



REPUBLIC OF KENYA



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**Koech v Republic (Criminal Appeal E053 of 2023)
[2025] KEHC 50 (KLR) (13 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 50 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E053 OF 2023**

RL KORIR, J

JANUARY 13, 2025

BETWEEN

COLLINS KIPLANGAT KOECH APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number E032 of 2021 by Hon. Kwambai T.K in the Principal Magistrate's Court in Sotik)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on 10th July 2021 at around 1900 hours within Bomet County, he intentionally caused his penis to penetrate the vagina of LM, a child aged 12 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on 11th July 2021 at around 1900 hours within Bomet County, he intentionally touched the vagina of LM, a child of 12 years with his penis.
3. The Appellant pleaded not guilty to both charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. The trial court found that the Prosecution had proved a prima facie case against the Appellant and put him on his defence. The Appellant gave sworn testimony and did not call any witness.
4. In a Judgement dated 31st May 2023, the trial court found the Appellant guilty of the offence of defilement and convicted him. The Appellant was consequently sentenced to serve 20 years imprisonment.



5. Being aggrieved with the Judgment of the trial court, the Appellant, Collins Kiplangat Koech through a Memorandum of Appeal dated 28th November 2023 appealed against his conviction and sentence on the following grounds: -
- i. That the learned trial Magistrate erred in law and in fact by failing to note that there were no eye witness in this matter and the P3 Form speaks for itself.
 - ii. That the learned trial Magistrate erred in law and fact by relying on evidence of PW1 and PW4 which was inconsistent.
 - iii. That the learned trial Magistrate erred in law and fact by failing to consider the evidence of the defence.
 - iv. That, the learned trial Magistrate erred in law and fact by holding that the Prosecution had proved its case beyond reasonable doubt without supporting evidence and in view of the unresolved contradiction in the Prosecution case.
 - v. That, the learned trial Magistrate erred in law and fact in holding that the Appellant has not proved his case.
 - vi. That, the learned trial Magistrate erred in law and fact by failing to make determination on merit.
 - vii. That, the learned trial Magistrate erred in law and fact by failing to make a valid judgement.
 - viii. That, the conviction and sentence was not supported by the evidence on record as the Prosecution failed to prove its case beyond reasonable doubt.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusion. See *Iman v Republic* [2024] KEHC 14394 (KLR)
7. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled RC (PW1) on 10th July 2021. PW1 testified that on the material day, the Appellant who used to be her boyfriend had sexual intercourse with her by forcefully undressing her and inserted his male genital organ into her female genital organ.
9. CK (PW4) who was the victim's mother testified that on the material day, she sent PW1 to the market and PW1 did not return home. That PW1 returned home the following morning and informed her that the Appellant had penetrated her. PW4 further testified that she took PW1 for medical attention.
10. Jackline Chepkurui Chelangat (PW3) who was the clinical officer testified that she examined PW1 on 12th July 2021 and found that she had a freshly broken hymen, bruises on her labia minora, a whitish discharge and high epithelial cells which was an indication of penetration.

The Appellant's Case

11. The Appellant, Collins Kiplangat Koech (DW1) who gave sworn testimony denied committing the offence. He stated that on the material day (10th July 2021), he had gone to Mokomoni for work until 6 p.m. after which he left and went to hospital to see his ailing mother and stayed there until 9 p.m. That he later went home and slept.



12. It was DW1's testimony that he was arrested the following day early in the morning and informed that he had been with the victim (PW1). He stated that he was not at the alleged scene.
13. On 25th July 2024, parties took directions to canvass the Appeal through written submissions.

The Appellant's submissions.

14. In his undated submissions filed on 15th October 2024, the Appellant submitted that the charge sheet was defective as the complainant was RC and not LM as indicated in the particulars of the charge sheet. He further submitted that the main charge indicated that the victim was defiled on 10th July 2021 and the alternative charge indicated that the charge of committing an indecent act was committed on 11th July 2021.
15. It was the Appellant's submission that both the age of the victim and the identification of the perpetrator were not proved. That there was doubt whether it was the Appellant, D or Brian who defiled the victim. The Appellant submitted that Brian whom the victim claimed was on the field on the material day was not called to testify.
16. It was the Appellant's submission that the offence was committed at 7 p.m. and there was no natural light that the victim could have used to identify him. Further that no identification parade was conducted.
17. The Appellant submitted that the scene where the offence was committed was not proved. That the victim (PW1) testified that she was defiled in the bushes while her mother (PW4) testified that PW1 was defiled at C's house. He further submitted that C was not called to testify.
18. It was the Appellant's submission that the PRC Form, P3 Form and treatment notes were defective and forged as the same was not rubber stamped. It was his further submission that the evidence of the clinical officer (PW3) was false. That the clinical officer worked at Sotik Health Centre and the P3 Form indicated that the victim was treated at Kapkatet District Hospital.
19. The Appellant submitted that penetration was not proved as the authenticity of the PRC Form and P3 Forms was questionable.
20. It was the Appellant's submission that the trial court did not consider his alibi defence. That he was in Mokomoni in Kisii County on the material day and when he came back at around 6 p.m., he went and stayed in the hospital until 9 p.m. and he went home and slept.
21. The Appellant submitted that he was not given a chance to call any witnesses. That he would have called his younger brother who was with him on the material day. He submitted that the trial court failed to protect his rights as an Accused person.

The Prosecution's/Respondent's submissions

22. The learned Prosecution Counsel filed submissions dated 31st October 2024 in which the Respondent conceded the Appeal on grounds of contradictory evidence. That the victim testified that she had previously had sexual intercourse with the Appellant and this testimony did not tally with the clinical officer's testimony that she found the victim to have a freshly torn hymen.
23. It was the Respondent's submission that the victim testified that after she had sexual intercourse with the Appellant, she spent the night with D and this testimony tallied with her mother's (PW4) testimony which stated that the victim did not return home the material night. That D was a material witness and the investigating officer should have established his role in the matter.



24. The Respondent submitted that the Appellant's defence of alibi raised serious doubts as to the victim's evidence. That in the absence of D, the alibi defence balanced the victim's evidence.
25. I have gone through and considered the trial court's proceedings, the Memorandum of Appeal dated 28th November 2023, the undated Appellant's written submissions filed on 15th October 2024 and the Respondent's submissions dated 31st October 2024. The following issues arise for my determination:-
- i. Whether there were procedural issues affecting a fair trial.
 - ii. Whether the Prosecution proved its case beyond reasonable doubt.
 - iii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iv. Whether the sentence preferred against the Appellant was just and fair.

Whether there were procedural issues affecting a fair trial.

26. The Appellant submitted that the charge sheet was defective. Section 134 of the Criminal Procedure Code provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

27. It was the Appellants' contention that the charge sheet was defective because the victim was abbreviated as L.M instead of R.C. The key issue in determining whether a charge sheet is defective or not is the prejudice it would cause the Appellant. The Court of Appeal gave guidance on determining whether a defect in a charge is fatal in *Benard Ombuna vs Republic* (2019) eKLR as follows:-

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

28. Similarly, the Supreme Court of India in *Willie (William) Slaney v State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:-

“Whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in the labyrinth of insubstantial technicalities.”

29. I have gone through the charge sheet and I have noted that the victim was wrongly abbreviated as LM. However in the same charge sheet, the complainant was identified as RC (name withheld). She testified as PW1 and the Appellant was present when the trial court conducted a *voire dire* examination on her where she stated her name. The Appellant also cross examined her.
30. The Appellant fully participated in the trial process and cross examined the remaining three prosecution witnesses. When the Appellant was placed on his defence, he testified and closed his case.



The Appellant was fully aware of the charge he faced from the beginning and actively participated in the trial and the trial culminated with his defence.

31. Flowing from the above, I am satisfied that the charge sheet was properly drafted and the Appellant understood the charge he faced. Additionally, the Appellant faced no prejudice as later had the opportunity to present his defence. In essence, the minor typographical error in the charge sheet did not make it defective and fatal to the Prosecution's case.

Whether the Prosecution proved its case beyond reasonable doubt.

32. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender ought to be proved.
33. Regarding the age of the victim, the victim (PW1) testified that she was born on 15th January 2008 and was 13 years old. She produced a Birth Certificate as P.Exh 1. The victim's mother, CK (PW4) also testified that the victim was born on 15th January 2008. The testimonies of PW1 and PW4 regarding PW1's age was uncontroverted during cross examination.
34. The Appellant in his submissions took issue with the registration date of the Birth Certificate and the issuance date being five years apart. In short, the Appellant was challenging the authenticity of the Birth Certificate at this stage. It is my finding that this was an afterthought as the Appellant had the chance to challenge the veracity of the Birth Certificate at the trial court when it was produced but he failed to do so. It is my further finding that the Birth Certificate being a statutory document issued by the Government was prima facie admissible unless its authenticity was challenged and the contrary proved.
35. I have looked at the Birth Certificate (P.Exh 1) and I have confirmed that the victim (PW1) was born on 15th January 2008. It is my finding that at the time of the commission of the alleged offence, the victim (PW1) was aged 13 years old.
36. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.
37. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence was insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
38. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
39. The victim (PW1) testified that on the material day at around 7.20 p.m., the Appellant had sexual intercourse with her by forcefully undressing her and inserted his male genital organ into her female genital organ. PW1 further testified that the Appellant used to be her boyfriend and they had had sexual intercourse before. PW1's evidence on the sexual intercourse was uncontroverted during cross examination.
40. Jackline Chepkurui Chelangat (PW3) stated that she examined the victim on 12th July 2021 and found that she had a freshly broken hymen, bruises on her labia minora, a whitish discharge and high epithelial cells which was an indication of penetration. She produced the P3 Form, PRC Form and treatment notes as P.Exh 2, 3 and 4 respectively.
41. The Appellant disputed the veracity of the above exhibits stating that they were forged and not stamped and that they were produced by the clinical officer (PW3) who did not work at Kapkatet Hospital. I have gone through the documents and I have noted that the P3 Form (P.Exh 2) and the PRC Form (P.Exh 3) were filled by the clinical officer (PW3) and stamped and the stamp bore the name Sotik



- Health Centre. In any event, this was an afterthought as the Appellant has wrongly challenged the veracity at this stage as opposed to the trial court where the documents were produced and he had a chance to challenge their authenticity during cross-examination.
42. I have gone through the P3 Form (P.Exh 2), PRC Form (P.Exh 3) and the treatment notes (P.Exh 4) and I have found that the contents corroborate the testimony of the clinical officer in all material respects. I note that PW3 was the same person who examined the victim. The documents all indicated that the victim's hymen was broken and it is only the clinical officer who stated that the hymen was freshly broken in her oral testimony.
 43. It is my finding that the findings in the document that the victim's hymen was broken corroborated the victim's testimony when she testified that it was not the first time she had sexual intercourse with the Appellant. It is my further finding that the ingredient of penetration had been proved.
 44. Regarding identification of the Appellant, the victim (PW1) testified that after they had sexual intercourse with the Appellant, he took her to D's house which was approximately 10 meters from their home. When she was cross examined, the victim contradicted herself by stating that she was not with the Appellant when he (Appellant) was arrested and on the same breath stated that she was with the Appellant when he was arrested.
 45. The victim's mother, CK (PW4) testified that she sent the victim to the market on the material evening and she did not return until the following morning. That the victim told her that the Appellant had penetrated her.
 46. PW4's testimony corroborated the fact that the victim did not sleep at home on the material night. It gave credence to the victim's testimony that she spent the night at D's place. There was no indication as to who D was and why the victim was dropped in his house.
 47. The investigating officer's (PW2) evidence in this case was not helpful. It was not clear to this court who arrested the Appellant and where he was arrested. The Appellant testified that he was alone when he was arrested the following day, early in the morning. In my view, the arresting evidence would have been helpful to know if indeed the Appellant was arrested alone or with the victim. The circumstances of arrest would have been useful to aid in the identification of the perpetrator.
 48. The evidence on record pointed to the fact that the victim (PW1) slept at D's house throughout the material night. What this court wondered was why the victim (PW1) didn't go home as D's house was approximately 10 meters from their home. Was D a relative? Was D's home one that the complainant could ordinarily visit? Who between the Appellant and D defiled the complainant?
 49. It is my finding that the identification evidence was not watertight and it created a doubt in this court's mind.
 50. The ingredients of defilement had to be proved conjunctively and not disjunctively. When an ingredient could not be adequately established, it created doubt and that doubt however small must go to the benefit of the Appellant.
 51. In the final analysis, it is my finding that the Prosecution did not prove its case against the Appellant to the required legal standard. The evidence created suspicion that the victim had sexual intercourse with the Appellant not just on the material date but on several occasions before as she testified that he was her boyfriend. It is the law however that suspicion alone cannot found a conviction. I find the conviction unsafe.
 52. In the end, the Appeal dated November 28, 2023 is allowed. I set aside the Appellant's conviction and quash his sentence. The Appellant is set at liberty forthwith unless otherwise lawfully held.



Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 13TH DAY OF JANUARY, 2025.

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr. Njeru for the Respondent/State and Siele (Court Assistant).

