



**Director of Public Prosecutions v Ondieki (Sexual Offence
E050 of 2021) [2022] KEMC 39 (KLR) (15 September 2022) (Judgment)**

Neutral citation: [2022] KEMC 39 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
SEXUAL OFFENCE E050 OF 2021
ZK KAGENYO, RM
SEPTEMBER 15, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

GLORIA MORAA ONDIEKI ACCUSED

JUDGMENT

1. The accused was arraigned on the 20th day of September 2021 over the indictment of casting corrosive substances with intent to harm contrary to section 231 (g) of the *Penal Code*.
The particulars are that on the 15th day of September 2021 at unknown time at Kona Musa area, Diani location of Kwale county within coast region, with intent to harm KTN unlawfully cast Loctite 401, a corrosive substance to the foreskin of KTN.
2. The accused denied the charges necessitating a full trial.
3. The accused person was unrepresented. She was present in court all through the trial. The matter was conducted in Kiswahili Language, the language of choice by the accused even though at times she intimated that she understood the English language.
4. The DPP to prove their case called a total of 4 witnesses.
5. PW testified how she was called by the accused who was her nanny, while at her workplace and was informed that her child had visible discharge from his penis which was quite unusual. She said that she immediately went home to attend to her son and when she got home, she took her son to Aga Khan Hospital for treatment and later to Diani Beach Hospital for further treatment.
6. PW 2 is the father to the child-complainant herein. He said that on the material day, he was at home but attending virtual meetings related to his work. When he went to check on his child, he found the child crying and on checking on his private parts, he did not notice anything and thought that they were



the diapers that were reacting adversely with the body of his son. Later, his son was taken to hospital and treated only to realize that what the real issue was, was that the nanny had applied superglue at the penis of his son.

7. PW 3, Medical Practitioner Kennedy Kiplimo Sang who told the court that relying on the Treatment Notes from Aga Khan Hospital, he filled the Form P3 which he produced as evidence. He also produced the Medical Treatment Notes from Diani Beach Hospital and the Medical Report from Diani Beach Hospital.
8. NPS Service No. 113256 PC David Omollo of Diani Police Station testified as PW 4 on behalf of the initial investigating officer PC (W)Maureen who is on her maternity leave. After the evidence of PC Omollo. The DPP closed their case and the accused was put on her defence where she gave her sworn evidence.
9. The accused denied the charges and advanced a defence of a set up by the complainant's family for two reasons; firstly, she said that PW 2 had tried to seduce her and she turned down his sexual requests and hence the set up and secondly, she said that she had discovered some secrets in that family which were not supposed to be known by any outsider and hence the vendetta by the PW 1 against her.
10. After her evidence, the court was called upon to make its determination.

Analysis and Determination.

11. In a criminal trial, the DPP is duty bound to prove the case against the accused person beyond reasonable doubt.
12. The accused person has been charged under section 231 (g) which states thus;
Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies any such fluid or substance to the person of any person, is guilty of a felony and is liable to imprisonment for life.
13. The state therefore is duty bound to adduce evidence proving that;
 - a. The accused actually cast a foreign substance on the child;
 - b. The substance found cast on the body was corrosive; and
 - c. That the accused had the intention of harming the child.

Whether the accused actually cast a substance on the child

14. There was no direct evidence from the prosecution witnesses that indeed the accused did cast a foreign substance on the child. Part of this shortfall could be because the complainant was a year old infant who could not recognize what was happening and express the same.
15. According to PW 1, when she responded from her work place, she found her husband, PW 2, holding the baby. She found the baby crying. She observed her and noticed that the penis was slightly white on the outer surface just at the tip. She prepared the baby and took him to the hospital.
16. According to PW 2, when he received the news from his wife, he went where the nanny, the accused, was holding the baby from. He held the baby and observed him. The baby did not have the diapers on. The accused informed him that the baby had issues with his penis. PW 2 observed the diapers the baby



- had been wearing and saw nothing of concern and made an assumption that the diapers had reacted with the skin.
17. By the time they were arriving at the Aga Khan Hospital, PW 1 stated that the child was very palsy, crying and frail. At the Aga Khan Hospital the baby was observed by the medical practitioner who, according to PW 1, he retracted the foreskin of the complainant and saw big white masses of substance. According to PW 1, the doctor informed them that most likely the child was suffering from fungal infection.
 18. After this observation and prescription by the doctor, PW 1 went back to the car and at the car, the child was crying without stopping. She said that she tried to calm her down in all ways possible all in vain until she resolved to pull out the diapers where she observed white hard particles at the edge of the penis. She discerned that that could not be fungal infection and went back to the doctor's room at Aga Khan and explained her observation. The doctor, PW 1 and PW 2 while all were trying to unravel what the issue could be, PW 2 stated that he was suspecting that there was superglue which had been applied on the child. PW 1 stated that the doctor advised them to take legal action as such a small child could not have applied super glue on himself.
 19. With this information, PW 1 and PW 2 went home and made a report to the police station. They were issued with a Form P3 to be filled by the medical practitioner.
 20. The doctor at the Aga Khan Hospital did not appear in court to explain what happened at the hospital that day of the diagnosis. However, his observations were presented by the medical practitioner, PW3 who produced the Form P3. According to PW 3, he filled the P3 Form on the 16th September 2021. PW 3 said that in order to fill the form P3 he relied on the medical treatment notes from Aga Khan Hospital. These treatment notes from Aga Khan Hospital were not produced and the only thing that was produced in court was a medical report from the Aga Khan Hospital dated 15th September 2021.
 21. I have read all the medical reports produced and one common factor is that there was a foreign body at the prepuce of the child, on retraction. The doctor at the Aga Khan diagnosed the substance to be a fungal infection at the first instance. The second instance he relied on the opinion of PW 2 and referred them to the police station without him making any forensic observation. He was the first medical expert to attend to the patient. There was no preservation of the foreign particles for chemical examination even after having suspected them to be superglue at such an early stage.
 22. After PW 2 suspected it to be super glue, he went to his house and started checking where the super glue was. It was a fact that there used to be super glue in his house and when he found it, albeit misplaced, he knew that it was not a foreign item in his house.
 23. It is the placing of the superglue at a different point in the house that made him believe further that the accused applied the super glue on the body of the child.
 24. There was no empirical nexus between the super glue in the house and the particles said to be at the penis of the child. If anything, when PW 2 first observed the child, he saw nothing of concern, when PW 2 observed the child he saw the penis slightly white at the tip. When the doctor at Aga Khan retracted the prepuce, he is said to have observed it to be a fungal infection. It is after the observation of the doctor that PW 1 went to the car with the child and came back reporting that there was a substance which PW 2 this time round appeared to be knowing what it was.
 25. The case of actual casting the substance by the accused is premised on circumstantial evidence.



26. The court of Appeal in *Joan Chebichii Sawe v Republic* [2003] eKLR cited with approval the finding in *R v Kipkering arap Koske & Another* 16 EACA 135 while guiding on how a court of law should rely on circumstantial evidence. In the *Kipkering* case, the court held inter alia, that,

In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

27. The court expounding on this principle, in the *Joan Chebii* (*supra*) stated that,

In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden, which never shifts to the party accused

28. The court has duly informed itself that circumstantial evidence is as good as direct evidence. In this particular case, the court is left in doubt on what substance was at the prepuce of the child. Was it super glue as suggested by PW 1 to the doctor at Aga Khan and later said to be extracted at Diani Beach Hospital or was it fungal infection as said by the doctor to PW 1 which he failed to make an observation about?

29. Further, the court made an observation on the chain of observation. Whereas the independent doctor after retraction of the penis could not observe any foreign material suggesting to be superglue on the body of the child, an observation which had equally been made by PW 2 at home, it is suspect that PW 1 observed outrightly immediately after leaving the doctor's room and into her car.

30. The accused argued that that was a set up and that there was grudge between the accused, PW 1 and PW 2. She argued in her defence that there was a snake she had seen in the house that she suspected to be of a cult. This issue was not raised with either PW 1 or PW2 during their testimonies and I see the same to be an afterthought undeserving of any dignification by way of any analysis by this Court.

Whether the substance said to have been cast on the body was corrosive

31. As observed earlier, the substance that was said to fall off upon the observation of the part of the body was not produced before court. Equally, a chemical analysis comparing the substance that was removed from the penis of the complainant with that which was produced in court as the super glue was not produced neither was its chemical composition made known before court.

32. The court bears in mind that the doctor at the Aga Khan Hospital had observed the patient and his diagnosis at the first instance was that the substance could be a fungal infection. This casts the reasonable doubt on what substance could have been on the penis of the child. The DPP failed to prove that the substance, if any, was corrosive in nature.

Disposition

33. Having found so, this court hereby dismisses the case against the accused person and forthwith acquits her under Section 215 of the *Criminal Procedure Code* for the offence of casting corrosive substances with intent to harm which is proscribed by section 231 (g) of the *Penal Code*.



34. I order that the accused be set at liberty forthwith unless she is otherwise lawfully held.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 15TH DAY OF SEPTEMBER 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of:

Mr. Felix- Court Assistant

Ms. Faith Luseno, Prosecution Counsel, for the DPP

Gloria Moraa Ondieki - Accused

