Kipchumba alias David Ejingwe Maisha v Republic (Criminal Appeal E041 of 2021) [2025] KEHC 2563 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2563 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E041 OF 2021

JR KARANJA, J

FEBRUARY 6, 2025

BETWEEN

DENNIS KIPCHUMBA ALIAS DAVID EJINGWE MAISHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and decision by Hon. D.A. Ocharo, Principal Magistrate in the Kapsabet Chief Magistrate's Court Criminal Sexual Offence Case No. E031 OF 2020 dated 15th October 2021)

JUDGMENT

1. The Appellant, David Ejingwe Maisha also known as Kipchumba , appeared before the Senior Principle Magistrate at Kapsabet Charged with defilement, Contrary to Section 8[1] as read with 8[2] of the *Sexual Offences Act*.

   It was alleged that on the 11th October 2020 at Nandi County the Appellant defiled a girl child referred to as "VC" aged [10] years.

   Alternatively, it was alleged that the Appellant committed an indecent act with the child, Contrary to Section 11[1] of the *Sexual Offences Act*, in that he caused his male genital organ to come into contact with the child's female genital organ.

2. After trial, the Appellant was convicted on the main count and sentenced to the mandatory life imprisonment sentence. Being dissatisfied, the Appellant preferred the present appeal anchored on the grounds set out in the petition of appeal filed herein sometimes in the year 2021.

   At the hearing of the appeal, the Appellant appeared in person and relied on his written submissions made in the Kiswahili language.

The Learned Prosecution Counsel, Ms. Asiyo, represented the State/Respondent who opposed the appeal and filed written submissions.

3. Having considered the appeal and the supporting grounds as well as the rival submissions, the task of this court was to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

4. Accordingly, the prosecution case was founded on the evidence of five witnesses [PW1 to PW5] and it was briefly that the Appellant was a neighbour to the child Complainant's parents and on the material date the child's mother, JJ [PW1], was away in Eldoret when she was notified that the child had been defiled by a neighbour and that she had been taken to hospital for treatment at Serem Health Centre.

5. The mother [PW1] produced a clinic card [P.EX1] showing that the Complainant [PW2] was born on 1st February 2009. She [PW1] was informed that the person responsible for defiling the Complainant was her neighbour called E, the Appellant herein.

   The Complainant [PW2] indicated that she was a grade three [3] pupil at [Particulars Withheld] Primary School and that she was at home when the Appellant whom she referred to as "Baba Wiki" called and promised to give her ovacado. She harvested the ovacado from the Appellant's home and he told her to pack them in a sack. Shortly thereafter, the Appellant held and threatened to cut her with a machete [panga]. He pushed her to the ground, removed her clothes and proceeded to defile her.

6. Thereafter, the Complainant reported the incident to her grandmother EM [PW3], who found her [Complainant] crying and bleeding from her genitalia.

   She [PW3] learnt from the Complainant that the Appellant whom she knew as "D" was the person responsible for the offence.

   After being taken to hospital by the grandmother, the Complainant was examined by a Clinical Officer, Dennis Odhiambo Aloo [PW4], who compiled the necessary P3 form [P. EX 2] confirming that the Complainant had been defiled.

7. The matter was reported to the police and investigated by PC Naomi Jelimo [PW5], after which the Appellant was charged with the present offence which he denied and stated in defence that members of the public attacked him on the material date and took him to Kobujoi Police Station without being told why he was arrested. He was later brought to court charged with the present offence which was a frame up by the Complainant's grandmother after he declined her advances for a sexual intercourse with him.

8. After considering the entire evidence, the trial court concluded that the charge had been proved beyond any reasonable doubt against the Appellant. He was therefore convicted.

   It is clear to this court that the evidence established without dispute that the Complainant was indeed defiled and that she was a minor at the material time of the offence having been born as per the clinic card on 1st February 2009 thereby placing her age at approximately ten to eleven years.

9. In any event, the Complainant's evidence as corroborated by that of the Medical Officer [PW4] and on the periphery that of the Complainant's grandmother [PW3] did establish and prove the two vital ingredients of the offence of defilement i.e penetration and age of the victim.

   The third ingredient is the identity of the offender and this was clearly established against the Appellant as he was a person very well known to the Complainant and her parents. They knew him as their neighbour who went by the name "Baba Wiki" or "D" or "E".

10. The three ingredients of defilement having been sufficiently and credibly established against the Appellant, it followed that the offence of defilement was complete and that he was responsible for it.

    The Appellant's defence was therefore disproved and rendered an afterthought. His conviction by the trial court was proper and lawful and is hereby affirmed.

11. On the life imprisonment sentence meted out against the Appellant, it was lawful and in accordance with Section 8[2] of the *Sexual Offences Act*. The trial court noted that it had no discretion than to mete out the sentence in terms of the mandatory nature of the aforementioned provision of the law.

    Indeed, the trial court had no discretion on the matter in sentencing and that position extends to this court as fortified by the decision of the Supreme Court in Petition No. E018 of 2023, *Republic v Joshua Gichuki Mwangi*, where it was held that: -

12.

> " "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences.
>
> What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence."

In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

DELIVERED AND DATED THIS 6TH DAY OF FEBRUARY 2025

HON. J. R. KARANJAH,

JUDGE