



REPUBLIC OF KENYA



**Cheruiyot v Republic (Criminal Appeal E031 of 2023)
[2024] KEHC 16194 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E031 OF 2023
RL KORIR, J
DECEMBER 19, 2024**

BETWEEN

BENARD CHERUIYOT APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
E061 of 2021 by Hon. Omwange J. in the Magistrate's Court in Sotik)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 4th December 2021 and 6th December 2021 at (Particulars withheld) Village in (Particulars withheld) town of (Particulars withheld) Sub-County within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of S.C, a child aged 15 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the Charge were that on diverse dates between 4th December 2021 and 6th December 2021 at (Particulars withheld) Village in (Particulars withheld) town of (Particulars withheld) Sub-County within Bomet County, he intentionally touched the vagina of S.C, a child aged 15 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case. The trial court found that the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave unsworn testimony and did not call any witness.
4. In a Judgement dated 31st May 2023, the trial court found the Appellant guilty of the offence of defilement, convicted him and sentenced him to serve 18 years imprisonment.



5. Being aggrieved with the Judgment of the trial court, the Appellant, Benard Cheruiyot through an undated home-made Petition of Appeal appealed against his conviction and sentence on the following grounds reproduced verbatim: -
- I. That the learned trial Magistrate erred in law and fact by failing to realize that the main ingredients of the present offence were not proved to the required standard.
 - II. That the learned trial Magistrate erred in law and fact by relying on evidence that had contradictions and was not corroborated.
 - III. That , the learned trial Magistrate erred in law and fact by failing to analyze that the entire evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.
 - IV. That the learned trial Magistrate erred in law and fact by rejecting my plausible defence without any explanation.
6. The Appellant filed further grounds of Appeal and they are reproduced verbatim as:-
- I. That the learned trial Magistrate erred in law and fact by not considering that the Prosecution did not discharge its burden of proof to the required standard.
 - II. That the learned trial Magistrate erred in law and fact by awarding a harsh sentence even after the trial court noted that he was a first offender.
7. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan vs State of Karnataka and Others Criminal Appeal No. 637 of 2015* as follows:-

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely..The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed.....”

8. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution’s Case.

9. It was the Prosecution’s case that the Appellant defiled S.C (PW3) on the material nights between 4th to 6th December 2021. PW3 testified that the Appellant penetrated her female organ using his male organ for two nights. That she decided to go back home and while on the way, she met PC (PW2) and told him what had happened and he took her to the police station.
10. PC (PW2) testified that on 6th December 2021 at around 10 a.m., he found PW3 in the company of one Hillary Cheruiyot and they were kissing. That he arrested the said Hillary Cheruiyot and took him to the police station.



11. Mutai Geoffrey (PW1) who was the clinical officer stated that he examined the victim (PW3) and stated that PW3 had a whitish discharge (infection) from her vagina. That her hymen was broken but longstanding. PW1 further stated that he found epithelial cells which indicated recent penetration. He further stated that there was possibility of sexual activity and that in his professional opinion, the medical evidence on penetration was inconclusive.

Appellant's Case

12. The Appellant, Benard Cheruiyot (DW1) denied committing the offence. He stated that between 4th and 5th of December 2021, he was in Kisii. That he came back on 6th December 2021 and was arrested by the police. DW1 further stated that they (Appellant and PW3) were examined.
13. It was DW1's testimony that the investigating officer was known to him and that he framed him because he did not pay the investigating officer.
14. As already stated, the Appellant was convicted at the close of the trial and sentenced to 18 years imprisonment.
15. The Appeal was canvassed through written submissions as directed by the court.

The Appellant's submissions.

16. In his undated submissions filed on 9th November 2023, the Appellant submitted that the Prosecution did not discharge its burden of proof. That the trial court relied on the evidence of the victim and PW2 who stated that he saw Hillary Cheruiyot kissing the victim. The Appellant further stated that the incident occurred at 10 a.m., and this was a case of mistaken identity.
17. It was the Appellant's submission that the Prosecution's failure to call Cherono whom the victim stated was in their company rendered the Prosecution's case doubtful. That the Prosecution also failed to call Hillary Cheruiyot.
18. The Appellant submitted that the trial court failed to consider that he was a first offender when it sentenced him. That he was the first born in his family and had a young family that depended on him. The Appellant further submitted that he was remorseful and asked this court to give him a second chance in life.

The Prosecution's/Respondent's submissions

19. Through their submissions dated 13th December 2023, the Respondent submitted that they proved the age of the victim which was 15 years of age through the production of the victim's Birth Certificate.
20. It was the Respondent's submission that the Appellant was positively identified by the victim. That the Appellant and the victim (PW3) knew each other very well. It was their further submission that the Appellant and the victim slept on the same bed and had sexual intercourse for two nights and that the Appellant was arrested in the same house.
21. The Respondent submitted that they proved penetration. That PW3 stated that she had sexual intercourse with the Appellant for two nights. The Respondent further submitted that the clinical officer (PW1) found that PW3 had a long standing broken hymen and had epithelial cells which indicated recent penetration.
22. It was the Respondent's submission that according to the clinical officer, the victim had a sexually transmitted infection in her vagina. That the clinical officer concluded that there was a possibility



of sexual activity. It was the Respondent's further submission that the evidence on penetration was beyond any doubt.

23. The Respondent submitted that the Appellant's defence was unsworn and was not corroborated by any other evidence. They further submitted that the Appellant was properly convicted and sentenced and that his Appeal lacked merit.
24. I have gone through and considered the trial court's proceedings, the undated Petition of Appeal filed on 13th June 2023, the Appellant's undated written submissions filed on 9th November 2023 and the Respondent's submissions dated 13th December 2023. The following issues arise for my determination:-
 - i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellant was just and fair.

i. Whether the Prosecution proved its case beyond reasonable doubt.

25. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
26. The victim (PW3) testified that she was born on 20th June 2006 and was aged 16 years. Joyce Chelangat (PW5) who was the victim's mother testified that PW3 was aged 16 years old. No. 243657 CPL Daniel Kirago (PW4) produced the victim's Birth Certificate as P.Exh 6. The testimonies of PW3, PW4 and PW5 regarding the age of PW3 were uncontested during cross examination.
27. In *Mwalengo Chichoro Mwajembe vs. Republic*, Msa. App. No. 24 of 2015 (UR), the Court of Appeal held: -

“the question of proof of age has finally been settled by decisions 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 is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa - vs - Republic, Criminal Appeal No. 19 of 2014* and Omar Uche *Vs Republic, Criminal Appeal No. 11 of 2015*. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable.....”
28. I have looked at the Birth Certificate (P.Exh 6) and it showed that PW3 was born on 20th June 2006. It is my finding that at the time of the commission of the offence, the victim (PW3) was aged fifteen and a half years old which in law is 15 years as she had not reached her 16th birthday.
29. With regard to the issue of identification, the victim (PW3) testified that she had sexual intercourse with the Appellant for two nights. When PW3 was cross examined, she stated that she knew the Appellant very well and that she had sexual intercourse with him.
30. No. 243657 CPL Daniel Kirago (PW4) who was Investigating Officer testified that after recording statements from the victim (PW3) and her mother (PW5), he visited the scene of crime which was the Appellant's house. When he was cross examined, PW4 stated that the victim (PW3) led them to the Appellant's house where she was defiled and they arrested the Appellant.



31. In his defence, the Appellant stated that police officers went to his house in the company of a lady who had school uniform. That he denied knowing the lady and he was arrested.
32. The Appellant's testimony confirmed that he was arrested in his house and this was the house that the victim had directed the police as the scene where she was defiled. It is highly improbable that the victim took the police officers to a stranger's house to effect the arrest. Further, I am convinced that the Appellant and the victim could not have had sexual intercourse for two days if they were not familiar with each other.
33. Additionally, when the victim (PW3) first testified, she was stood down as she stated that the Appellant who was out on bond, had reached out to her and sought forgiveness. That he convinced her (PW3) to lie to the trial court and state that they did not have sexual intercourse on the material night as she slept on the couch while the Accused slept on his bed. The Appellant denied going to the victim's place. In my view, this testimony though contested, painted a clear picture to the court that the victim and the Appellant were not strangers to each other.
34. From the evidence above, it is clear to me that the Appellant and the victim (PW3) were well known to each other. The evidence of identification as shown in this particular case was strong and free from any doubt.
35. Flowing from the above, it is my finding that the Appellant was positively identified by the victim (PW3) as the perpetrator of the offence.
36. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
37. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record reasons for such belief.
38. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
39. Regarding medical evidence, Mutai Geoffrey (PW1), a clinical officer from Sotik Health Centre testified that he examined the victim (PW3) and found that she had an old broken hymen and upon vaginal examination, she had a whitish vaginal discharge. That he examined the victim approximately 10 hours after the commission of the offence and found epithelial cells which indicated recent penetration. PW1 stated that there was a possibility of sexual activity and that the medical evidence of penetration was inconclusive. He produced the victim's P3 Form, PRC Form, victim's treatment notes, the Appellant's P3 Form and the Appellant's treatment notes as P.Exh 1, P.Exh 2, P.Exh 3, P.Exh 3, P.Exh 4 and P.Exh 5 respectively.
40. I have looked at the aforementioned exhibits and they all indicate that PW3 was examined on 6th December 2021 The victim's P3 Form (P.Exh1) and PRC Form (P.Exh 2) indicated that there was no evidence of penetration as the the victim had no lacerations on her genitalia.
41. Having considered the above evidence, it is my finding that the clinical officer's (PW1) testimony was not in consonance with the findings of the P3 Form (P.Exh 1) and PRC Form (P.Exh 2). The conclusion in the P3 Form was "There was no evidence of penetration as there was no spermatozoa seen or any bruises on the labia minora/majora". The clinical officer contradicted himself when on one hand he stated that the presence of epithelial cells indicated recent penetration and on the other hand, he concluded that the examination on penetration was inconclusive. This was in stark contrast to the finding in the P3 Form and PRC Form that there was no evidence of penetration. It was evident to this



court that the clinical officer was either inexperienced or actively misled the court. His contradicting evidence therefore became unreliable and of little probative value.

42. As earlier stated, the court can use the sole testimony of the victim as a basis for conviction. Section 124 of the *Evidence Act* provided:-

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth

43. In this case, I have carefully looked at the proceedings. The trial court did not indicate on the record why it believed the evidence of the complainant.
44. I have carefully gone through the proceedings and observed that the complainant testified twice. She first testified on 23rd February 2022 as PW3. She told the court that on 4th October 2021 at 4 p.m., she received information from one Philip (who was the Appellant's friend) that Bernard was looking for her. He gave her a phone number to call and she obliged and Bernard told her that her friend Cheronon was looking for her. She went to meet both Cheronon and Bernard at Sotik and ended up sleeping in Bernard's house where she purportedly slept on a couch while Bernard slept on the bed. She also stated that Bernard visited her home to seek forgiveness.
45. At that juncture, the Prosecutor applied to step down the witness whom he informed the court had turned hostile. The court obliged and even went ahead to cancel the Appellant's bond for alleged interference with the witnesses and the trial. When she resumed her testimony on 20th July 2022, PW3 testified that she had sexual intercourse with the Appellant on two nights. She stated that she slept with the Appellant and he penetrated her female genital organ using his male genital organ. When she was cross examined, she stated that the Appellant had told her to lie to the court that they did not have sex. When she was re-examined, she reiterated that she had sexual intercourse with the Appellant.
46. It was clear to this court that the trial faced interference. The Appellant attempted to seek forgiveness from the victim and her family which led to the victim stating that she was no longer interested in the case. As already stated, the victim testified negatively and positively as to the circumstances that surrounded the commission of the offence and this made her evidence contradictory.
47. In light of such evidence, the Prosecutor ought to have applied to have the victim declared hostile and proceed to cross examine her. It was unprocedural to have the witness stepped down only for her to come and testify with a seeming change of heart. It is my finding that by virtue of the victim's (PW3) refractory and contradictory evidence, her testimony became of little probative value. As earlier stated, the trial court did not record why it believed her testimony.
48. I have already observed that there was interference with the trial which was a matter of grave concern to the administration of justice and action ought to have been taken by the investigation officer and the prosecution counsel. On appeal however the court can only evaluate the evidence on record. Upon evaluation, I find that the evidence raised deep suspicion that penetration did occur but suspicion no matter how strong cannot be used as a basis for a conviction. See *John Mutua Munyoki v Republic* [2017] KECA 376 (KLR).



- 49. It is therefore my finding that the Prosecution did not prove penetration to the required standard of proof which was beyond reasonable doubt.
- 50. The ingredients of defilement i.e. age of the victim, identity of the perpetrator and penetration had to be proved conjunctively and not disjunctively. When an ingredient could not be adequately established, it created doubt and that doubt however little must go to the benefit of the Appellant.
- 51. In the final analysis, the Prosecution failed to prove its case against the Appellant beyond reasonable doubt and his conviction was unsafe.
- 52. The Appeal is allowed. I hereby set aside the Appellant’s conviction and quash his sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 19TH DAY OF DECEMBER 2024.

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R. LAGAT-KORIR
JUDGE

Judgement delivered in the presence of Mr. Njeru for the state, the Appellant acting in person and Siele (Court Assistant).

CRIMINAL APPEAL NO. E031 OF 2023 - JUDGEMENT	0
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