



REPUBLIC OF KENYA



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**Chengo v Republic (Criminal Appeal 9 of 2019)
[2019] KEHC 103 (KLR) (14 April 2019) (Judgment)**

Samuel Karisa Chengo v Republic [2019] eKLR

Neutral citation: [2019] KEHC 103 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL 9 OF 2019**

RN NYAKUNDI, J

APRIL 14, 2019

BETWEEN

SAMUEL KARISA CHENGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence in
criminal case no.4 of 2018 in the SRM's Court at Kaloleni before
Hon. L.N Wasighe (SRM) chambers dated 5th November 2018)*

JUDGMENT

1. The Appellant was charged, tried, convicted and sentenced to serve 15 years imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006. An alternative charge of committing an indecent act with a child contrary to section 11 of the same *Act* had also been preferred in case the main charge fails.
2. The particulars of the offence as per the charge were that the Appellant defiled the 16 year old A.K on the 7th day February 2018 at [particulars withheld] village [particulars withheld] Location, Kaloleni Sub-county within Kilifi County. He was alleged to have intentionally and unlawfully committed an act which caused penetration to the female genital organ with his genital organ.
3. Having been dissatisfied with both conviction and sentence meted out by the honourable trial court, the Appellant preferred this appeal on the following grounds as couched in the petition of appeal:
 - (a) That the prosecution failed to prove its case beyond reasonable doubt.
 - (b) Failure by the court to consider that there was grudge between his family and that of the complainant.



- (c) That his defence was not considered.
4. This is the first appellate court and as such, it is trite that the duty of this court is to reconsider the evidence, evaluate it anew and draw its own conclusions or findings in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinize the evidence to see if there was some evidence to support the trial Court's findings and conclusions. The aforesaid duties of the first appellate court are clearly set out in the Court of Appeal Case of *Okeno v. Republic* Criminal Appeal No. 32 of 1972 EA LR.

The Evidence at trial

5. The complainant was 16 years old class 6 student when the alleged defilement was perpetrated on her. She stated that the appellant was a well-known person to her as he is related to her. She told the court that the Appellant's father and her father are brothers. Further, she states that the Appellant cornered her in one of houses at their compound and used a knife to threaten her so that she could not scream. He removed her clothes and sexually abused her. It was at around 11.am in the morning.
6. When the Appellant finished the ordeal, he then threatened to kill the complainant if she were to disclose what had transpired. Despite the Appellant's threats, she proceeded to tell her sister in law (name withheld) about the incident. The said sister in law then called and told the Appellant's mother, who then proceeded to tell the Appellant's father. She stated that the Appellant's further confronted the Appellant on the matter but he denied having been involved in sexual intercourse with the complainant. The matter was then handed over to the police.
7. A medical examination was conducted on the complainant. The prosecution produced an age assessment report, treatment notes and a PW3 form marked as P.MFI – 1, P.MFI-2 and P.MFI-3 respectively. The testimony of PW2 is basically the same as that of PW1.
8. PW3, is a senior clinical officer at Mariakani Hospital. He stated that he examined the complainant on the 9/2/2018. She had been defiled four days prior to being brought to the hospital. She was found to have a normal unkempt external vagina, loose vaginal sphincter muscles, her hymen was broken and she had whitish discharge from her vagina. The Clinical officer's conclusion was that the complainant was defiled despite late reporting. He produced the P3 form and the treatment notes. PW4, the investigating officer basically the following testimonies.
9. The Appellant in his defence denied having committed the alleged offence. He confirmed that he was related to the complainant. He states that while he was at home on the 19th of February 2018 at around 11pm when police officers knocked his door, entered inside and arrested him without giving reasons.
10. His defence was that the allegations leveled against him were trumped up due to a land dispute between his family and that of the complainant. Further, PW2 will benefit tremendously if he was to go to jail.

Findings, Analysis and Determination

11. Having considered the evidence on record, the submissions in respect of both at trial and on the instant appeal, the exhibits produced by the prosecution, the issues for determination are as follows:
1. Whether the prosecution proved its case beyond reasonable doubt?
 2. Whether the charges levelled against the Appellant were trumped up and whether his defence was not considered.



11. The ingredients of the ingredients forming the offence of defilement are the minority of the complainant, proof of penetration and positive identification of the perpetrator. The prosecution is duty bound to prove these ingredients beyond any reasonable doubt. Section 8(1) as read with 8(4) of the S.O.A provides that:

“Section 8(1):

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

Section 8(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.”

12. The Appellant argues that the prosecution did not prove its case beyond reasonable doubt. This ground was not further expounded on in the Appellant’s written submissions. The prosecution on the other hand argues that the same was proved to the required standard of proof. The evidence on record suggests that the complainant was seventeen years old when she was defiled. The prosecution produced Exhibit No.5 which is a School Admission Record which exhibits that the complainant was in class seven and was born in 2001 and have been admitted in the school as number 274. This kind of evidence may not have been doctored for the purposes of the criminal proceedings since the said record existed before the alleged offence was committed.
13. Additionally, the prosecution also produced an age assessment report which estimated the complainant’s age on seventeen years. And also PW2 the complainant’s mother in her testimony confirmed that the minor was 17 years old the time of the commission of the offence. With all the above evidence on the age of the complainant, I have no doubt whatsoever that the age of the minor was proved to the required standard of proof beyond reasonable doubt.
14. On the question of whether the prosecution proved the element of penetration, the appellant believes the same was not proved. On the other hand the prosecution argues to the contrary. The complainant alleged that it was the Appellant who sexually abused her by forcing her into having sexual intercourse, a fact which was vehemently denied by the Appellant. To get to the bottom of this, the prosecution led medical evidence to support its position. PW3, the clinical officer at Mariakani Hospital examined the minor and she produced the treatment notes whose history show that she was treated pursuant to allegations of defilement.
15. Further, the complainant was found to have been defiled with unkempt external which had loose vaginal sphincter muscles and her hymen was broken. In my view it cannot be said to be coincidence that the minor alleged that the Appellant defiled her, then her examination with a medical professional she is found to have been defiled. This also touches on the identification of the accused as the perpetrator. The Appellant denied the offence and attributed the allegations levelled against him to a grudge between the family of the complainant and him.
16. In his defence, he strongly cited the said grudge as the reason for the trumped up charges. The complainant told the court of how the matter was first reported to his parents who then asked him and denied it. The investigating officer in his testimony stated that after having interrogated both families on the same, she could not establish any grudge. If indeed there was a dispute between the Appellant



and the Complainant's family, his family would have been keen to attend court in support of their son who was in jeopardy. In my view the appellant's defence was nothing but an afterthought.

17. In the premises, the prosecution led ample evidence before the trial court to establish all essential ingredients of the offence of defilement. I therefore find that the Appellant was properly convicted by the learned trial Magistrate.
18. On sentencing, this court shall weigh the aggravating factors against the extenuating circumstances available in this matter in light of the decision in *Francis Muruatetu & Another v Republic* (2017) eKLR. As part of the appellant's mitigation, it was ascertained by the prosecution that he was a first offender, that he had not been caught on the wrong side of the law before he committed the instant offence. He also mentioned that he was the sole bread winner of a very young family which is comprised of among others, 2 children.
19. On the other the Applicant committed a despicable act with a relative and in my view the Appellant betrayed the trust and respect that the complainant had for him. I also note that the sexual act was not consensual, in fact the Appellant used a dangerous weapon in form of a knife accompanied by death threats so as to secure an opportunity to satisfy his sexual desires on the complainant.
20. In my view the aggravating circumstances available in this matter outweigh mitigation and any extenuating circumstances. In that regard I find the sentence of 15 years from the date of arrest imposed by the trial cannot be interfered by this court. The instant appeal against both conviction and sentence lacks merit. The same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2019.

R. NYAKUNDI

JUDGE

In the presence of: -

Appellant present

