Chinja v Republic (Criminal Appeal 86 of 2023)
[2025] KEHC 1744 (KLR) (Crim) (11 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1744 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 86 OF 2023

KW KIARIE, J

FEBRUARY 11, 2025

BETWEEN

PATRICK LUMBASI CHINJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. case NO. E086 of 2022 of the Senior Principal Magistrate's Court at Engineer by Hon. D.N. Sure-Principal Magistrate)

JUDGMENT

1. PLC, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on the diverse dates between July 2020 and September 2020 in the [Particulars Withheld] within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of C.W.W., a child aged eight years.

3. The appellant was sentenced to life imprisonment. He was aggrieved and filed this appeal against both the sentence and conviction. He was in person. He raised grounds of appeal as follows:

    a. The learned trial magistrate erred in law and fact when he convicted the appellant in a prosecution case in which the charge of defilement was not proved.

    b. The learned trial magistrate erred in law and fact when he convicted the appellant in the prosecution case, in which the victim's age was not proved.

    c. The learned trial magistrate erred in law and fact by applying the wrong standard of proof in a criminal case.

d. That the learned trial magistrate erred in law and fact by convicting the appellant but did not consider the appellant's defence.

4. The state opposed the appeal through Ms Judy Rukunga, who argued that the case was proved to the required standards and that the sentence was proper.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.

6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:

   a. That there was penetration of the complainant's genitalia;

   b. That the accused was the perpetrator and

   c. The victim must be below eighteen years old.

   These are the ingredients the prosecution must prove beyond any reasonable doubt before the trial court.

7. C.W.W. (PW1) testified that she was ten years old when she testified on November 4, 2022. A copy of her birth certificate shows her date of birth as February 1, 2012. At the time of the alleged offence, she was eight years old.

8. The prosecution proved the victim's age to the required standards.

9. The complainant's narration of the incident should have raised a red flag. The prosecution should have elicited more evidence to ascertain if, indeed, the defilement occurred. Her grandmother had sent her to call the appellant for supper. This is part of her testimony:

> When I reached his house, he covered my mouth and pulled me inside. He closed the door. There was torchlight. I had seen P and knew he was the one who pulled me inside. The torchlight was not too strong, but he covered my eyes with a cloth and placed me on the bed. He removed my trousers and panty. I felt something entering and being pulled out of my Kasusu. I was lying facing up. P was on the sides of my legs. [Emphasis added]

10. The complainant was a young child aged eight years. Her evidence was so casual, and one would be forgiven to think it was akin to wiping one's nose. Forced sex is a painful experience, even for an adult who is used to consensual intercourse. It is unbelievable that she did not feel any pain. If she had, even with the alleged threats, her grandmother would have noticed that she was uncomfortable. It was imperative to call the complainant's grandmother as a witness.

11. Had the complainant's grandmother been called, her evidence would have assisted the court in making an informed decision. Indeed, hers would have been circumstantial, but in some instances, circumstantial evidence is the best. There was no explanation for why the prosecution did not call her to testify. The Court of Appeal in the case of Bukenya vs Uganda [1972] EA 549 (Lutta Ag. Vice President) held:

> The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.
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> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, I am persuaded to infer that had she been called, her evidence would have been adverse to the prosecution case.

12. When C.W.W. was examined on the 15th day of October 2022, she was found with a fresh injury on the left and the right side of her vagina. According to the evidence of Dr Joseph Mburu (PW3), he questioned the complainant in the presence of her mother about it. No explanation was given. This, again, ought to have been another red flag. The doctor noted an old hymen tear. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of P. K.W vs Republic [2012] eKLR. The court observed as follows:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse.
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769."

13. The only evidence of the alleged penetration was that of the complainant. I have already doubted whether, indeed, it occurred. The proviso to section 124 of the *Evidence Act* provides:

> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, 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.

14. The evidence of the complainant commutatively does not pass the test prescribed by the Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.
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> I find that the conviction was unsafe. I quash it and set aside the sentence. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 11TH DAY OF FEBRUARY 2025

KIARIE WAWERU KIARIE

JUDGE