



REPUBLIC OF KENYA



**Chesimet v Republic (Criminal Appeal E021 of 2022)
[2025] KEHC 1858 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E021 OF 2022
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

SIMON KIPKEMOI CHESIMET' APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant has filed this Appeal following conviction and sentence from Bomet Magistrate's Court Sexual Offence No.81 of 2019.
2. In the lower court the Appellant, was convicted of the offence of Defilement contrary to section 8 (1) as read with section 8(2) of the Sexual Offences Act by Hon. L.N. Kiniale (P.M. as she then was).
3. Following the conviction the Appellant was sentenced to serve 20 years imprisonment.
4. In the Appeal the Appellant has raised the following grounds:-
 1. He pleaded not guilty to the charges and still maintain that position.
 2. The learned trial magistrate erred in law and fact in not analyzing the contradictory and inconsistent evidence of the witness.
 3. The learned trial magistrate erred in law and fact in failing to find that the prosecution case was not proved beyond reasonable doubt.
 4. The learned trial magistrate erred in law and fact in dismissing the Appellant's defence.
5. The Appellant therefore prays for quashing of the conviction and setting aside of the sentence. He seeks to be set at liberty.
6. The prosecution in its response conceded to the appeal. The prosecution filed a notice of concession.



7. The lower court charge and particulars were that on 30th day of November 2019 within Bomet County, intentionally caused his penis to penetrate the vagina of MC a child aged 16 years.
8. The duty of the court in respect to a first appeal as this one is to re-evaluate the entire evidence. This is properly settled in law and the relevant law in support is:-
9. The Court of Appeal in the case of Mark Ouiruri Mose Versus Republic (2013)eKLR, held that:

That 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 demeanour of the witnesses and hearing them give evidence and give allowance for that.”
10. I have therefore gone through the entire record of the trial court. I have also considered the facts and the applicable law.
11. For the offence of defilement to be proved, there are three key ingredients to be established.
 - i. The age of the victim must be below 18 years, that is, the victim must be a minor.
 - ii. The act of penetration must be established.
 - iii. The perpetrator or the accused in this case must be positively identified.
12. My evaluation will therefore hinge on the three ingredients.
 - i. On the first issue of age, it is clear on record that the victim (MC) was 16 years old as per the evidence on record and there is nothing to doubt or counter this finding by the court.
13. On the second issue of penetration I find that the finding has emerging doubts-
14. From the initial treatment notes and specifically the PRC (Post Rape Case Form) the comments on general examination of the survivor (victim) are indicated as attempted rape.
15. The issue of penetration was not noted following the incident.
16. It was also the finding both in the PRC and the medical report (P3 form) that the hymen was broken and old looking.
17. There was no spermatozoa seen.
18. Indeed the bruises that were treated were clearly done following a fall as the victim tried to escape. The dates are also mixed-up.
19. This doubt ought to be determined in favour of the defence.
20. On the last issue of identification of the accused or perpetrator I find it also to be a grey area in this matter.
21. The victim told the mother at the scene that she was not able to identify the perpetrator.
22. The prosecution witness also did not clearly come out to say how they knew the accused.
23. The offence is alleged to have occurred at night. The intensity of the light is not disclosed.
24. The victim stated that she was in company of the others who have not been treated as witnesses in view of the grey area in identification. The accused has raised a defence of alibi. The same has not been properly dislodged by the prosecution.



25. From the totality of the circumstances herein, it is clear that conviction on the above set of facts and evidence would be unsafe.

26. I do therefore agree with the Appellant and the Prosecution, the Appeal herein has merit and allowed. Accordingly, I do quash the conviction and set aside the sentence.

27. The Appellant is subsequently set at liberty forthwith unless lawfully held.

Orders accordingly

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 20TH DAY OF FEBRUARY, 2025

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the absence of the Appellant, Mr. Njeru for the State, and Siele, Susan (Court Assistants)

