



**Kipyego v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 2723 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E008 OF 2023**

**JR KARANJA, J
MARCH 14, 2024**

BETWEEN

VINCENT KIPYEGO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Vincent Kipyego, was charged with defilement, Contrary to Section 8(1) read with Section 8(2) of the *Sexual Offences Act* and in the Alternative, committing an Indecent Act with a child, Contrary to Section 11 (1) of the *Sexual Offences Act*.

It was alleged that on the 17th July 2020 at Nandi County, the Appellant defiled IC, a child aged fifteen (15) years or that he committed an indecent act with her.

2. When he appeared before the Chief Magistrate Court at Kapsabet the Appellant pleaded not guilty to both the main and alternative counts and after a full trial he was convicted on the main count and sentenced to a twenty year term of imprisonment.

Being dissatisfied with the conviction and sentence, the Appellant preferred this appeal on the basis of the eight (8) grounds contained in the memorandum of appeal rather the petition of appeal dated and filed herein on the 24th February 2023.

3. At the hearing of the appeal, Mr. Maritim, learned counsel, appeared for the Appellant while the Learned Prosecution Counsel, Ms. Asiyo, appeared for the State/ Respondent.

The hearing was by way of written submissions with both sides filing their respective submissions on different dates.



Having considered the appeal and the rival submissions the duty of this court was to reconsider the evidence and draw its own conclusion having in mind that the trial court had the advantage of seeing and hearing the witnesses.

4. In that regard, the prosecution case was in summary that on the material date at about 7:00pm the child Complainant (PW2) and the Appellant were together at a farm when the Complainant's mother (PW1) appeared there and caned the Complainant. The Appellant reacted by assaulting the Complainant's mother even as the Complainant fled from the scene towards a nearby forest.
5. At the forest, the Complainant was joined by the Appellant who requested her to accompany him to his uncle's home at a place called [Particulars Withheld]. When there, the two engaged in sexual intercourse but on the following day the two were arrested and taken to Songor Police Station from where they were taken for examination at Maraba Hospital all along in the company of the Complainant's mother (PW1) and the Complainant's father, AM (PW3), neighbours to the Appellant.
6. At the hospital, both the complainant and the Appellant were medically examined and necessary medical reports (P3 forms) were prepared and duly signed by the examining Medical Officer. The reports (P. Exhibit 1 and 3) were produced in court by Henry Kipchuchumba Rotich (PW4), on behalf of the examining medical officer who was away on study leave. Also marked for production were treatment notes (PMFI 2).
7. Prior to that arrest, the Complainant's mother (PW1) had reported to an assistant Chief, Paul Robert Kemei (PW5), that she had been attacked by the Appellant who thereafter left with the Complainant. He (PW5) was unable to trace the Complainant the time but he collected her from a colleague chief two days later. The Appellant was in the process arrested.
8. The matter was partly investigated by PC Gabriel Nyongesa (PW6) who thereafter charged the Appellant with the present offence. The Appellant denied the charge and contended in his defence that he did not defile the Complainant as alleged.

The trial court, after considering the evidence in its totality concluded that the prosecution discharged its burden of prove by establishing that the Complainant was defiled by the Appellant while aged sixteen (16) years old whereby placing him in conflict with Section 8(1) as read with Section 8(4) of the Sexual Offences Act rather than Section 8(1) as read with Section 8(2) of the Act.

9. In this appeal, with regard to conviction, grounds 1, 2, 3, 4, 5, and 6 of the appeal are most vital and all amount to a complaint that the Appellant was convicted on evidence which was insufficient, contradictory and unworthy of belief. That, the evidence was insufficient in establishing the material ingredients of a charge of defilement, more so, the age of the Complainant.

On sentence, the Appellant in ground 7 and 8 of the appeal contended that it was manifestly harsh and excessive and ought to be reduced.

10. All those grounds were reiterated and buttressed by the Appellant in his submissions but were opposed by the State/Respondent who contended in its submission that the material ingredients of the charge were fully established and proved by the evidence adduced by the prosecution. That, the sentence imposed on the Appellant was lawful and within the ambit of "Section 8(2) of the Sexual Offences Act" (*sic*).
11. Having reconsidered the evidence, it's the opinion of this court that the main issue for determination was whether the Complainant was defiled within the meaning of Section 8(1) of the Sexual Offences Act and if so, whether the Appellant was responsible for the offence.



The elements of penetration and age of the victim are the two most vital ingredients for the offence of defilement.

12. The P3 from relating to the Complainant (P. Exhibit 1 indicated as P. Ex 3) was inconclusive with regard to penetration or any semblance of Sexual Assault. It merely indicates that the Complainant suffered bodily harm after being beaten rather than being sexually assaulted.

The P3 form relating to the Appellant (P. Exhibit 3 indicated as P. Exhibit 4) was not relevant for purposes of establishing penetration. In any event, it turned out negative for whatever purpose.

13. It must be pointed out herein that the numbering of the exhibits in the trial court left a lot to be desired in as much as it created uncertainty and confusion.

Be that as it may, the medical officer (PW4) stated that a treatment chit indicated that the Complainant hymen was broken and that she was bleeding from her genitalia. This was indicative of penetration but, the record shows that if any treatment chit or note or book was availed in court, then it was never produced as an exhibit other than being marked for identification and formal production (PMFI 2).

14. The upshot of this very costly omission was that the element of penetration was never established and proved against the appellant beyond any reasonable doubt even though the element of age was established and proved by the production of the Complainant's birth certificate (P. Exhibit 1) which indicated that the Complainant was born in the year 2005 thereby placing her at the age of fifteen (15) or thereabout at the material time of the offence.

15. In the absence of proper, sufficient and credible evidence to establish and prove penetration, a charge of defilement cannot stand. It would therefore follow that the Appellants' conviction by the lower court was not safe and sound. It is hereby quashed and the resultant sentence set-aside.

In sum, this appeal is allowed. The Appellant be set at liberty forthwith unless otherwise lawfully held.

DELIVERED AND DATED THIS 14TH DAY OF MARCH, 2024

J. R. KARANJAH,

JUDGE

