



**HWN v Republic (Criminal Appeal 101 of 2019)
[2023] KECA 295 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 295 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 101 OF 2019
F SICHALE, LA ACHODE & WK KORIR, JJA
MARCH 17, 2023**

BETWEEN

HWN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret, Ogembo, J), dated 8th June 2017) IN HC. CRA NO. 70 OF 2015)

JUDGMENT

1. HWN (the appellant herein), has preferred this second appeal against the judgment of Ogembo, J dated June 8, 2017, in which he had initially been charged at the Principal Magistrate’s Court in Kapsabet with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence were that on January 1, 2015, at (particulars withheld), he intentionally and unlawfully caused his penis to penetrate the vagina of LN a child aged 8 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of section 11 (1) of the same [Act](#). The particulars of the offence were that at the same time and place, he intentionally and unlawfully caused his penis to come into contact with the vagina of LN, a child aged 8 years.
4. The appellant denied the charge after which a trial ensued. In a judgment delivered on May 18, 2015, Hon. G Adhiambo, then Senior Resident Magistrate convicted him of the main charge and sentenced him to life imprisonment.



5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on June 8, 2017, Ogembo J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.
6. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide a Memorandum of Appeal filed in Court on March 3, 2020, raising the following grounds:
 1. That the first appellate judge erred in law by failing to evaluate the evidence on record afresh but confirmed the lower court's findings.
 2. That the first appellate court judge erred in law by relying on insufficient evidence to uphold the appeal notwithstanding that the evidence adduced was based on speculations and conjecture based on fabrication, implication and intimidation leading to injustice.
 3. That the first appellate court judge erred in law by failing to observe that the names of the complainant were at variance with the evidence on record leading to a miscarriage of justice.
 4. That the first appellate court judge made an error in law on the face of the record and/or made an error of fact by failure to ascertain that there was no age assessment report conducted on the victim leading to a mistrial.
 5. That the first appellate court judge erred in law by failing to observe that the appellant was not accorded a fair hearing as enshrined in Article 50 (2) of the Constitution as no statements were given to him hence fundamentally prejudiced (sic).
 6. That the first appellate judge erred in law by failing to observe that there was no DNA test carried out on the appellant as per section 36 (2) of the Sexual Offences Act No 3 of 2006 hence prejudiced.
 7. That the first appellate court judge erred in law by failing to observe that that the appellant was not taken to any medical examination to see whether there was any nexus connection to the alleged crime.
 8. That the first appellate court judge made a non- direction on the fact that the prosecution had failed to prove their case to the required standard of cogent proof by failure to summon their vital/crucial witnesses to testify.
 9. That the first appellate court judge erred in law by failing to observe that the evidence adduced was insufficient and marred with a lot of material contradictions that weakened and destroyed the inference of guilt.
 10. That the first appellate court judge erred in law by failing to evaluate my cogent strong alibi defence that was not shaken or destroyed by the prosecutions in compliance with section 212 of the CPC but shifted the burden of proof on I the appellant hence prejudicial (sic).”
7. Briefly, the background to this appeal is that LN was at home when her stepfather (the appellant), lay on top of her on the bed and did bad manners to her by putting his thing for urinating into her thing that she uses to urinate. It was her further evidence that she was alone with him in the house at the time as her mother was washing clothes in the stream. She later reported the incident to her mother.
8. PW2 was CN and PW1's mother. It was her evidence that on January 1, 2015, she was doing laundry at the stream while PW1 was at home with the appellant. At about 4PM, she noticed that PW1 had taken long and she sent for her and when she came she asked her to chase away some sheep that were



- destroying the farm whereupon she noticed that she was not walking properly. She enquired from her what had happened and PW1 told her that the appellant had done bad manners to her.
9. PW3 was PM. It was his evidence that on January 3, 2015, he was at the home of the appellant when PW2 came and told him that the appellant had chased her away. The appellant then charged at them with a panga and they left.
 10. PW4 was Juliet Sigilai. She testified that on January 3, 2015, she was at home when H's wife (PW2) told her that H had raped her daughter on January 1, 2015. She later relayed the information to her husband and a village elder culminating in the arrest of the appellant on January 4, 2015. She later recorded her statement.
 11. PW5 was Paul Birgen a clinical officer stationed at Kabiyet health center. He testified that January 4, 2015, he received a patient by the name LN who had a history of having been defiled by a person well known to her. Upon examination of the vagina, there were abrasions on the labia manora and the hymen was recently broken. He concluded that the minor had been defiled and that there was penetration which caused the hymen to be broken.
 12. PW6 was PC Kennedy Akumu attached to Kipkaren police post. It was his evidence that on January 4, 2015, he was at the station when a report of defilement was made against the appellant. He booked the report in the occurrence book and recorded witness statements. He also produced the complainant's immunization card which he received from PW2 (the complainant's mother) and which showed that the complainant was born on May 22, 2006.
 13. The appellant in his defence gave a lengthy unsworn statement and called no witnesses and denied having committed the offence and testified that on the material day he was working in the home of PW4.
 14. When the matter came up for plenary hearing on December 5, 2022, the appellant who appeared in person briefly orally highlighted his submissions and submitted that the investigation officer did not carry out sufficient investigations and that further there were discrepancies of the name in the charge sheet and the complainant's birth certificate. Mr. Ndete learned counsel, for the state on the other hand submitted that the appellant was raising issues of fact and that the issue of section 36 (1) of the *Sexual Offences Act* was not raised in the High Court.
 15. We have considered the record, the rival oral and written submissions, the authorities cited and the law.
 16. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic Nyeri* Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

“...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ...”
 17. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under section 361 of the *Criminal Procedure Code*:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* [1984] KLR 213).”



18. Having considered the grounds of appeal raised by the appellant some of which are overlapping, we are of the considered opinion that the following issues arise for our determination:
 1. Whether the learned judge erred in law by relying on insufficient evidence to dismiss the appeal?
 2. Whether the learned judge erred in law by failing to note that there was no age assessment report?
 3. Whether the learned judge erred in law by failing to observe that the appellant was not accorded a fair hearing as enshrined in Article 50 (2) of the constitution as the appellant was not issued with witness statements?
 4. Whether the learned judge erred in law by failing to observe that there was no DNA test carried out on the appellant as per section 36 (2) of the Sexual Offences Act No. 3 of 2006?
 5. Whether the learned judge erred in law by failing to consider/evaluate the appellant's *alibi* defence?
19. Turning to the first issue, it is now well settled that for a conviction to be found on a charge of defilement three key ingredients must be proved namely; age of the victim, proof of penetration and identification of the appellant as the perpetrator of the offence.
20. In the instant case, PW1 who was the victim testified that on the material day she was at home with the appellant who was her step father when the appellant did bad manners to her by putting his thing that he uses to urinate into hers. Her evidence towards this respect remained firm and unshaken even under intense cross examination by the appellant. PW5 the clinical officer who examined PW1 indeed confirmed that she had been recently defiled as there were abrasions on the labia majora and the hymen was broken. Again this evidence was never controverted.
21. PW1 further testified that the appellant was her step-father and that they lived in the same house. They therefore knew each other very well. She further testified that the incident happened during the day and the sun was shining brightly. The identity of the appellant was therefore not in question and there was no possibility of mistaken identity.
22. Regarding the age of the victim, PW1 during *voire dire* examination testified that she was 7 years old. PW2 who was PW1's mother corroborated PW1's evidence that she was 7 years old. Additionally, the immunization card produced by PW6 showed that PW1 was aged 8 years. Though there was a small discrepancy in the testimonies of PW1 and PW2 regarding the age of PW1 where both PW1 and PW2 testified that PW1 was aged 7 years whilst the immunization card produced by PW6 showed that PW1 was 8 years, it is our considered opinion that this slight discrepancy was not fatal to the prosecution's case as still, the age of PW1 fell within the age bracket provided for under section 8 (1) (2) of the Sexual Offences Act No 3 of 2006.
23. Having considered and re-evaluated the evidence on record, it is our considered opinion that all the ingredients for the offence of defilement were proved to the required standard. Consequently, nothing turns on this ground of appeal and the same must fail.
24. The High Court was further faulted for failing to note that there was no age assessment report. It is indeed true that no age assessment was conducted on PW1. Additionally, this issue was not even before the High Court for determination. Be that as it may, both PW1 and PW2 testified that PW1 was 7 years old. The evidence of these two witnesses as regards the age of PW1 was not challenged even in cross examination and the appellant never suggested that PW1 was aged otherwise. Further,



the immunization card produced by PW6 showed that PW1 was born on March 22, 2006. From the circumstances of this case, it is evident that there was overwhelming evidence as regards the age of PW1 and an age assessment report was not necessary. The appellant seems to have the idea that the only way to prove age is by way of an age assessment report which is not the case. We say no more regarding this issue.

25. The High Court was further faulted for allegedly failing to observe that the appellant was not accorded a fair trial as enshrined in Article 50 (2) of the [Constitution](#) as no witness statements were availed to him. The appellant further submitted that he was not informed of his right to legal representation. Again, this issue was not one of the issues for consideration before the High Court.
26. Be that as it may, the record shows that when the appellant was first arraigned in court on January 5, 2015, the court directed that he be supplied with a copy of the charge sheet, witness statements and any other documents that the prosecution intended to rely on. When the matter came up for hearing on January 19, 2015, the appellant indicated that he was ready to proceed and he had received the statements. The contention by the appellant that he was not supplied with witness statements is therefore clearly false. Additionally, the appellant in his defence stated that he understood the charge he was facing.
27. Regarding the right to legal representation, the appellant did not raise this issue for consideration by the trial court. This Court in the case of [Isaiab Maroo v Republic](#) [2015] eKLR while discussing the issue of legal representation stated extensively thus:

“Does the right to legal representation which we have treated(sic) above apply to appeals”
We think not. Beginning with the constitutional text itself, it is quite plain that the right to State funded legal representation is available to “every accused person.” Indeed, it is one of nearly a score safeguards to a fair trial during which all care must be taken to ensure that the process of adjudicating on whether an accused person is guilty of that which he is charged with is fair, open, transparent, timely, efficient and devoid of prejudice. The entire process presupposes the accused person’s innocence until the court should find otherwise on the basis of evidence tendered by the prosecution to the appropriate standard in discharge of a duty peculiarly its own. We do not apprehend that the entire corpus of the elements of a fair trial applies wholesale to an appeal. Once a person has been convicted, on a trial fairly and properly conducted, he no longer enjoys that all-important presumption of innocence. The presumption that sets in is one of legitimacy of his conviction and sentence so long as it was imposed by a court of competent jurisdiction. The fair trial rights enumerated in Article 50 (2) (a) to (p) do not and cannot apply to his situation without leading to an absurdity. In fact, the only application of Article 50 (2) to an appeal is in (q) which provides that an accused person has the right; “if convicted, to appeal to, or apply for review by a higher court as prescribed by law. “It is for precisely this change of status that, for instance, release on bond or bail, which is a right that an arrested person has pending charge or trial and which he enjoys automatically unless compelling reasons dictate otherwise under Article 49(h), becomes available to a convicted person only under unusual or exceptional circumstances. See, [Jivraj Shah v Republic](#) [1986] KLR 605; [Somo v Republic](#) [1972] EA 476 and [Munjia Muchubu v Republic](#) [2014] eKLR. The considerations that obtain and the position an accused person is placed at in the eyes of the law are totally different after the trial. In the latter case the law is highly solicitous of the position of an accused person, anxious to ensure he receives a fair trial, hence the extra safe guards including State-funded legal representation. In contrast, appeals and other consequential proceedings have a voluntary or elective character at the instance of the appellant. In a jurisdiction where even provision of



State-funded legal representation at trial is yet to materialize, it seems to us overly ambitious for the appellant to seek to upset the judgment of the High Court on account of his not having been provided an advocate to represent him in his first appeal.” Emphasis added.

28. From the circumstances of this case it has not been demonstrated that the appellant suffered any prejudice due to lack of legal representation. Consequently, nothing turns on this point.
29. The learned judge was further faulted for failing to observe that there was no DNA test carried out on the appellant as per section 36 (2) of the *Sexual Offences Act* No. 3 of 2006. Firstly, the provisions of section 36 of the *Sexual Offences Act* are not couched in mandatory terms and in the instant case there was no need to carry out a DNA test as there was overwhelming and direct evidence pointing to the appellant as the perpetrator of this offence. In any event the offence of defilement is not proved by way of a DNA test. See *AML v Republic* (2012) eKLR where this Court stated:

“The fact of rape or defilement is not proved by DNA test but by way of evidence.”

30. More recently in *Robert Mutungi Muumbi v Republic* [2015] eKLR, this Court stated:

“Clearly that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical evidence on DNA evidence is not the only evidence by which commission of a sexual offence may be proved. “

31. We reiterate the above position and hold and find that a DNA test was not necessary in this case. Accordingly, this ground of appeal fails.
32. Finally, the High Court was faulted for failing to consider the appellant’s *alibi* defence. the High Court while addressing the appellant’s defence stated as follows:

“This court notes that all through the trial and even in this appeal, the appellant has not denied specifically the allegations that he defiled the complainant e.g., that he had been home only with the complainant, that they stay in the same house and that he inserted her penis in her vagina. The appellant has on the other hand dwelt extensively on his alleged disagreements and disputes with the mother of the complainant. With respect, the appellant only raised these issues in his defence. when the witness (PW2) gave evidence, he never raised them as to enable the court determine whether indeed there were such ulterior motives that could make the appellant be framed. To me, his defence was clearly an afterthought which cannot challenge the prosecution’s case that the child was defiled.”

33. From the passage from the judgment of the learned judge we have reproduced above, it is evident that the appellant’s *alibi* defence was considered contrary to his submissions. We have indeed looked at the appellant’s defence, he never raised the issue of *alibi* during cross examination and the alleged disagreements between him and PW2. The same was only raised in his defence. PW1’s evidence that she was defiled by the appellant remained unchallenged throughout the trial.

34. In the case of *Victor Mwendwa Mulinge vs. R* [2014] eKLR this Court while considering an *alibi* defence stated:

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of *alibi* lies on the prosecution; see *Karanja vs. R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of *alibi* and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take



into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”(Emphasis added).

35. The appellant ought to have raised the issue of *alibi* at the earliest opportunity to enable the prosecution interrogate the same. Having raised the same late in the day, we are wholly in agreement with the finding by the High Court that the same was clearly an afterthought. This ground of appeal is therefore without merit and the same must fail.
36. Regarding the discrepancies of the name of PW1 in the immunization card and the charge sheet, the same was conclusively addressed by the two courts below and was in addition sufficiently explained by PW2 and we need not rehash the same.
37. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW1 and no one else.
38. We therefore find and hold that the appellants’ conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant’s appeal on conviction.
39. Turning to sentencing, the appellant was sentenced to life imprisonment as provided under section 8 (2) of the *Sexual Offences Act*. We have considered the circumstances under which the offence was committed. The appellant defiled her step daughter and breached the trust bestowed on him by society to protect such a child. Additionally, he did not appear remorseful. In our considered opinion, he doesn’t deserve any mercy. We are therefore not inclined to disturb the sentence.
40. Accordingly, the appellant’s appeal is without merit and the same is hereby dismissed in its entirety.
41. It is so ordered.

DATED AND DELIVERED AT NAKURU ON THIS 17TH DAY OF MARCH, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

