



REPUBLIC OF KENYA



KENYA LAW
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**KMO v Republic (Criminal Appeal E105 of 2022)
[2024] KEHC 4220 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E105 OF 2022**

RPV WENDOH, J

APRIL 29, 2024

BETWEEN

KMO APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence by Hon. R. K. Langat –Principal Magistrate
in Rongo Principal Magistrate’s Court S.O. No. E025 of 2021 delivered on 12/10/2022)*

JUDGMENT

- 1 KOM has filed this appeal against the judgment of the Principal Magistrate in Rongo, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#). In the alternative, the appellant faced a charge of committing an incident Act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#).
- 2 The particulars of the charge are that on 20th July, 2021, at about 1930hrs at Awendo Sub County within Migori County in the Republic of Kenya, unlawfully and intentionally caused his penis to penetrate the vagina of EBO a child aged 15 years or that in the alternative he unlawfully and intentionally caused his penis to touch the vagina of EBO.
- 3 The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of four witnesses in support of their case namely PW1 EBO. the complainant; PW2 AO the complainant’s father; PW3 Adrian Ochillo Okwach, a clinical officer at Dede Hospital Centre and lastly PW4, PC Gimisu Susan the investigating officer attached to (Particulars withheld) Police Station.
- 4 When placed on his defence, the appellant gave a sworn statement and called one witness in support of his case.



5 Upon conviction, the appellant was sentenced to serve twenty (20) years imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 21/10/2022 and Amended on Grounds of Appeal filed on 28.11.2023 outlined as follows: -

1. That the trial court erred by not finding that the ingredients of defilement were not proved;
2. That the conviction was based on inconsistent evidence;
3. That the trial court's record was incomplete contrary to Article 50 (2) (4) of *the Constitution*;
4. That the appellant's defence was not considered.

6 The appellant therefore prays that the appeal be allowed, conviction be quashed and the sentence of 20 years imposed be set aside and the appellant be set free. The appellant also filed written submissions together with authorities in support of the appeal. Despite being given time to file their submissions, at the time of writing this judgment no submissions had been filed. The appeal is therefore deemed unopposed.

7 This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it and arrive at its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal said: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

8 PW1 (FBO), the complainant, told the court that she was 15 years old, a student at (Particulars Withheld) Secondary School in Form 1. She knew the appellant who was Her uncle; that on 20/7/2021, she went to the appellant's shop where he sells electrical appliances at around 7pm. He closed the shop and took her to the bedroom which is inside the shop. He dragged her and put her on the bed. He removed her trouser and pant and removed his trousers and panty too. He started touching her breasts and then inserted his penis into her vagina; that the appellant threatened her not to scream or he would kill her. After the act, the appellant escorted her to her home and she got home at around 8:30pm. When she got home she explained to her father what had happened. The appellant denied committing the act. They went to Dede Police Station and thereafter to Dede Dispensary. She confirmed that the blood-stained panty (PEXNI 1) before court belonged to her.

9 PW2 AO, the complainant's father told the court that her daughter was born on 23.5.2006. He produced the Birth Certificate as Pexh.2. He stated that on 20/7/2021, he was at home, while the complainant had left with her mother to fetch firewood; that PW1 returned at around 9:30pm accompanied by the appellant; that he started to discipline her and it is then that she told him that the appellant had defiled her when she passed by his shop. They went to the appellant's house but he denied committing the offence. They then went to Dede Police Station where they reported the



- incident and proceeded to Dede Health Centre where the victim was examined and treated, the P3 Form was filled together with treatment notes and the Post Care Rape Form;
- 10 PW3 Adrian Ochillo Okwach, a Clinical Officer examined the complainant and observed that the victim was limping, she had a blood-stained underwear, red stains on her upper thigh, laceration on the vagina, whitish discharge and her hymen was broken. They conducted urinalysis, which revealed red blood cells and spermatozoa seen in the urine. It was his testimony that the spermatozoa confirmed penetration.
 - 12 The investigating officer PC Gimisu Susan (PW4) stated that on 21/8/2021, she was asked to collect samples from the accused person and the victim. She thereafter took them to the Police Station and recorded their statements. She produced PW1's blood-stained panty as Pexh.1.
 - 13 The appellant's (DW1) alibi defence was that on the date of the alleged offence, he was at Masara Mining Gold and that he travelled home at around 11pm. He denied defiling the victim and stated that the charges against him made up against him since they had a land dispute with some of his relatives at home. He further stated that he is a gold mine at Masara in Migori and does not have any electrical appliances shop.
 - 14 DW2, Simeon Ogot Odongo, testified in support of the defence that on 20/1/2021, he was at Masara gold mining site together with the appellant; that the appellant received a call that he was needed back home and he later learnt that the appellant had been arrested and charged. On cross-examination, he stated that he was with the appellant from 6am to 6pm on the 20/7/2021.
 - 15 The appellant submitted on the grounds of appeal in the Amended Petition of Appeal. On grounds 1 and 2, it was his submission that the prosecution did not establish beyond all reasonable doubts, the charge of defilement against him. That the conviction was solely based on the evidence by PW1 to 4 despite the fact that there was no eye witness; that other than the evidence of PW1, the evidence by the other witnesses was merely hearsay. Further, that the evidence of PW1 was not specific as to the act of penetration and what actually happened in the act of having sex. He maintained that the shop is located in a public place and surrounded by members of the public, it would therefore not be possible for such an act to take place without the knowledge of the members of the public.
 - 16 He relied on the case of Julius Kioko Kivuva vs Republic [2015] eKLR in that regard. He thus maintained that the quality of the evidence was unsafe to be relied upon by the court.
 - 17 On the other evidence tendered by the prosecution; it was his submission that there was no age assessment conducted to affirm the age of PW1; that the purported blood stains were also not accurately established whether the same were menses or were from an internal injury and of which particular part of the body or vagina; that the evidence was marred with contradictions particularly on the timelines, when PW1 allegedly went to shop and was escorted back home and hence variance in nature. He relied on the case of Ndung'u Kimani vs Republic [1979] KLR 282 and Okehi Okale [1965] EA in this regard.
 - 18 On grounds 3 and 4, it was his submission that the trial court record served upon him was incomplete even though the same had been certified as the correct copy of the court; some of the crucial evidence and part of the trial court's judgment were missing; that the manner in which the evidence was obtained was unprocedural and in gross violation of Article 50 (2) (4) of *the Constitution*.
 - 19 In conclusion, it was his submission that the trial court made an error in basing the conviction on insufficient and unsafe evidence while disregarding his defence which was strongly supported that on the date of the incident he was not at the scene, that Masara is 120km away from (Particulars Withheld)



where the offence took place. That there was also a land dispute which he indicated as the source of the dispute. He urged the court to allow the appeal, quash the conviction and sentence and he be set aside.

20 No submissions were filed on behalf of the prosecution despite being served with the appellant's submissions and being granted time to file. Be that as it may, I will proceed to render my decision as hereunder based on the evidence on record, grounds of appeal and appellant's submission.

21 I have carefully read and understood the proceedings and the judgment of the trial court, the amended grounds of appeal and the submissions. This being an offence of defilement, the prosecution has the duty to prove beyond any reasonable doubt the following: -

1. Proof that the complainant was a minor;
2. Proof of penetration;
3. Proof of identification of the perpetrator.

Proof that the Complainant was a minor.

22 The age of the victim is not in dispute. In the case of *Mwalango Chichoro Mwanjembe vs. Republic (2016) eKLR* the Court of Appeal laid down some of the ways in which age can be proved under the *Sexual Offences Act*. The court said:

.... The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary 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 guardian or medical evidence among other credible forms of proof.

23 PW2, the victim's father produced a copy of her Birth Certificate as Pexh. 2 and which shows that the victim was born on 23.5.2006. Therefore, at the time of the offence on 20/7/2021, the victim was aged 15 years 2 months. I therefore find that the victim was a minor at the time of the offence.

Proof of Penetration

24 Penetration is defined under Section 2 of the *Sexual Offences Act* as: -

The partial or complete insertion of the genital organs of a person into the genital organs of another person." While, "genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus."

25 In the present case, the victim gave a detailed account of what transpired on the 20/7/2021 between her and the appellant and the same can be found at page 4 of the Record of Appeal. It was partly her testimony that

"he took me to the bedroom which is inside the shop. He dragged me and placed me on the bed. He switched off the lights. I was wearing a trouser and T-shirt. I had panty. It is a white panty with red strips. He removed my trouser and my pant. He removed his trouser and panty. He inserted his penis on my vagina. He touched my breasts. He inserted his penis in my vagina....".

This narration in my considered view meets the threshold of what amounts to penetration as defined in Section 2 of the *Sexual Offences Act*. Further, PW3 the Clinical Officer in his testimony stated that he conducted some tests on the victim including urinalysis. The urinalysis revealed red blood cells and spermatozoa were also seen in the urine. It was his conclusion that the spermatozoa were evidence of



penetration. The officer also observed that there was fresh superficial lacerations on the labia majora and labia minora, fresh tear of the hymen with minimal bleeding and fresh bleeding on the vaginal walls. Thus, there is no dispute that the prosecution proved that indeed there was unlawful penetration of the child EBO.

26 The final element and which is at the centre of this Appeal is on Proof of identification of the perpetrator. The appellant's denied defiling the complainant and raised an alibi defence that he was at Masara in gold mining site with DW2 until late .

27 The trial court in his judgment on the issue of identification of the perpetrator reproduced the testimony and/or narration of the victim on the occurrence of events. The trial court opined that there was a vivid description of the events and her evidence was not shaken on cross-examination; that the victim was firm and consistent and the medical examination done a few hours later confirmed that she was defiled. On the defence of alibi raised by the appellant, the trial court opined partly as follows: -

... the prosecution through its witnesses dislodged this defence that the accused person was not at the scene when the incident occurred. The complainant and her father (PW2) placed the accused person at the scene. The complainant testified that she was defiled by the accused person inside his shop at Rapando at around 7 pm and thereafter escorted home by the accused person at around 9:30pm. This corroborates her father's testimony that the complainant arrived home at 9:30pm on the material day in the company of the accused person. Furthermore, the two testified that upon the complainant disclosing to her father what had transpired, they went to the accused person's house, where they met the accused person who denied having defiled the complainant.....”

28 I have carefully looked at the trial court's judgment, the prosecution evidence and the alibi defence raised by the appellant. Issues

- (1) Did the prosecution discharge their burden of proof to the required standard?
- (2) Did the defence of alibi raise reasonable doubt in the prosecution's case?
- (3) Was there a proper analysis of the facts and evidence by the trial court in his judgment.

29 The appellant alibi defence, raised at the defence stage. R. Aburili J. in the case of Waka Evans Amira v Republic [2021] eKLR cited with approval the EACA decision in R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 where it was held as follows;

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”

30 In this case, the appellant raised the alibi about a year after arrest. He never alluded to it earlier. Be that as it may, it is settled law that a successful alibi defence entirely rules out the appellant as the perpetrator of the offence. Again, while addressing the issue of alibi, the Court of Appeal in the case of Erick Otieno Meda v Republic [2019] eKLR at para 23 observed as follows: -

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.



- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
 - (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
 - (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu - v - S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))
- 31 DW2 stated that he was with the appellant between 6am and 6pm on the material date of the incident. He cannot confirm any happenings after 6pm. The offence herein occurred between 7 pm and 9:30pm before PW1 got to their home. I find the alibi to be an afterthought and goes to the credibility of the Appellant’s testimony. Besides, the Appellant had a right to cross-examine PW1 to 4 and at no time did he raise the issue of the land in dispute or alibi. The allegation of land dispute is hollow. The nature of the dispute and the parties to it was not disclosed. There was no reason for the complainant and PW2 to frame the appellant with the charges. To this end, I find the analysis by the trial court, in terms of the testimonies by PW1 and PW2 to be proper. The prosecution’s evidence was not dislodged by the alibi defence at all.
- 32 The appellant alleged that PW1’s evidence in the Record of Appeal was incomplete. I have looked at the Record of Appeal against the court record and it is complete. Besides, when the appellant noticed that the Record of Appeal was incomplete, he should have notified the court.
- 33 For the above reasons, I find the conviction to be safe and I affirm it. I therefore find that the Appeal lacks merit and is hereby dismissed. On sentence, the courts are tending to do away with mandatory minimum sentences. For that reason, I set aside the 20 years imprisonment and substitute it with 15 years imprisonment. The Appeal succeeds to that extent. The sentence will commence from 12/10/2022

DELIVERED, DATED AND SIGNED AT MIGORI THIS 29TH DAY OF APRIL, 2024.

R. WENDOH

JUDGE

In presence of; -

Ms. Kogos for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistant

