



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Esirima v Republic (Criminal Appeal 103 of 2015)
[2023] KECA 608 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KECA 608 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 103 OF 2015
FA OCHIENG, LA ACHODE & WK KORIR, JJA
JUNE 2, 2023**

BETWEEN

PETER MUKHABI ESIRIMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the decision of the High Court at Nakuru
(Ongeri.J) dated 22nd July, 2015 In HCCR.APP. No. 155 of 2013)*

JUDGMENT

1. This is the second appeal of Peter Mukhabi Esirima, the appellant, against the decision of the High Court at Nakuru by Ongeri J. The appellant was charged at Naivasha Magistrate’s Court with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the [Sexual Offences Act](#) (SOA) He was found guilty and sentenced to life imprisonment.
2. The particulars of the offence were that on December 17, 2011 at around 1500 hours at [Particulars Withheld] village, the appellant caused his penis to penetrate the vagina of TW a child aged 6 years. The appellant pleaded not guilty. Consequently, the prosecution presented six witnesses to prove their case, while the appellant made an unsworn statement in his defence and called no witnesses.
3. We now set out a brief background of the case from the trial court to bring the appeal into perspective.
4. The prosecution’s case was that (PW1), a minor known as TW who was the complainant in this case, was playing with her eight-year-old cousin BK (PW2) on the material day when the appellant who was their neighbour and lived in the same plot, called them to his house. While in his house, the appellant placed PW1 on the floor and removed her trouser as well as his, and did what she referred to as “bad manners” to her. PW1 testified that the appellant inserted his thing that he uses to urinate, into her thing that she uses to urinate and in the process of defiling her, he threatened to cut her if she screamed. After the appellant completed the act, the minor put on her clothes and went home.



5. The eye witness testimony of PW2 confirmed the testimony of PW1.
6. It was SNK (PW4), the father of the minor who noticed that evening that the minor was walking in a strange manner and asked the mother, SWW, (PW3) to find out what the problem was. Consequently, PW3 examined the minor's private parts, and noticed some bruises.
7. PW3 and PW4 took the minor to Heni Hospital the following day from where they were referred to Naivasha District Hospital. On December 22, 2011 they took the minor to Naivasha District Hospital for medical attention.
8. Dr Mbuga, (PW6) produced the P3 form on behalf of Dr Maundu who examined the minor. He told the court that upon examination, Dr Maundu had found that there were lacerations on the minor's vulva, and her hymen was broken. Dr Maundu approximated the injuries to be 3 days old. His conclusion was that the minor had been defiled and that the defilement had occurred recently.
9. While at the Hospital the minor told her parents that the appellant is the one who had defiled her. They then reported the matter at Magumu Police station and the appellant was arrested and charged.
10. When the appellant was put on his defence, his unsworn testimony was that on December 21, 2011, two policemen came to his house and arrested him. They took him outside the minor's home. They called the minor out and asked her if he was the one and she answered in the affirmative. He only learnt of the accusations later on but he denied them. He added that he was not taken to the hospital for examination.
11. He blamed the accusations brought against him on differences between him and the minor's parents, because he once reported to them that their children were misusing the toilet. The parents did not take it well and thus, held a grudge against him. Also, that the minor's family had been evicted from Kitale due to post election violence and therefore, since he hails from the Western part of Kenya, he sensed that the family was bitter with him for living peacefully in the area when they had been chased away.
12. He also testified that the fact that he had called for the investigation diary and it was not produced, meant that no investigation had been carried out. Further, that the fact that the victim's PRC form was not filled at the diagrams space meant that nothing was seen to be out of the ordinary on the minor's genitalia.
13. Upon considering the evidence before him, the learned Magistrate, E Boke (PM) (as she then was), found the appellant guilty as charged. She considered his mitigation and sentenced him to serve life imprisonment.
14. The appellant being dissatisfied, by the said judgment, filed an appeal in the High Court at Nakuru. The grounds of the appeal were that the trial Magistrate convicted him on feeble evidence and in complete oblivion to section 36 of the SOA. Further, that the contradictions in the prosecution evidence were weighty, the medical evidence did not incriminate him and that his defence was not considered.
15. The learned Judge considered the appeal before him and found the conviction to be safe. He dismissed the appeal and upheld the conviction and sentence of the trial court.
16. The appellant filed the instant appeal alleging that the learned Judge erred in law by:
 - a) Contravening the appellant's rights under articles 50(2)(a), (b), (c) and (j) of *the Constitution*.
 - b) Not adhering to section 198 (1) of the *Criminal Procedure Code*.



- c) Contravening article 27 of *the Constitution*.
 - d) Relying on medical evidence that was not cogent to prove penetration and the age of the appellant, and
 - e) Relying on prosecution witnesses that were unbelievable and untruthful.
17. The appeal was disposed of by way of written submissions that were orally highlighted during plenary hearing.
 18. The appellant appeared in person. Vide his undated written submissions, he contended that his rights under article 50 (2) (a)(b)(c) and (j) of *the Constitution* were contravened by the prosecution not supplying him with copies of the statements, charge sheet and documentary exhibits, before the hearing date. That as such, the first witness testified without full disclosure of the evidence that the prosecution intended to rely on. He urged this Court to accord him benefit of doubt due on that ground.
 19. On the second ground, the appellant complained that the court did not enquire what language he understood and as a result, section 198 (1) of the *Criminal Procedure Code* was contravened. He urged the Court to find that he was prejudiced since he could not adequately follow the proceedings.
 20. The appellant further submitted that before the trial commenced, the prosecution sought and was granted leave on March 20, 2012 to amend the Charge Sheet, to include the words “unlawfully” and “intentionally”. He was however, not called upon to plead to the Charge as amended.
 21. He also argued that the age of the minor was not proved, as the immunization card that indicated that she was six years old was produced by the investigating officer and not her parents, while her mother testified that she was seven years old.
 22. Senior Prosecution Counsel, Mr Duncan Ondimu represented the respondent and filed written submissions dated November 15, 2022 in opposition. He relied on the High Court decision in *Dennis Edmond Apaa & 2 others v EACC & another* [2012] eKLR, to contend that disclosure of evidence is a continuous process and that the appellant was supplied with all the necessary disclosure in order for him to mount a defence. He urged that in any case, this issue was not raised in the first appeal.
 23. In response to the complaint on violation of section 198 (1) of the *Criminal Procedure Code*, counsel submitted that the trial court used two languages during proceedings being Kiswahili and English. He contended that the appellant actively participated during the entire proceedings with ease and that the issue of language was not even raised as a ground in the first appeal.
 24. Counsel also submitted that the appellant did not raise the issue of the charge being defective in the trial court, or in the superior court. He stated that the appellant was charged with the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. That the statement of offence clearly stated an offence known in law which he was charged with and the charge sheet contained the particulars of the offence. He urged that the mere omission of the words; ‘unlawfully’ and ‘intentionally’, did not in any way, prejudice the appellant.
 25. On proof of defilement, counsel contended that the age of the minor was proved by the minor’s evidence during voire dire examination when she stated that she was 6 years old; her mother, PW3, who stated that she was 7 years old and the medical report which indicated that she was 6 years old. He urged that section 8 (2) of the SOA provides for the range of ages of eleven years and below. He submitted that penetration was proved by the evidence of the minor, that of PW2, PW3 and PW6 and that the appellant was well known to the minor so that identification was by recognition by the victim



- as well as PW2. Further, that the appellant confirmed that indeed he was a neighbour to the minor. Accordingly, counsel urged this Court to dismiss the appellant's appeal for lack of merit and maintain the life sentence.
26. We have considered the record of appeal, the submissions of both parties and the law and the issues that fall for our consideration are whether:
- I. The appellant's rights under articles 50(2)(a), (b), (c) and (j) of *the Constitution* were Contravened.
 - II. Section 198 (1) of the *Criminal Procedure Code* was contravened.
 - III. The absence of the words "unlawfully" and "intentionally" in the charge sheet at plea taking was prejudicial to the appellant.
 - IV. The prosecution proved its case against the appellant beyond reasonable doubt.
27. This being the second appeal as indicated earlier, our mandate is circumscribed under section 361 of the *Criminal Procedure Code* and as was reiterated by this Court in *David Njoroge Macharia v Republic* [2011] eKLR as follows;
- "That being so only matters of law for consideration -see section 361 of Criminal Procedure Code. As this court has stated many times before, it 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 *Chemagong v R* [1984] KLR 611.
28. The first issue for our consideration is whether the appellant's rights under articles 50(2)(a), (b), (c) and (j) of *the Constitution* were contravened as stated by the appellant in his first ground of appeal. He did not specify in what manner his rights under article 50(2) clause (a), (b) and (c) were contravened. His complaint that the prosecution did not supply him with copies of the statements, charge sheet and documentary exhibits, before the hearing date falls under clause (j). He submitted that as such, the first witness testified without full disclosure of the evidence that the prosecution intended to rely on. In opposition, the respondent submitted that the appellant's said rights were not contravened as he was supplied with the necessary documents as the proceedings were going on.
29. The record of appeal reveals that the appellant did not raise this issue before the trial court or the 1st appellate court and therefore, the two courts did not pronounce themselves on it. Be that as it may, a perusal of the record shows that the appellant was served with the requisite documents in the course of the proceedings and was therefore, not ambushed. There is no evidence that new facts came to his attention after he was supplied with the statements nor that he requested for the first witness to be recalled for further cross examination.
30. We therefore find no basis to conclude that the appellant's rights under article 50(2)(a), (b), (c) and (j) of *the Constitution* were contravened. Hence, this ground fails.
31. The second issue for our consideration is whether section 198 (1) of the Criminal Procedure Code was contravened. In his second ground of appeal, the appellant argued that the court did not enquire what language he understood as envisaged under section 198 (1) of the Criminal Procedure Code. He urged this Court to find that he was prejudiced since he could not adequately follow the proceedings. In rebuttal, the respondent contended that the appellant was able to actively participate in the



proceedings. Further, that he did not raise this issue before the trial court or as a ground of appeal for the superior court to determine.

32. Indeed, the record of appeal indicates that the appellant did not bring this complaint before the trial court, nor did he raise it as a ground of appeal before the superior court. There is therefore, no pronouncement by the court on it.

33. Section 198 (1) of the *Criminal Procedure Code* (Cap 75) provides for interpretation of evidence to the accused person or his advocate and states that:

“Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in a language which he understands.”

34. The record however, indicates that the appellant was an active participant in the proceedings before the trial court. He cross-examined the prosecution witnesses at length and also gave his unsworn defence in detail. This is not an achievement he would have attained if he was unable to follow the proceedings. We find no proof that the appellant did not understand the case against him, or the language(s) used in the trial court. Consequently, we find no basis to hold that the requirement of the provisions of section 198 (1) of the *Criminal Procedure Code* was not satisfied by the trial court. This ground too therefore, fails.

35. Although not raised as a substantive ground of appeal, the appellant also submitted that the charge sheet was defective, as it did not indicate the words “intentionally” and “unlawfully.” On the other hand, the respondent argued that the fact that the charge did not contain those words, did not prejudice the appellant, as he was charged with an offence known in law and he was able to understand and plead to it. Further, that the appellant did not raise this issue as a ground in the first appeal.

36. The Record indicates that the two words were introduced with the leave of the court, before the hearing began. In that regard, the question that begs to be answered is whether the omission of the said words at the time of plea taking prejudiced the appellant, or occasioned him injustice. On this, we are guided by section 382 of the *Criminal Procedure Code* which stipulates:

“.... no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.”

37. In our view the omission did not prejudice the appellant, for the particulars of the offence were properly framed and the appellant was adequately informed of the offence for which he was charged. He was able to understand the charge and plead to it. The defect, if any, which in any case was cured before the trial commenced, was one such as was curable under section 382 of the *Criminal Procedure Code*. In the premise, the omission did not occasion a failure of justice.

38. The last issue for determination is whether the prosecution proved its case beyond reasonable doubt. In a criminal trial, the prosecution has a duty to prove its case against the accused person beyond reasonable doubt. In this regard, this Court in *Richard Munene v Republic* [2018] eKLR pronounced itself as follows:

“In a criminal trial, the accused person enjoys a presumption of innocence because the burden of proving the charges is on the prosecution, and to do so beyond any reasonable doubt. Secondly in an adversarial system the purpose of evidentiary rules is to assist the court in



establishing the truth and in the process provide protection to the accused in respect to his right to a fair trial. As they say, the prosecution must present a watertight case that meets the threshold of beyond reasonable doubt in order to obtain a conviction.

39. As stated earlier, the appellant was charged with defilement contrary to section 8(1) as read with subsection (2) of the SOA. The said section provides as:

- “ 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”

40. The ingredients comprising the offence of defilement were captured in the case of *John Mutua Munyoki v Republic* (2017) eKLR where this Court held that:

“For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:

- a) The victim must be a minor
- b) There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.”

41. The appellant’s argument is that the complainant’s age was not proved to the required standard. He based his argument on the fact that the immunization card produced in court, indicating that she was 6 years old, was not produced by her parents but by PW5. Further, that her mother testified that she was 7 seven years old. The respondent on the other hand, argued that age was proved to the required standard by the evidence of the minor, her mother and the medical report produced in court by PW6.

42. In *Edwin Nyambogo Onsongo v Republic* [2016] eKLR this Court held that:

“...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 documents, 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 guardians or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.” (emphasis ours).

43. The record before us reveals that the evidence of the minor and the medical report indicated that she was 6 years old, while her mother testified that she was 7 years old. The immunization card indicated the date of birth as January 30, 2005. The offence occurred on December 17, 2011. The minor was therefore aged 6 years and 11 months and was just one month and some days shy of her seventh birthday. Of importance is that she was below 11 years of age at the time of the offence. We cannot therefore, find fault with the finding of the two courts below that her age was proved to the required standard, since it was within the bracket covered by section 8 (2) SOA as required by law.

44. On penetration the appellant argued that it was not proved, since nothing was drawn to show the injuries sustained by the minor, in the space provided for diagram in the PRC form. On the contrary, the respondent urged that the minor’s testimony, P3 form, and medical report all clearly proved penetration.



45. As argued by the appellant, indeed the PRC form on the diagram space was not completed. There was no drawing showing the injuries sustained by the complainant in her genitalia. Be that as it may, the appellant gave graphic evidence on how the appellant inserted his genitalia into hers. Her evidence was further corroborated by that of PW2, as well as the P3 form and the medical report produced in evidence.

46. Section 2 of the SOA defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Supreme Court of Uganda in the case of *Bassita v Uganda SC Criminal Appeal Number 35 of 1995*, held thus on this issue:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim’s own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not a hard and fast rule that the victim’s evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that it is sufficient to prove the case beyond reasonable doubt”.

47. Accordingly, we find in the circumstances, that the two courts below were in order to find that the prosecution had proved penetration to the required standard.

48. In regard to the identity of the perpetrator, it was not disputed that the minor and the appellant were neighbours. The appellant confirmed it in his defence. The appellant invited the minor and her playmate into his house in broad day light and we surmise that the children went into his house because he was a neighbor, a person known to them. This was therefore a case of recognition and we are guided by the timeless caption of this Court in *Reuben Taabu Anjononi & 2 others v Republic* (1980) eKLR where it held that:

“.....recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of an assailant in one form or another ”

49. After a careful appraisal of the evidence on record tendered by both the prosecution and the defence, we are satisfied as were the trial and superior courts respectively, that the prosecution proved its case against the appellant beyond reasonable doubt. Nothing in the defence, or the arguments the appellant laid before us managed to debunk the prosecution’s case.

Ultimately, we find that the conviction was safe and uphold it. This appeal is therefore, found to lack merit and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF JUNE, 2023

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

