**Kisa v Republic (Criminal Appeal E045 of 2023)**
**[2024] KEHC 2860 (KLR) (18 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2860 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KITALE**

**CRIMINAL APPEAL E045 OF 2023**

**AC MRIMA, J**

**MARCH 18, 2024**

**BETWEEN**

**DAVID KISA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising out of the conviction and sentence of Hon. J. K. Ng'arng'ar (Chief Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. E093 of 2021 delivered on 21st July 2022)***

**JUDGMENT**

**Background:**

1. David Kisa, the Appellant herein was charged with the offence of Defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the charge were that on the 6th of December 2019, at [particulars withheld] within Trans-Nzoia County, the Appellant intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of CJS a child aged 13 years.

3. The Appellant faced the alternative charge of committing indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars thereof were that on the 6th day of December 2019, at [particulars withheld] within Trans-Nzoia County the Appellant intentionally caused contact between his genital organ namely penis and the genital organ namely vagina of CJS a child aged 13 years.

4. The Appellant denied both charges. A total five witnesses testified in support of the Prosecution's case. At the close of their case, the Appellant was placed on his defence.

5. The Appellant testified without calling any witness.

6. In its Judgment, the trial Court found the Appellant, then Accused, guilty of the main charge, that is the offence of Defilement contrary to Section 8(1) and 8(3) of the *Sexual Offences Act*. He was sentenced to 10 years' imprisonment.

**The Appeal:**

7. The Appellant was dissatisfied with both his conviction and sentence. Through an undated Amended Petition of Appeal, he advanced the following grounds: -

    1. That the learned trial Magistrate erred in failing to find that medical evidence tendered by PW3 and PW5 did not meet the threshold of proof beyond reasonable doubt on the act of penetration.

    2. That the learned trial magistrate failed to note that the age of the victim was not conclusively proved.

    3. That the learned trial magistrate failed to note that there was credible contraction on the prosecution's evidence.

    4. That the learned trial magistrate failed to note that there was failure of prosecution to call or summon crucial key witnesses.

    5. That the learned trial magistrate failed to note that there was failure of PW3 and PW5 to introduce themselves as per the law.

**The submissions:**

8. In his undated written submissions, the Appellant submitted that despite PW3 stating that the hymen was broken, that the victim was bleeding and that yeast cells were found, that evidence was not conclusive proof of penetration in accordance to Section 2 of the *Sexual Offences Act*. It was his case that PW3 did not state whether the penetration was partial or complete.

9. With regard to the evidence of PW5, it was the Appellant's position that since the victim's hymen was intact, it meant that penetration did not happen. It was his case that the Clinical officer failed to point out what caused the partial penetration.

10. The Appellant submitted that the presence of epithelial cells did not conclusively point to penetration. The Appellant contended that there was no strong evidence of penetration. He relied on the decision in Criminal Case No. 2960 of 2012, *Samuel Barasa -vs- Republic.*

11. As regards the age of the victim the Appellant submitted that her age was not conclusively proved to the required standard for failing to produce her Birth Certificate, a Baptismal Card or a Clinical Card.

12. It was further his evidence that the Investigating Officer did not confirm the age of the victim or at all. On the basis that the victim's mother and the Investigating Officer stated that the victim was 13 and 14 years respectively, he urged the Court to find the inconsistency in his favour.

13. On ground 3 of his appeal, the Appellant submitted that the inconsistencies and contradictions of the entire case were glaring. He referred to the different dates on the Charge sheet. He stated that the date at the right top corner of the charge sheet indicating April 13, 2021 is different from the one on apprehension report which is written April 14, 2021. He further stated that the date it is indicated he took plea was April 13, 2021.

14. It further was his case that the inconsistencies of the victim as her name varying from CJS, and CJ made him unable to understand who the victim was.

15. It was his case that from the evidence, he failed to understand whether C and J were together and that the prosecution failed to clear that doubt.

16. In further reference to the aspect of contradiction, the Appellant submitted that PW3 and PW5 evidence on whether the hymen was broken such contradiction ought to be viewed to his advantage. He relied on *Richard Appela -vs- Republic* 1981 EACA 945 where it was observed;

> Two contradictory statement admitted in court of law as the evidence of the truth either one is the truth and another is not true since there is no possibility for both of them to be admissible due to their contradictory nature.

17. On failure to call crucial witness, the Appellant referred to PW1's evidence and stated that the failure to call the lady that allegedly heard the commission of the offence did not clear the doubt as to the occurrence of the offence.

18. It was his case further that since PW2, the mother of the victim testified that she had sent both J and the victim to collect firewood, the evidence of J who was not called was crucial to the case. the decision in *Bukenya & Another -vs- Uganda* 1971 EA 549 was relied upon where it was observed;

> The prosecution must make available all witnesses necessary to establish the truth even if the evidence may be inconsistent. The high Court has the right and duty to call witnesses necessary whose evidence appears essential to the just decision of the case; where the evidence called is barely adequate, the court may infer that the evidence of the uncalled witness could have been rendered adverse to the prosecution.

19. On the last ground of appeal the Appellant submitted that the failure by PW3 and PW5 to disclose their qualifications rendered them incompetent to examine the victim and adduce evidence in court. The Appellant drew support from the Court of Appeal in Muthoni -vs- Republic and submitted that PW3 and PW5 were incompetent to give important evidence.

20. In the end, he urged the Court to reconsider the evidence, quash his conviction and set him at liberty.

**The Respondent's case:**

21. The Republic opposed the appeal through written submissions dated June 20, 2023. It was its case that PW4 produced the Age Assessment report of the victim as Exhibit 1 that estimated her age to be 14 years. It was its case further that the Court was able to assess the victim's age. The decision in Criminal Appeal No.2 of 2000, *Omuroni -vs- Uganda* and the Court of Appeal decision in Criminal Appeal No. 24 of 2015, *Mwolongo Chichoro Mwanyembe -vs- Republic*, were referred to where, in the former, it was observed;

> Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense.

22. With respect to penetration the Respondent submitted that PW1's, PW2's and PW3's evidence considered together proved beyond reasonable doubt that it did occur.

23. Lastly, as regards the aspect of identity of the perpetrator, the Respondent submitted that the victim knew the Appellant very well since he used to sell her firewood. The decision in *Roria -vs- Republic*

1967 EA 583 was cited in support of the position that the circumstances were tenable to enable the complainant identify and recognize the appellant.

24. In rebutting the grounds of appeal fronted by the Appellant the Respondent submitted that all the elements of defilement were proved by prosecution beyond reasonable doubt.

**Analysis:**

25. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in *Ajode v. Republic* [2004] KLR 81.

26. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.

27. The Appellant's first ground of appeal was in respect to failure by prosecution to prove penetration.

28. Before re-evaluating and reassessing the evidence I, will briefly look at the law on penetration and the evidence then appreciate the principles that have overtime been established by the Courts of superior jurisdiction.

29. The Appellant was charged under section 8(1) of the *Sexual Offences Act*. It provides as follows;

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

30. The term 'Penetration' is defined by Section 2 of the said *Act* in the following way;

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person.

31. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

> .... Many times, the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.... (emphasis added).

32. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

> In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

33. From the definition of penetration and the guidance by the Court of Appeal, it is the position that penetration may only be 'slightest and to the surface' to suffice in law. It, therefore, means that there may be instances where the slight penetration, depending on other factors including passage of time, may not be possible to be ascertained by way of medical evidence. Therefore, the failure to prove penetration by medical evidence does not ipsa facto mean that there was no penetration. It all depends on the peculiar circumstances of a case and the extent to which the trial Court believes the victim.

However, in such instances, the Court must exercise extreme caution as to weed out miscarriage of justice including instances where a victim is framed up for ulterior motives.

34. The Court will, before proceeding further, look at the evidence on record albeit briefly.

35. The complainant testified as PW1. It was her evidence that on December 6, 2019 they were to fetch firewood with her sister J. It was her evidence that they had two donkeys.

36. PW1 further testified that they were to first get firewood from David Kisa the Appellant herein, who used to make firewood for them. She stated that when he requested the Appellant for firewood, the Appellant retorted that he was tired. The Appellant then sent the complainant to get him roasted maize. The complainant stated that she instead roasted it for him.

37. It was her further testimony that as she gave the Appellant the maize in his hut, he held her and put her on the bed and forced her to remove her clothes and then defiled her.

38. The complainant stated that she screamed and a lady came and was heard. It was her evidence that the Appellant threatened her but she managed to escape. It was her case that upon meeting her mother on her way, she instantly reported the incident. She stated that her mother took her to hospital at [particulars withheld] and later went to K Hospital where she was treated. They later recorded statements and a P3 form issued to PW1.

39. PW1 pointed right at the accused during trial and stated that she knew him since he used to make firewood for them.

40. On cross-examination, the complainant stated that her name was C. It was her case that her sister J had left for home and was to come later.

41. The complainant also stated that she was 13 years old and that J was her elder sister.

42. MAN, the complainant's mother testified as PW2. It was her evidence that CJ was born in the year 2006.

43. That on December 6, 2020, she sent the complainant to fetch firewood with her sister J.

44. She further testified that she waited for the complainant for long and that got her anxious and went to find her. It was her evidence that she found the complainant on the road crying. It was her case that the complainant told her that the person selling them firewood had defiled her.

45. PW2 took her to the hospital at [particulars withheld] and was referred to and took PW1 to K D Hospital and later to the police at [particulars withheld].

46. She identified PW1's treatment notes and the Police P3 form.

47. On being cross-examined by the Appellant, PW2 stated that she sent the complainant alone. It was her evidence that it is her children who used to go to fetch the firewood.

48. PW2 confirmed that C and J were her daughters, but that J did not go to fetch firewood that day.

49. M C testified as PW3. It was his evidence that he works at E Sub-County Hospital and that he examined the complainant and filled the P3 form.

50. He stated that the complainant was 13 years of age and that he examined her physically. It was his evidence that the complainant had changed clothes but had not taken a bath.

51. According to PW3, the complainant had external visible injuries.

52. On examination of her private parts, PW3 observed that PW1 had bruises on her *labia*. She was bleeding and that her hymen was freshly broken. It was his evidence that he took some specimen for analysis.PW3 stated that the tests had yeast cells. He treated PW1 and filled in a P3 form which he produced as P. Exh 3.

53. PC No. 11xxxx, Dennis Onchiri testified as PW4. He stated that he was attached at the E Police Station.

54. It was his evidence that on December 6, 2019 while working at S Police Post, the complainant in the company of PW2 reported a defilement incident. That he booked the report and issued a P3 form and urged them to proceed to the hospital. PW1 was examined and treated and the P3 form duly filled.

55. PW4 testified that the Appellant was arrested by members of public. He also testified further that the minor was assessed to be about 14 years old at the time of the incident. To that end, he produced the Age Assessment Report dated April 12, 2021 as an exhibit. He identified the Appellant at the dock.

56. PM, the Clinical Officer at Kitale County Hospital testified as PW5. It was his evidence that he had the P3 form of a girl by the name CJS aged 13 years.

57. It was her testimony that she saw the complainant on December 9, 2019 at the health facility and that he examined her and found that her private parts had injuries. He stated that PW1 had bruises on the bottom area and that there was some bleeding and that her hymen was intact.

58. He testified further that laboratory tests of the complainant's urine showed some infections. It had yeast cells and epithelial cells.

59. He further stated that an age assessment revealed that she was about 13 years old.

60. In conclusion, it was his evidence that there was partial penetration and treated and referred the complainant for HIV and other treatment for primary penetration.

61. The Appellant was subsequently placed on his defence.

62. Giving his evidence on oath, the Appellant stated that on February 13, 2021, he was at a video shop in a shopping centre when the police arrested him, among others, for being out late.

63. He further stated that police wanted Kshs. 5,000/= but had only Kshs. 2,000/-. He was, hence, charged with offences he knew nothing about and maintained that he had been framed.

64. On cross examination, it was his evidence that he only saw M, the mother to the complainant and PW1 in Court for the first time and not before. He also stated that he neither knew PW1 nor supplied her with any firewood.

65. The Appellant, however, stated that he later came to know that PW1 was a sister to J. It was his evidence that J went to the forest.

66. At the close of the defence case, the Court rendered its decision. In its judgment, the trial Court was of the finding that the complainant was a child of 14 years as per the Age Assessment Report and according to the evidence of her mother.

67. It also was its finding that penetration, albeit partial, was proved according to the medical evidence produced.

68. As regards identity of the perpetrator, the trial Court was of the finding that the Appellant was well known to the Complainant and her mother as well and that the offence took place in broad day light.

69. Upon considering the foregoing, the trial Court dismissed the Appellant's evidence on the basis that it was an afterthought.

70. This Court has reviewed and carefully re-assessed both the evidence of the prosecution and that of the defence.

71. The Court is not in doubt that the aspect of penetration was proved by PW1, PW2, PW3 and PW5.

72. The direct evidence of PW1 was corroborated by that of PW2, PW3 and PW5.

73. The Appellant, however, sought to leverage on the contradiction between the evidence of PW3 [the Clinical officer from E Hospital] and the one of PW5 [the Clinical officer from Kitale County Hospital].

74. Whereas PW3 referred to P3 form, the same is not in part of the record before this Court. However, his evidence that he examined the Complainant and that found that she had bruises on her labia was corroborative and consistent with the findings of PW5.

75. That said, this Court notes the Appellant's argument that the evidence of PW3 suggested that the hymen was 'freshly broken' and PW5 stated that there was 'partial penetration'. He urged this Court to settle the inconsistency in his favour.

76. The inconsistency is not in respect of one witness saying there was penetration and another saying that there was no penetration. Both testimonies affirm penetration. The net effect of the two 'inconsistent' pieces of evidence is that there was some aspect of penetration whether partial or otherwise.

77. The foregoing notwithstanding, this Court's attention is drawn by the Court of Appeal in Criminal Appeal 312 of 2018, *Evans Wanjala Wanyonyi v Republic* [2019] eKLR where the appellate Court cited with approval the decision in Criminal Appeal No. 84 of 2005 (Mombasa) *Kassim Ali -vs- Republic* where the Court stated thus: -

> ... [The] absence of medical examination 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.

78. From the foregoing, the evidence of the complainant that of her mother and the Investigation officer to the exclusion of the hospital would be sufficient to secure a conviction. This finding also dislodges the Appellant's claim that PW3 and PW5 failed to introduce themselves as medical practitioners.

79. That said, during cross-examination, the mere denials by the Appellant as to the occurrence of the offence do not raise any reasonable doubt as to the question that indeed there was a sexual encounter between the Complainant and the Appellant.

80. In conclusion, this Court finds that the trial Court's finding on the ingredient of penetration cannot be faulted.

81. The age of the complainant was in contest. The Appellant stated that it was not conclusively proved. In her evidence, the complainant stated that she was 13 years old. Her birth certificate was not produced but an Age assessment report was produced as Exhibit 1. It indicated that at the time of the offence, PW1 was 14 years old.

82. The Court has also sighted the treatment notes of Kitale County Hospital which indicated that the complainant was 13 years of age.

83. The discrepancy of 1 year can be attributed to the parameters used in the 'estimation' process.

84. In the premises, this Court finds that PW1 was aged between 13 and 14 years old. She was, hence, a child in law.

85. The ground of appeal, therefore, fails.

86. Finally, as pertains identity of the assailant, it was only PW1 who rendered such evidence. The evidence of the complainant was, hence, that of a single witness. It was on identification of the assailant by way of recognition.

87. Evidence by a single witness must be treated carefully and cautiously. In *R –vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court 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....

88. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.

89. In giving guidance on how the issue of recognition ought to be distinguished from that of identification of a stranger, the Court of Appeal in *Peter Musau Mwanzia vs. Republic* (2008) eKLR, Court stated as follows: -

> We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

90. Further, the Court of Appeal in upholding the evidence of recognition at night in *Douglas Muthanwa Ntoribi vs Republic* (2014) eKLR held as follows: -

> " On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> > "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

91. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in *Peter Okee Omukaga & Another vs R* (unreported) had this to say on the evidence of recognition at night: -

> " We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants."

92. The above Courts in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition is watertight so as not to cause an injustice to an innocent accused.

93. Again, this Court reiterates that the witnesses testified before the trial Court and the Court observed their demeanours. There were no adverse findings made on any of the witnesses. The Court also believed their evidence.

94. The complainant was quite forthright on the identity of the assailant. The incident occurred during day time. PW1 knew the assailant as a person whom she regularly bought firewood from.

95. There is, therefore, no doubt that the complainant knew the Appellant quite well. Given the way the events occurred on the fateful day, this Court is satisfied that the complainant was able to recognize the assailant as the Appellant without error.

96. This Court has also considered the Appellant's defence. He raised the issue of having been framed by the police on refusing to part with Kshs. 5,000/=. The police then framed him on account of a debt he had with PW1's sister, J. According to the Appellant, the case had been amicably settled.

97. The defence was duly considered and disregarded as an afterthought. This Court agrees with that finding. The defence did not dislodge the prosecution's evidence.

98. The trial Court was right in finding that the Appellant was positively identified by way of recognition.

99. On sentence, the term of 10 years' imprisonment was quite fair going by the nature and circumstances of this case as well as the contents of the Pre-Sentence Report.

100. This Court does not wish to disturb the sentence.

**Disposition:**

101. In the end, this Court finds and hereby hold that the entire appeal is without merit. It is hereby dismissed and the conviction affirmed and the sentence upheld.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 18TH DAY OF MARCH, 2024.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court and in the presence of: -

David Kisa, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.