Chepkoech v Republic (Criminal Appeal E001 of 2021)
[2022] KEHC 1792 (KLR) (28 February 2022) (Judgment)

Daisy Chepkoech v Republic [2022] eKLR

Neutral citation: [2022] KEHC 1792 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E001 OF 2021

RL KORIR, J

FEBRUARY 28, 2022

BETWEEN

DAISY CHEPKOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From Original Conviction and Sentence by Hon.B.K Kiptoo (SRM) in Principal Magistrate's Court Sotik Criminal Case S.O. Number. 31 of 2019)

The ingredients of the offence of defilement have to be proved conjunctively and not disjunctively.
The case discussed whether the elements of the offence of defilement have to be proved together and the appropriate time to raise a defense of alibi (evidence of absence in commission of a crime) during criminal proceedings.

Reported by Moses Rotich

Criminal Law *– offences – defilement – ingredients for defilement – proving ingredients for defilement – where the appellant was charged and convicted for the offence of defilement – whether the ingredients of defilement had to be proved conjunctively or disjunctively – Sexual Offences Act, cap 63A, sections 8 (1) & (3), and 11.*

Criminal Law *– offences – offence of defilement – ingredients – proving ingredients for the offence of defilement – where the appellant was charged and convicted for the offence of defilement – appeal - defence of alibi – whether a defense of alibi brought later in criminal proceedings amounted to a fabricated afterthought – Sexual Offences Act, cap 63A, sections 8(1)(3) and 11.*

Criminal Law *- burden and standard of proof - standard of proof in sexual offences - beyond reasonable doubt - where the appellant was charged and convicted for the offence of defilement - what was the meaning of beyond reasonable doubt as a standard of proof in criminal proceedings.*

Brief facts

The appellant was charged and convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, cap 63A. The appellant was accused of intentionally and unlawfully

causing the penis of EKR, a boy aged 15 years, to penetrate her vagina. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. The appellant pleaded not guilty to both charges.

Following a full hearing, the appellant was convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied with the decision of the trial court, the appellant instituted the instant appeal against both conviction and sentence. The appellant asked the court to consider the testimonies of all the witnesses afresh in order to determine if the offence of defilement was proven to the required standards. The appellant also asked to consider his defence of *alibi* (evidence of absence in commission of a crime).

Issues

i. Whether the ingredients of defilement had to be proved either conjunctively or disjunctively.
ii. Whether a defense of *alibi* (evidence of absence in commission of a crime) brought later in criminal proceedings amounted to a fabricated afterthought.
iii. What was the meaning of beyond reasonable as a standard of proof in criminal proceedings?

Held

1. A first appellate court was obliged to consider the evidence presented in the trial court afresh, bearing in mind that the benefit of receiving the evidence first hand and assessing the demeanor of the witnesses was lacking. The court was duty-bound to revisit the evidence presented before the trial court, evaluate and analyze it, and arrive at its own independent conclusion. However, the court was required to keep in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing their testimony, and thus, it should give allowance for that factor in its assessment.
2. The age of the victim of sexual assault under the Act was a critical component. It formed part of the charge which had to be proved the same way as penetration in the cases of rape and defilement. It was therefore essential that the same be proved by credible evidence for the sentence to be imposed would be dependent on the age of the victim.
3. The trial court conducted a *voir dire* (a mini-hearing within a trial) as indicated in the proceedings to ascertain that the victim who was a minor, understood the importance of the oath and the evidence he adduced before court. However, the court did not record the reasons why it was satisfied that the victim was telling the truth under the circumstances. It merely acknowledged in the judgment that the victim was advanced in his teenage years, was carrying condoms and yielded to the offer for sex by the appellant. No reasons were recorded to demonstrate why the court chose to believe the victim's sole evidence that he and the appellant had sex. The appellant was subsequently convicted on the sole testimony of the victim.
4. The trial court was at fault for not giving the reasons why it chose to believe the sole evidence of the victim. The standard of proof in a criminal case had to be beyond reasonable doubt so as to lead to a conviction. The criminal justice system was pegged on article 50(2)(a) of the Constitution which guaranteed individual freedoms under the Bill of Rights, particularly the aspect of innocence until proven guilty. It could not be gainsaid that that burden of proof rested on the state and did not shift to the accused.
5. Standard of proof needed not reach certainty but it had to carry a high degree of probability. Proof beyond reasonable doubt did not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence was so forceful against a man to leave only a remote possibility in his favour which could be dismissed with the sentence, it was possible but not in the least probable, the case was proven beyond reasonable doubt but nothing short of that would suffice.
6. The ingredients of defilement had to be proved conjunctively and not disjunctively. When one of the elements could not be adequately established based on the absence of some fact or otherwise, thereby creating any form of doubt, however small, that doubt had to go to the benefit of the accused person.

7. The only evidence as to whether penetration occurred was that of the victim when he testified that they had sex. That evidence was not cogent enough to sustain a criminal conviction for defilement. It was evidently clear that there was a strong suspicion that the victim and the appellant were in a relationship, whether intimate or otherwise, and that the said relationship could have materialized into a sexual engagement on the night in question. Suspicion, however strong, could not provide the basis of inferring guilt which had to be proved by evidence beyond reasonable doubt.
8. The court was reluctant to find that the appellant committed the offence of defilement and that the same had been proven beyond reasonable doubt. There was a strong suspicion that the appellant and the minor victim were sexually involved. However, suspicion alone would not be enough especially where the liberty of an accused person was concerned.
9. In considering the alternative charge of committing an indecent act with a child, the offended section of the law was section 11 of the Sexual Offences Act. It stated that any person who committed an indecent act with a child was guilty of the offence of committing an indecent act with a child and was liable upon conviction to imprisonment for a term of not less than ten years.
10. The Act also defined what entailed an indecent act. Section 2 provided that indecent act meant an unlawful intentional act which caused any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but did not include an act that caused penetration. It also meant exposure or display of any pornographic material to any person against his or her will.
11. In the entire testimony of the victim, there was no indication that the appellant touched him in any of the places outlined in the said section of the law. There was the blanket testimony of the fact that they had sex. Having noted previously that it was not proven to the required threshold, it was even harder for the court to determine that an indecent act occurred where the evidence available did not point to it. None of the elements of indecent act came out in the victim's testimony and as such, the alternative charge had not been proven.
12. There was nothing on the record showing that the victim raised that specific defense of *alibi*. She claimed that she had an *alibi* during the material night but failed to call any witnesses to establish that defence. In addition, that defense was never raised throughout the trial.
13. The defense of an *alibi* had to be raised at the earliest opportunity by an accused person during trial to enable the prosecution look into the same and verify whether the trial ought to proceed or be stopped because such a trial would be superfluous in the event that the accused person could not be placed at the scene of crime at the material time.
14. If a person was accused of anything and his defence was an *alibi*, he should bring forward that *alibi* as soon as he could because, firstly, if he did not bring it forward until months afterwards there was naturally a doubt as to whether he had not been preparing in the interval, and secondly, if he brought it forward at the earliest possible moment it would give prosecution an opportunity of inquiring into that *alibi* and if they were satisfied as to its genuineness, proceedings would be stopped.

Appeal allowed.

Orders

Conviction was quashed and sentence set aside.

Citations

Cases

Kenya

1. *Kasomo, Kaingu v Republic* Criminal Appeal 504 of 2010 - (Explained)
2. *Lumbasi v Republic* Criminal Appeal 17 of 2016; [2016] KEHC 2942 (KLR) - (Applied)
3. *Maingi, Philip Mueke v Republic* Petition 436 of 2016; [2017] KEHC 4815 (KLR) - (Applied)
4. *Mose, Mark Oiruri v Republic* Criminal Appeal 295 of 2012; [2013] KECA 67 (KLR) - (Explained)
5. *Sawe v Republic* Criminal Appeal 2 of 2002; [2003] KECA 182 (KLR) - (Applied)

6. *SCG v Republic* Criminal Appeal 25 of 2017; [2018] KEHC 1361 (KLR) - (Applied)

United Kingdom

Miller v Minister of Pensions [1947] AII ER 373 — (Explained)

Regional Court

Republic v Sukha Singh s/o Wazir Singh & others (1939) 6 EACA 145 — (Followed)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general — (Cited)
2. Constitution of Kenya article 50(2)(a) — (Interpreted)
3. Evidence Act (cap 80) section 124 — (Interpreted)
4. Sexual Offences Act (cap 63A) sections 2, 8(1)(3); 11(1) — (Interpreted)

Advocates

Mr Muriithi for the respondent

JUDGMENT

1. The appellant, Daisy Chepkoech, was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act, 2006*. The particulars of the offence were that on May 18, 2019 within Bomet County, intentionally and unlawfully caused the penis of EKR, a boy aged 15 years, to penetrate her vagina.

2. She was also charged with an alternative count of Committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Particulars were that on May 18, 2019 within Bomet County, intentionally and unlawfully caused EKR, a boy aged 15 years, to touch her vagina with his penis.

3. The appellant pleaded not guilty to both the main and the alternative charge. A full hearing was conducted in which the prosecution called six (6) witnesses. PW1 who was the victim in this case testified that he together with his friend had met with the appellant and her friend and after escorting them to their house, he had sex with the appellant. It was also his friend's testimony (PW2) that he also engaged with the appellant's friend in sexual relations. The victim's mother testified that the victim was arrested by members of the public alongside his friend when they failed to go to school and it was at that time that they dsicovered that the victim had had a sexual relationship with the appellant. The appellant alongside her friend one MC and the two boys were arrested. He (the victim) was examined a month after the incident as confirmed by the medical report (Exhibit 2,3 and 4).

4. At the close of the prosecution's case, the trial court put the appellanton her defense. The appellant gave sworn evidence and called no witnesses. It was her assertion that she did not know the victim but only knew his mother. By judgmentdelivered on October 17, 2019, the appellant was convicted and sentenced to serve ten (10) years imprisonment.

5. Being dissatisfied with the decision of the trial court, the appellant instituted this Appeal against the conviction and sentence. On the following grounds:

    a) That she pleaded not guilty;

    b) That the court relied only on the evidence produced by the prosecution which was fabricated to implicate her in the offence;

c) That the trial magistrate erred in law and fact in concluding that the offense of defilement was proved without considering the evidence of the clinical officer; and

d) That the learned trial magistrate erred in law and fact by rejecting her alibi defense without a cogent reason.

6. The Appeal was canvassed through written submissions.

Appellant's Submissions.

7. The appellant submitted that the trial court convicted her based on the Prosecution evidence which did not prove the offence of defilement to the required threshold. That PW1's (the victim) evidence was uncorroborated and that the medical examination report presented by PW3 the Clinical Officer did not indicate any abnormality or prove that there had been any indications of penetration. She also submitted that the trial court relied on hearsay evidence from all the witnesses who only reported what the victim had told them. She finally submitted that the trial court unreasonably rejected her defence of having an alibi and that the conviction and sentence ought to be set aside.

Respondent's Submissions.

8. The respondent submitted that the offence of defilement had three main ingredients namely age, penetration and positive identification of the perpetrator. They relied on the case of *Mueke v Republic* [2017] eKLR. They submitted that the age of the victim was evidenced by their Certificate of Birth (Exhibit-) which indicated that he was 15 years old at the time of the incident.

9. Secondly, on the issue of identification and penetration, the respondentsubmitted that it was evident that the Accused was well known to the victim since they had consensual sex and seemed to have known each other from before. That the medical officer who examined the victim was unable to ascertain if there was penetration since the examination was carried out a month after the incident. The respondent therefore relied on section 124 of the *Evidence Act* to the extent that the law made an allowance for lack of corroboration where the charge related to a sexual offence and where the court was satisfied that from the demeanor of the minor, he or she was telling the truth. They relied on the case of *George Muchika Lumbasi v R* [2016] eKLR. In addition, the respondent submitted that the word sex in the victim's testimony connoted penetration and thus the case was proven to the required threshold. They relied on the case of *SCA v R* [2018] eKLR.

10. Lastly, on the issue of sentencing, the respondent submitted that sentencing was discretionary on the trial court and that a superior court could only interfere where the trial court failed to consider material factors or imposed an excessive or harsh sentence. In the present case, the respondent submitted that since the offence bore a minimum sentence of 20 years, the sentence of 10 years was just and legal.

Issues for Considerations

11. Having reviewed the trial file, the grounds of appeal and the parties' respective submissions, the only issue pertinent for my determination is whether the offence of defilement was proven to the required legal standard and whether a conviction was appropriate under the circumstances.

Whether the offence of defilement was proven to the required standard

12. It is my duty as the first appellat court to consider the evidence presented in the trial court afresh, bearing in mind that the benefit of receiving the evidence first hand and assessing the demeanor of the

witnesses is lacking. This duty was enunciated in a number of cases, one being, *Mark Oiruri Mose v R* [2013] eKLR where the Court of Appeal stated thus:-

> "This court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that."

13. In light of the above, I will consider the testimonies of all the witnesses afresh in order to determine if the offence of defilement was proven to the required standards. In the alternative, consideration must also be made as to whether the ingredients of the alternative charge could have been proven to the required standard based on the circumstances of the present case, if the threshold required for the main charge was not met. The appellant has also raised the issue of an alibi, which I will briefly consider in this analysis.

14. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under section 8(1) of the *Sexual Offences Act* No 3 2006 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 of blood or affinity."

The Age of the Victim

15. Proof of age is important in a sexual offense. In *Kaingu Kasomo v Republic*,Criminal Appeal No 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same wasy as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to sentence to be imposed will be dependent on the age of the victim."

16. In the present appeal, it was not in dispute that the victim was a minor aged 15 years at the time and in Class 7. He produced his Birth Certificate (Exhibit No. 1) that indicated his date of birth as August 20, 2004 and this remained uncontroverted by the Appellant.

Identification of the Appellant.

17. It is also not in dispute that the appellant was well known to the victim since both the victim and PW2, KK, his friend were able to identify her as one of the ladies whom they escorted home on the material night. The victim also admitted in court that the appellant was his friend even though the appellant denied knowing him. A mere denial by the appellant is not sufficient to conclude that the victim was unknown to her. I am convinced that the appellant was correctly identified as person who was with the victim in her house.

Penetration

18. PW3 was the Clinical Officer who examined the victim at Koiwa Dispensary on July 12, 2019. It is noteworthy that the examination was conducted more than one month since the offfence occurred and thus made it impossible for the Clinical Officer to detect any anomalies on the victim. The Treatment notes (Exhibit 3) and the PRC Forms (Exhibit 4) and the P3 form (Exhibit 2)all indicated that the victim's physical state was normal and it was therefore not possible to ascertain whether there was penetration or other sexual activity.

19. It follows then that the only evidence that the court can rely on is that of the victim. section 124 of the *Evidence Act* provides guidance on this as follows:-

> "
>
> " 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

20. In the present appeal, the trial court conducted a voire dire as indicated in the proceedings to ascertain that the victim who was a minor, understood the importance of the oath and the evidence he adduced before court. However, the court did not record the reasons why it was satisfied that the victim was telling the truth under the cicumstances. It merely acknowleged in the judgment that the victim was advanced in his teenage years, was carrying condoms and yielded to the offer for sex by the appellant. No reasons are recorded to demonstrate why the court chose to believe the victim's sole evidence that he and the Appellant had sex. The appellant was subsequently convicted on the sole testimony of the victim.

21. In light of the above, I fault the trial court for not giving the reasons why it chose to believe the sole evidence of the victim in this case. At the same time, I am alive to the standard of proof in such a case: The standard of proof must be beyond reasonable doubt enough to lead to a conviction. Our criminal justice system is pegged on article 50(2)(a) of the *Constitution* which guarantees individual freedoms under the Bill of Rights, particularly, the aspect of innocence until proven guilty. It cannot be gainsaid that this burden of proof rests on the State and does not shift to the Accused.

22. English caselaw is also replete with decisions which elucidated this standard of proof in a criminal case. Lord Denning in the case of *Miller v Minister of Pensions* [1942] AC stated as follows:-

> "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

23. In the present Appeal, the victim who was 15 years old testified that he was carrying condoms and that they had sex with the Appellant. The medical evidence as already demonstrated above was inconclusive on penetration. Since the examination was conducted about a month from the date of the incident, it was difficult for the clinical officer PW3 to detect any anomalies on the victim. PEX2, PEX3 and PEX4 which were the P3 Form, the Treatment notes and the PRC Form respectively, all indicated that the victim was in normal condition, that there were no injuries on his genitalia. As such, the clinical officer could not ascertain that there was penetration.

24. The ingredients of defilement must be proved conjunctively and not disjunctively. When one of the elements cannot be adequately established based on the absence of some fact or otherwise, thereby creating any form of doubt, however small, that doubt must go to the benefit of the accused person.

25. In the present case, the only evidence as to whether penetration occurred is that of the victim when he testified that they had sex. In my view this evidence is not cogent enough to sustain a criminal conviction for defilement. It is evidently clear that there is a strong suspicion that the victim and the appellant were in a relationship, whether intimate or otherwise, and that the said relationship could have materialized into a sexual engagement on the night in question. However, the Court of

Appeal already pronounced itself in this regard. Kwach, Lakha and O'Kubasu JJA in the case of *Sawe v Republic* [2003] KLR 364 stated thus:-

> " Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

26. I am therefore reluctant to find that the appellant committed the offence of defilement and that the same has been proven beyond reasonable doubt. There is a strong suspicion that the appellant and the the minor victim were sexually involved. However suspicion alone will not be enough especially where the liberty of an accused person is concerned.

27. In considering the alternative charge of committing an indecent act with a child, the offended section of the law is section 11. It states as follows:-

> " 11.
>
> (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years."

28. The *Sexual Offences Act* also defines what entails an indecent act. Section 2 provides as follows:-

> " indecent act" means an unlawful intentional act which causes-
>
> (a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) Exposure or display of any pornographic material to any person against his or her will."

29. In the entire testimony of PW1, there is no indication that the appellant touched him in any of the places outlined in the above section of the law. There is the blanket testimony of the fact that they had sex. Having noted previously that this was not proven to the requied threshold, it is even harder for this court to determine that an indecent act occurred where the evidence available does not point to it. None of the elements of indecent act come out in the victim's testimony and as such, I also find that the alternative charge has not been proven.

30. I now address the alibi defense raised by the appellant. I have perused the trial file and noted that there is nothing on the Record showing that she did raise this specific defense. She claimed that she had an alibi during the material night but failed to call any witnesses to establish this defence. In addition, this defense was never raised throughout the trial.

31. It is trite that the defense of an alibi must be raised at the earliest opportunity by an accused person during a trial to enable the prosecution look into the same and verify whether the trial ought to proceed or be stopped because such a trial would be superflous in the event that the accused person cannot be placed at the scene of crime at the material time. The former Eastern Africa Court of Appeal case of *Republic v Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA, 145 gave the necessary guidance on this as follows:-

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards

there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped".

32. The above precedent settles the issue of an alibi. I dismiss the same as an afterthought. The trial court could not consider something that was never raised by the appellant to begin with.

33. In the end, I find the appeal merited. The conviction was unsafe owing to insufficiency of evidence. I quash the conviction and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

JUDGMENT DELIVERED,DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2022

.....

R.LAGAT-KORIR

JUDGE

In the presence of the Appellant Acting in Person, Mr.muriithi for the State And Kiprotich (court Assistant)