



REPUBLIC OF KENYA



KENYA LAW
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**Kiprop v Republic (Criminal Appeal E034 of 2021)
[2023] KEHC 2516 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2516 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E034 OF 2021
RN NYAKUNDI, J
MARCH 27, 2023**

BETWEEN

MESHACK KIPROP APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against conviction and sentence of the Chief Magistrate's
Court at Kapsabet by Hon. S.M. Mokuu (CM) delivered on 18/11/2021)*

JUDGMENT

1. This is an appeal against the judgment and sentence delivered by Honourable SM Mokuu, Chief Magistrate at Kapsabet Law Courts on November 18, 2021.
2. The Appellant herein 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 offence were that on the May 7, 2021 in Tinderet Sub-County within Nandi County intentionally and unlawfully did cause his penis to penetrate the vagina of FC a girl aged 15 years in violation of the said Act. He was alternately charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* and the particulars are that on the same date, place and time, the appellant intentionally and unlawfully did cause his penis to come in contact with the vagina of FC a child aged 15 years in violation of the said Act.
3. The Appellant pleaded not guilty to the abovementioned charges. The matter proceeded to trial after which he was found guilty, convicted and sentenced to serve 20 years imprisonment. The Appellant, being dissatisfied with the decision of Hon Mokuu he appealed against both conviction and sentence. The appeal is based on the following grounds of appeal:
 1. That the learned trial Magistrate erred both in law and fact in failing to properly evaluate and or analyse the evidence before him thus reaching an erroneous decision.



2. That the learned trial Magistrate erred both in law and fact in entering a conviction which went against the weight and or strength of the evidence before her.
3. That the learned trial Magistrate erred both in law and fact by not considering the Appellant's defence, the contradicting and inconsistent evidence of the prosecution witnesses.
4. That the trial Magistrate erred by not considering the pre-sentence report by the probation officer.
5. That the learned trial Magistrate erred both in law and fact in shifting the burden of proof to the Appellant thus reaching an erroneous decision.
6. That the trial Magistrate erred by sentencing the Appellant to a very severe sentence.
7. That the sentence imposed on the Appellant was harsh, excessive and punitive.

The Evidence

4. (PW1), FC, gave a sworn testimony. She informed the court that she was a pupil is standard 8. On the material day, she met the Appellant at a trading centre at around 4:00pm and the Appellant instructed her to go to his house. She stated that she heeded to his call and met him in his house at around 1:00am where the Appellant had sex with her and that they retired to bed. She told the court that at around 2:00am she heard her father calling her and that she had responded to his call. She stated that her father told Meshack to open the door and he did open the door and asked what they were doing. She told the Court that they had asked his father to forgive them. She told the court that her father then arrested then and escorted them to the police station at Songhor where they were placed in a cell. She stated that she was recorded a statement and was taken to Maraba Hospital where she was examined and a P3 Form was filled. She produced a copy of the P3 Form which was marked as exhibit (PMFI-1). She stated that she was born in 2006 and produced a copy of her birth certificate which was marked as exhibit (PMFI 3).
5. (PW2), Daniel Kipchumba Rotich, a Clinical Officer based at Metitei Sub-County Hospital. He testified that he examined and filled P3 form of the complainant. She was alleged to have been defiled by her boyfriend on 7/5/2021. Upon examination, he told the court that her injuries were a day old and that both labias were normal but cervix was reddened. There was no discharge. The pregnancy test was negative, HIV and AIDS was negative so was her urine. The doctor confirmed that the complainant had been defiled due to the redness in the cervical wall. He produced the P3 Form together with the treatment notes before the trial court which were marked as exhibit PEX-1 and PEX-2). He also told the court that he had examined the Appellant and that his injury was a day old and that he was placed on treatment. On cross-examination he stated that the complainant's hymen was broken.
6. (PW3) HKK, the complainant's father told the court that on the material day the complainant left their house at around 1:00am. He stated that his wife went looking for the complainant. He told the court that he suspected the Appellant as he had interest in the complainant. He stated that he went to the house next to the Appellants house where he heard the Appellant and the complainant speaking. He then instructed the Appellant to open the door where he found the Appellant standing in his house while the complainant was seated on a mattress on the floor. He stated that he arrested both the Appellant and the complainant and took them to Songhor Police Station where he recorded a statement. He told the court that that the complainant was born on 7/10/2006.
7. (PW4) SKM, testified that he is a Village Elder and that on the material day he had escorted PW3 to the Appellant's house. He told the court that PW3 had informed him that the complainant was in the



Appellant's house but the Appellant had declined to open his door. He told the court that he then arrested the Appellant and the complainant and then escorted them to Soghor Police Station.

8. (PW5) DKM, a neighbour testified that on the material day at around 1:00am, PW3 woke him up with suspicion that the complainant had eloped to a neighbour's house. He stated that he escorted PW3 to the Appellant's house where they found both the Appellant and the complainant. He told the court that they arrested them and then escorted them to Soghor Police Station.
9. (PW6) PC Jacob Muthia, the investigating officer in this matter testified that he re-arrested the Appellant and the complainant on 7/5/2021. He stated that he then placed them in a police cell and then escorted them to hospital for examination after which he preferred charges against the Appellant.
10. After the close of the prosecution case, the learned Magistrate found the Appellant to have a case to answer. He was therefore placed on his defence He testified as (DW1). He stated that on the material day he was at his place when Kelvin rang him and told him that there was a problem in his house which required his assistance. He stated that he then proceeded to Kelvin's house where he found the complainant seated in Kelvin's house. He stated that he then inquired from Kelvin what the problem was but Kelvin left the house and never came back. He told the court that later the parents of the complainant came and knocked the door and beat him up before escorting them to the Village elder's house. He basically denied having committed the alleged offence.

The Submissions

The Appellant's Submissions

11. On November 23, 2022, Counsel for the Appellant, Mr Duncan Tallam filed submissions on behalf of the Appellant herein. Counsel submitted that the Appellant ought to have been prosecuted beyond reasonable doubts and if any doubts arise then the same ought to be in favour of the accused as the Court of Appeal held in the case of *Pius Arap Maina v Republic* [2013] eKLR. Counsel further cited the case of *Bakare v State Court of Nigeria* to buttress his submissions.
12. Counsel argued that the P3 form filled by the Clinical Officer raises doubt as the report established that the labia of the complainant was normal and that there was no discharge. Counsel contends that the only proof that the Clinical officer relied on the report was that of a reddened cervix which made him draw the conclusion that there was penetration of the complainant's genitalia. Counsel argued that a reddened cervix is normal scientifically and that always common, a reddened cervix may be caused by a number of factors including infections, chemical or physical irritations and allergies. Counsel maintained that a reddened cervix is not proof of penetration. Counsel also argued that that upon examination of the Appellant the Clinical officer observed that everything was normal including his genitalia which was actually normal with no previous injuries.
13. Counsel further submitted that the trial Magistrate thus erred in law and fact by failing to properly evaluate and analyse the evidence tabled before her before making a finding that there was penetration hence erroneously convicting the Appellant. Counsel cited the case of *Queen v Manuel Vincent Quintanilla*, 1999 ABQB 769, a Canadian case which was relied on by the Court of Appeal in *PKW v Republic*, HCCRA No 331 of 2008 to buttress his submissions.
14. Counsel further faulted the prosecution for tendering contradictory evidence against the Appellant as the evidence of the witnesses was contradictory and inconsistent. Counsel cited the case of *CWK v Republic* Criminal Appeal No 72 of 2013; where it was stated that the critical ingredient forming the offence of defilement is age of the complainant, proof of penetration and positive identification of the assailant.



15. Counsel argued that the prosecution failed to consider the vital ingredient of identification as there was another suspect whom the prosecution failed to consider by the name of Kevin Kipchirchir. According to the Appellant's Counsel, the Appellant herein was set-up by his friend Kevin Kipchirchir.
16. Regarding the witnesses, Counsel submitted that the complainant seemed to have been coached to implicate the Appellant. That although she claimed to have had sexual intercourse with the Appellant, the medical report on record shows that the Appellant never engaged in any sexual intercourse with the complainant and thus there was no penetration.
17. Counsel argued that there are inconsistencies and contradictions surrounding the scene of the crime with respect to the Appellant being caught in the act or just merely being found at the scene of the crime. That PW2 testified that Appellant was found by the complainant's father defiling the complainant whereas the complainant's father stated that he found the Appellant standing in the house and the complainant seated on a mattress on the floor naked. Counsel further argued that there is an inconsistency surrounding the story as to who owns the house that was the alleged crime scene. That PW3 stated that the accused was in his own house whereas PW2 stated that they were at Kelvin's house. Counsel further submitted that in his defence the Appellant maintained that he was at a friend's house where the alleged incident took place.
18. Counsel faulted the trial court for ignoring these inconsistencies before condemning the Appellant without any proof. Counsel cited the case of *Augustine Njoroge v Republic* Criminal Appeal No 185 of 1982. Counsel further argued that P3's and PW4's testimonies contradicted the testimony of PW1.
19. Counsel further faulted the trial Magistrate for not considering the pre-sentencing report by the probation officer. Counsel argued that the report recommended a non-custodial sentence given the gravity of the matter and the context of the relationship between the Appellant and the complainant. Counsel argued that a pre-sentencing report is quite vital in the sentencing process and it was thus prudent for the trial court to consider it before sentencing the Appellant. That the report indicated that the two families had talked and resolved the issue and that the complainant had forgiven the Appellant.
20. Counsel further submitted that the trial court had shifted the burden of proof from the complainant to the accused jeopardizing and breaching attendance of a just outcome. That the trial court failed to consider all elements surrounding the circumstances of this case and focused on the instance of being caught. Counsel argued that in the proceedings and the pre-sentencing report it was clear that there was one Kelvin Kipchirchir who was inadvertently missing in the entire proceedings despite his house being the crime scene and having been mentioned as the perpetrator by the Appellant in this case. Counsel argued that the trial court left the entire burden of proof to the Appellant to prove his innocence.
21. Regarding the sentence, Counsel argued that the sentence that was imposed on the Appellant was harsh, excessive and punitive, this is because the Appellant is innocent and that the prosecution never took consideration of the evidence and never prosecuted the Appellant beyond reasonable doubts. That the trial court ignored the pre-sentence report and that the Appellant herein was a victim of a set-up.

The Respondent's Submissions

22. On December 7, 2022, Ms. Asiyo, J, State Prosecutor, filed submission on behalf of the state.
23. On whether the prosecution proved its case beyond reasonable doubt, Counsel submitted that the Appellant herein was a person well known to the complainant and that such the identification was



by recognition. Counsel cited the case of *Peter Musau Mwanzia v Republic* [2008] eKLR in support of her arguments. Counsel argued that the Appellant was also identified by the complainant's father and that although the complainant herein tried to blame his friend Kelvin, the court noted that the incident had occurred in the Kelvin's house but it was the Appellant herein and not Kelvin who had defiled the complainant. Counsel argued that the Appellant in his defence did not deny that Kelvin was his friend or that he was at Kelvin's house with the complainant on the material date which statement corroborated the complainant's testimony. Counsel argue that the Appellant's allegation of a conspiracy to frame him is nothing but hot air. That there is no evidence whatsoever of foul play of any kind, no evidence of ill motive or grudge by either the complainant or the complainant's father to implicate the Appellant.

24. Regarding the age of the complainant, Counsel submitted that the same has not been contested by the Appellant either his grounds of appeal or submission.
25. Regarding proof of penetration, Counsel submitted that the Appellant contests the evidence on penetration particularly the reddening of the cervical wall as not conclusive proof of penetration as indicated by the Clinical officer. Counsel maintained that the finding by the medical officer is usually on the medical history given by the victim coupled with findings on physical examination of the victim's genitalia as was in this particular case. Counsel argued that the contention raised by the Appellant in his submissions is thus improper and should be declared ad such. Counsel maintained that the Appellant is clear submitting on matters to which he is devoid of any expertise. That there is no authority or tangible evidence presented in support of the above misconceived theory by the Appellant neither is there proof that he is a medical expert or professional. Counsel cited the case of *Fappyton Mutuku Ngui v Republic* [2014] eKLR to support her submissions.
26. On whether there were contradiction and or inconsistencies in the prosecution case to make the conviction unsafe. Counsel submitted that although the Appellant alleges that the witnesses claimed that he was found in the act, the proceedings clearly show that PW3's testimony is that he found the Appellant and the complainant and the in the house and that the complainant was seated naked on the mattress on the floor. Counsel argued that there was no mention of being found in the act as alleged. That similarly, PW4 and PW5 were categorical that they too did not witness the act.
27. Counsel argued that the Appellant is relying on the alleged evidence of PW5 that the Appellant was found in the act of defiling the complainant while such evidence lacks probative value and the court did not even consider such evidence if at all it was presented.
28. As to who own the house where the incident took place, Counsel argued that this is not in dispute as both the Appellant and complainant agree that the house is owned by Kelvin. That the evidence shows that both the complainant and the Appellant were found in that house and it was the same house where the complainant was defiled and thus the issue of ownership is not crucial in proving the elements of defilement.
29. Counsel maintained that the prosecution proved its case beyond any reasonable doubt and in case of any inconsistencies the same did not affect the veracity of the prosecution case. Counsel relied on the findings in *Erick Onyango Ondeng' v Republic* [2014] eKLR.
30. Regarding allegations that the trial Magistrate failed to consider the Appellant's defence prior to conviction, Counsel submitted that the trial Magistrate exhaustively analysed the Appellant's defence and found it to be wanting when placed against the weight of the prosecution's evidence. That the only defence raised by the Appellant was that it was his friend who defiled the complainant. Counsel maintained that the Appellant herein was positively identified by the complainant by way of recognition and that the trial court exhaustively analysed the aspect of identification and the



Appellant's defence in its judgment. That save for the clinical officer and the investigating officer, the Appellant herein was well known to PW3, PW4 and PW5.

31. Counsel argued that the allegation that the trial Court did not consider the Appellant's defence is thus incorrect. Counsel maintained that the Court cannot be faulted for exercising its discretion to make a finding of guilt upon considering the facts of this case, the evidence and defence before making its determination unless the same is predicated upon wrong legal principles. Counsel argued that the prosecution case is watertight and was not shaken during the defence hearing where the Appellant's sworn testimony was based on mere denials and thus not sufficient to topple the prosecution case and as such the finding of the lower court on conviction was both proper and lawful.
32. Regarding the sentencing, Counsel submitted that prior to sentencing the Appellant, the trial Magistrate made an order for the pre-sentencing report which the court considered before meting out the sentence. Counsel argued that it is clear that the Court took consideration of the facts of the case, the nature of the offence, the defence presented by the Appellant, his mitigation and recommendation of the probation officer and made an informed sentence.

Analysis and Determination

33. The offence of defilement is rooted on three main ingredients being the age of the victim, penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the *Sexual Offences Act* No 3 of 2006 and must each be proven for a conviction to issue. (See *George Opondo Olunga v Republic* [2016] eKLR.)

Section 8(1) of the *Sexual Offences Act* provides as follows:

8.

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
- (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
- (5) It is a defence to a charge under this section if -
 - (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
 - (b) the accused reasonably believed that the child was over the age of eighteen years.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.



- (7) Where the person charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the Borstal Institutions Act and the Children's Act.
- (8) The provisions of subsection (5) shall not apply if the accused person is related to such child within the prohibited degrees.
34. In defilement cases, proof of the age of the victim is crucial because it is a determinant on what sentence will be meted in the event the accused is convicted. In Hilary Nyongesa vs Republic (2010) eKLR, the court said;
- “Age is such a crucial aspect in Sexual Offences that it has to be conclusively proved.....
- And this becomes more important because punishment (sentence) under the Sexual Offences Act is determined by the age of the victim.”
35. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:
- “... 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. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”(emphasis added).
35. Turning to the circumstances of this case, it is clear that the minority of the complainant was proved beyond reasonable doubt. The complainant testified that she was 15 years old at the time the offence was committed. The prosecution produced her birth certificate marked as exhibit PMFI-3 which indicates that she was born on 7/10/2006. (PW3), the complainant's father also confirmed that the complainant was 15 at the time the alleged offence was committed. In that regard, I place my reliance on the case of Musyoki Mwakavi v Republic [2014] eKLR the court said;
- “Apart from medical evidence, the age of the complainant may also be proved by both certificate, the victim's parents or guardian and observation or common sense...”
36. In light of the above judicial authority, the age of the complainant in the instant matter was ascertained by way of documentary evidence in form of the complainant's birth certificate. I find that the prosecution successfully proved the age of the complainant to the required standard of proof beyond reasonable doubt.
37. On the question of penetration, I note the same was proved beyond reasonable doubt. 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”
38. The complainant vividly narrated what transpired on the material date. She stated that she had met the Appellant at the trading centre who instructed her to go to his house. She told the court that she went to his friend's house where they proceeded to have sexual intercourse.



39. The Clinical Officer, (PW2) Daniel Kipchumba Rotich, examined the complainant and made findings that both labias were normal but the cervix was reddened and her hymen was broken. (PW3) confirmed that there was proof of penile penetration on the complainant's genitalia. The testimony of the complainant was corroborated by that of (PW3). I am satisfied that from (PW1's) narration of the events that there was indeed penetration.
40. The Appellant denied having committed the offence. However, the trial court found the same to be nothing more than an afterthought. I also find that the Appellant was positively identified as the perpetrator of the offence. The matter was one of identification by recognition which makes it little or no risk as far as mistaken identity is concerned. I place reliance in the case of *Hassan Abdallah Mohammed v Republic* [2017] eKLR it was stated that:
- “Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga vs Republic* (1989) KLR 424 at 426 had this to say:
- “Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
8. In *Nzaro v Republic* [1991] KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction.
41. I have no doubt in my mind that the Appellant was positively identified by way of recognition as the perpetrator of the defilement in question. Therefore, it is the court's view that the prosecution proved the offence of defilement to the required standard of proof beyond reasonable doubt. The appeal against conviction is hereby denied.
42. On the question of Sentence, the appellant was sentenced to serve 20 years imprisonment. The Appellant argued that the sentence is manifestly excessive in the circumstances of this case. An appeal against a sentence imposed by a trial Court can only be set aside, substituted or varied under the following circumstances:
- (a). Where the trial Court misapprehended the relevant factors and principles on sentencing.
- (b). Where the trial Court failed to interpret the Laws on sentencing to ascertain the intention of the legislature.
- (c). Where in arriving at the sentence the balance of the relevant factors and the competing considerations were never dissected to arrive at a fair and proportionate sentence for the crime.
43. This is what the Court in *Bernard Kimani Gacheru v Republic* [2002] eKLR emphasised that:
- It is now settled Law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate Court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial Court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate Court feels that the sentence is heavy and that the appellate Court might itself not have passed that sentence, these alone are not



sufficient grounds for interfering with the discretion of the trial Court on sentence unless, anyone of the matters already states is shown to exist.”

44. In my view, the nature of the offence deterrence must apply and is permissible for the court to impose disproportionate sentence provided the aim of such is to protect the larger society. The appeal on sentence is therefore denied.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF MARCH, 2023.

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R. NYAKUNDI

JUDGE

In the presence of Appellant – Present

MrMugun –Present

