



**Maritim v Republic (Criminal Appeal E033 of 2023)  
[2024] KEHC 15998 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15998 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E033 OF 2023  
RL KORIR, J  
DECEMBER 19, 2024**

**BETWEEN**

**MATHEW KIPKORIR MARITIM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Sexual Offence Case Number  
E055 of 2021 by Hon. Omwange J. in the Magistrate's Court at Sotik)*

**JUDGMENT**

1. Mathew Kipkorir Maritim (now Appellant) was charged with the offence of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 15th November 2021 in Sotik Sub-County within Bomet County, he intentionally caused his penis to penetrate the vagina of FC, a child aged 14 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 15th November 2021 in Sotik Sub-County within Bomet County he intentionally touched the vagina of FC, a child aged 14 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 six (6) witnesses in support of its case.
4. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant testified and called two witnesses before he closed his case.
5. At the conclusion of the trial, the Appellant was convicted and sentenced to serve twenty (20) years in prison.



6. Being dissatisfied with the Judgment dated 31st May 2023, Mathew Kipkorir Maritim appealed against his conviction and sentence on the following grounds:-
  - i. That , the learned trial Magistrate erred in both law and fact in placing reliance on inconsistent and contradictory prosecution evidence.
  - ii. That the Honourable Magistrate erred in the law and fact in failing to consider that the evidence of the medical doctor which was adduced and exonerated the Appellant on the issue of penetration.
  - iii. That the Honourable Magistrate erred in law and fact by failing to consider the Appellant’s testimony in his defence.
  - iv. That the learned Magistrate erred in fact by failing to take into account the mitigation of the Appellant and calling for a pre-sentencing report before issuing the sentence herein.
7. The Appellant filed further grounds of Appeal on 6th March 2024. The grounds reproduced verbatim below were:-
  - i. That the learned trial Magistrate erred in law by convicting the Appellant and sentencing him to serve a sentence of 20 years imprisonment which was awarded in a mandatory form and without considering the circumstances which prevailed during the commission of the offence and other constitutional provisions including Article 50(2) (p) of *the Constitution* of Kenya.
  - ii. That the learned trial Magistrate erred in law and fact by holding that the offence of defilement was proved but failed to note that the ingredients of the offence were not proved by the Prosecution.
  - iii. That the learned trial Magistrate erred in law and fact by failing to note that the whole Prosecution case was marred with inconsistencies and contradictions which if considered would have overturned the Prosecution case.
  - iv. That the learned trial Magistrate erred in law and fact when he failed to consider the defence evidence given by the Appellant alongside other Prosecution evidence.
    1. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See *Pandya vs. Republic* (1957) EA 336.

### **The Prosecution’s Case.**

9. It was the Prosecution’s case that the Appellant defiled FC (PW2) on 15th November 2021. PW2 testified that on the material day, they (PW2 and PW3) had been sent away from school to go and call their parents but they did not. They instead went to meet her boyfriend one Amos. It was PW2’s testimony that later that night, the Appellant who was the friend of Amos penetrated her female genital organ using his male genital organ. That the Appellant left after the sexual intercourse.
10. FC (PW3) testified that she was with PW2 on the material day and she also had sexual intercourse with Amos. That they had sexual intercourse in the same house as the Appellant and PW2.
11. Doris Cherotich (PW1) who was the clinical officer testified that she examined PW2 on 17th November 2021 and found no evidence of penetration. That PW2 did not have any bleeding and had no bruises in her genital organ.



### **The Appellant's Case.**

12. The Appellant, Mathew Kipkorir Maritim (DW1) denied committing the offence. He stated that on the material day, he was at Sunfeld Centre where he stayed until 7 p.m. That his neighbour (DW2) picked him up with a boda boda and took him home where he spent the night with his wife and children. DW1 further stated that the Chief came to his house early the next morning and alleged that he (Appellant) was with PW2 and PW3 the previous night.
13. Joab Kipkemoi Cheruiyot (DW2) stated that he was a boda boda rider. That he met DW1 and carried him on his boda boda and he dropped him in his house at 7 p.m.
14. FC (DW3) stated that she was DW1's wife. That on the material day, DW1 came back home between 7.40 p.m. to 8 p.m. and they later slept.
15. On 16th April 2024, I directed that this appeal be dispensed off by way of written submissions.

### **The Appellant's submissions**

16. Through his written submissions filed on 6th March 2024, the Appellant submitted that the trial Magistrate erred when he sentenced him to serve 20 years imprisonment. That the sentence in section 8(3) of the [Sexual Offences Act](#) was couched in mandatory terms and it did not leave room for the trial court to award a lesser sentence. He further submitted that the trial court should have the discretion to consider the circumstances of the case and his mitigation before meting the sentence. He relied on sections 216 and 329 of the Criminal Procedure Code.
17. It was the Appellant's submission that this court in considering the sentence, to note the provisions of section 333(2) of the Criminal Procedure Code and consider the time he spent in remand. He relied on Ahmad Abolfathi Mohammed & another vs Republic (2018) eKLR.
18. The Appellant submitted that the ingredients of defilement were not proved by the Prosecution. That the age of the victim was not proved. He further submitted that even though the P3 form and the victim indicated to the court that she was 14 years old, the investigating officer (PW6) who produced the Birth Certificate did not confirm to the trial court the victim's age as captured in the Birth Certificate.
19. It was the Appellant's submission that the person who filled the P3 form did not explain to the trial court where he got PW2's Birth Certificate and further that PW2 was not taken for age assessment. That it was doubtful that the Birth Certificate was a genuine document.
20. The Appellant submitted that the Prosecution did not prove penetration. That the clinical officer's (PW1) testimony was clear that PW2 had not been penetrated. That the presence of a broken hymen indicated that PW2 was not a virgin. He relied on PKW vs Republic (2012) eKLR. He further submitted that no one witnessed the occurrence of the offence and the court was left with his defence and PW2's testimony regarding the defilement.
21. It was the Appellant's submission that the Prosecution's evidence had inconsistencies and contradictions which made his conviction unsafe. That PW2 and PW3 did not state why they were chased from school and further that their parents did not come to testify and explain to the court why the two minors (PW2 and PW3) were not in school.
22. The Appellant submitted that PW2 and PW3 could have sent away from school due to indiscipline and misconduct. That their testimonies were not credible. He relied on Ndungu Kimanyi vs Republic (1979) KLR 282. The Appellant further submitted that the court had to decide whether the inconsistencies and contradictions were minor to affect the root of the matter.



23. It was the Appellant's submission that the trial court did not consider his defence.

**The Prosecution's/Respondent's submissions.**

24. Through their written submissions dated 11th October 2024, the Respondent conceded the Appeal. The Respondent submitted that it was interesting and suspect that PW2 did not have sexual intercourse with her boyfriend (Amos) but instead had with the Appellant.

25. It was the Respondent's submission that the clinical officer (PW1) found no evidence of penetration upon examining PW2. It was the Respondent's submission that the victim (PW2) testified that the Appellant left the house in the middle of the night but his wife (DW3) stated that the Appellant got home at around 7.40 p.m. That this was supported by DW2 who stated that he dropped the Appellant home at around 7.40 p.m.

26. The Respondent submitted that the minors (PW2 and PW3) did not specify the hours of the night that they were with the Appellant. That this created reasonable doubt. They further submitted that the Appellant's defence was strong and there was no need for the Accused to call one Abraham Cheruiyot.

27. It was the Respondent's submission that Benard Cheruiyot alias Amos was charged in Sotik Sexual Offence Case Number E056 of 2021 for defiling PW3 and he was acquitted. That both minors gave similar testimonies in this case (Sotik Sexual Offence Case Number E055 of 2021) and Sotik Sexual Offence Case Number E056 of 2021.

28. The Respondent submitted that in Sotik Sexual Offence Case Number E056 of 2021, the trial court found that FC (PW3) was not truthful. That Benard Cheruiyot alias Amos was acquitted on similar evidence as the present case.

29. It was the Respondent's submission that there cannot be two conflicting findings where the circumstances are similar. That they had not appealed the Judgment in Sotik Sexual Offence Case Number E056 of 2021. It was their further submission that if the conviction was to be upheld then this court consider the circumstances of the case when determining the sentence.

30. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal dated 13th June 2023, the Appellant's written submissions filed on 6th March 2024 and the Respondent's written submissions dated 11th October 2024. The following issues arise for my determination:-

- i. Whether the Prosecution proved its case beyond reasonable doubt.
- ii. Whether the Defence placed doubt on the Prosecution case.
- iii. Whether the sentence preferred against the Appellant was harsh and severe.

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

31. 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.

32. Rule 4 of the Sexual Offences Rules of Court 2014 provided that:-

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.



33. The victim (PW2) stated during voire dire examination that she was aged 14 years old and during her testimony she stated that she was born on 23rd August 2007. No. 226xxx CPL Charles Bett who was the investigating officer produced the victim's Birth Certificate as P.Exh 5 which indicated that the victim was born on 23rd August 2007. I have looked at the Birth Certificate and confirmed that the victim was born on 23rd August 2007.
34. As stated by Rule 4 of the Sexual Offences Rules of Court above, the law allows age of a victim to be proved from the information contained in a Birth Certificate. Further, In the case of Edwin Nyambaso Onsongo vs Republic (2016) eKLR, in which the court cited the case of Mwolongo Chichoro Mwanyembe Vs Republic, Mombasa Criminal Appeal No.24 Of 2015 (UR) the Court of Appeal 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 guardian or medical evidence, among other credible forms of proof.....”
35. The Appellant submitted that the victim was not presented for age assessment. In my view, an age assessment report would be critical in determining the age of a victim if a Birth Certificate was not available. In essence, age assessment was one of the ways of proving the victim's age but it was not the only way.
36. Flowing from the above, it is my finding that the Birth Certificate (P.Exh 5) was sufficient proof of the victim's age. It is therefore my further finding that the victim (PW2) was aged 14 years at the time the offence was alleged to have been committed.
37. With regards 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.
38. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim's testimony and the medical evidence tendered.
39. FC (PW2) testified that on the material day (15th November 2021), together with her friend, FC (PW3) they had sexual intercourse with the Appellant and Benard Cheruiyot alias Amos in the same house. PW2 stated that the Appellant penetrated her female organ using his male organ and left at around 8 p.m. When she (PW2) was cross examined, she restated that the Appellant left at 8 p.m.
40. Doris Cherotich (PW1), a Clinical Officer testified that she examined PW2. That PW2 had an old standing broken hymen, had no bleeding and had no bruises on her genitalia. It was her professional opinion that there was no evidence of penetration. She produced a P3 Form, PRC Form and treatment notes as P.Exh 1, P.Exh 2 and P.Exh 3 respectively. I have looked at the exhibits and I have noted that the victim was examined on 17th November 2021 which was two days later and the results was in line with the clinical officer's (PW1) testimony that there was no evidence of penetration.
41. The medical evidence above did not tally with the victim's evidence that she had been penetrated.



42. However, courts can still convict solely on the testimony of the victim and the only caveat is that the trial court has to believe the testimony of the victim and record the reasons why it believed the victim. In Section 124 of the *Evidence Act* provides:-

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. I have gone through the record and the trial court did not record the reasons why it believed the victim.
44. From the Judgement, it was apparent that the trial court based its positive finding on penetration on the unexplained high epithelial cells found in the victim and the corroborative evidence of PW3.
45. FC (PW3) stated that on the material day, Benard Cheruiyot alias Amos penetrated her female organ using his male organ and that the Appellant slept with PW2. That the Appellant left in the middle of the night and she left Amos' bed and went and slept with PW2. When she was cross examined, PW3 stated that she heard the Appellant conversing with the victim (PW2). That the Appellant and Benard Cheruiyot alias Amos switched off the lights when they had sexual intercourse with them (PW2 and PW3).
46. As submitted by the Respondent, Benard Cheruiyot alias Amos was charged with defiling PW3 in Sotik Sexual Offences Case Number E056 of 2021 and in a Judgement dated 20th December 2023 by Hon. E. Muleka, the trial Magistrate acquitted Benard Cheruiyot alias Amos stating that the Prosecution failed to prove its case. The trial Magistrate stated that PW3 was not convincing as to the events of the material day.
47. It is imperative to note that the circumstances in Sotik Sexual Offences Case Number E056 of 2021 and the present case were similar as PW2, PW3, Benard Cheruiyot alias Amos and the Appellant were alleged to have been involved in sexual intercourse at the same time, same day and in the same house. For the reasons explained above and the medical evidence tendered by the clinical officer (PW1), these chain of events created a doubt in this court's mind as to the truthfulness of PW2 on the events of the material day.
48. It was clear to me from my evaluation of the evidence that the Prosecution did not prove the ingredient of penetration to the required legal standard. What was clear from the evidence however was that the two minors spent the night in the house of one Amos whom PW2 described as her boyfriend and whom she stated slept with her friend while she slept with the Appellant. The circumstances show that she may or may not have been penetrated that particular night as the only cogent evidence presented showed earlier sexual activity.
49. The ingredients of defilement 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. The evidence in this case showed a very strong suspicion that the Appellant did penetrate the victim on the material night. The law however is clear that suspicion alone cannot found a conviction.



50. This case clearly demonstrates how the system failed the two minors. At 14, they left school and went to the house of one Amos the Appellant's friend who clearly took advantage of their naivety. The investigation was either wanting or compromised with the result that no credible evidence was laid before the court leaving only the evidence of the minors' physical presence in Amos' house where they spent the night in the company of both the Appellant and his friend Amos.
51. In the final analysis, it is my finding that the Prosecution did not prove its case against the Appellant to the required legal standard.
52. In the end, the Appeal dated 13th June 2023 is allowed. I 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 19<sup>TH</sup> DAY OF DECEMBER 2024.**

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**R. LAGAT-KORIR**

**JUDGE**

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

