



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chepkwony v Republic (Criminal Appeal E027 of 2021)  
[2022] KEHC 11581 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11581 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E027 OF 2021  
FA OCHIENG, J  
JULY 28, 2022**

**BETWEEN**

**KELVIN KIPKIRUI CHEPKWONY ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Conviction and sentence of the PM's Court  
at Tamu by Hon. P. K. Rugut (PM) dated 26 th day of May 2021 and  
21 st day of June 2021 respectively in Criminal Case SO No. 26 of 2020)*

**JUDGMENT**

1. The Appellant, Kelvin Kipkirui Chepkwony, was convicted for the offence of Defilement contrary to section 8 (1) as read with section 8 (3) of the [Sexual Offences Act](#).
  1. In his appeal, the appellant raised 3 grounds, which can be summarized as follows;
    - a. The case was not proved beyond reasonable doubt.
    - b. The trial court misdirected itself by shifting the burden of proof to the appellant.
    - c. The trial court relied on extraneous evidence, to wit; evidence from the bar, which was inconclusive.
  2. When canvassing the appeal, the appellant submitted that the evidence in this court did not meet the threshold set down in the case of *Ramanlal Trambaklal Bhatt v R* [1957] EA 332. In that case, the court reiterated that the legal onus is always on the prosecution to prove its case beyond reasonable doubt.
  3. The respondent readily conceded that the prosecution bears the burden of proof of every element in a criminal charge.



4. Being the first appellate court I will re-evaluate all the evidence tendered. I will do so within the context of the submissions made before me. However, I will also bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were testifying.
5. The appellant advanced his case under 3 distinct headings; I will adopt the same categorization herein.

### **Proof of Age of Complainant**

6. The appellant submitted that the age of the complainant was not proved beyond reasonable doubt.
7. He pointed out that the complainant was a student in Class 8. Therefore, in his understanding, the complainant would already have had a Birth Certificate, because she would not otherwise have been allowed to register for her KCPE.
8. The appellant believes that the prosecution deliberately hid the complainant's Birth Certificate from the trial court, because it could have shown that the complainant was not a minor.
9. A birth certificate is usually a reliable mode of proving the age of a person. It is a document which would ordinarily have been issued in the normal course of life. It may have been issued when the child was still a baby, if the parent(s) applied for it at the time immediately after the baby was born.
10. In some instances, the birth certificate is issued when a child is due for admission into school.
11. In this case, the mother of the complainant testified that she had the complainant's birth certificate. However, she explained that the said birth certificate was "still being processed in school."
12. That line of questioning was not pursued further. Therefore, this court does not have any material from which it can draw an informed conclusion, concerning the nature of the process through which the birth certificate was being taken.
13. I find no basis for the appellant's contention, that the complainant's birth certificate was being hidden from the court.
14. But that does not answer the question as to whether or not the evidence adduced was sufficient to prove beyond reasonable doubt, that the complainant was 13 years old at the material time.
15. The appellant made reference to the;

“..... celebrated case of *Francis Omuroni v Uganda* Court of Appeal No 2 of 2000, where it was held;  
‘In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth



certificate, the victim's parents or guardian and by observation and common sense .....

16. Therefore, even in the authority cited by the appellant, there was a clear holding, that the parents of the victim may prove the age of the said victim.
17. In this case, the complainant's mother testified that her daughter was born on 1 September 5, 2007.
18. That testimony was not challenged at all during cross-examination of the complainant's mother.
19. The appellant also failed to put forward any suggestion, to the witness, regarding the possibility that the complainant was not a minor. In effect, the challenge which the appellant was mounting now, was not a factor when the trial court was rendering its Judgment.
20. In her Judgment, the learned trial magistrate expressed herself thus;

“The Court of Appeal in *Simon Ngole Katunga v republic* [2020] eKLR held that a mother of a child is the best placed to know the age of the child and her evidence in that regard was sufficient to determine the age of the victim.

In the case of *Mangunyu v R* (2015) eKLR it was held as follows;

‘..... age may be proved by a birth certificate or particularly in the case of Africans, by the person present at birth .....

I therefore take the complainant's age to be 13 as testified by her mother.”

21. I find that the trial court correctly held that the evidence tendered by the mother of the complainant constituted sufficient proof of the complainant's age.

### **Proof of Penetration**

22. The appellant pointed out that although the Clinical Officer testified that the complainant's hymen was broken, he did not interview the complainant to ascertain whether or not she had had sexual intercourse before the date when the Clinical Officer examined her.



23. It was the understanding of the appellant that lack of spermatozoa raises further doubts about penetration.
24. And if the accused had pushed the complainant to the bed, causing the bed to hit her, the appellant submitted that the complainant ought to have had evidence of blunt injuries.
25. I have re-evaluated the evidence on record. The Clinical Officer testified that the complainant's clothes were blood-stained. He testified as follows;  

“I examined her genitalia; there were lacerations on posterior part of the vagina. There was blood coming out. The hymen was broken.”
26. It is significant that;  

“The lacerations in the vagina were fresh, since she was still bleeding. The injuries were about 2 hours old.”
27. In the light of that evidence, I am surprised that the appellant did suggest that the complainant may have had sexual intercourse previously.
28. During cross-examination, the Clinical Officer ruled out the possibility that the complainant was bleeding due to menstruation. He emphatically stated that;  

“The blood was caused by the traumatic penetration, not menstruation.”
29. Therefore, the evidence proved that there was penetration.
30. There is no legal requirement that there be spermatozoa inside or on the body of the complainant, in order to prove penetration. Accordingly, the absence of spermatozoa is not an indication of lack of penetration.
31. It must always be borne in mind that even partial penetration is sufficient to prove the offence of defilement.

### **Identity of Perpetrator**

32. The mother of the complainant beat up her daughter, to compel her to open up about what had transpired.
33. According to the appellant, that meant that the complainant only mentioned his name because of the fear which had been inflicted on her.
34. The appellant submitted that it was normal for a parent to force a child who was under his or her care, to do something even if such a thing was against the beliefs of the child.



35. The appellant urged this court to find that the evidence of the complainant ought not to have been believed. His reason for so saying was that the incident happened at a shopping centre; therefore the Appellant said that in the circumstances, there ought to have been several people around, when the incident took place.
36. I note that when he was put on his defence, the appellant readily admitted having been in the company of the complainant on the material day, at the material place.
37. He told the court that he bought soda for the complainant and the younger sibling. He was not a stranger to either the complainant or her mother.
38. This was obviously a case of recognition. There was absolutely no room for any mistaken identification.
39. In the result, I find that all the ingredients of the offence of defilement were proved; and that it is the appellant who committed the offence. Therefore, there is no merit in the appeal.
40. I uphold both conviction and the sentence.

**DATED, SIGNED AND DELIVERED AT KISUMU**

**THIS 28<sup>TH</sup> DAY OF JULY 2022**

**FRED A. OCHIENG**

**JUDGE**

