



**Kirui v Republic (Criminal Appeal E015 of 2022)  
[2024] KEHC 5618 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5618 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E015 OF 2022**

**RL KORIR, J  
APRIL 11, 2024**

**BETWEEN**

**ISAIAH KIRUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the Conviction and Sentence in Sexual Offence Case Number  
55 of 2019 by Hon. Omwange J. in the Magistrate's Court at Sotik)*

**JUDGMENT**

1. Isaiah Kirui (now Appellant) and Aaron Cheruiyot being the 2nd Accused and 1st Accused respectively were tried by Hon. J. Omwange, Senior Resident Magistrate for the offence of gang defilement contrary to Section 10 of the *Sexual Offences Act*. The particulars of the charge were that on 2nd November 2019 at Sotik Sub County, within Bomet County in association and with common intention one after another intentionally and unlawfully caused their penises to penetrate the vagina of S.C, a child aged 13 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 on 27th November 2019 at Sotik Sub County, within Bomet County he intentionally touched the vagina of S.C, a child aged 13 years with his penis.
3. Both Accused pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case.
4. 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. The trial court also ruled that the Prosecution had failed to prove its case against Aaron Cheruiyot and he was acquitted under Section 210 of the *Criminal Procedure Code*.



5. At the conclusion of the trial, the Appellant was convicted and sentenced to serve fifteen (15) years in prison.
6. Being dissatisfied with the Judgment dated 14th January 2021, Isaiah Kirui appealed against the trial court's conviction and sentence on the following grounds reproduced verbatim:-
  - i. That, I pleaded not guilty at the trial.
  - ii. That the learned trial magistrate erred in law and fact in convicting the Appellant on the present charge without considering that the burden of proof was not established to warrant the conviction thus contravening section 107 as read with section 109 of the Evidence Act.
  - iii. That the learned trial magistrate erred in law and in fact while relying on the evidence that had massive invariance, contradictions which did not corroborate with other evidence to warrant the conviction thus contravening section 153 as read with section 154 of the Criminal Procedure Code.
  - iv. That the trial magistrate erred in law and in fact without detecting that there was no medical evidence to link the Appellant with the alleged offence. No DNA report was presented to prove that I participated in the offence.
7. The Appellant further filed Amended Grounds of Appeal on 28th November 2022 and relied on the following reproduced verbatim grounds:-
  - i. That the learned trial Magistrate erred in law & fact by failing to realize that the age of the complainant (PW2) was not proved beyond reasonable doubt.
  - ii. That the identity of the perpetrator was not proved.
  - iii. That the penetration was not proved.
  - iv. That the charge sheet was not amended as required by the law from gang defilement to gang rape.
  - v. That the broken hymen was not proof of the present case.
  - vi. That PW2 was an incredible witness.
  - vii. That no voire dire examination was conducted to PW2 as required by the law.
  - viii. That no report was brought to court from the government chemist to ascertain the truth of PW1's allegations of bleeding, pus cells and red blood cells neither belonged to the Appellant or PW2.
  - ix. That the Appellant was not examined to ascertain the truth about PW2's allegation and any link to the offence.
  - x. That PW2's testimony was uncorroborated.
  - xi. That vital witnesses did not come to court to testify.
  - xii. That my rights to a fair trial were violated as I was not furnished with all the documents that the Prosecution relied on in their case.
  - xiii. That the Charge Sheet was defective.



- xiv. That there is no gang rape by one Appellant. By acquitting the 1st Accused and convicting him was a prejudice to him.
  - xv. That the sentence of 15 years imposed on me lacks the element of Article 27 of the Constitution and discretion and lacks the doctrine of separation of powers.
  - xvi. That the Prosecution case is marred with contradictions, discrepancies and huge gaps.
  - xvii. That the trial Magistrate erred in both law and fact by dismissing my alibi defence which was cogent, coherent and trustworthy to secure my acquittal.
8. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See *Pandya vs. Republic* (1957) EA 336.

#### **The Prosecution's Case.**

9. It was the Prosecution's case that the Appellant defiled S.C (PW2) on 2nd November 2019. S.C testified that on the material day, the Appellant took her to a shamba where he used to work and thereafter he took her where he lived. It was S.C's testimony that the Appellant defiled her many times before she finally left his place.
10. Kibet Kirui (PW1) who was the clinical officer testified that he examined the minor (PW2) a week after the incident and found that she had vaginal bleeding and had lacerations on her labia minora and labia majora. It was PW1's further evidence that the minor had a long standing broken hymen and that he further found red blood cells and pus cells. It was his conclusion that there was evidence of penetration.

#### **The Appellant's Case.**

11. The Appellant, Isaiah Kirui testified that he was a herdsman and that on the material day, he was not at the alleged scene. That he had taken milk to sell in Ngariet. That he was later arrested by people despite his protest.
12. It was the Appellant's testimony that he was being framed because the complainant said that the person who defiled her had a mark and he did not have one.
13. On 18th October 2022, I directed that this appeal be dispensed off by way of written submissions.

#### **The Appellant's Submissions.**

14. It was the Appellant's submission that the age of the minor was not proved as no birth certificate was produced or age assessment done. That also no parent or guardian testified as to her age. He relied on *Francis Omuroni vs. Uganda*, Criminal Appeal No. 2 of 2000 and *Kaingu Elias Kasomo vs. Republic* (2016) eKLR. It was his further submission that the Prosecution failed to prove the victim's age thereby failing to prove the offence.
15. The Appellant submitted that penetration was not proved. That there was no report from the government chemist to ascertain that there were red blood cells to link him or PW2 to the offence, that there was no spermatozoa and that he was not medically examined. He further submitted that the PRC and P3 forms did not tally and thus exonerated him from the offence.
16. It was the Appellant's submission that no *voire dire* examination was conducted on PW2 before she testified and this was against the law. That PW2's testimony could not be used to base a conviction.



17. The Appellant submitted that PW2 was an incredible witness and that it was unsafe to rely on her witness which raised doubts. He relied on *Ndungu Kimanyi vs. Republic* (1979) KLR 283 and *Geoffrey Orieno Bor vs. Republic* Cr. Appeal No. 22 of 2020.
18. It was the Appellant's submission that a broken hymen was not proof of defilement. That the trial court placed a high premium on the fact the victim's hymen had been broken. It was his further submission that a hymen could be broken as a result of other factors and that some girls were even born without a hymen.
19. The Appellant submitted that he was not accorded a fair trial as his rights under Article 50(2) of the *Constitution* were infringed upon. That he was not furnished with the documents that the Prosecution relied on and that he could not be convicted for the offence of gang rape as gang rape could not be committed by one individual.
20. It was the Appellant's submission that the charge changed from gang defilement to gang rape without the charge sheet being amended and that it was a grave error.
21. It was the Appellant's submission that this court quashes his conviction, sets aside his sentence and sets him at liberty.

#### **The Prosecution's/Respondent's Submissions.**

22. The Respondent submitted that it was clear from the record that the victim was defiled severally by the Appellant together with another person. That the victim's testimony was corroborated by the clinical officer who stated that when he examined the victim, she had vaginal bleeding, lacerations on the labia minora and labia majora and a broken hymen and he concluded that there was evidence of penetration. The Respondent further submitted that the clinical officer produced a P3 form and treatment notes to support his evidence.
23. It was the Respondent's submission that PW4 stated that the victim informed him that the Appellant together with another person had been defiling her for about one week. That PW3 indicated that two suspects were brought to the police station who were suspected to have defiled the victim. It was their further submission that there was no doubt that the victim was defiled by more than one person at the same time in turns.
24. The Respondent submitted that it was clear from the record that the victim knew the Appellant very well. That she referred to his name in court and even knew where the Appellant lived. The Respondent further submitted that the victim had been defiled from 4pm until the day ended, therefore the offence took place during the day when it was easy to identify and recognize a person.
25. It was the Respondent's submission that the victim knew the Appellant very well because she took PW4 to the Appellant's house and further told him that she had been staying with the Appellant for about one week. That the identification of the Appellant was beyond any doubt.
26. The Respondent submitted that Appellant's defence was very shallow and was not corroborated. That the Appellant did not manage to challenge their overwhelming evidence.
27. It was the Respondent's submission that the trial court was lenient in sentencing the Appellant as it gave the Appellant the minimum sentence. It was their further submission that the Appeal lacked merit and the trial court's sentence and conviction ought to be upheld.
28. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal filed on 15th March 2022, the Amended Grounds of Appeal and Appellant's written



submissions both filed on 28th November 2022, the Respondent's written submissions dated 1st December 2022 and the following issues arise for my determination:-

- i. Whether there were procedural issues affecting a fair trial.
- ii. Whether the Prosecution proved its case beyond reasonable doubt.
- iii. Whether the Defence places doubt on the Prosecution case.
- iv. Whether the Sentence preferred against the Accused was manifestly excessive, harsh and severe.

#### **i. Procedural Issues affecting fair trial**

##### **a. Whether the Charge Sheet was defective.**

29. The Appellant contends that the Charge Sheet relied on by the trial court to convict him was defective. The substantive law on defective Charge Sheets is Section 134 of the [Criminal Procedure Code](#) which provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

30. In determining whether a Charge Sheet was defective or not, the Court of Appeal in [Sigilani vs. Republic](#) (2004) 2 KLR, 480 held as follows:-

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.

31. The Charge Sheet contained the particulars of the offence. The gang defilement was alleged to have been committed on 2nd November 2018 at Cheptebe Village in Sotik Sub County within Bomet County. It was plain from the charge sheet what charge the Appellant was supposed to face. There was no ambiguity at all.

32. The substance of the charge and its particulars were read out to the Appellant in a language he understood and he pleaded not guilty. The Appellant was present during the trial and cross examined all the Prosecution's witnesses. He thereafter presented his defence. This demonstrated that the Appellant fully understood the charge he faced.

33. The Appellant contends that the Charge Sheet was defective as it was not amended from gang defilement to gang rape. He submitted that the trial court convicted him on the charge of gang rape while the charge sheet read gang defilement. On this matter, I agree with the apt exposition by Odunga J. (as he then was) in [Francis Matonda Ogeto v Republic](#) (Criminal Appeal 49 of 2017) [2019] KEHC 10896 (KLR) (3 October 2019) (Judgment), where he addressed himself on the matter of gang defilement and gang rape thus:-

“Under section 10 of the [Sexual Offences Act](#), the ingredients of gang rape are: rape or defilement under the Act; committed in association with others; or committed in the company of another or others who commit the offence of rape or defilement with common intention. It is therefore clear that defilement which is committed in association with others or with common intention notwithstanding the fact that the accused may not have defiled the victim amounts to gang rape according to the said section. It therefore matters not



whether the offence was rape or defilement as long as the conditions under section 10 are found to exist.” (Emphasis mine).

34. I hasten to add that the only thing that distinguishes defilement and rape is the age of the victim. Defilement denotes that the victim was below 18 years and lacking the capacity to consent while rape denotes that the victim did not consent to the sexual intercourse.
35. It is my finding that the charge sheet was properly drafted and the Appellant understood the charges he faced. Based on the foregoing, this ground of appeal is dismissed.

**b. Whether the Appellant’s right to a fair trial under Article 50(2)(j) of the Constitution was infringed upon**

36. Article 50 (2)(j) of the Constitution provides that:-  
Every Accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.
37. The Appellant submitted that he was not furnished the documents that the Prosecution relied upon. I have gone through the trial court record and the record was silent on whether the prosecution supplied the evidence in advance. It is also silent on whether the Accused requested for them or indicated to the court their request. What is clear however is that when the matter came up for hearing on 15th January 2020, the 1st and 2nd Accused indicated that they were ready to proceed.
38. The trial proceeded and the Prosecution produced the P3 Form and treatment notes. There was no objection by the Accused who went ahead to cross examine PW1, the clinical officer.
39. The record further shows that the Appellant proceeded with his trial and cross examined all the Prosecution’s witnesses. I therefore do not find any reason to believe that the Accused was not supplied with the documentary evidence or that he was prejudiced in any way. I consider the ground an afterthought fit for dismissal.

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

40. Gang defilement is defined under Section 10 of the [Sexual Offences Act](#) as:-  
Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.
41. Gang is defined as:- means two or more persons
42. In [Cosmas Koech v Republic](#) (2021) eKLR, Gikonyo J. held that:-  
“Elements of the offence of gang rape or gang defilement are in Section 10 of the [Sexual Offences Act](#) are:-
  - a. Unlawful sexual act committed in association with another or others or
  - b. Being in the company of another or others who commit the offence with common intention of committing the offence.



Accordingly, a person may not have engaged in the sexual act of defilement but is guilty of gang rape or defilement if he was in company of another or others who commit the offence with common intention of committing the offence”.

43. 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 must be proved.
44. Regarding the age of the victim (S.C), I have gone through the trial record and I have noted that the Prosecution did not adduce any evidence to back up their claim that at the time of the commission of the offence, S.C was aged 13 years old. They did not produce any birth certificate or testimony by a parent or guardian of S.C. The victim herself did not testify as to her age.
45. I have noted that the P3 form indicated (P.Exh1) that the victim was aged 14 years but no age assessment report was produced to back up PW1’s finding on the victim’s age. I am therefore in agreement with the Appellant that the age of the victim was not proved to the required legal standard. It is therefore my finding that the Prosecution failed to prove S.C’s age. However, it is my further finding that lack of proof of age does not extinguish the offence but would only affect sentence if the conviction was confirmed. This explains why the trial court convicted the Appellant of gang rape and not gang defilement.
46. With regards 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. In the case of *Bassita vs. Uganda S. C Criminal Appeal Number 35 of 1995*, the Supreme Court held that:-

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence.....”
47. Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim coupled with a medical examination must be sufficient to determine whether penetration occurred.
48. Kibet Kirui (PW1) who was the clinical officer at Sotik Health Centre testified that when he examined the victim (PW2), he found that she had vaginal bleeding and lacerations on her labia minora and labia majora. He further stated that he found a long standing broken hymen, pus cells and red blood cells and he concluded that there was evidence of sexual penetration.
49. It is salient to note that PW1 testified that he examined the victim a week after the alleged offence.
50. PW1 produced a P3 Form and Treatment Notes that were marked as P.Exh 1 and 2 (a) and (b) respectively. The P3 Form (P.Exh.1) indicated that at the time of examination, PW2’s injuries were a week old. The findings on the P3 Form were that PW2 had lacerations and bruises on both the labia minora and majora, that she had PV bleeding and had a foul and smelly discharge. The P3 Form was signed on 4th November 2019.
51. The treatment notes (P.Exh.2 (a) and (b)) indicated that PW2 was examined on 4th November 2019 for injuries that were suspected to have been inflicted upon her between 29th October 2019 and 1st November 2019. The findings in the treatment notes mirrored those found in the P3 form.
52. I have considered the medical evidence above. It clearly demonstrates that there was penetration and therefore corroborates the victim’s evidence that she was defiled by two men.



53. I observe that the victim PW1 testified that she was penetrated repeatedly on 2<sup>nd</sup> November, 2019 when the Appellant (Isaiah) took her to the house where he lived with the 1<sup>st</sup> accused. The Clinical officer stated in the P3 form that the injuries she had were about a week old. He examined her on 4<sup>th</sup> November, 2019.
54. I have considered the slight variance in the dates. The variance however was not material. It could not have been medically possible for the clinical officer to state with exactitude the time or date that the complainant was penetrated. In any case the evidence of the complainant and of PW3 who rescued her showed that she had been in the Appellant's house for a number of days. I therefore find the slight variance curable under Section 382 of the Criminal Procedure Code. The Appellant was well aware of the charge he faced and he suffered no prejudice in his defence.
55. The next question is who then penetrated the complainant? With regard to the issue of identification, the Court of Appeal in the case of Cleophas Wamunga vs. Republic(1989)eKLR expressed itself as follows:-
- “Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.....”
56. The victim (PW2) testified that on the material day, the Appellant took her to the shamba where he worked and that he later took her to where he lived and did bad things to her. Gilbert Ngeno (PW4) testified that on the material day, the victim took him to a house where they found the then 1st Accused and the Appellant and that the victim identified them as the people she was with. I am satisfied that the Appellant was placed in the scene of the alleged offence by PW4 and the Appellant and was positively identified by the victim as the person who took her to his house and did bad manners to her. The court understood bad manners to mean penetration.
57. In this case there was no possible danger of mistaken identification. This is because it was clear to this court that the Appellant was very well known to the victim. She told the court that she met him while on her way to her grandmother's home and he took her to his place of work and into a house where he lived. He defiled her and also let his roommate (the 1<sup>st</sup> Accused) defile her as well. It was clear that after an ordeal lasting a couple of days, the victim who was a stranger in that village was found by PW4 who upon questioning her, was shown the house where she had been. She was taken back there and she did identify the Appellant and the 1<sup>st</sup> accused both of whom were arrested. The circumstances of the Appellant's arrest therefore lend further credence to the fact that he was properly identified.
58. A careful analysis of the victim's evidence shows that she knew exactly who penetrated her. When she first testified, she identified both the 1<sup>st</sup> accused and 2<sup>nd</sup> accused before she was stepped down. On resumption of her testimony, she categorically stated that the 1<sup>st</sup> accused did not penetrate her leading to his acquittal.
59. In the end, I am satisfied that the Appellant was properly identified. This court observes that the complainant became a refractory witness and ought to have been cross examined in respect of the 1st Accused. I have found the charge proven. As the age of the victim was not proven, the trial court was within the law to convict the Appellant of gang rape.
60. I confirm both conviction and sentence with the consequence that the appeal is dismissed in its entirety.
61. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 11TH DAY OF APRIL, 2024**



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**R. LAGAT-KORIR**

**JUDGE**

Judgement delivered in the presence of Mr Njeru for the State, Appellant present acting in person and Siele (Court Assistant)

