



**Cheruiyot v Republic (Criminal Appeal E022 of 2022)
[2025] KEHC 3422 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E022 OF 2022
JR KARANJA, J
MARCH 21, 2025**

BETWEEN

HANNINGTON CHERUIYOT APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of Hon. S.M. Mokuu, Chief Magistrate
in CMCC SO CASE NO. 34 of 2020 delivered on 26th February 2024)*

JUDGMENT

1. The Appellant, Hannington Cheruiyot, appeared before the Chief Magistrate at Kapsabet in CMCC SO No. 34 of 2020, charged with defilement, Contrary to Section 8[1] as read with Section 8[3] of the *Sexual Offences Act*. Alternatively, he was charged with indecent Act with a child, Contrary to Section 11[1] of the *Sexual Offences Act*.
2. It was alleged that on the 17th August 2019 at [Particulars Withheld] Location , Nandi County, the Appellant defiled MCK, a girl aged fifteen [15] years or that he committed an indecent act with the child.

After pleading not guilty to both the main and alternative counts the Appellant was tried and convicted on the main count. A sentence of fifteen [15] years imprisonment was then imposed upon him.
3. Being dissatisfied with the conviction and sentence, the Appellant preferred this appeal on the basis of the grounds set out in the petition of appeal dated 3rd April 2024 filed herein on his behalf by Duncan Tallam and Company Advocates.

These were canvassed by way of written submissions filed herein by both sides with the Respondent opposing the appeal.



4. Having considered the appeal, the supporting grounds and the rival submissions, this court embarked on its duty of reconsidering the evidence and drawing its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.
5. In that regard, the prosecution case was briefly that the Complainant [PW1] was at the material time a primary school pupil at [Particulars Withheld] Primary School and on the material date she proceeded to a neighbour's farm while it was raining. The Appellant was nearby, he beckoned her to come close to him and when she did he held and pulled her to a grass patch in the farm. She removed her inner wear and dress after being told to do so by the Appellant.
6. The Appellant removed and unzipped his black pair of jeans trousers, inserted a rubber sheath [condom] on his male sexual organ [penis] and proceeded to defile the Complainant after which he told her to go away. On her way she met Kibiwott Onesmus alias Felix Kibiwott [PW2], who saw her put a panty in a pocket. He led her to Willy Ngetich [PW3] who had earlier seen her enter the farm after the Appellant known by name Kiptanui had already entered the farm.
7. Willy [PW3] later saw the Appellant emerge from the farm followed by the Complainant from another direction. The Accused was at the time putting on a black pair of trousers. It was then that the Complainant and Kibiwott [PW2] approached Willy, who asked the Complainant what she did in the maize farm. She denied any wrong doing.
8. Again, on the following day [i.e. 18th August 2019] while the Complainant was heading to school she met the Appellant who then led her to a nearby toilet and defiled her. He thereafter, asked her not to disclose to anybody what he had done. However, on the 23rd August 2019 after a parent's visit to her school the Complainant was notified of her pregnancy and asked not to report back to school. She therefore went to reside at Kamagut where she gave birth on 21st April 2020 to a baby girl called AC. She attributed her pregnancy to the Appellant's acts of defiling her and contended that he was the person who broke her virginity.
9. The Complainant indicated that at the time of the offence she was a minor and produced a birth certificate [P. Exhibit 1] giving her date of birth as the 22nd January 2004. This was confirmed by her father, DKK [PW4], who learnt from her school principal that she was pregnant and from her [complainant] that the Appellant was the person who impregnated her.
10. A Clinical Officer at Nandi Hills Hospital, Paul Sanga [PW5], examined the Complainant and noted that she had been defiled severally and was twenty six weeks pregnant. He compiled and signed the necessary police medical form [P3] which he produced [P. Exhibit 4].

A government analyst, Polycarp Lutta Kweyu [PW6], examined the blood samples obtained from both the Complainant and the Appellant for purposes of DNA analysis. He thereafter compiled a report [P. Exhibit 5] which was negative against the Appellant with respect to the paternity of the Complainant's child.

11. PC Damaris Wanjiru [PW7] of Lessos Police Station took over the investigations of the case in the month of July 2020.

As at the time, the investigation had been completed and the Appellant charged in court.

In his defence, the Appellant denied the offence and contended that the Complainant's father and himself were business partners for a period of nine [9] years. That, he bought land from the Complainant's father and this was the beginning of this case after the Complainant alleged that he was her boyfriend and that he had impregnated her.



12. The Appellant denied the Complainant's allegation and implied that the DNA test vindicated him when it established that the Complainant's child, the alleged product of the alleged offence, was not his child, he was not the father of the child.
13. After considering the evidence in its totality, the trial court concluded that the case against the Appellant was proved beyond reasonable doubt in that all the necessary ingredients of the offence of defilement were established against the Appellant meaning that he was the person responsible for sexually assaulting the Complainant by defilement.
14. From the evidence, as led by both the prosecution and the defence, this court is satisfied that there was sufficient evidence from the Complainant [PW1] and the Clinical Officer [PW5] establishing and proving that the offence of defilement was committed against the Complainant. The birth certificate [P. Exhibit 1] placed the age of the Complainant at approximately thirteen [13] or so years as at the time she was defiled. This qualified her description as a minor or a child.
15. The medical P3 form [P. Exhibit 4] did establish and prove the element of penetration.
Thus, the offence of defilement proper was fully established and proved by the prosecution evidence. Indeed, there was no particular dispute from the defence that the offence was committed against the Complainant.
The bone of contention was clearly the alleged identification of the Appellant as the offender.
Identification is often treated as a third element of the offence of defilement. It was therefore incumbent upon the prosecution to provide sufficient and credible evidence to establish and prove that the Appellant was the person who defiled the Complainant.
16. The evidence by the clinical Officer [PW5] clearly indicated that the Complainant was a sexually active minor and could therefore have been defiled by any person. She however, pinpointed the Appellant and said that he was the person who defiled her because he was her boyfriend and that his unlawful acts of defilement against her led to her pregnancy. She indicated that she was a virgin and that the Appellant was the person who broke her virginity, thereby implying that it was him and nobody else who defiled and impregnated her.
17. In fact, the Complainant talked of two incidences of defilement committed against her by the Appellant i.e. on the material 17th August 2019 and on the day that follows i.e. 18th August 2019. Her evidence suggested that she consented to both incidences thereby confirming the tag of being a sexually active minor. However, her consent was irrelevant for the purposes of the offence of defilement.
18. The Appellant denied that he was responsible for defiling the Complainant and made a clear indication that he was framed by the Complainant's father, his erstwhile business partner, as a result of a land sale. He supported his denial by contending that the DNA analysis did not prove that he was the father of the complainant; "product" of the defilement act or acts attributed to him.
19. Indeed, the evidence of the Government Analyst [PW6] put to rest the suspicion that the Appellant was the father of the Complainant's child.
However, the issue at hand was not that of paternity but defilement and whether or not the DNA report was in favour of the Appellant it did not disprove the fact of defilement and could not overrule the prosecution evidence in that regard.
20. However, such a report would impact on the credibility of evidence of identification against a suspect. In this case, such evidence came from the Complainant only and was seemingly believed by the trial court by dint of Section 124 of the *Evidence Act*.



In this court's opinion, considering that it was not the Appellant's obligation to prove his innocence but for the prosecution to prove its case against him beyond reasonable and also considering that the Complainant contended and strongly maintained that the Appellant was the person who broke her virginity and the only person with whom she had engaged in sexual intercourse before she learnt that she was pregnant seemingly by him, It was not possible to hold that her evidence of identification against the Appellant was credible. The DNA report [P. Exhibit 5] produced by the prosecution overruled and discredited the Complainant's evidence of identification against the Appellant.

21. It would therefore follow that the element of identification was not established and proved beyond reasonable doubt against the Appellant. He could not in the circumstances be said to be the person who to the exclusion of any other person offended the Complainant as alleged by the prosecution.
22. For all the foregoing reasons, this court upholds the appeal on the question of conviction as reflected in grounds 1, 2, 3 and 5. Grounds 4, 6 and 7 were essentially on sentence and are invariably "caught up" with the upholding of the grounds on conviction hereinabove. Ultimately, it is the finding of this court that the Appellant's conviction by the trial court was neither safe nor sound and was against the weight of the evidence. It is hereby set aside and/or quashed together with the accruing sentence of fifteen [15] years imprisonment.
23. In sum, the appeal is merited and is hereby allowed with the result that the Appellant is hereby set at liberty unless otherwise lawfully held.

DELIVERED AND DATED THIS 21ST DAY OF MARCH 2025

HON. J. R. KARANJAH,

JUDGE

