



**Magige v Republic (Criminal Appeal E125 of 2022)
[2023] KEHC 22739 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E125 OF 2022
RPV WENDOH, J
SEPTEMBER 21, 2023**

BETWEEN

SAMWEL CHACHA MAGIGE APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Samwel Chacha Magige was convicted on two charges namely:-
 1. Defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*.
 2. Giving false information to a person employed in the Public Service contrary to section 129 (a) of the *Penal Code*.
2. He pleaded guilty to a third charge of failing to attend court contrary to section 121 (1) (b) of the *Penal Code* and was sentenced to two years imprisonment.
3. The particulars of the charges are that on diverse dates between 20th and April 21, 2021 in Kehancha, Kuria West Sub County, intentionally inserted his penis in the vagina of RJM a child aged 16 years. Further particulars are that on 21/4/2021 at Kehancha Police Station, the appellant informed PC Kibe, a person employed in the Public Service that he was Sammy Weldon Njogu from Meru when he knew the said information to be false.
4. After a full trial and conviction, the appellant was sentenced to 10 years imprisonment on the first count and two years' imprisonment on the second count sentence were ordered to run concurrently. He is dissatisfied with the judgment of the court. He preferred this appeal citing the following grounds:-
 1. That article 50 (2) (g) and (h) were not complied with;
 2. That the offence of defilement was not proved to the required standard;



3. That the appellant's defence was not considered.
5. The appellant filed submissions in support of the grounds in which he argued that, no document was produced from Wasafi Guest house where he was allegedly arrested to prove that he was found there, that there was no medical evidence produced linking him to the offence; that the evidence of the clinical officers was irregularly admitted in absence of the marker of the P3 Form; that no birth certificate was produced to prove the age of the complainant and lastly, that penetration was not proved as required by the law. He prays that the conviction be quashed and sentence set aside.
6. The prosecution counsel Mr. Kaino filed submissions opposing the appeal. It was his contention that the three ingredients necessary to establish an offences of defilement was proved and that the P3 was properly tendered in evidence as was held in the case of *Republic v Ronoh Khalif Abmet* (2015) eKLR; that medical evidence i.e DNA is not necessary to prove an offence of defilement. Reliance was made on the case of *Benjamin Mwangi v Republic* (1984) eKLR. He urged the court to dismiss the appeal.
7. This is a first appeal and it is the duty of this court to re-examine all the evidence tendered in the trial court afresh, analyse and evaluate it, and arrive at its own determination as was held in *Okeno v Republic* (1972) EA 32.
8. The prosecution called a total of six (6) witnesses while the appellant testified on oath in his defence.
9. PW1 JRM recalled that on 21/3/2021, the appellant found her at (Particulars Withheld) market and asked for her phone number which she gave him. He called her next day and later they met at (Particulars Withheld) hotel at (Particulars Withheld). He refused to let her alight from the matatu they travelled in at 1:00p.m and led her to (Particulars withheld) Guest House at (Particulars Withheld) where they engaged in sexual intercourse; that the appellant had introduced himself to her as a police officer named Samwel Weldon Njogu, from Meru. He left her in the lodging and returned at 8:00p.m and they went to visit her sister RG (PW3). Later, her brother in law called the police who arrested them. She said that she was born on 20/6/2004 and that she was a child and unfit to marry. She was taken to hospital for examination.
10. PW2 JMM, is the father of the complainant (PW1). He arrived home on April 20, 2021 and did not get one of his children, the complainant. He enquired from the others including RG(PW3) who did not know where PW1 was but later called to inform PW1 that she had found the complainant who had informed her that she was getting married to a Meru man and they had visited her. He told her to hold them.
11. PW3 PC Magdaline Kibe, of Kehancha Police station received a report from members of public on 21/4/2021 that a suspect had been seen entering a lodging with a minor. Police officers proceeded there and arrested the minor and suspect. She escorted the minor to hospital for examination and age assessment. She also recorded witness statements; that the appellant first introduced himself as Samuel Weldon Njogu and so did his mother. PW3 then released him on cash bail and he absconded. He was arrested on 9/2/2022 and upon interrogation, it turned out that he was not Samuel Njogu but Samuel Magige Chacha.
12. PW4 Brian Mogaka, a clinical officer at Migori Referral Hospital who had earlier worked at Kuria Sub County produced the treatment notes prepared by his colleague Nyamu whose whereabouts could not be known. He also produced the P3 form filled by one Denis Chacha who was by then studying in Nairobi. He said that the clinical officers had not noted any injuries to the complainant's genitalia.



13. PW5 CPL Albert Ruto, of Kehancha police station recalled that he received information of a minor being at a lodging where he proceeded with CPL Mutua and PC Kwach and found the appellant and minor in a room and arrested both.
14. PW6 RG, a sister to PW1 testified that the father had called to find out if she was with PW1 but she was not. On 21/4/2021 PW1 then called to tell her that she was married to Samuel Magige. PW6 informed the father who asked her to call police which she did after PW1 and the appellant visited her and she trailed them to their lodging room at Wasafi Guest House.
15. The appellant in his sworn defence denied having defiled the complainant. He stated that the complainant's father is his step father and that he believes that he was arrested because of a dispute he had with the said step father; that it is a case of mistaken identity because PW1 named her boyfriend as Sammy Weldon Njogu. He denied being arrested in a hotel.
16. Having considered the grounds of appeal and the evidence on record, the first issue for consideration is whether the court violated the appellants rights under article 50 (2) (g) and (h) of the Constitution. Article 50 of the Constitution guarantees an accused persons 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.

17. Under the above provision, the court is mandated to inform an accused at the earliest time possible of this right to counsel so that an accused person can decide whether or not to engage counsel to represent him. See the case of NMT alias Aunty v Republic Criminal Appeal No. 44 of 2019 (Migori). At paragraph of the said decision, the judge quoted from SV Daniels and another (1983) (2) 275 (A) at page 19 where the duty to inform the accused was emphasised when the court said:-

“ the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity to enable a judgment to be made as to the adequacy of the explanation...”

See also Mphukwa v S CA & R 360 – (2004) (2012). See also Joseph Kiema Philip v Republic (2019) eKLR.

18. I have seen court record and on 10/2/2022, after plea had been taken, the court did explain the appellant of his right to counsel.
19. As to whether the right under article 50 (2) (h), was violated. It is required of the court to inform an accused of his right to be availed counsel at State expense if substantial loss may arise. As regards this right, it has been held not to be absolute because it has to be established that substantial injury will result if an accused is not assigned counsel. In Karisa Chengo v Republic (2017) eKLR the Supreme Court as much and set out ingredients when substantial injustice may arise which include:-
 1. Complexity of the case;
 2. Severity of the sentence;



3. Ability of an accused to afford services of counsel etc.
20. In this case, it has not been demonstrated that substantial injustice may have arisen as regards the appellant. In the end, I find that the ground lacks merit.
21. The appellant faced a charge of defilement. To establish the said offence, the prosecution has to prove beyond any reasonable doubt the following:-
 1. That the complainant is a minor;
 2. Proof of penetration;
 3. Proof of identity of the perpetrator.

Of Age:

22. PW1 JRM told the court that she was seventeen (17) year; having been born on 20/6/2004. The birth certificate was however not produced. However, an age assessment was done by the clinical officer who examined her and was produced in evidence. In the case of Mwalango Chichoro Criminal Appeal 24 of 2015, the court 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.”

23. In *Fappyton Mutuku Ngui vs. Republic* (2012) EKLS

the conclusive proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

24. The court also said that a birth certificate is not the only way to prove age.

25. In *Francis Omuroni v Uganda* Criminal 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...”

26. In this case, the complainant was mature enough to know her age. She was school going. Besides, her age was assessed at 16 – 17 years. I am satisfied that the age of the complainant was proved to be about 17 years at the time of commission of the offence.

Penetration:

27. Penetration is defined in section 2 of the *Sexual Offences Act* 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.”



28. In the case of *Mark Oiruri Mose v Republic* the court explained what amounts to penetration. The court said:-

Many times “... 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. The complainant narrated to this court how she met the appellant and they ended up in a lodging where he inserted his penis in her vagina. It is the same lodging where they were later arrested when PW6 led the police officers, PW3 and PW5 there. PW4 produced treatment notes made by a fellow clinical officer who could not be traced and the P3 form filled by one Denis Chacha who was said to have gone for further studies. The appellant did not object to the production of the said documents by another person who was not the author. Besides, under section 77 of the *Evidence Act*, a professional can produce a document made by another if the other is familiar with the handwriting/ signature and they have worked together, where the maker cannot be easily traced or that he will not be traced without delay. An explanation was given by the prosecutor as to why the other medical officers were not present which explanation was satisfactory. I have no doubt that the medical documents were properly produced in evidence. Although no injuries were found on PW1 I am satisfied that the testimony was credit worthy and the trial court believed her.

30. In his defence, the appellant tried to raise an allegation that he was a step son to the complainant’s father and they had a dispute. He did not disclose the nature of the dispute. Besides, PW1 and even PW2, the complainant’s mother testified and the Appellant never raised any allegation of a frame up to any of them to respond. He never mentioned it to the investigating officer. The allegation of frame up is an afterthought and not believable.

Who was the perpetrator

31. PW1, PW2, PW3, PW5 and PW6 all told the court that the appellant was arrested at Wasafi Guest House while in company of the complainant. The appellant never got away. I am satisfied that he is the perpetrator and the trial court arrived at the correct finding. I therefore affirm the conviction.

32. On sentence, the appellant was handed ten (10) years imprisonment. In my view, the sentence is neither harsh nor excessive in view of section 8 (4) of the *Sexual Offences Act* which provides the sentence as not less than fifteen (15) years.

33. On count 2, the appellant did not make any submissions. There is overwhelming evidence that he held out himself as one Samuel Weldon Njogu from Meru and a police officer, PW1 confirmed that that is the name he had told her which she came to know later, was lie. The appellant continued with the same lie upto the police station. I find no reason to interfere with the sentence .

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

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

R. WENDOH

JUDGE

In presence of; -



Mr. Kaino for the state

Appellant Present

Ms. Emma –Court Assistant

