



REPUBLIC OF KENYA



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**Cheruiyot v Republic (Criminal Appeal 13 of 2023)
[2024] KEHC 2672 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2672 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDAMA RAVINE**

CRIMINAL APPEAL 13 OF 2023

RB NGETICH, J

MARCH 14, 2024

BETWEEN

JOSEPH KIPROP CHERUIYOT APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal against both conviction and sentence arising from the
Judgement by Hon. R. Yator (SRM) delivered on the 4th September,
2014 in Eldama Ravine Magistrate's Court S/O No. 291 of 2012)*

JUDGMENT

1. The Appellant was charged with two counts of offences. Count I is the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual offences Act](#) No.3 of 2006. The particulars of the offence being that the Appellant on the night of 31st October, 2012 and 1st November, 2012 at Mogotio District within Baringo County did cause his penis to penetrate the vagina of SC a child aged 11 years.
2. Alternative charge to count I is the offence of indecent act with a child contrary to section 11(1) of the [Sexual offences Act](#) No.3 of 2006. The particulars of the offence being that the Appellant on the night of 31st October, 2012 and 1st November, 2012 at Mogotio District within Baringo County committed an act which caused his penis to come in contact with the vagina of SC a child aged 11 years.
3. Count II with the offence of grievous Harm contrary to section 234 of the Penal Code. The particulars of the charge being that the appellant on the night of 31st October, 2012 at in Mogotio District within Baringo County unlawfully did grievous harm to SC.
4. The Appellant denied all the charges and after hearing, the trial court found the appellant guilty and convicted him of count I. He was acquitted of count II. on the 4th September, 2014 sentenced the appellant to life imprisonment for count I.



5. The Appellant having been aggrieved and dissatisfied with the trial court's judgment and sentence, appealed on the following grounds: -
 - i. That the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution's case where the evidence adduced was shoddy and immaterial.
 - ii. That the learned trial magistrate erred in law and fact by convicting the Appellant in a case where penetration was not proved.
 - iii. That trial magistrate erred in law and fact by convicting the appellant in a case where age of the complainant was not proved beyond reasonable doubt.
 - iv. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard as the medical evidence did not link the appellant to the offence.
 - v. That the Appellants defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the Appellant's defence.
6. The appellant prays for the total success of this Appeal, conviction quashed, sentence set aside and the Appellant set at liberty.
7. The appeal proceeded by way of both written and oral submissions. The Appellant filed amended grounds of appeal together with the submissions as follows: -
 - i. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to a mandatory sentence of life imprisonment but failed to note that the appellant was a first offender, was an old man thus the court could have awarded a definite sentence in considerations of the provisions of Article 50(1) (2) (p) of *the constitution* and sections 216 and 329 of the criminal procedure codes and the policy sentencing guidelines (2016).
 - ii. That, the learned trial Magistrate erred in law by awarding a conviction and a Mandatory Life Sentence but failed to appreciate recent law developments, the Sentencing policy Guidelines 2015 and the constitutional Provisions Article 50(2)(q).
 - iii. That, the learned trial magistrate erred in law and fact when failed to note that, the appellant was not accorded a fair hearing since he was not provided with the relevant documents that the prosecution wished to rely on being witness statements prior to the commencement of the hearing of the case.
 - iv. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant to a mandatory sentence of life imprisonment but failed to note that, the ingredients of the charge of defilement were not proved to the required standards of the law AGE and penetration were not proved.

Appellants Submissions

8. The Appellant submits that trial court imposed mandatory minimum sentence and failed to exercise discretion. He submitted that the recent developments in law have clearly shown that courts can divert from the mandatory minimum sentences enshrined in the *sexual offences act* and cited the case of Philip Mueke Maingi & 5 Others v Director of Public Prosecutions & the Attorney General.
9. The appellant submitted that mandatory minimum sentences do not give the court discretion to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence. The



- appellant submitted that in the case of Joshua Gichuhi Mwangi Cr. Appeal No. 84 of 2015 [2022] eKLR the court allowed appeal on sentence and substituted sentence of 20 years with a sentence of 15years to run from the time the trial court imposed the sentence.
10. The appellant further cited the case of Regan Otieno Okello Cr. Appeal No. 189 of 2016 [2022]eKLR where relying on Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR the court substituted a sentence of 20 years imprisonment awarded in mandatory form to a discretionary sentence of 10 years imprisonment While citing decision in Philip Mueke Maingi & 5 others V Director of Public Prosecution & the Attorney General and the Petition No.97 of 2021 at Mombasa High Court among other cases; and urges this court to re-evaluate the evidence adduced before trial court and make an independent finding on both conviction and proper sentence.
 11. The appellant submits that his right under article 50[2] [g] of *the constitution* was not considered. That he was not informed of his right to choose and be represented by an advocate and that he suffered prejudice as he was unrepresented and was illiterate. He cited Supreme Court Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR where the court stated that the right to legal representation under the said article is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional. That in the instant matter the court erred in not informing the appellant his right to legal representation and this omission went to the root of the prosecution case.
 12. The appellant further submit that he proceeded without being given witness statements and was therefore not accorded fair hearing and relied on the case of Alex Kwaso Otieno –vs- Republic criminal appeal no. 178 of 2016 and in Cr. Appeal No. 52 of 2016 Jacob Mwangama Mwandigha vs Republic (2017) e KLR.
 13. The Appellant submits that penetration was not proved and argued that the trial magistrate relied mostly on evidence of PW5 who gave the medical evidence which was a misdirection to court and the court failed to note that upon examination, the complainant did not have bruises in her genitalia and the state of urine was not disclosed; that the hymen was broken and the high vaginal swab had spermatozoa but he did not suggest that his said conclusion was based on any other observations beyond the broken hymen.
 14. The Appellant submits that a doctor's medical opinion must flow from the examination findings and in this case, the opinion is not supported by the findings of examination and the history does not support the complainant's assertions that she was defiled hence it was a misdirection for the learned trial magistrate to give his own hypothesis when the doctor who is the expert never explained anything. The medical examination did not establish that the complainant was defiled and cited that the case of Arthur Mshilla Manga vs Republic (2016) where the court observed as follows: -

“But did the medical evidence on record establish that JM was defiled” We do not think so. It is apposite to produce verbatim the findings of Jenliza after examining JM, as narrated before the trial court by PW3. No blood stain was seen on clothes. On the head, abdomen and thorax nothing was seen. On the genitalia the hymen was absent and the vagina was open. No discharge was seen. No injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done after three months. I wish to produce the P3 form as PEXI...”
 15. That in the instant case, the doctor's evidence does not support the evidence of pw1 was not supported by the evidence of PW1 that the appellant had sex with her and penetration was not therefore proved; and urged the court to quash conviction and set aside the sentence imposed by the trial court.



Respondent's Submissions

16. The Respondent submits that PW1 who was the victim properly identified the Appellant as the person who defiled her; that she referred to the appellant as Moses. She said the offence occurred at 9 p.m and she identified the appellant's face when she lit the lamp, the Appellant let her go.
17. In respect to age, the respondent submitted that child's health card produced as exhibit 4 indicate date of birth as 16th June, 2001 and the incident occurred on 31st October,2012 at the time the child was 11 years old and age was therefore proved.
18. On penetration, the state submits that PRC Form was produced as exhibit 6 and the P3 Form as exhibit 3 and the opinion of the doctor was that there was forceful vaginal penetration and the child had discharge. On identification, the appellant was found sleeping on the family bed where the incident took place and he was the only male person in the house where the act took place; and submitted that all the ingredients of the offence were proved.
19. In respect to sentence, the respondent submit that the minor was 11 years and the *Sexual Offences Act* provides for life imprisonment where the child is below 11 years; the appellant was sentenced to serve life imprisonment on 4th September,2014 and the sentence was within the parameters provided for in the *sexual offences Act*. That the trial court noted that the offence was serious and shall forever affect the victim psychologically considering her tender age, the sentence was legal and should not be disturbed.

Analysis and Determination

20. This is the first appellate court and our duty as such was well set out in the case Okeno Vs. Republic [1972] E.A 32 as follows:-

“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs. Republic [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Rulwala Vs. Republic [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
21. In view of the above, I have perused and considered grounds of appeal, proceedings before trial court and submissions filed herein and find the following as issues for determination: --
 - i. Whether the ingredients for the offence of defilement were proved
 - ii. Whether the sentence meted on the Appellant was harsh, excessive and unconstitutional.(i) Whether the ingredients for the offence of defilement were proved
22. The elements constituting the offence of defilement are proof of penetration, the age of the minor and the identity of the assailant (See C.W.K v Republic [2015] eKLR).



a. Penetration

23. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

“The partial or complete insertion of the genital organ of a person into the genital organs of another person.”

24. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration.

25. The complainant herein Pw1 stated that on 31st October, 2012 at 8.30 pm she was in her home with her mother who was drunk and her two sisters when the appellant defiled her. She said the appellant went down from the bed to where the minor was and defiled her. When she tried to scream, he covered her mouth. She said she went to school the next morning and at night she informed her mother that Moses alinitomba" meaning Moses had carnal knowledge of her. She said she had difficulties urinating.

26. Pw5 a clinical officer who examined the minor testified that she appeared sick looking, shaken and afraid and he found it hard to examine her and used a female chairperson. He stated that there were enlarged organs and abdomen but lumps around super pubic area (around umbilical cord) He did vaginal examination and there was obvious whitish mucus discharge at entrance of vagina - introitus. The Hymen was broken, vulva appeared swollen and inner lips of vagina (labia minora) were inflamed.

27. That Urinalysis revealed PH6.0 which is an acidic urine. HIV test (DTC) and results were negative blood tests showed 12.0mg normal. Epithelial cells were present in the urine indicating infusing. High vaginal swab revealed epithelial cells but no pus cells. In his diagnosis there was forceful vaginal penetration on the 5th November, 2012. He added her drugs and asked her to return on 29/11/12 to do repeat test of HIV. He produced MF12 now exhibit.2. He classified the offence as grievous harm and nature of offence was "rape" and estimate age of victim was 11 years old. That the Hymen was broken not intact, vulva was swollen, labia minora inflamed and the whitish mucoid discharge and his conclusion was for offender be brought for examination but he was not brought. Final remarks were that there was forceful vaginal penetration with alteration evidence of inflammation and discharge. He produced MFI3 as exhibits.3 and the PRC form MMFI-6 as exh.6.

28. From the foregoing, the doctor's evidence corroborated the complainant's evidence of penetration. In view of the above, I find that penetration was proved beyond reasonable doubt.

(b) Proof of age

29. The second ingredient of the offence of defilement is proof of age of the victim. The Court of Appeal in *Edwin Nyambogo Onsongo vs. Republic* (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think



that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable.”

30. Pw2 produced clinical card from Kisanan Health centre which showed that she was born on 16th June, 2001. The card was produced as exhibit 4. It therefore proved age of the minor as 11 years at the time of the offence.

(c) Identification of assailant

31. The complainant herein Pw1 stated that on 31st October, 2012 at 8.30 pm, she was in her home with her mother who was drunk and her two sisters when the appellant defiled her. She said the appellant went down from the bed to where the minor was and defiled her. When she tried to scream, he covered her mouth. She said she went to school the next morning and at night she informed her mother that Moses alinitomba” meaning moses had carnal knowledge of her. She said she had difficulties urinating.
32. Pw2 stated that on waking up the following morning, they found the appellant asleep on her husband's bed which was not strange as he used to sleep there sometimes. From the foregoing, it is clear that the Appellant was not a stranger to the victim having interacted with him at home severally. It is therefore plausible that the victim was able to not only identify him but to recognize him as the person who committed the act. There is therefore no doubt that the appellant was positively identified as the person who defiled the minor herein.
33. As to whether appellant's defence was considered < record show that the trial magistrate considered the appellant's defence and found that it was an afterthought and did not shake the complainant's evidence. From the foregoing, I find that the ingredients for the offence of defilement were proved beyond reasonable doubt and I proceed to uphold decision of trial court in respect to conviction.

(ii) Whether sentence imposed was harsh and excessive

34. On whether the sentence meted on the appellant by the trial court was excessive, it is trite law that this court can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and section 362 as read together with section 364 of the Criminal Procedure Code.

1. The Appellant argues that the sentence imposed was harsh and excessive in the circumstances. The Appellant was sentenced to serve life imprisonment. The Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated as hereunder: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

35. Section 8(2) of the *Sexual Offences Act* under which the appellant was charge with provide mandatory life imprisonment. The trial court imposed the mandatory life imprisonment on the appellant.



However, the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die. In view of the above, I am inclined to set aside life sentence and impose 25 years' imprisonment.

Final Orders: -

36.

1. Life imprisonment is hereby set aside.
2. The appellant is sentenced to 25 years imprisonment.
3. Period served in remand to be computed from sentence in orders 2 above.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 14TH DAY OF MARCH 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

Appellant present.

Ms Rateemo for State.

Karanja, Court Assistant.

