P3 form to him which was duly filled at the hospital. She charged the Appellant with the offence.
6. The complainant was on the 7/6/2022 examined by an Oral dental Officer, Naima Yusuf PW3, who found that he had not erupted his last molars which led her to form an opinion that he was aged between 15 and 17 years. The witness also examined the Appellant and found that all his essential teeth and molars had erupted. She formed the opinion that he was over 18 years of age. She prepared age assessment reports for both of them. During the hearing she produced the age assessment report for the complainant as exhibit, P.exh. 2(b).
7. The complainant was also examined by a Clinical Officer, Halima Jillo PW2 on the same day, 7/6/2022. She found him to be mentally unstable. A wet swab was taken from his anal region and was examined in the laboratory. Red blood cells were found which meant that there was trauma in the anus. It was her opinion that this confirmed sodomy. The witness filled the complainant's P3 form. She produced it in court as exhibit, P.exh.1.
8. When placed to his defence the Appellant stated in a sworn statement that he was arrested by the area chief on the 5/6/2022 and taken to a nearby police post. He was then taken to Marsabit police station at 9 pm. That on 6/6/2022 he was told that he had sodomized a certain boy. His statement was recorded on 7/6/2022 and was charged in court on 8/6/2022. He denied committing the offence. He said that Halkano PW4 lied against him as they had a family dispute over a parcel of land that Halkano's family had bought from the Appellant's family. That Halkano had threatened to have him jailed for life.



9. The appeal proceeded by way of oral submissions. The Appellant submitted that the case was fabricated due to a land dispute. That he had parents who depended on him and his mother was disabled. He pleaded with the court to reduce the sentence.
10. The state on the other hand through the Prosecution Counsel, Mr. Otieno, submitted that the Appellant was correctly convicted for the offence of defilement. That the victim was proved to be below the age of 18 years. He identified the Appellant as the person who sodomized him. That the act of sodomy was witnessed by PW4. That medical evidence confirmed that there was penetration. That his contention that the case was framed by PW4 was rejected by the trial court. The state urged the court to dismiss the appeal.

Analysis and Determination

11. I have considered the grounds adduced in support of the appeal and the submissions by the appellant and the Prosecution Counsel.
12. This being a first appeal, the duty of this court is to analyse and re-examine afresh the evidence presented before the trial court and draw its own independent conclusions but bearing in mind that it did not see or hear the witnesses testify– see *Okeno v Republic* (1972) EA 32. In this respect the Court of Appeal in the case of *Kiilu & another v Republic* (2005)1 KLR 174 stated as follows:-

“ An Appellant in a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
13. The Appellant challenges the conviction on the ground that the evidence adduced in court was insufficient to sustain a conviction and was un-corroborating and contradictory. That the trial magistrate failed to note that the charges were framed by the complainant and his witnesses and that the court rejected his defence without giving any cogent reasons. The Appellant further challenges the sentence imposed on him on the ground that it is harsh and excessive.
14. The ingredients of the offence of defilement are: proof of the age of the victim, proof of penetration and proof of the identity of the offender - see *George Opondo Olunga v Republic* [2016] eKLR.)
15. The age of the complainant in this matter was proved by the evidence of the oral dental Health Officer PW3 who did an intra-oral examination on the complainant and found that he had not erupted his last upper and lower mandibular and thus assessed his age at between 15-17 years. She prepared a report to that effect. The report was not challenged by any evidence to the contrary. In the premises the age of the complainant was proved at 15-17 years.
16. The trial court in its judgment said that the clinical officer who examined the complainant confirmed that the complainant had been sodomized.
17. In her evidence, the Clinical officer, PW2, testified that there were red blood cells in the anal swab that was taken from the complainant. That the presence of red blood cells in the anal swab meant that there was internal trauma in the anus of the complainant.



18. I have gone through the P3 form that was completed by the clinical officer, P.exh.1. Nowhere in the report did she indicate an opinion that there was evidence of injury in the anus. Why would the clinical officer wait until when she testified in court for her to form an opinion as to the meaning of the presence of red blood cells in the anal swab? The fact that she never made a conclusive opinion at the time of filing the report can only mean that the evidence of trauma/injury in the anus was not conclusive for her to form a firm conclusion. The trial magistrate was not correct in relying on the conclusion of the clinical officer that her findings confirmed penetration. I therefore find that there was no medical evidence to support penetration on the complainant's anus.
19. However, it is trite that absence of medical evidence in proof of defilement or rape is not fatal as the two offences can be proved by other ways and not necessarily by way of medical evidence. The Court of Appeal in the case of *Kassim Ali v Republic*, Criminal Appeal No. 84 of 2005, stated that:

“The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence”.
20. The question then is whether in the absence of medical evidence the offence of defilement against the appellant was proved by the oral evidence of the prosecution witnesses.
21. The complainant's evidence was that the Appellant found him grazing his family goats in the bush and proceeded to remove his pair of trousers and sodomized him. This evidence was corroborated by Halkano PW4 who stated that he found the Appellant in the act of sodomizing the complainant. The trial court dismissed the Appellant's defence that the case was fabricated by Halkano PW4 due to a grudge over a grazing field. The court found the prosecution witnesses to be truthful and reached a conclusion that the act of penetration was proved.
22. I have re-examined the evidence adduced against the appellant by the prosecution witnesses against the Appellant's defence that the case was fabricated by PW4 due to a grudge over a grazing field. Though the complainant was mentally unstable he gave evidence in court and was cross-examined by the Appellant. His evidence that the Appellant sodomized him was corroborated by Halkano PW4 who stated that he found the Appellant in the act of doing so. The trial magistrate found the two witnesses to be a truthful and believed their evidence. I have no reason to differ with the finding.
23. The Appellant in his defence alleged that the case was fabricated by Halkano due to a grudge over a grazing farm. The trial magistrate dismissed the defence and believed that Halkano was telling the truth.
24. The Appellant never questioned Halkano about the alleged grudge when he cross-examined him in court. Neither did he question any of the prosecution witnesses on the issue. There is no evidence that the Appellant brought the issue to the attention of the investigating officer PW5 during investigations. The Appellant only raised the issue during his defence. Asked by the prosecution in cross-examination why he did not raise the issue with Halkano when he was testifying, he stated that he had been told by a sister to the complainant not to bring up the issue in the case. I do not find the reason to be convincing. The Appellant did not have a reason why he did not raise the issue with Halkano in court. In the absence of any explanation, the inevitable conclusion is that the defence was an afterthought. The trial magistrate was right in dismissing the defence. The contention by the Appellant that the trial court dismissed his defence without giving a cogent reason does not stand. There is no truth that the case was fabricated by the complainant and his witnesses.
25. On the third ingredient of the offence of defilement relating to identification, Halkano PW4 testified that he knew the Appellant before the date of the incident. The Appellant admitted that Halkano knew him as he alleged that they had differences over a land dispute. Halkano stated in his evidence



that he talked to the Appellant when he found him sodomizing the complainant and asked him why he was doing such an act to someone who was mentally challenged. It is clear that the witness properly saw and identified the Appellant. The Appellant was identified as the perpetrator.

26. I have considered the evidence adduced against the Appellant in its totality and I find it overwhelming. He was convicted on solid grounds. There is no merit on the challenge on the conviction and I thereby uphold the conviction.

Sentence

27. The Appellant was charged under section 8(4) of the *Sexual Offences Act* which provides that:

Any person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

28. The age of the complainant in this case as stated in the charge sheet is 17 years. The Appellant was sentenced to serve 10 years imprisonment. The law is that where a minimum sentence is prescribed by statute, the court has no discretion to impose a lesser sentence – see *Rotich v Republic* (1983) KLR 541. The sentences imposed by Section 8 of the *Sexual Offences Act* are mandatory. The trial court erred in imposing a lesser sentence than provided by the law. This court has a duty to correct the indiscretion by the trial court. The court did warn the appellant during the hearing of the appeal that the court could enhance the sentence.

The sentence of 10 years imprisonment is therefore set aside and substituted with one of fifteen years imprisonment. Sentence to run from the date of plea, i.e, 21/6/2023.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20TH SEPTEMBER 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Otieno for Respondent

Appellant – Appearing in person

Court Assistant –

14 days R/A.

