



**Domokwang alias Cheptioma v Republic (Criminal Appeal
E002 of 2024) [2024] KEHC 8372 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E002 OF 2024
RB NGETICH, J
JULY 8, 2024**

BETWEEN

LORANGI DOMOKWANG ALIAS CHEPTIOMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both the conviction and sentence from the Judgment delivered on the 19th day of December, 2023 by Hon. E. Mulochi (SRM) _____ in Kabarnet Magistrate's court Criminal Case S.O No. E004 of 2022)

JUDGMENT

1. The Appellant was charged with 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 were that the accused on the 11th day of September, 2022 at (Particulars withheld) Location, (Particulars withheld) village in Tiaty West Sub- County within Baringo County intentionally caused his penis to penetrate the vagina of K.L a child aged 9 years.
2. The accused faced an alternative count of committing an 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 accused on the 11th day of September, 2022 at (Particulars withheld) Location, (Particulars withheld) village in Tiaty West Sub- County within Baringo County intentionally caused his genital organ to come into contact with the genital organ (vagina) of a female juvenile named K.L aged 9 years.
3. The accused denied all the charges and the matter was set down for full trial with the prosecution calling 4 witnesses. The trial court found that the appellant had a case to answer and was placed on his defence. Upon considering prosecution and defence evidence, the trial court found the appellant guilty and convicted him for the offence herein and on 8th January, 2024, he was sentenced to serve life imprisonment.



4. Dissatisfied with the conviction and the sentence of the trial court, the Appellant filed a petition of appeal on the following grounds:-
 - i. That the trial court erred both in law and facts by relying on uncorroborated and contradictory evidence of the prosecution witnesses.
 - ii. That the trial court erred in both law and facts by failing to infer that the investigations were not conducted to the required standard.
 - iii. That trial court erred in both law and facts when he relied on the prosecution's case that was not proven to the required standard of law but shifted the burden of proof to the accused.
 - iv. That trial magistrate erred in law and facts by convicting the Appellant herein without appreciating that the medical findings were not conclusive and supportive for the charge of defilement.
 - v. That the Appellant's alibi defence was dismissed by the trial court without any cogent cause.
 - vi. That the trial magistrate erred in both law and facts by failing to consider the Appellant's defence and that the trial magistrate imposed a harsh and excessive sentence.
5. The Appellant prays for the total success of this appeal, conviction quashed, sentence set aside and he be set at liberty.
6. The appeal proceeded by way of both written and oral submissions.

Appellant's Submissions

7. The appellant prayed for re-trial of the case. He stated that he has a case against the complainant's father. He stated that he was selling livestock with him and he gave complainant's father Kshs.60,000/= which he did not return to him and that the charge was framed against him because he was demanding the money. He sought for a re-trial stating that he is not satisfied with the conviction and that his witnesses were not allowed to testify.

Respondent's Submissions

8. The Prosecution counsel Ms. Ratemo submitted orally on behalf of the state. She submitted that the prosecution was required to prove penetration, identification and age of the child. On penetration, she submitted that there was evidence adduced to confirm penetration. She submitted that the victim testified and gave detailed description of what transpired as shown on the record of appeal. That she said the Appellant grabbed her legs, removed her clothes and proceeded to remove her black inner pant, pressed her on the ground and inserted his private part in her private part and blood oozed from her privates and upon being taken to hospital, she was admitted for one and half weeks; and the complainant identified her blood-stained pant in court and cotton bandage which was used to prevent bleeding prior to being taken to hospital.
9. She submitted that the complainant was treated and examined by PW5 who confirmed that there was penetration and produced a P3 Form, post rape care form and treatment notes as exhibits.
10. On the issue of age, she submitted that the age apparent indicated on the treatment notes and P3 Form indicated that the child was 9 years old. She submitted that birth certificate was not produced but age assessment was done and the age assessment report indicated that the child was 10 years old. She submitted that the court of appeal decided that the age also means age apparent which could be proved by age indicated in the P3 Form as held in the case of *Evans Wamalwa Simiyu vs Republic* [2019] eKLR



where the court relied on age indicated on the P3 Form to be apparent age and submitted that even with the absence of the birth certificate, the P3 Form sufficiently showed the age of the child.

11. On the issue of the identification, she submitted that the victim indicated that the incident occurred at around 4 p.m which means there was sufficient lighting for her to identify her assailant and she identified him as C and said C is a son of T. That the appellant being the son of T was not disputed during the trial and the complainant also identified the accused in court as the assailant. That the complainant said she knew C meaning hyena in the village. She submitted that the assailant was positively identified by the complainant and the prosecution proved the three ingredients of defilement.
12. On argument that the accused's defence was not considered, she submitted that the trial court considered his defence at paragraph 38 to 51 of the judgement and as shown at paragraph 68, the court dismissed his defence.
13. In respect to sentence, the prosecution counsel submitted that the appellant was sentenced to serve life imprisonment which is the minimum sentence provided in the sexual offences Act but in view of the recent court of Appeal decision, the state will not object to the Appellant being given a determinate sentence and urged this court to consider the age of the child, the seriousness of the offence and the trauma the victim is likely to suffer for the rest of her life and prayed for determinate sentence to deter other people from defiling young children. She proposed a sentence of 40 years imprisonment to be substituted with life imprisonment; and submitted that the appeal is not merited and it be dismissed.

Analysis And Determination

14. This being the first appellate court, I am required to re-analyze and re-evaluate afresh all the evidence adduced before the trial court. This I do while minded of the fact that unlike the trial court, I did not get the benefit of taking evidence first hand and observe the demeanor of witnesses. The principles that guide first appellate court were well stated in the case of *Okeno vs. Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court 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) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 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 finding and conclusion; 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 vs. Sunday Post* [1958] E.A 424.”

15. In view of the above, I have considered evidence adduced before the trial court and find that issues for determination are as follows: -
 - i. Whether the ingredients for the offence of defilement were proved beyond reasonable doubt.
 - ii. Whether the sentence imposed was harsh and excessive.



(i) Whether the ingredients for the offence of defilement were proved beyond reasonable doubt

16. 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

17. 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.”

18. 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.
19. The complainant herein who testified as pw1 testified that at around 4 p.m she was herding goats when the appellant whom she called C arrived and beat her using a stick then he grabbed her legs, pulled her clothes, removed her black inner pant then threw her down on the ground, pressed her and had carnal knowledge of her. She said that blood oozed from her private parts. She said he continued defiling her as she screamed. She went home after the appellant left her and her sisters C and C arrived home and saw blood on her clothes. They inquired from her what had happened and she narrated to them was transpired.
20. The complainant said they went to a neighbor Tondongole’s house where a medical officer one stan was called who gave her medication by injecting her and they she spent the night at home. The following day, she proceeded to Chemolingot and to a dispensary called Kolowa where she was treated and from there they went to Chemolingot hospital where she stayed for one and half weeks receiving medication. She stated that she knew C before and that he is called C D. That D is his father’s name. Record show she positively identified the appellant in court by pointing at him.
21. Pw5 Fredrick Kiplagat Cheboi a Clinical Officer at chemolingot confirmed that the complainant L aged 9 years visited their facility on 12th September,2022 after being seen at Kolowa Health Centre. Upon examining the complainant, he found that she had been defiled. He produced P3 Form dated 13th September,2022, treatment notes and post rape care form dated 13th September,2022 as exhibits.
22. Record show that the victim was candid on how the appellant defiled her. Based on the evidence of the victim, the evidence of PW1 and PW5 there is no doubt that penetration was proved.

(b) Proof of age

23. 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.”

24. Birth certificate was not produced in court but estimated age of the complainant as per P3 Form is 9 years. The court directed that the complainant be escorted to hospital for age assessment on 14/9/2022. Her age was assessed at 10 years. The age assessment done on 26th September 2022 confirmed the complaint's age as 10 years and the ingredient of age was therefore proved beyond reasonable doubt.

(c) Identification of assailant

25. The complainant stated that she knew the accused's person before the incident whom she referred as C D. The incident occurred at 4p.m. and the complainant having known the appellant before, she was able to recognize him as she took time to remove her clothes and defile her. There is there for no doubt on identification of the appellant as being the person who defiled the appellant.
26. On whether appellant's defence was considered, the proceedings confirm that the trial court considered appellant's defence and concluded that it did not shake the prosecution's evidence. From the foregoing, I find that the 3 ingredients for the offence of defilement were proved beyond reasonable doubt.

(ii) Whether sentence imposed was harsh and excessive

27. 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.”

28. In this case, the offence in which the Appellant was convicted of 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 penalty is life imprisonment. The Appellant is now serving the sentence of life imprisonment, which he is challenging on ground that it is excessive.
29. I take note of the fact that in the case of Malindi Court of Appeal Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso Versus Republic the court of appeal declared life imprisonment unconstitutional.
30. In view of the above, I find that the appellant should benefit form change in jurisprudence to have the life sentence imposed against him set aside and determinate sentence imposed.
31. Having considered the circumstances surrounding the offence herein, the age of the child estimated at 9 to 10 years, I am inclined to impose 30 years imprisonment.

32. Final Orders: -

1. Appeal on conviction is dismissed.



2. Life imprisonment sentence set aside.
3. Appellant sentenced to 30 years imprisonment.
4. Period served by the appellant in remand and in prison from the date of arrest to be computed in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 8TH DAY OF JULY 2024.

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RACHEL NGETICH

JUDGE

In the presence of:

CA Elvis.

Appellant present.

Ms. Ratemo for State.

