**Chepkulul v Republic (Criminal Appeal E051 of 2022) [2024] KEHC 5494 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5494 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BOMET**

**CRIMINAL APPEAL E051 OF 2022**

**RL KORIR, J**

**APRIL 11, 2024**

**BETWEEN**

**WESLEY CHEPKULUL ........................................................................ APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(From the Conviction and Sentence in Sexual Offence Case Number 20 of 2020 by Hon. Aduke P.J in the Magistrate's Court in Bomet)***

## JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the Charge were that on 18th March 2020 at [Particulalr withheld] within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of E.C, a child aged 15 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the Charge were that on 18th March 2020 at [Particulalr withheld] within Bomet County, he intentionally touched the vagina of E.C, a child aged 15 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case and the Appellant gave sworn testimony and did not call any witness.

4. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. The Supreme Court of India explained the duty of a first appellate court in *K. Anbazhagan vs State of Karnataka and Others* Criminal Appeal No. 637 of 2015 as follows:-

> "The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed......."

5. I proceed to consider the case before the trial court in the succeeding paragraphs.

**The Prosecution's Case**

6. It was the Prosecution's case that the Appellant defiled E.C (PW1). PW1 testified that she had sex with the Appellant at a lodging in [Particulars Withheld] for two days. She had been reported missing by her guardian PW3, who with the assistance of Police Officers traced her to a lodging in [Particulars Withheld].

7. No. 105637 PC C N (PW5) testified as the Investigating Officer. She stated that she took PW1 to hospital where she was examined and P3 and PRC Forms were filled. She further stated that her investigations revealed that PW1 was aged 16 years and that the Appellant defiled PW1. That the Appellant and PW1 knew each other.

8. J M (PW4) a clinical officer at Longisa Hospital testified that he examined PW1 and found that she had no bruises but had an old broken hymen. He further testified that PW1 had a whitish vaginal discharge and concluded that she had UTI.

9. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

**Appellant's Case**

10. The Appellant, W K C testified that he was arrested on 18th March 2020 at home. That the police told him that a girl (PW1) who had been reported missing had been seen at the Lodging where he worked. The Appellant further stated that they proceeded to the Police Station.

11. It was the Appellant's testimony that the girl was brought to the police station at around 4pm and he was told that he had sex with her. The Appellant stated that he did not defile PW1.It was the Appellant's further testimony that the clinical officer had testified that the victim (PW1) had been sexually active much earlier.

12. In a Judgment dated 5th July 2021, the trial court convicted the Appellant of the charge of defilement contrary to section 8(3) of the *Sexual Offences Act*. He was consequently sentenced to serve 20 years' imprisonment.

13. Being aggrieved with the Judgment of the trial court, the Appellant, W C through an undated home-made Petition of Appeal appealed against his conviction and sentence on the following grounds reproduced verbatim: -

I. That the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.

II. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence that were not adduced in court during the trial.

III. That, the learned trial Magistrate erred in law and fact by depending on evidence which was based on theory of conspiracy between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the prosecuting witnesses.

IV. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.

V. That I wish to be present during the hearing of my appeal and I also request court proceedings.

14. On 17th July 2023, this court directed the Appeal to be canvassed by way of written submissions.

**The Appellant's Submissions.**

15. In his undated submissions filed on 23rd March 2023, the Appellant submitted that PW1 lied to the trial court that she was a Form One student yet she could not communicate in English and Kiswahili.

16. It was the Appellant's submission that PW1 contradicted herself in her testimony. That she informed the court that she had been defiled between 5th April 2020 and 6th April 2020 but when she was re-examined, she stated that she had been defiled on 7th April 2020. It was the Appellant's further submission that Dennis Sigei (PW2) also contradicted himself when he stated that he took PW1 to hospital on 5th April 2020 but changed to 7th April 2020 when he was cross examined by the Appellant.

17. The Appellant submitted that the medical doctor (PW4) and the Investigating Officer (PW5) admitted that he was not subjected to a medical examination therefore there was no proof that he committed the offence. Further that the medical doctor testified that PW1 had no bruises, had an old broken hymen and a whitish vaginal discharge. That the pregnancy and HIV tests were negative and this raised the question whether PW1 was defiled or had a venereal disease.

18. It was the Appellant's submission that the court used the sole evidence of PW1 to convict him. That no other witness saw him commit the offence.

19. The Appellant submitted that E S (PW3) reported the matter to the Police before the offence was committed. That PW3 stated that on 18th March 2020, she went with the Police and arrested him and PW1 at 4 pm while PW1 had testified that they had sex with the Appellant on 18th March 2020 at 8pm.

**The Prosecution's submissions**

20. Through their submissions dated 7th August 2023, the Prosecution submitted that PW1 was aged 15 years at the time of the incident and the same was proved by the production of P.Exh1.

21. It was the Prosecution's submission that they proved penetration. That the victim's oral account was manifestly clear and that the medical evidence led credence to the victim's testimony. It was the Prosecution's further submission that the clinical officer (PW4) found that PW1 had an old broken hymen and formed an opinion that PW1's genitals had been penetrated.

22. The Prosecution submitted that the identification of the Appellant was not in doubt. That the victim engaged in sexual intercourse with the Appellant and was able to identify him. The Prosecution further submitted that the Appellant was arrested at the scene and identified by PW3 as a neighbour.

23. It was the Respondent's submission that their evidence was overwhelming and that the conviction was safe.

24. I have gone through and considered the trial court's proceedings, the undated Petition of Appeal, the undated Appellant's written submissions and the Respondent's submissions dated 7th May 2023. The following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Appellant's defence placed doubt on the Prosecution case.

    iii. Whether the Sentence preferred against the Appellant was just and fair.

**i. Whether the Prosecution proved its case beyond reasonable doubt.**

25. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.

26. The victim (PW1) testified that she was born in the year 2004. D S (PW2) and S (PW3) who were the victim's foster parents testified that the victim was born on 6th June 2004. PW2 produced a Child Health Card as P.Exh 1. The testimonies of PW1, PW2 and PW3 regarding the age of PW1 were uncontested during cross examination.

27. In Mwalengo Chichoro Mwajembe v Republic, Msa. App. No. 24 of 2015 (UR), the Court of Appeal held: -

    " .............the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See Denis Kinywa v Republic, Criminal Appeal No. 19 of 2014 and Omar Uche Vs Republic, Criminal Appeal No. 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond reasonable doubt. This form of proof is a direct influence by the decision of the Court of court Appeal of Uganda in Francis Omuroni is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..........."

28. I have looked at the Health Card (P.Exh1) and it shows that PW1 was born on 6th June 2004. It is my finding that the Prosecution satisfactorily proved the age of the victim. It is my further finding that at the time of the commission of the offence being 18th March 2020, PW1 was aged 15 years old.

29. With regard to the issue of identification, the victim (PW1) testified that she had sex with the Appellant at a lodging. She testified that they had sex for two days before they were discovered by the askari. No. 105637 PC C N (PW5) stated that from her investigations, the Appellant and the victim (PW1) were well known to each other.

30. In his defence, the Appellant stated that Police Officers came to his home on 18th March 2020, interrogated him about the whereabouts of PW1 and thereafter asked him to go to the Police Station. That the girl was brought to the Police Station at around 4pm.

31. This evidence tallies with the testimony of E S (PW3) who stated that she reported to the Police about the disappearance of PW1 and sought their assistance in locating her. It was her testimony that the Appellant told them where they would find PW1 (room 6). PW3 further stated that the Appellant was their neighbour.

32. It was uncontested fact that the Appellant worked in the said lodging.

33. From the evidence above, it is clear to me that the Appellant and the victim (PW1) were well known to each other. The victim's foster mother (PW3) identified the Appellant as their neighbour. Further, PW1 was found in the lodging where the Appellant worked and where the Appellant led the Police Officers (in room 6 of the said lodging). The evidence of recognition as shown in this particular case is strong and free from any doubt.

34. Flowing from the above, it is my finding that the Appellant was positively identified by the Appellant as the perpetrator of the offence. Both of them were placed at the scene (lodging). Equally, I dismiss the Appellant's contention that he met the victim (PW1) at the Police Station for the first time on 18th March 2020.

35. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

36. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.

37. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.

38. Regarding medical evidence, J M (PW4) testified that he examined the victim (PW1) and found that she had an old broken hymen. Further, that PW1 had no bruises but had a whitish vaginal discharge. It was his conclusion that PW1 had UTI. PW4 produced the P3 Form and PRC Form as P.Exh 2 and P.Exh 3 respectively.

39. I have looked at the aforementioned exhibits and they all indicate that PW1 was examined on 20th March 2020. The findings on the P3 and PRC Forms mirrored the testimony of PW4. The P3 Form (P.Exh 2) further stated that even though there had been no evidence of forceful penetration, PW1 had previous sexual exposure.

40. The medical evidence above confirmed that the victim (PW1) had engaged in sexual intercourse.

41. Turning to the victim's evidence, PW1 stated that she stayed with the Appellant in a lodging for two days where they engaged in sexual intercourse. That the Appellant asked her to be his wife, removed her clothes, told her to lie down and proceeded to have sexual intercourse without a condom. The Appellant did not challenge the victim's assertion that they had sex.

42. I have considered the medical evidence produced by the clinical officer (PW4) and the testimony of the victim (PW1) and I am satisfied that the victim and the Appellant engaged in sexual intercourse.

43. The Appellant submitted that the clinical officer (PW4) and the Investigating Officer (PW5) admitted that he had not been subjected to any medical examination therefore he could not be linked to the offence. Section 36(1) of the *Sexual Offences Act* provides that: -

    Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples

be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

44. In expounding Section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of *Robert Mutungi Mumbi v Republic* [2015] eKLR, held that: -

> “ Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

45. It was therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was among others, penetration, which they have.

46. The Appellant submitted that PW1 contradicted herself when she testified that she was defiled on the dates between 5th April 2020 and 6th April 2020 but changed to 7th April 2020 when she was re-examined. In my view, these are not material and grave contradictions that would be fatal to the case. These are minor contradictions which do not affect the main substance of the case which was whether or not the Appellant defiled PW1. The Court of Appeal in *Jackson Mwanzia Musembi v Republic*, [2017] eKLR cited with approval the Ugandan case of *Twahangane Alfred v Uganda*, Cr. Appeal No. 139 of 2001[2003] UG CA,6 where the court held that:

> “ ...with regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.” (Emphasis mine)

47. Flowing from the above, the Prosecution was able to prove the age of the complainant, the positive identification of the Appellant and penetration through the witnesses they availed.

48. Having proved all the ingredients of the offence, it is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

**ii. Whether the Appellant’s defence placed doubt on the Prosecution’s case.**

49. I have already laid out the Appellant’s (DW1) defence earlier in this Judgment. In summary, he stated that he did not defile the girl. That on 18th March 2020, he had gone home after completing his work at the Lodging and Police Officers came and interrogated him about the whereabouts of PW1 before he was asked to go to the Police Station.

50. It was the Appellant’s contention that he met PW1 for the very first time at the Police Station.

51. In his submissions, the Appellant stated that E S (PW3) reported the offence before it occurred. That PW3 testified that the Police arrested him and PW1 on 18th March 2020 at 4 pm, while PW1 testified that they had sexual intercourse on 18th March 2020 at 8 p.m. According to the testimony the victim’s mother (PW3), she stated that PW1 had disappeared from home the previous night (18th March

2020). She reported the disappearance to the Police on 19th March 2020 and not on 18th March 2020 as alleged by the Appellant. Accordingly, this argument by the Appellant is dismissed.

52. I have considered the Appellant's defence and after analysing the Appellant's defence as a whole, it is my finding that his defence was weak and did not create any doubt on the Prosecution's case which I have already found proven.

**iii. Whether the Sentence preferred against the Appellant was severe.**

53. The penal section for this offence is found in section 8(3) of the *Sexual Offences Act* which states that:-

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

54. From the wording above, the sentenced was couched as mandatory terms. However, this court is keenly aware of jurisprudence in which superior courts have hesitated to affirm the mandatory sentences where the justice of the case so demanded. This was the Court of Appeal's position in *Dismas Wafula Kilwake v Republic* [2019] eKLR in which it expressed itself as hereunder:-

> "Here at home in a judgment rendered on 14th December 2017 in Francis Karioko *Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015*, the Supreme Court concluded that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code is unconstitutional. While appreciate that the decision had nothing to do with the *Sexual Offences Act*, we cite it because of the pertinent observations that the apex Court made regarding mandatory sentences.......
>
> ......... In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing."

55. The Appellant stated that he was a first offender.

56. From my appreciation of the evidence on record, it is clear to me that the Appellant and the victim (PW1) were well known and cordial to each other. The Appellant even went as far as issuing an informal proposal to the victim to be his wife. It appears to me that they had been having a long standing "consensual" sexual relationship which was cut short when the victim disappeared from home and her mother (PW3) reported to the Police. However, the circumstances of this case notwithstanding, the Appellant broke the law by having sexual intercourse with an underage girl whose naivety he clearly took advantage of. He deserves the sanction of the law.

57. Consequently, while I uphold the conviction, I find it just and fair to interfere with the sentence. A long jail term would in the circumstances neither be useful nor meet the ends of justice.

58. I reduce the sentence from twenty (20) years to ten (10) years imprisonment from the date of the sentence by the trial court being 19th July 2021.

59. Orders accordingly.

**Judgement delivered, dated and signed this 11th day of April, 2024.**

**R. LAGAT-KORIR**

**......................**

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**Judgement delivered in the presence of**

the Appellant in person and Mr Njeru for the Respondent and Siele (Court Assistant)