



**Kogo v Republic (Criminal Appeal 57 of 2022)  
[2024] KEHC 3455 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3455 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL 57 OF 2022  
RN NYAKUNDI, J  
APRIL 11, 2024**

**BETWEEN**

**MOSES KIPNGETICH KOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E. Kigen (SRM) delivered  
on 18/3/2022 in Eldoret Criminal Case S.O Case No. 219 Of 2019)*

**JUDGMENT**

1. The Appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Sub-section 8 (3) of the [Sexual Offences Act](#) No. 3 of 2006 and sentenced to 20 years imprisonment. The particulars of the charge were that on the 16<sup>th</sup> day of December 2019 at Kapseret Sub-county within Uasin County, the Appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of CJ a girl aged (12) years old.
2. He was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 OF 2006.
3. He was aggrieved by both the conviction and the sentence and filed this appeal raising the following grounds: -
  1. That the learned trial Magistrate erred in fact and in law by relying on irrelevant evidence, uncorroborated and contradictory evidence.
  2. That the learned Magistrate erred in disregarding the evidence of the Appellant.
  3. That the learned trial Magistrate erred in law and in fact in convicting the Appellant.



4. That the learned trial Magistrate erred in fact and in law in convicting the Appellant yet prosecution had not discharged their obligation in proving the offence beyond reasonable doubt.
4. The Appellant wants the appeal allowed, conviction and sentence set aside and he be set at liberty.

### **Prosecution Evidence**

5. The prosecution called 5 (five) witnesses in support of the charges.
6. PW1 was Phylis Jepchirchir, she testified that she resides at Chepkitet village and is employed at HCT as chancellor at Sigot Centre. She told Court that on 16/12/2019 at about 7:30 am she was on duty when she received a call from Joy Jepkosgei her nephew informing her that terrible things had happened. She told her that Hada alias Moses had pulled the complainant and proceeded to defile her. She told Court that the accused is her cousin. She stated that she sent a bodaboda rider to pick the complainant and the complainant was brought to hospital and after being examined by the doctor, the doctor informed her that it would be important for them to proceed to Mosoriot to the lab since they did not have a lab. She stated that they then proceeded to Mosoriot with the complainant and in the company of Lucy and they were referred to a Clinical officer who examined the minor and thereafter proceeded to the lab and they then later went to Ampath for Counselling. She told Court that after counselling the minor was given PEP for 2 weeks and they were advised to go to the police station. She stated that the following day they went to Langas Police Station to report the matter where they bought the P3 Form and were referred to Moi Teaching and Referral Hospital where the minor was examined. She then produced the P3 Form dated 18/12/2019 and marked as PMFI1, treatment notes from Moi Teaching and Referral Hospital marked as PMFI 2. She told Court that the minor is her child and that she aged 13 years and was born on 13/11/2007.
7. During cross-examination she stated that as per the minor it was the Appellant who committed the offence and that the minor knows the Appellant very well.
8. PW2 was Lucy Jepkosgei, she testified that she is 17 years old. She told the Court that on the material date she was at home at Chepkatet in company of the complainant and another child. She stated that she went with the other girls to get the cows so that they could milk them and that they left the complainant at home and that on arrival they did not find her. She told the Court that she called the complainant thrice and she answered while behind the store and that she came crying and informed her that the Appellant had pulled her to the store, removed her clothe and defiled her. She told the Court that the complainant was wearing a trouser. She stated that they then milked the cows and after lunch she called the complainant's mother who asked them to wait for a boda who picked them and they headed to Sigot dispensary. She further testified that the complainant was then taken to Mosoriot and thereafter they went to Langas Police Station where they were referred to Moi Teaching Referral Hospital. She told the Court that the complainant told her that Adish alias Moses had defiled her. She stated that the Appellant is called Adish at home.
9. During cross-examination she stated that there was someone at home. She told the Court that Thomas left and that the Appellant remained behind.
10. PW3 was the complainant, she testified that she is 12 years old and in class 7. She told the Court that on 16/12/2019 she was at home with her sister (PW2) and Barbra Jepkoech and that the said Barbra and (PW2) went to get cows and asked get water and milking cans. She told the Court that she went to fetch water when the Appellant pulled her to the store and told her that if she made a sound he will strangle her, he asked her to remove her clothes but she refused and he forcefully removed her



trouser and also removed his trouser, she asked him to leave her and he wanted to defile her but they struggled and when her cousin called her, he left her and she ran. She told the Court that she recorded her statement and that the accused inserted his penis into his vagina and removed his underwear but his whole penis did not go inside. She told the Court that they were both standing when the incident occurred. ( the Minor becomes emotional and starts crying). She testified that PW2 called out her name and she rushed and told her what happened and she advised that they break the news fast and then called her mother who sent a bodaboda who took them to Sigot dispensary and thereafter to Mosoriot hospital. She told the Court she was examined and asked to go to the police station. She stated that the following day she went to Langas Police station and thereafter to Moi Teaching and Referral Hospital. She told the Court that she and the Appellant were facing each other when the act was committed, that he removed his pant and that she was born on 13/11/2007.

11. PW4 was No.61309 Sergeant Magarine Jepkorir Kipyego attached to the Langas Police Station. She testified that on 17/12/2019 a report was made at the Station by PW1 accompanied by PW3 for defilement. She told the Court that she recorded the statements and issued a P3 Form and also referred the complainant to Moi Teaching and Referral Hospital. She stated that on 18/12/2019 she went to Mosoriot Police Station to pick the Appellant who had attempted to flee but the Mosoriot officers managed to arrest him. She told the Court that she then recorded his statement and thereafter charged him.
12. PW5 was Dr. Irene Simiyu, she testified that she works at Moi Teaching and Referral Hospital where she works with Dr. Taban and is familiar with her handwriting and signature. She told the Court that Dr. Taban saw the complainant and on examination she had changed clothing and that the complainant narrated that she was going to milk when the Appellant pulled her and carried her to the store and defiled her and that he threatened to kill her if she screamed. On examination her head, neck, stomach, back, lower limbs were normal, her private parts healed, hymnal tears, 3 and 9 o'clock, confluence of vestibule, redness of vulva, had whitish discharge, HIV test was negative, pregnancy test was negative urinalysis was normal and syphilis was negative. She told the Court that the doctor opined that the minor had been defiled and then proceeded to fill the P3 Form which was signed and stamped on 18/12/2019.

### **Defence Evidence**

13. At the close of the prosecution case, the trial Court made a finding that there was a case to answer and put the accused to his defence. The defence was based on the sole unsworn testimony of the Appellant. He basically denied all the charges levelled against him and prayed for leniency.

### **The submissions**

14. Both parties filed their respective submissions. The Appellant filed his submissions on 22/2/2024 whereas the Respondent filed on 20/2/2024.

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

15. Counsel for the Appellant, Mr. Martim submitted that the charge sheet was defective. He argued that the offence as framed in Count one read subsection 8 (1) (3) which is a non-existence provision of the Sexual Offences Act. Counsel relied on the provision of Section 134 of the Criminal Procedure Code. He argued that the trial Court ought to have acquitted the accused person on the basis that the offence as captured in the charge sheet was not known in law.
16. With regard to the evidence tendered, Counsel submitted that the complainant (PW3) testified that " He forcefully removed my trouser and also removed his trouser, I asked him to leave me alone, he



wanted to defile me but we struggled and when my cousin called me, he left me and I ran” Counsel submitted that the accused then goes ahead to retell what she recorded in her statement. Counsel maintains that there was no actus reus for the offence of defilement. Counsel argued that as per the testimony of the victim, no penetration took place. According to Counsel the nature of such an offence is such that it is shrouded with stigma and that there is pressure to nail the perpetrator and the societal pressure to exert pressure to whoever is accused to be convicted. Counsel maintained that the Appellant did not commit the offence of defilement as framed in the charge sheet and that the elements of defilement were not proved. Counsel argued that the burden of proof in criminal cases lies with the prosecution and that this burden never shifts. Counsel referred the Court to the case of *Alex Chemwotei V Republic* in that regard. Counsel further argued that a medical report cannot be used to resuscitate a dead case.

17. Counsel also referred the Court to the following cases; *Okeno v Republic* [1972] EA and *Kiilu & Another v Republic* [2005] 1 KLR 174.

### **The Respondent’s Submissions**

18. State Counsel Mr. Mugun, submitted that the main issues for determination are; whether the conviction is supported by evidence and whether the conviction is legal. With regard to proof that the complainant was a child Counsel submitted that the complainant’s birth certificate was produced in evidence which shows that her date of birth is 13/11/2007 and therefore as at 16/12/2019 she was 12 years old. Counsel argued that the Appellant was the complainant’s relative and if there was evidence to contrary, he would have alluded to it in cross-examination but he did not do so, as such he knew the complainant’s age.
19. With regard to proof of penetration, Counsel submitted that the Appellant partially inserted his manhood into her genitalia and that as he was doing so he heard PW2 calling out the complainant’s name and that is how she freed herself from his grip and rushed towards PW2. Counsel further submitted that PW5, Dr. Irene Simiyu testified that when the complainant was examined, her genitalia had healed hymenal tears at 3 and 9 o’clock positions, there was also confluence of the vestibule which all drove her to conclude that the minor had been defiled. Counsel argued that these findings corroborate the testimony of the complainant that she was defiled.
20. With regard to positive identification of the Appellant, Counsel submitted that PW1 testified that the Appellant is her cousin and that in cross-examination she confirmed that the complainant knew the Appellant very well and that PW5 on her part testified that the complainant informed her that Adish alias Moses had defiled her and that she pointed the Appellant as the man who went by that name. According to Counsel, the implication of these witnesses’ testimonies is that they support the complainant’s testimony that the Appellant is not a stranger to her but someone that she is very familiar with. Counsel argued that the Appellant refused to cross-examine the complainant on this aspect therefore crystallizing the fact that he was known to the complainant. Counsel submitted that thus this becomes a case of recognition rather than identification of stranger as was stated in the case of *Reuben Taabu V Republic* where the court opined that recognition is more believable and more reliable than identification of a stranger.
21. Counsel submitted that the Appellant made two statements in his defence; he introduced himself and stated that the accusations against him were untrue. Counsel argued that he did not put up a defence therefore cannot cry that his defence was not considered while in essence he offered none.
22. With regard to the legality of the sentence, Counsel submitted that the sentence prescribed by Section 8 (3) of the [Sexual Offences Act](#) is 20 years imprisonment which the trial Magistrate did not hesitate to



pronounce. Counsel cited the case of Bernard Kimani Gacheru v Republic [2002] eKLR in that regard. Counsel observed that there has been conflicting jurisprudence on whether Courts have discretion in sentencing in minimum mandatory sentences prescribed by the Sexual Offence Act. Counsel maintained that in light of the Statutory provisions, the sentence was lenient and not excessive. Counsel cited the Court of Appeal in Onesmus Safari Ngao v Republic [2021] KECA 154 KLR.

23. In the end, Counsel urged that there was satisfactory and compelling evidence to show that the Appellant committed the offence as charged, that the trial Court sentenced him to 20 years imprisonment and that he has not advanced any lawful reason for the Court to interfere with the sentence.

### Determination

24. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal for Eastern Africa stated that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya v R [1975] 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. Ruwala v R [1957] E.A. 570. It is not the junction 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, see (Peters v Sunday Post [1978] E.A. 424.”

25. I have carefully considered the evidence on record, the grounds of appeal and submissions for and against the appeal. In my humble view, the main issue for determination is whether the prosecution proved their case against the Appellant beyond reasonable doubt that it was the Appellant who defiled the complainant. There are other issues that have been raised by the Appellant in his submissions which I will address my mind to as I determine this main issue.
26. The Appellant challenged the conviction and sentence on the basis that the prosecution failed to prove its case beyond reasonable doubt, particularly on the question of penetration. Counsel for the Appellant argued that there was no penetration and further maintained that a medical report cannot be used to resuscitate a dead case.
27. This being a case for defilement what was to be proved are the ingredients of the offence of defilement and in the case of George Opondo Olunga v Republic [2016] eKLR, it was stated that the ingredients of an offence of defilement are; identification or recognition of the offender, penetration and the age of the victim.

Section 8(1) of the [Sexual Offences Act](#) provides as follows:

- “8. A person who commits an act which causes penetration with a child is guilty
- (1) of an offence termed defilement.
- (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”



28. In this case the issue of identification has not been challenged in this appeal. The complainant evidence is that of recognition and has not been disputed. Therefore, the two critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.
29. In this case the issue of identification has not been challenged in this appeal. The complainant evidence is that of recognition and has not been disputed. Therefore, the two critical elements that must be proved to sustain a conviction for the offence of defilement under these provisions of the law are the act of penetration and the age of the victim.
30. In regard to the age of the complainant herein, the same is not in dispute, as the copy of the certificate of birth on record indicates that the victim was born on 13/11/2007, thus the complainant at the time of commission of the alleged offence was (12) years old.
31. The next element is proving of penetration. Section 2 of the *Sexual Offences Act* defines penetration thus:
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
32. As such even the slightest insertion of the genital organs of one person into the genital organs of another is sufficient to establish a sexual offence.
33. In her testimony at the trial Court PW3 the complainant testified that as she was going to fetch water when the Appellant pulled her to the store and told her that if she made a sound he will strangle her, he asked her to remove her clothes but she refused and he forcefully removed her trouser and also removed his trouser, she asked him to leave her and he wanted to defile her but they struggled and when her cousin called her, he left her and she ran. She told the Court that she recorded her statement and that the accused inserted his penis into his vagina and removed his underwear but his whole penis did not go inside. She told the Court that they were both standing when the incident occurred.
34. In *Erick Onyango Ondeng’ v Republic* [2014] eKLR the Court of Appeal had this to say about penetration:
- “...even partial penetration of the female genital by male genital will suffice to constitute the offence. In *Twehangane Alfred v Uganda*(supra) the Uganda Court of Appeal expressed the same view as follows:
- In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.”
35. And in *Mark Oiruri Mose v Republic* [2013] eKLR, the Court of Appeal had this to say about penetration:
36. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ.
37. Further, it is also worth noting that key evidence relied by the Courts in rape cases and defilement in order to prove penetration is the complainant own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the



evidence of the doctor is key so as to corroborate such testimonies. I have critically analyzed the evidence of PW5 the doctor who testified herein.

38. It was her testimony that on examination the complainant's head, neck, stomach, back, lower limbs were normal, her private parts healed, hymenal tears, 3 and 9 o'clock, confluence of vestibule, redness of vulva, had whitish discharge, HIV test was negative, pregnancy test was negative urinalysis was normal and syphilis was negative. She told the Court that the doctor made the observation that the minor had been defiled
39. From the foregoing there is no doubt that the medical evidence available on record is cogent and consistent, as well as corroborating the testimony of the complainant.
40. With regard to the charge sheet being defective. The Appellant although not framed as a ground of appeal has submitted that the charge sheet herein is defective as the offence as framed in Count one reads "subsection 8 (1) (3)" being a non-existence provision of the Sexual Offence Act and such the trial Court ought to have acquitted him.
41. I have myself carefully examined the charge sheet which states the offence and the section of the law under which the Appellant was charged. The only issue with the charge is that it does not clearly state that the offence committed was contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 but instead states as read with Section 8 (1) (3). This omission however does not make the charge sheet defective for the reason that the particulars give the date and the place where the alleged offence took place. The particulars also give the name of the Appellant as well as the name and age of the complainant. It cannot therefore be said that the charge sheet was defective. In any event even if there was such a defect, like the one pointed out earlier, the same is curable by dint of the provisions of Section 382 of the Criminal Procedure Code, Cap 75 of the laws of Kenya. It is also worth noting that the Appellant did not raise this complaint during the trial.
42. The court recognises that the circumstances surrounding individual offences can vary greatly, and that is so even before one comes to consider the circumstances of the individual offender. While a consistency of approach to sentencing is highly desirable, it is not to be expected that there will be a uniformity in terms of the actual sentences that are imposed. There are just too many variables in terms of circumstances of individual offences, but even more so in the circumstances of individual's offenders, for that to happen. Again the court recognises that there is no clear blue water between the ranges. Often the most that can be said is that an offence falls in the upper mid-range/lower higher range. In many cases whether an offence is to be labelled as being at the high end of the mid-range or at the low end of the high range for an offence is often a fine call. The judge's legitimate margin of appreciation may well straddle both. In that event, how is labelled may in fact not impact greatly on the sentence that will ultimately be imposed.
43. The *Sexual offences Act* the letter and the Spirit on Sentencing is to provide effective deterrence for both the convicts and those out there having the itch to go after the young children of Kenya to commit offence prescribed in the Act. That is certainly the objective and design by the legislature for the court to carry out and impose sentences against those found culpable. In the case of R vs Radich 1954 NZ LR 56 deterrence is stated to achieve the following. " One of the main purpose of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them, they will meet with severe punishment. In all civilised countries all ages. That has been the main punishment and it still continues so. "
44. The Appellant was sentenced to 20 years imprisonment. The complainant was 12 years old at the time when the offence was committed. Her certificate of birth shows that she was born on 13/11/2007. In the circumstances, I find that the sentence imposed was merited.



45. The upshot of the foregoing is that the appeal on both conviction and sentence is hereby dismissed in its entirety.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11TH DAY OF APRIL 2024.**

**In the Presence of**

**Mr. Mugun for the State**

**Appellant**

.....

**R. NYAKUNDI**

**JUDGE**

