



REPUBLIC OF KENYA



KENYA LAW
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**Kiplangat v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 24750 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL E005 OF 2022
JR KARANJA, J
OCTOBER 31, 2023**

BETWEEN

NICHOLAS ROTICH KIPLANGAT APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Nicholas Rotich Kiplangat was charged before the Resident Magistrate at Kericho with the offence of defilement, contrary to Section 8 (1) as read Section 8 (2) of the [Sexual Offences Act](#). It was alleged that on the 3rd June 2021 within Kericho County, the appellant intentionally caused his penis to penetrate the vagina of AC a child aged (11) years.
2. After a full trial, the appellant was convicted on the main count of defilement there having been an alternative count of indecent act with a child, contrary to Section 11 (1) of the [Sexual Offences Act](#). The conviction led to the life imprisonment sentence imposed upon the appellant by the trial court.
3. Being dissatisfied with the conviction and sentence the appellant preferred the present appeal on the basis of the grounds set out in the Petition of appeal filed herein on 17th March 2022 and amended petition (Memorandum) of appeal filed on the 22nd November 2022 in which the appellant essentially complains that he was convicted on evidence which was insufficient; inconsistent, contradictory and lacking in credibility such that the material ingredients of the offence were not established and proved to the required standard.
4. The Appellant also complained that his alibi defence was disregarded by the trial court which then shifted the burden of proof to himself. That the life mandatory life imprisonment sentenced imposed on him by the trial court was unconstitutional.



The appellant therefore beseeched this court to allow the appeal by quashing his conviction by the trial court and setting aside the life imprisonment sentence.

5. At the hearing of the appeal, the appellant appeared in person and relied on his written submissions in support of the appeal.

Appearing for the state/respondent, the Learned Prosecution Counsel, M/s Aseda, opposed the appeal and argued that the appellant was properly convicted as the case against him was proved beyond reasonable doubt and that the necessary ingredients of the charge were duly established by the prosecution.

The Learner Prosecution counsel therefore prayed for the dismissal of the appeal.

6. This court, being a first appellate court was obliged to re-visit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. In that regard, the prosecution case was briefly that the child complainant (PW1) was at the material time aged approximately ten (10) years and a primary school pupil in class 4 at [Particulars Withheld] Primary School. After a lunch break on the material date she (PW1) and a friend AC were sent by her mother to go and fetch firewood at a place called [Particulars Withheld]. In the process, they met a man who was identified as the appellant. He directed Chepkorir to exit the scene before he caused the complainant to lie down on the ground held her neck, removed her innerwear and forcefully defiled her.
7. The complainant's sister, PC (PW 2) was heading to a river at about 6.00pm when she met AC who informed her that the complainant had been pulled away by a man. (PW 2) proceeded to the scene of the act inside a forest and found the complainant being held by the neck by a man she recognized as the appellant.

The said AC (PW 3) clarified that her actual name was EC and confirmed that the complainant and her were together fetching firewood when a man appeared from behind and pulled away the complainant. She was not able to identify the man but she left the scene after he threatened to kill her if she did not. Thereafter, she met Prisca (PW 2) and alerted her on what had happened to the complainant.

8. The complainant's mother, SCR (PW 4) indicated that the complainant was born on 18th May 2009 and produced a child health card (P. Ex1) indicating as much. She (PW 4) was at home on the material date when between 5.00pm to 6.00pm the complainant was brought home by a group of people who alleged that she had been defiled and directed her to take her (complainant) to hospital. She took the complainant to hospital after reporting to the area D.O and the police. She later learnt from parents (PW 2) and the complainant (PW 1) that the appellant, who was their neighbour and known to her for over twenty (20) years was the person responsible for defiling the complainant.
9. At the Roret Sub County hospital, the complainant was examined by Dr. Kirui Collins Kimutai (PW 5), who thereafter compiled and signed the necessary medical examination report – P3 form (P. Ex2) confirming that the complainant was indeed defiled.

The matter was investigated by P. C Cherotich Sarah (PW 6) who thereafter preferred the present charge against the appellant whose defence was a denial and a contention that he was at his house on the material date from 9.00am to 9.00pm recovering in bed after being kicked by a donkey. He also contended that he went to a river on 7th June 2021 at 10am and while returning home he spotted AC in a coffee plantation with her mother and others. They were picking coffee. A's mother and father were in the coffee plantation intoxicated and with a condom. A lay down on the ground while her mother S was inserting the condom with a banana into complainant's private parts as her father held the condom.



10. The appellant further contended that on the 8th June 2021 he was herding cattle when he was confronted by A's father accompanied by a group of drunk cannabis (bhang) smoking motorcycle taxi-operators (boda-boda) who then arrested him. He implied that he was implicated by the complainant's family due to an existing grudge between him and the family which was bent on destroying his work and life.
11. The evidence was considered in its totality by the trial court which arrived at the conclusion that the prosecution case had been proved beyond reasonable doubt.

After re-visiting the evidence and taking into consideration the appellant's ground of appeal and the rival submissions for and against the appeal, this court is satisfied that the appellant's conviction by the trial court was safe and sound. This is because there was credible and sufficient evidence from the complainant (PW 1) and the good doctor (PW 5) establishing the fact of defilement.

12. Indeed, there was no dispute that an act of defilement was indeed committed against the complainant (PW 1) a child of the age of approximately eleven (11) years as confirmed by the child health card (P.Ex1). The dispute centered mainly on the appellant's criminal responsibility of the offence. His defence in that regard was a denial and an alibi that he was at home and not at the scene of the crime on the material date and time. However, the complainant (PW 1) and Prisca (PW 2) by their respective evidence clearly placed him at the scene of the offence at the material time thereby disproving his alibi and his weird suggestion that the act of defilement was deliberately inflicted upon the complainant by her parents when they inserted a condom laden banana into her private parts with a view to implicating him due to their existing grudge.
13. As a matter of fact, the appellant's defence was nothing short of a "cock and bull" story which the trial court found quite unreliable and so does this court as there was sufficient and credible evidence from the prosecution establishing all the necessary ingredients of the charge of defilement against him. His conviction by the trial court was thus based on solid grounds and is hereby upheld.
14. With regard to the sentence imposed on the appellant i.e life imprisonment; it was lawful and in tandem with S.8 (2) of the *Sexual Offences Act* which provides for such sentence in mandatory terms for a person who commits the offence of defilement with a child aged (11) years or less.
15. However, regard being given to emerging jurisprudence coming from our superior courts in recent times it would appear that a mandatory life imprisonment sentence is after all inconsistent with our constitution and therefore, unconstitutional. It is for this reason that this court would find it prudent to interfere with the sentence imposed on the appellant to the extent of setting it aside and substituting it for a sentence of fifteen (15) years imprisonment.

Save the alteration in the sentence, the appeal is largely wanting on merit and is hereby dismissed.

Ordered accordingly.

[DATED, DELIVERED THIS 31ST DAY OF OCTOBER, 2023.]

J. R. KARANJAH

JUDGE

