Chirchir v Republic (Criminal Appeal E054 of 2023)
[2025] KEHC 2746 (KLR) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E054 OF 2023

AB MWAMUYE, J

FEBRUARY 3, 2025

BETWEEN

DENNIS KIPKORIR CHIRCHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. A.K. Mokoross (SPM) delivered on 2nd August, 2023 in S.O Case No. E025 of 2022)

JUDGMENT

1. The Appellant, Dennis Kipkorir Chirchir, was charged with the offence of Defilement Contrary to section 8(1), as read with Section 8(3) of the *Sexual Offences Act*, 2006. The particulars of the offence as stated on the Charge Sheet were that on the 2nd December, 2022 at Kipkelion West Sub-county within Kericho County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.C.A, a child aged 9 years. The appellant was also charged, with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the alternative count was that on the 2nd December, 2022 at Kipkelion West Sub-county within Kericho County, the appellant intentionally and unlawfully touched the Vagina of S.C, a child aged 9 years with his penis.

2. The Appellant pleaded not guilty. The prosecution called a total of 5 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to life imprisonment for the offence of defilement.

3. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

4. I have considered the Trial Court's proceedings, the Petition of Appeal, the Appellant's submissions and the Respondent's rival Submissions and I identify issues for determination as follows: -

   a. Whether the elements of the offence of defilement were proved beyond reasonable doubt as required in law;

   b. Whether the sentence was harsh and excessive under the circumstances.

Whether the elements of the offence of defilement were proved beyond reasonable doubt as required in law

5. To sustain a conviction in a charge of defilement, the prosecution is required to prove elements of age of the complainant, penetration and identification of the assailant beyond all reasonable doubt. This position was held in the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013 where it was held: -"The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

6. Additionally, Section 8 (1) and (2) of the *Sexual Offences Act* provide as follows: -

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

   2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

7. On the age of the complainant,PW1, the minor's mother testified that the minor was 9 years old. She further produced the minor's clinical card which showed that the minor was born on 28/8/2013. This was also not contested at the trial Court.The age of the complainant was therefore properly proved and the charge under Section 8 (1) and (2) of the *Sexual Offences Act* properly preferred.

8. On the element of element of penetration, the Complainant narrated how the appellant removed her clothes and placed her on the bed and did bad manners to her. He put his penis into her vagina. She stated that she felt pain but she did not tell anyone and she felt pain when she walked.

9. Further the medical reports corroborated this. PW4, a Clinical officer confirmed that when he examined the complainant's private parts. The labia was lacerated. There were also pus cells which indicated an injury. He stated that the injury to the labia shows that there was friction Therefore, the second element of penetration was proved beyond reasonable doubt.

10. Regarding the identification of the perpetrator, it was not disputed that the appellant was well known to the victim. There is therefore no doubt that the Appellant was properly identified as the perpetrator of the offence of defilement.

11. I therefore find that all the elements of the offence of defilement were proved beyond all reasonable doubt and the evidence tendered was sufficient to sustain a conviction.

Whether the sentence was harsh and excessive under the circumstances

12. The appellant contended that the sentence was excessive given the circumstances of the case herein. Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

13. In the case of Joshua Gichuki Mwangi Vs. Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake Vs. Republic [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing.

14. Further, in the case of Maingi & 5 others V. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) the Court expressed itself thus:-

> " The sentence of life imprisonment goes against the principles of sentencing which include equity and proportionality to the circumstances and at such reducing it to the very least severe form would neither be a prejudice nor a case of injustice in any way."

15. I am also guided by the decision of the Court of Appeal in Manyeso V. Republic [2023] KECA 827 (KLR) where the court stated:-

> " We also acknowledge that in Kenya and internationally, sentencing shouldnot only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation, and recidivism."

16. From the foregoing reasons, the upshot of this Court's decision is that the Appellant's Appeal is partly merited. His conviction be and is hereby upheld as the same was safe.

17. However, the sentence of life imprisonment that was imposed on him be and is hereby set aside and/or vacated and replaced with an order that he is hereby sentenced to thirty (30) years imprisonment, to run from the date he was first in custody in accordance with Section 333(2) of The *Criminal Procedure Code*.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

BAHATI MWAMUYE

JUDGE