



**Republic v Ali (Sexual Offence E002 of 2023)
[2023] KEMC 152 (KLR) (4 September 2023) (Judgment)**

Neutral citation: [2023] KEMC 152 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
SEXUAL OFFENCE E002 OF 2023
AT SITATI, SPM
SEPTEMBER 4, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

BWANAHERI FAMAU ALI ACCUSED

JUDGMENT

4 counts were preferred against the accused person.

1. In Count I, he was charged with defilement contrary to section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 26th January, 2023 in (Particulars withheld) village of (Particulars withheld) Sub-County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.A. (initials) a female minor aged 12 years old.
2. In Count II, he was charged with the alternative count of committing an indecent act to a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 26th January, 2023 in (Particulars withheld) village in (Particulars withheld) Sub-County he intentionally and unlawfully caused his penis to touch the vagina of M.A. (initials) a female minor aged 12 years old.
3. In Count III, In Count I, he was charged with defilement contrary to section 8(1) and (3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 26th January, 2023 in (Particulars withheld) village of (Particulars withheld) Sub-County within Lamu County, he intentionally and unlawfully caused his penis to penetrate the anus of M.A. (initials) a female minor aged 12 years old.
4. In the alternative Count IV, he was charged with the offence committing an indecent act to a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars were that on 26th January, 2023 in (Particulars withheld) village in (Particulars withheld) Sub-County he intentionally and unlawfully caused his penis to touch the anus of M.A. (initials) a female minor aged 12 years old.



5. The accused person denied all the 4 counts.
6. After taking the plea, the DPP successfully applied for the denial of bail-bond to the accused person on the ground of direct threats to the complainant after evidence was presented that after the defilement report was filed by the complainant, she was stoned by the accused person's relatives with a view to discourage from giving evidence in court. The court denied him bond and so he was remanded in custody for the entire duration of the trial. He was represented by Miss Zipporah Murimi, Advocate. The DPP's case was conducted by Prosecution Counsel David Onyango.

The DPP's Case

7. The Complainant as PW2 M.A (initials) told the court that on 26th January, 2023 her mother left her in the house for work leaving PW2 washing utensils. She stepped out briefly and came across the accused person standing close to one R (initials) another female minor who was similarly washing utensils. When the accused person saw PW2 emerge from her mother's house, he went back inside his own house leaving R(initials) and PW2. It was at that point that R(initials) told PW2 that the accused person had just been asking R (initials) for sexual favours. When R(initials) told PW2 this, PW2 advised R (initials) to leave the scene and go to inform her mother who worked not far from the home. R (initials) followed the advice and left.
7. According to PW2, no sooner had R(initials) left to inform her own mother that the accused person was making sexual advances on her than the accused person approached PW2 as PW2 who was also making her way out of the compound and pulled her into his house, locked the door and forcefully removed her clothes and proceeded to first insert his penis into her vagina. When he had satiated his appetite, he turned her over and proceeded to insert his penis into her anus until defiled her until he got satisfied. The he ordered her out of his room.
8. PW2 said that she was in a lot of pain and fear and struggled to leave the scene and went to her mother's workplace to report the crime.
10. In cross-examination, she affirmed that she did not scream because he covered her mouth with a piece of cloth. She affirmed that he promised her cash afterwards but she never took his money. She added that he threatened her and that was why she failed to speak up to her mother in the first instance.
11. PW1 L.S.O (Initials) mother to the complainant told the court that on 26th January, 2023 her daughter aged 12 years 3months old showed up at her workplace and looking confused. The mother became curious and asked her why she had showed up. The child kept silent expressing fear but eventually she disclosed that Bwanaheri Famau who lived the next door had forced her into sexual intercourse. When PW2 returned home with the child, the child repeated all the details in the presence of the accused person and the accused person's wife. Following the disclosures, the mother reported to the police and the accused was taken into custody. Medical examinations confirmed that the child had been sexually penetrated.
12. In cross-examination, her evidence remained consistent and unshaken.
13. PW3 Medical Doctor Mohamed Abdul Hussein produced the medical documents P3 Form, Treatment book and Post Rep Care form in evidence showing that that the child had been defiled as evidenced by a freshly lacerated anus, a freshly lacerated vagina, missing hymen and whitish discharge in her private parts all consistent with penile penetration.
14. PW4 S/no. 239246 Inspector Paul Ongesa of Kizingitini Police Station testified as the investigating officer. He told the court that he received the complainant and her mother and recorded their report



of alleged defilement and noted that the complainant was shaken and in a panic. The child named Bwanaheri Famau who lived next door and said that prior to the actual defilement on 26th January, 2023 the offender had been putting pressure on the child for sex for an entire week but she had been resisting before he grabbed her and pulled her into house.

15. PW4 later escorted the child to the hospital where the doctor medically examined the child and confirmed that the child had been penetrated as evidenced by the lacerations. IP Ongesa compiled the police file and produced the child's birth certificate as an exhibit after receiving it from the child's mother.
16. After compiling the police file, he went with the complainant and her parents to the homestead where they lived and PW4 arrested the accused person. When he was interrogated, the accused person blamed the child for seducing him saying that he had been tempted by the child who had invited him into her parent's house for sex.
17. The testimony of PW4 was unshaken in cross-examination.
18. At the end of his testimony, the DPP closed his case and the court ruled that the accused person had a case to answer. He was put to his defence.

The Defence Case

19. Bwanaheri Famau as DW1 gave sworn defence denying the charges. He termed them as fabricated lies. He said that on 26th January, 2023 he went out fishing the whole day and returned in the evening. He added that he was falsely accused of defilement yet he was away at sea.
20. In cross-examination, he confirmed that in his initial plain statement he had told Inspector Ongesa that on 26th January, 2023 he was inside the house the whole day. He then sought to reject this recorded plain statement in order to retain the new alibi defence.
21. DW2 N.A.M. (initials) one of the neighbours to the accused person told the court that she does not know why the accused person had been charged since she did not witness anything as she was away selling snacks the whole day on 26th January, 2023.
22. DW3 A.S.M. (initials) wife to the accused person told the court that her husband was away the whole day of 26th January, 2023 and he could not have done such a crime.
23. DW4 M.A.M. (initials) a relative to the accused person told the court that he was present at the medical examination when the child exonerated the accused person and wondered why the police still went ahead to charge him in court. .
24. DW5 A.A.A. (initials) told the court that he was with the accused person out at sea fishing the whole day of 26th January, 2023 and when they returned with fish in the evening he went to his house while the accused went to his house. In cross-examination, he conceded that the day that he went out to sea with the accused person was on a different day other than 26th January, 2023.
25. At that stage, the defence closed their case whereupon the accused person lodged written submissions challenging the case on the ground that the witnesses had been inconsistent and that the case was actuated by hatred and malice.
26. The duty of this Honourable Court was to determine whether or not the DPP had proved their case beyond any reasonable doubt as required by law.



Undisputed Issues

1. The complainant was a female minor aged 12 years 3 months old as of 26th January, 2023 when the alleged defilement took place meaning that she was a minor as per her birth certificate.
2. The accused person lived next door to the complainant's parent's house and both knew each other well.
3. The accused person was arrested by Inspector Ongesa and other officers after the child had reported her case and had been medically examined.

Issues For Determination

1. What sexual offence, if any, had been (dis)(proved)?
2. Identity of the offender if a sexual offence has been proved.

Determination

Issue 1: Proof of sexual offence or otherwise

27. From the material placed before the court, the court is satisfied that there is overwhelming and direct evidence to prove that there was vaginal and anal penetration of this child. This is proved by her direct oral evidence and the medical reports. The court is first weighed the child's testimony and found it truthful under section 124 of the Evidence Act which provides as follows:

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

28. The importance of the testimony of a victim of a sexual offence was earlier discussed by the Court of Appeal in the case of KASSIM ALI -v- REPUBLIC (2006)eKLR (Omolo, Bosire & Githinji JJ.A) in the following manner:

“Moreover, as the superior court correctly held, the commission of a sexual offence can be properly corroborated by circumstantial evidence (see Ongweya v. Republic [1964] EA 129). So the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”

29. In her tested oral testimony, the child truthfully described in detail how the accused person pulled her by force into his house after waylaid her as she exited her mother's house on 26th January, 2023 at 11am and forcefully removed her clothes and pushed her onto his bed. It was daytime at 10am heading to 11am meaning that the conditions for identification and recognition were unimpeded.
30. The further tested evidence showed that he covered her mouth with a piece of cloth to muffle her screams and used threats to silence her and then forcefully inserted his penis into her vagina and tore it in the process. After satisfying his appetite for her vagina, he turned her over and after flipping her over, inserted his penis into her anus and raped her in the process. This proved defilement as both her anus and vagina were torn during the forced penetration.



31. In her first report, the child revealed the entire details to her parent and the police as persons who are in authority over her life. As held in numerous Court of Appeal authorities, the evidence of a first report given to a person in authority when the matter is still fresh carries a lot of weight. One such authority is that of Bernard Githiaka Mbugua & 4 Others-v- Republic (2016)eKLR (Waki, Nambuye, Kiage JJ.A.) citing with approval the authority of Terekali S/o Korongozi & Another -v- Rex (1952)EA 259 where the learned Judges held as follows:

“Evidence of first report by the Complainant to a person in authority is important as it often provides a good test by which the truth and accuracy of subsequent statement may be gauged and provides a safeguard against later embellishment or made up case. Truth will always come out in a first statement taken from a witness at a time when recollection is very fresh and there has been no time for consultation with others...”

32. In his defence, the accused person raised a defence of an alibi claiming that he was out at sea the whole time. The court notes that he raised this defence of an alibi as an afterthought as shown by the following:

a. When he was initially arrested, he admitted to an officer of the rank of inspector that the sex took place but blamed the child accusing her of seducing him into her mother’s house. This line of defence was raised with Inspector Ongesa when he had just been arrested and he had had no time to consult with others. While not amounting to a confession, the Plain Statement estopped him from denying that he made this line of defence to the police. Issue estoppel is provided for in section 24 of the Evidence Act in the following provision:

24. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

b. As proved by the complainant and her mother, she narrated the story first to her mother and later repeated it in the presence of the accused person and the accused person’s wife. This means that when the police showed up to arrest him, he had already known the reason for the arrest and when Inspector Ongesa apprehended him, he pleaded to be forgiven saying that the child was to be blamed.

c. By law, an alibi ought to be raised at the earliest opportunity and not at a late stage of the defence as was done in this case. In the Court of Appeal authority of Karanja -v- Republic (1983) eKLR (Hancox JA, Chesoni & Plat Ag. JJ.A.) it was held:

We do not accept that the appellant’s story amounted to an alibi on the facts of this case, but in any event it is a material factor that when charged initially the appellant did not put forward this story, but contented himself with little more than a denial. Nevertheless, we agree with the observations of the Court of Appeal for Eastern Africa in R v Ahmed Bin Abdul Hafid (1934) 1 EACA 76, and with those of the former Court of Criminal Appeal in R v Little boy, [1934] 2 KB 413, that in a proper case the court may, in testing a defence of alibi and in weighing it with all the other evidence, to see if the accused person’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for the investigation and prevent any suggestion of afterthought.”

d. Even if the lateness in raising the defence was to be ignored, the corroboration of the alibi by his friend DW5 became shaky and collapsed when the friend said that the only days that he



went out to sea for fishing with DW1 were on different days other than 26th January, 2023 on which day the child was defiled. Even his own wife admitted that she went out of the house on the material day and could not have possibly witnessed the defilement

Issue 2: Identity of the offender

33. On this issue, the court is satisfied that there was positive recognition of the offender by the complainant since she knew him well. The event occurred in the daytime at 10am or thereabouts meaning that the conditions for recognition were good.

That being so, the court found guidance from the case of *George Mbayi Githinji –v Republic (2019)eKLR (Mwongo J.)* where the learned Judge had this to state about recognition evidence:

34. The Court of Appeal for Eastern Africa in *Abdalla Wendo v Republic [1953] 20 E.A.C.A 166* held on this issue as follows:

“Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification, were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or/ direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

7. The same court in *Roria v Republic [1967] EA 573*, also held that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness that danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification.”

8. The courts in Kenya have consistently relied on the English case of *R v Turnbull & Others (1976) 3 ALL ER 549*, which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The Court there said:

“...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

9. Further, the Kenya Court of Appeal in the case of *Wamunga v Republic (1989) KLR 426* followed this view when it stated:

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that



the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.”

Conclusion

35. The court is satisfied that the DPP has proved the ingredients of the offence beyond any reasonable doubt and showed that the accused person penetrated the child’s vagina and anus using his penis and these constituted 2 distinct defilement offences. The P3 and Post Rape Care Form showed the anus and vagina had fresh lacerations and tears consistent with forced penetration which ruptured her private parts. He is guilty as charged and is convicted of the 2 main defilement charges under section 215 of the Criminal Procedure Code. Right of appeal is 14 days.

DATED READ AND SIGNED AT LAMU THIS 4th DAY OF SEPTEMBER, 2023

HON. T.A SITATI

SENIOR PRINCIPAL MAGISTRATE

LAMU LAW COURTS

Present

The accused person (virtually, from Malindi GK Prison)

Miss Murimi Advocate for the accused person

DPP Onyango

Faiza Court assistant

