



REPUBLIC OF KENYA



**Kurgat v Republic (Criminal Appeal E044 of 2023)
[2024] KEHC 9160 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E044 OF 2023**

JR KARANJA, J

JULY 23, 2024

BETWEEN

HILLARY KIMUTAI KURGAT APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment, Conviction and Sentence of
Hon. I. Kabuteh (RM) in the Senior Principal Magistrate's Court
at Kapsabet Magistrates Sexual Offences Case No. E060 of 2022)*

JUDGMENT

1. The Appellant, Hillary Kimutai Kurgat, appeared before the Resident Magistrate at Kapsabet charged with defilement, Contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*, in that on the October 15, 2021 at [particulars withheld], Nandi County he defiled a girl aged eleven (11) years known as SJ or in the alternative he committed an indecent act with the said child, contrary to Section 11(1) of the *Sexual Offences Act*.
2. After a full trial, the Appellant was convicted and sentenced to thirty five (35) years imprisonment on the main count. He was dissatisfied with the conviction and sentence and preferred the present appeal on the basis of the ground set out in the petition of appeal dated August 3, 2023 and filed herein on his behalf by Kipkosgei Choge and Company Advocates.
3. Basically, the Appellant complains that he was convicted on the basis of prosecution evidence which was insufficient and did not establish the ingredients of the offence against him. He also complains that the trial court shifted the burden of proof to himself and also imposed a sentence which was excessive in the circumstances.

The Appellant therefore prayed for quashing of the conviction and setting aside of the sentence for him to be set free forthwith.



4. The Respondent/ State opposed the appeal which proceeded to hearing by way of written submissions with the Learned Defence Counsel, Mr. Choge appearing for the appellant and the Learned Prosecution Counsel, Ms. Oduor appearing for the Respondent.

Having considered the appeal on the basis of the supporting grounds and the rival submissions the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witness (See, *Okeno vs. Republic* (1972) EA 32).

5. In that regard, the prosecution case was briefly that the child Complainant (PW1) was on the material date sent by her grandmother to drive some cows into the Appellant's place for milking. Thereafter, the Appellant sent away another child who was in the company of the Complainant and remained with the Complainant. It was then that he (Appellant) took her (Complainant) into his house and defiled her. She knew the Appellant as her grandmother's neighbour.
6. The incident was brought to the attention of EC (PW2) who enquired from the Complainant as to what had happened. The Complainant then confirmed that she had been sexually assaulted by the Appellant and was in the process threatened by him.
7. After the matter was reported to the Police, PC Frankline Koome (PW5), referred the Complaint to Kapsabet County Referral Hospital where she was examined by a Clinical Officer, Lucy Chelangat Boritor (PW4) who compiled and signed the necessary Medical Examination Report (P3 form) indicating that the Complainant was indeed defiled. Another Clinical Officer, Danson Gichangi (PW3), examined the Complainant and assessed her age as being less than twelve (12) years. He also examined the Appellant and compiled the necessary Medical Examination Report.
8. On completion of police investigations the Appellant was charged with the present offence and in his defence, he denied the charge and contended that he was at his home on the material date when he took cows to graze and did not at all meet the Complainant who lived with her grandmother. He further contended that he did not defile the Complainant.
9. The offence of defilement is complete when a person commits an act which causes penetration with a child (See, Section 8(1) of the *Sexual Offences Act*.)

And, a person who commits an offence of defilement with a child aged eleven (11) years or less shall upon conviction be sentenced to imprisonment for life.

From the evidence herein, the commission of the offence against the Complainant (PW1) was not disputed and was in any event established and proved by the Complainant's own unsworn evidence as corroborated by that of the Clinical Officer (PW4).

10. The fact that the Complainant was at the material time below the age of twelve (12) years was also not disputed and was indeed established by the age assessment report produced by the Clinical Officer (PW3) as P. Exhibit 2.

Basically, the issue which presented itself for determination was whether the Appellant was identified and/or recognized as the person who defiled the Complainant.

11. In that regard, the Complainant's evidence stood on its own. She implicated the Appellant and indicated that he was not a stranger to her, but a neighbour to her grandmother. Emily (PW2) indicated that the Appellant was actually related to the Complainant. She (PW2) stated that the Appellant was a cousin of the Complainant's father.
12. The trial court believed the Complainant's evidence of identification against the Appellant and found it to be credible in as much as the Appellant was a person known to the Complainant.



This court cannot therefore interfere with findings of the trial court based on the credibility of a witness especially in Sexual Offences regard being given to the proviso in Section 124 of the Evidence Act to wit: -

“.....provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

13. This court, having reconsidered the Complainant’s evidence would hold that she spoke the truth. There was nothing in the entire evidence availed by both the prosecution and the defence which raised any suspicion that she may have lied against the Appellant or that she had reasons to lie against the Appellant.
14. Thus, the Appellant’s defence that he did not defile the Complainant was shattered and disproved by the Complainant’s credible evidence which had the effect of placing him directly at the scene of the offence on the material date and time in as much as he was clearly recognized by the Complainant.
15. This court finds and hold that the Appellant’s conviction by the trial court was safe and sound and is hereby upheld with the result that grounds one(1) to six(6) of the appeal are accordingly overruled and dismissed and so are the Appellants’ submissions in respect thereto.
16. The Appellant’s submission that he was denied the right to cross-examine the Complainant, is not demonstrated in the record. Nowhere in the record is it shown that the Appellant through his counsel on record requested to cross-examine the Complainant and the request was turned down by the trial court. It is not unusual for a party to reserve his right to cross-examine a witness.
17. Section 150 of the Criminal Procedure Code, which was relied upon by the Appellant would not apply in the circumstances of this case as it provides for witnesses who are summoned by the court to testify or re-called to testify. Section 208 of the CrimInal Penal Code which was also relied upon by the appellant clearly indicates that the right to put questions to a witness by way of cross-examination is not mandatory such that a party may opt not to examine a witness.
18. On the question of sentence i.e grounds seven (7) of the appeal, the appellant complains that the sentence of thirty five (35) years imprisonment imposed by the trial court was excessive.
However, the sentence was lawful and was below the prescribed sentence of life imprisonment which is a mandatory sentence and which was not adhered to by the trial court perhaps due to recent jurisprudence on the constitutionally of such sentences.
19. The trial court did not therefore have to impose the prescribed life imprisonment sentence but settled for a lesser sentence of thirty five (35) years imprisonment, but considering that the Appellant was a first offender the sentence, in the opinion of this court, ought to have been much lower in the circumstances of this case. In that regard, the Appellant’s complaint that the sentence was excessive is valid. Consequently, the sentence of thirty five (35) years imprisonment is hereby set aside and substituted for a sentence of fifteen (15) years imprisonment.
20. Other than the alteration in the sentence, the appeal is largely devoid of merit and is hereby dismissed.

DELIVERED AND DATED THIS 23RD DAY OF JULY 2024

J. R. KARANJAH,

JUDGE

