



REPUBLIC OF KENYA



**Kairu v Republic (Criminal Appeal 13 of 2019)
[2023] KEHC 3008 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3008 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 13 OF 2019
SC CHIRCHIR, J
MARCH 29, 2023**

BETWEEN

CHARLES MAINA KAIRU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from a decision of Hon. I. Gichobi Senior
Resident Magistrate at Kangema SPM'S Court S.O No. 14 of 2018)*

JUDGMENT

1. The Appellant 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 (The Act). It is alleged that on diverse dates between March 2017 and the 28th Day of March 2018 in Mathioya Sub-County within Muranga County intentionally caused his penis to penetrate the vagina of AN a child aged 13 years. He also faced an alternative charge of committing an indecent Act with a child contrary to Section 11(1) of the *Act*.
2. He was found guilty of the 1st charge and sentenced to 20 years in prison. The Appellant was dissatisfied with the outcome and consequently filed this appeal.
3. However, in his submissions he focused on slightly different points. This court is mindful of the fact that the Appellant did not have the benefit of legal representation and will therefore consider the grounds as set out in the submissions.

Grounds of Appeal

4. From what I can decipher from the Appellant 's submissions, the following are his grounds of appeal:
 - a. That the evidence do not disclose the offence of defilement



- b. That there were material contradictions, discrepancies and inconsistencies in the prosecution's case
- c. There was no corroboration of the complainant's testimony.
- d. That the sentence meted out was inconsistent with Articles 159 and Article 161(1) of the [constitution](#).

Submissions

5. On the age of the child the Appellant admits that the complainant was 13 years old at the material time.
6. On the identification of the perpetrator, it is the Appellant's submissions that he is being used as a scape goat and that the perpetrator is one Julius Wachira who has been charged separately with the same offence. That the complainant was attempting to place the offence on him in an attempt to protect the said Julius Wachira Murithi who was allegedly her boyfriend.
7. He further submits that the evidence of the investigations officer points to Julius Wachira and not him as the perpetrator; that his prosecution was an attempt to cover up for the real culprit. That his defence of alibi was not considered.
8. On penetration, the appellant submits that from the narrative given by the complainant what she called "bad manners" could have been any other thing other than penetration. It is further submitted that the complainant alleged testimony was given under pressure from the complainant's mother whose intention was that the Appellant herein be convicted in place of Julius Wachira. It is the Appellant's further submissions that the medical evidence given by the doctor never proved penetration; that to a broken hymen is not proof of penetration and finally the term "bad Manners" used by the complainant does not constitute an offence known in law.
9. The Appellant also submits that the prosecution evidence was full of inconsistencies, contradictions and discrepancies. The Appellant has cited the following portions of the complainant's evidence in this regard.
 - a. Where the complainant in one instance told her Aunt that she was defiled once yet in another instance she stated that she had been defiled twice.
 - b. Further that she contradicted herself regarding the various places where she reported to have been defiled, plus the timings of the alleged defilement.
10. It is also the Appellant's submission that the complainant evidence was never corroborated and the trial court never gave reasons for believing her testimony, as per the requirement of section 124 as the [Evidence Act](#).
11. It is the Appellant's contention that his conviction was based on suspicion, that he was framed to shoulder the acts of one John Wachira who has been charged separately with a similar offence and in which the complainant therein is also a victim. It is further submitted that some essential witnesses were not summoned
12. On the sentence meted out, the appellant's submission is that the sentence of 20 years violated Article 50 of the [constitution](#). The appellant further urges the court to review this sentence in the light of the high court decisions in the *Edwin Wachira & others vs. Republic* Mombasa High Court Petition No. 97/2021 and [Philip Maingi & others vs. Republic](#) Machakos High Court Petition No. 017/2021.



Respondent's Submissions

13. It is the respondent submissions that all the ingredients of defilement namely, penetration, age of the victim and positive identification were proved. The prosecution relied on the case of *Kaingi Kasomo vs. Republic* Cr. No. 504/2010(CR), *JWA – vs. Republic* (2014) eKLR and *Anjononi & others Vs. Republic* (1980) KLR to buttress the submissions.
14. On the alleged contradictions and inconsistencies, the Respondent's calls them "very remote and insignificant". In this regard, Reliance was placed on the case of *Richard Munene vs. Republic* (2018) eKLR. *Dickson Elia & another vs. Republic* (Criminal Appeal No. 2 of 2007 and *Eric Onyango vs. Republic* (2014) eKLR.

Determination.

15. I have considered the grounds of Appeal, the rival submissions and authorities cited. I have also perused the record of Appeal. The role of this court as the first appellate court as it has been restated in many past decisions is to look at the evidence afresh, re-evaluate it and arrive at its own finding. (see *Okeno vs. Republic* (1972) EA 32 and *Mark Oirun Mose vs. Republic* (2013) eKLR.)
16. I will address myself to the grounds of appeal asset out by the appellant.

Whether the charge of defilement was proved.

17. The charge of defilement has 3 ingredients namely, positive identification of the perpetrator, age of the victim and penetration. These ingredients must not only be all present, but each must be proved beyond reasonable doubt.

Age of the victim

18. The complainant's age was given as 13 years. Her age was not an issue in the trial court or in this appeal. I will not therefore address myself to it.

Identification of the perpetrator

19. It is the Appellant's submission that the culprit is one John Wachira and not him; That he is being used as a scape goat to allow the real perpetrator to escape blame.

In my view the appellant has not addressed the issue of identification within the context of the legal context. His real complain is that he was being framed, not that he was not positively identified. Identification evidence is defined as "evidence that a defendant was or resembles a person who was present or near a place where the offence was committed or an act committed to the offence." (See *Donald Atema Sipnti vs. Republic* (2019) eKLR). In the present case, it is evident that the Appellant, the complainant, PW2 and PW3 knew each other well. The complainant, PW2 and PW3 kept referring to the Appellant by one name "Maina" I therefore find identification was by recognition, and was proved.

Penetration

20. Section 2 of the *sexual offences Act*, defines penetration as "The partial or complete insertion of the genital organs of a person into the genital organs of another person" There are two ways of proving penetration, namely medical examination and the testimony of the complainant.



According to PW4, the medical officer, he found that the complainant's hymen was broken and there was redness on the opening of the cervix an indication of defilement. Thus there is no question as to whether the complaint was defiled.

21. The big question that the prosecution needed to have answered was, who defiled the complainant? It emerged during the hearing that there was another defilement case involving the complainant herein and that the perpetrator in that other case was one Julius Wachira. It emerged from the evidence of the complainant's mother (PW3) and the investigations officer (PW5) that the Appellant's name came up during an interrogation of the complainant in respect of the charge against Julius Wachira. Julius Wachira also features in PW1's evidence. During cross examination, on being questioned by the accused, the complainant told the appellant that neither he nor the said Wachira "loved her more"
22. Also from the evidence of PW3, the need for medical examination of the complainant was prompted by an incident with "Wachira". It emerges from the evidence of PW5 that Wachira was arrested on 29th April 2018. (Last paragraph on page 13 of the proceedings.) On the basis of the evidence of PW3 and PW5 it is correct to conclude that both the Appellant herein and Wachira were arrested around the same time.
23. According to the Clinical Officer, when the complainant was examined on 29th April, 2018, she had been freshly defiled. The pertinent question is: who between the two men, defiled the complainant around the 28th or 29th April, 2018?
24. The complainant's as well her mother's testimony was silent on this latest incident of defilement. The complainant however told the court that the appellant defiled her between March 2017 and 2018. There was no medical evidence to corroborate this.
25. Was her evidence enough to convict the appellant within the context of Section 124 of the Evidence Act? Having gone through her testimony, I am hesitant. I cannot help but agree with the Appellant that there are gaps and inconsistencies, in this case which materially affect the prosecution's case.
26. Something else raises my doubts; from the evidence of the complainant, PW2 and PW3 the sexual encounter between the Appellant and the complainant had been going on for a period of one year. This was never taken up by PW3 as the mother of the complainant. Indeed, the Appellant was only arrested because his name came up during interrogation of the complainant in an ongoing investigation against Wachira. Why would a mother keep mum in the face of defilement of not just a child, but her own?
27. It is also PW2's own testimony that she would sometimes beat the complainant, in an attempt to pressure her to confess that she has had "bad Manners" with the Appellant. Sometimes it was through inducement of sweets. Can such confessions, obviously obtained through duress and undue influence be said to be believable enough, to convict the Appellant; within the context of section 124 of the Evidence Act? I think not.
28. The complainant was 13 years old. She was of the age when she could understand and be able to clearly explain certain basic and things. Thus her assertion for example that "she does not know what boys use to urinate" portrays her as being less than candid.
29. PW4, told the court that the complainant's pregnancy turned out positive. It is not known what happened to this pregnancy as subsequent tests showed she was not pregnant. The complainant told the clinical Officer that she believed the Appellant impregnated her. However, it is only if the pregnancy had resulted in birth, followed by a DNA would we have known if the appellant had ever defiled the complainant. This would have been a corroboration of the complainant's evidence. I do find that in the absence of corroboration, and the rather unbelievable evidence of the complainant, the act of



penetration was not proved. There are doubts and gaps in the prosecution's case. And all and any doubts must and always go to the accused.

It is my finding that the conviction of the Appellant was erroneous.

Sentencing

30. The Appellant has told the court that the mandatory minimum sentences are no longer binding following the declarations made in the high court constitutional petition No. 97 of 2021 (Mombasa) and petition No. E017/2021 (Machakos).
31. Sentencing is a matter of discretion and I would not have had any reason to interfere with the sentence of 20 years had I upheld the conviction
32. In conclusion, however, I find that the conviction of the Appellant was unlawful. The conviction is hereby quashed, and sentence set aside. The appellant be set at liberty at once, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF MARCH 2023

S. CHIRCHIR

JUDGE

In the presence of :-

Susan – Court Assistant;

Appellant – present

Ms. Miviu for the Respondent

