



**Oliech v Republic (Criminal Appeal E073 of 2023)
[2024] KEHC 12523 (KLR) (Crim) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E073 OF 2023**

**LN MUTENDE, J
OCTOBER 17, 2024**

BETWEEN

GORDON AMOS ONUONG'A OLIECH APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the original conviction and sentence in S. O.
Case No. 37 of 2022 at the Chief Magistrates' Court Makadara)*

JUDGMENT

1. Gordon Amos Onuong'a Oliech, the Appellant, was indicted for Defilement contrary to Section 8 (1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on 29/11/2021 in Njiiru Sub-County within Nairobi County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of GM a girl child aged 17 years.
2. In the alternative he faced the charge of Committing an Indecent Act with a Child contrary to Section 11(1) of the *Sexual Offences Act*. Particular being that on the 29th day of November, 2021, at the stated area, Njiru, he unlawfully and intentionally touched the vagina of GM.
3. Having been taken through full trial, he was convicted for defilement and sentenced to serve fifteen (15) years imprisonment.
4. Aggrieved, the appellant proffered this appeal on grounds that:
 1. The trial magistrate limited the appellant's constitutional rights as guaranteed under Article 50 (2) (g) and (h) of *the Constitution*.



2. The court failed to recognize the pervasive importance of the right to counsel for purposes of his defence; the guiding hands of counsel at the proceedings would have ensured at least a modicum of equity to counter the prosecution's advantage.
 3. The appellant was not given time to retain another counsel to assist him in his defence and submissions and to address the regularity of the proceedings.
 4. The trial Court failed to weigh the sufficiency and contradictions of the prosecution's case.
 5. The medical evidence was not consistent with the findings of defilement; the general body on examination was normal, and, the vagina had a clear discharge.
 6. There was no conclusive evidence of paternity since DNA was not done to ascertain the biological relation between the child and the appellant.
 7. The prosecution did not prove the essential elements of the main charge beyond reasonable doubt.
 8. And, that the sentence was harsh and excessive.
5. Facts of the case were that the appellant was the Principal of the Morning Star School where the complainant had transferred to from Utiini Girls, Makueni. The appellant also taught the complainant's class Business lessons. Previously, the appellant requested the complainant to be his regular companion with whom they would have a romantic relationship but she declined. On 27/11/2021 the entire school went for games at Kirima; and, on that day the appellant gave the complainant directions of his residence at Jacaranda court. He had been asking her to visit him at his residence, where he purportedly lived with his wife and a child.
 6. Subsequently, on 29/11/2021, she went to the appellant's residence to find him alone at home. Where she was locked up in the house and violated sexually without her consent. She went back to school and borrowed a chemistry book from a fellow student who was a boarder. She went home and her father arrived at 7:00pm to find her mopping the veranda at night. He beat and chased her away. She went to her sister's place and stayed there until 1/1/2022 when her sister accompanied her back home.
 7. A month later, on 31/1/2022, it was established that she was pregnant. She identified the appellant as the person responsible. The matter was reported to the police, investigations were carried out which culminated into the appellant being arrested and charged. Hence the case. Although it was established that the complainant later had a miscarriage.
 8. Upon being placed on his defence, the appellant denied the allegations. He stated that he had travelled to Homabay to see his mother when the director of Morning Star school called and notified him of the allegations about a student, GM. who had been defiled by him and was pregnant. Therefore, he was recalled from leave and he travelled back.
 9. That the director had told him that the parents of the student wanted to be compensated, but, being innocent he declined. That on 8/2/2022 while at work, he was sent to buy stationaries and was notified by the Director of the presence of the parents of the student. He was arrested and advised by the police to settle the matter with the complainant who was with them but he declined claiming he was innocent.
 10. That the complainant was told to take them to his house, they went to Jacaranda court and she showed the police a house. He told them that his house was not at 1st floor though it was within the plot. He was told to give out the keys but his keys were at the school and the other key was with his wife at the salon. He was taken to Kayole Police Station and subsequently charged.



11. The appeal was disposed through written submissions which I have taken into consideration together with authorities cited.
12. This being a first appeal, the court is expected to review, analyze and re-evaluate the evidence which was before the trial court and come to its own conclusions. The court must take into account the fact of not having seen or heard witnesses who testified.
13. In *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated this on the duty of the court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to 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, see *Peters v Sunday Post*, [1958] E. A. 424.”

14. The appellant contests the question of fair trial; in particular he urges that there was no compliance with Article 50 (2) (g) and (h) of *the Constitution*. That in the result entire proceedings were a nullity. In this respect, reliance was placed on *N.M.T. alias Aunty v Republic* [2019] eklr where *Mrima J* stated that:

“The right under Article 50(2)(g) of *the Constitution* must be distinguished from the right under Article 50(2)(h) of *the Constitution* given that in many instances the rights under Article 50(2)(g) and (h) of *the Constitution* are dealt with contemporaneously. The right under Article 50(2)(h) of *the Constitution* on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of *the Constitution* on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one’s choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2) (h) of *the Constitution* deals with instances where the State must assign an Advocate to an accused person.”

15. Article 50 of *the Constitution* 2010 refers to the right to fair hearing. Article 50(2) provides that: 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.

16. Article 50(2)(h) on the other hand refers to the right to representation at the State expense. The threshold for pro bono legal services is where substantial injustice would or is likely to result. The provision enacts that :

Every accused person has the right to a fair trial, which includes the right...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 this right promptly.

17. These have been further legislated in the *Legal Aid Act*. Section 43 of the Act provides that:



- 43.
- (1) A court before which an unrepresented accused person is presented shall —
 - (a) Promptly inform the accused of his or her right to legal representation;
 - (b) If substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - (c) Inform the Service to provide legal aid to the accused person
18. The right to counsel is a fundamental right which forms the core tenets of fair trial. The court has a duty to inform the accused of his right to access or be represented by an advocate of his choice provided under Article 50 (2)(g).
19. The serious complaint advanced by the appellant is that the court did not give the appellant reasonable opportunity to retain and consult another counsel hence impeding the principle of choice of counsel. Looking at the record of the trial court, it does not indicate if the court notified the appellant of the right to have counsel at plea-taking time; however, subsequently the appellant notified the court that he had instructed a lawyer to defend him. On the stated date the court accommodated him by placing the file aside but the lawyer did not turn up. In the result, the case was adjourned. At a later date the appellant informed the court that the lawyer was not willing to take up the case hence he would proceed in person. He did not seek time to instruct another counsel.
20. The trial court has also been faulted for not extending help to the appellant to get an advocate at the State expense. The trial against an accused must be conducted justly by not only an impartial court but as envisaged by *the constitution*, such a person should be assigned an advocate who renders professional services to him at a cost to be met by the State. Counsel retained by the State would ordinarily act for a lower cost. But, not all cases qualify for free representation, it depends on whether substantial injustice would result is likely to result.
21. In Republic v Karisa Chengo & 2 Others [2017] eKLR the Supreme court held that this right is not an open ended one, the apex court delivered itself thus:
- “We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available “if substantial injustice would otherwise result”
- Substantial injustice is not defined in *the constitution* and what amounts to substantial injustice should be determined on case to case basis. The *Legal Aid Act* lists duty of the court and the considerations, which as stated where not complied with by the trial court.”
22. In Karisa Chengo case (Supra) the court listed additional grounds for State legal representation to include:
- “(i) The seriousness of the offence;
 - (ii) The severity of the sentence;
 - (iii) The ability of the accused person to pay for his own legal representation;
 - (iv) whether the accused is a minor;
 - (v) The literacy of the accused; and



(vi) The complexity of the charge against the accused.”

23. Although the court did not consider whether the appellant required State representation, what is imperative is whether an injustice was caused and whether fair trial was violated. Substantial injustice calls for looking at the facts, factors and circumstances of each case. Hence the question who the appellant was? In *David Njoroge Macharia v Republic* [2011] eKLR the Court of Appeal stated:

“Under the new Constitution, State funded legal representation is a right in certain instances.

Article 50

(1) provides that an accused shall have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense.”

24. The appellant herein was an enlightened person who had authority over the complainant, it cannot be said that the appellant was ignorant of his right to have an advocate during the trial; as stated he moved court and requested to procure one. Therefore, it cannot be said that an injustice was caused during the period he acted without counsel. Further, the appellant cross examined all witnesses and responded to the charges. The arguments on the application for bail and further ..demonstrate that he was literate and that substantial injustice did not result from the proceedings. The appellant has also not demonstrated in this appeal that the issues were of a complex nature and that he was unable to defend himself.

25. This therefore brings us to the issue whether the offence was proved beyond reasonable doubt. Section 8(1) of the *Sexual Offences Act* provides as follows:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

26. The principle ingredients to be proved are therefore: the age of the victim; penetration; and, identification of the perpetrator. On the question of age; In *Francis Omuroni v Uganda*, Criminal Appeal No. 2 OF 2000, the Court of Appeal held thus:

“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...”

27. The *children Act* defines a child as an individual who has not attained the age of eighteen years. A certificate of birth issued to the victim proved that she was born on 27/10/2021 which was undisputable evidence that at the time of the act, she was a child.



28. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:
- “The partial or complete insertion of the genital organ of a person into the genital organs of another person.”
29. Following what transpired, the victim was examined at Mama Lucy hospital two months later and confirmed to be pregnant. She had old tears at 3,6 and 9 O'clock. This was evidence of penetration having occurred. In *Williamson Sowa Mbwanga v Republic* [2016] eKLR, it was stated that:
- “... whilst paternity of PM’s child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence, does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement.”
30. The issue to grapple with is hence whether the appellant was the perpetrator. Right at the outset the appellant denied having been responsible for the act that caused penetration of the complainant’s genitalia. He argued that a DNA test should have been conducted to prove paternity of the foetus. In *AML v Republic* [2012] eKLR, the Court of Appeal stated that:
- “The fact of rape or defilement is not proved by DNA test but by way of evidence.”
31. In *Williamson Sowa Mbwanga* (Supra), the Court of Appeal stated as follows:
- “The import of the proviso to section 124 of the *Evidence Act* is that the trial court can convict an accused facing a charge of defilement solely on the evidence of the victim, if for reasons to be recorded, the court is satisfied that the victim is telling the truth. Medical evidence is not mandatory under that proviso, a position which was reiterated thus by this court in *GEORGE KIOJI V REPUBLIC CR APP. NO.270 of 2012* (Nyeri): “where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and record the reason for such belief”
32. Right at the outset, the victim stated that the person responsible for the pregnancy was the appellant. She led her parents to the school where he was the school principal, an individual in a leading position at the school. Admitting that he held that position in school, he stated that he was called by the Director of the school following the allegations. The trial court in compliance with Section 124 of the *Evidence Act*, was satisfied that the witness was telling the truth. It would be unlikely for a child to come up with such allegations against a school Principal.
33. The trial court considered and rejected the defence put up on the ground that the appellant did not call the director to corroborate his claims. The defence was incredible and did not shake the prosecution’s case. There was no evidence that the complainant set him up or had any motive. Additionally, the claims of bribery and demand for money were not put to the witnesses to wit the Investigating Officer,



the complainant's mother, would be in a position to confirm this and therefore cast doubt on the veracity of the charges.

34. On Sentence, Section 8 (4) of the *Sexual Offences Act* provides:

A 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.

35. It is apparent that the sentence meted out was within the limits provided under Section 8(4) therefore, it was neither harsh nor excessive.

36. The upshot of the above is that the appeal lacks merit. Accordingly, it is dismissed in its entirety.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 17TH DAY OF OCTOBER, 2024.

L. N. MUTENDE

JUDGE

