



REPUBLIC OF KENYA



**Korir v Republic (Criminal Appeal E026 of 2023)
[2024] KEHC 8170 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E026 OF 2023
AC MRIMA, J
JULY 5, 2024**

BETWEEN

PAUL KIPLIMO KORIR APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C. M. Kesse (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 167 of 2018 delivered on 23/3/2023))

JUDGMENT

1. The Appellant herein, Paul Kiplimo Korir, was charged with the offence of Defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 27th day of September 2018 at [particulars withheld], intentionally caused his penis to penetrate the vagina of S.J.T., a child aged 14 years old.
2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched the vagina of S.J.T., a child aged 14 years old.
3. The Appellant denied all the charges and he was tried. The Appellant was represented by Counsel.
4. After a full trial, the Appellant was found guilty of Defilement and was convicted accordingly. He was then sentenced to 10 years imprisonment.

The Appeal:

5. The Appellant being aggrieved by the conviction and sentence subsequently lodged an appeal.



6. In his Petition of Appeal through Counsel, the following grounds of appeal were cited: -
- i. That the Learned Trial Magistrate erred in Law and fact in finding that the prosecution had proved its case beyond reasonable doubt yet there were a lot of doubts and contradictions on the evidence on record, thus amounting to miscarriage of justice.
 - ii. That the Learned Trial magistrate erred in law and fact when she heavily relied on evidence that did not support the charge and or extraneous facts to convict the appellant instead of analyzing the entire evidence on record as required by law.
 - iii. That the Learned Trial Magistrate erred in law and fact by convicting the appellant yet the clinical officer's evidence and findings did not support the charge facing the accused then (appellant).
 - iv. That the Learned Trail Magistrate erred in law and fact in convicting the appellant yet the evidence did not tally with charge.
 - v. That the Learned Trail Magistrate failed to appreciate that the relationship between the appellant's family, the village elder (Isaac Keter) Nyumba Kumi (Nelson Chirchir) and one Jane was soar.
 - vi. That the learned Trial Magistrate erred in law and fact in convicting the appellant yet the persons who falsely pressurized the arrest and charging of the appellant did not record statements and come to court to give evidence.
 - vii. That the Learned Trail Magistrate erred in law and fact in convicting the appellant yet the investigation officer failed to come to court and give evidence and as such no investigations and hence was fatal to the prosecution's case.
 - viii. That the Learned trial Magistrate erred in law and fact in convicting the appellant yet the clinical officer confirmed that the bruises on the minor's private part might have been caused by friction during the time of playing games.
 - ix. That the trial magistrate erred in law and fact by failing to appreciate that the Aps (administration police officers) who received first-hand information and also father of the minor did not record statements and come to court to give evidence.
 - x. That the Learned trial magistrate failed to appreciate that the age of the minor was not proved as required by law.
 - xi. That the Learned trial magistrate failed to appreciate that the offence facing the appellant (accused then) was a frame up.
 - xii. That the Learned trial Magistrate erred in law and fact by relying on extraneous facts to convict the appellant instead of analyzing the entire evidence on record as required by law.
 - xiii. That the Learned trial Magistrate erred in law and fact when she shifted the burden of proof to the appellant contrary to law.



- xiv. That the findings of the Learned trial Magistrate were biased, one sided and against the weight of the available evidence on record.
6. In his written submissions, the Appellant expounded on the above grounds.
 7. The Prosecution opposed the appeal through written submissions dated 6th September 2023.
 8. The Respondent relied on several decisions in urging the dismissal of the appeal.

Analysis:

9. This Court has considered the appeal and submissions by both parties. It has also read the record of the trial Court and the impugned judgment.
10. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
11. Having carefully perused the record, this Court is now called upon to determine whether the offence of defilement was committed, and if so, whether by the Appellant.
12. It is established by law and settled judicial precedents that the offence of defilement carries three components. They are the age of the victim, penetration and identification of the assailant.
13. Suffice to state that the prosecution called five witnesses in proof of its case. They were the complainant who testified as PW1. There was also PW2 and PW3 were the complainant's school mates and who walked together home on the day the ordeal befell PW1. PW4 was the complainant's mother was a Clinical Officer who examined and treated PW1.
14. At the close of the prosecution's case, the Appellant was placed on his defence. He gave unsworn defence and called no witness.
15. This Court will now deal with each of the issues in turn.

Age of the victim:

16. The age of a person may be proved in many ways. It may be by way of medical evidence or any official documentation for instance Certificate of Birth, Child Health and Nutrition Card, School registration documents, among others. The age may also be proved by evidence of the parents or persons who may positively testify to the fact.
17. In this case, the complainant herself testified that she was 14 years old having been born in 2004 and that she was a Class 6 pupil at Kondabilet Primary School. She also produced her Child Health and Nutrition Card. The said evidence was corroborated by the complainant's mother, PW4. Further, all the medical documents on record vouched PW1's age as 14 years old.
18. Going by the evidence of the foregoing evidence, this Court is satisfied that the complainant was aged 14 years old at the time of the alleged ordeal and that she was a child within the meaning ascribed to the term under the Children's Act.



Penetration

19. Section 2(1) of the [Sexual Offences Act](#) defines “penetration” to mean “the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
20. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

.... Many times, the attacker does not fully complete the 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.... (emphasis added).
21. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

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.
22. The Appellant herein vehemently argued that the prosecution failed to establish penetration.
23. The issue of penetration was testified to by three witnesses. They are the complainant, PW4 and PW5.
24. In the evidence, the complainant narrated how she was confronted by the Appellant on her way home with PW2 and PW3. That, she was pulled inside a bush, undressed, laid on the ground and her vagina was inserted with the Appellant’s penis. That, the villain escaped as she bled. She, nevertheless, managed to walk home where she took shower three times, but the blood still streamed from her vagina.
25. PW4 later examined PW1. She also saw blood oozing from her vagina. They spent the night at home until the following morning when PW4 reported the matter to the Area Chief and the police. PW4 would later take PW1 to hospital.
26. It is also on record that PW1 was taken to Kondabilet Dispensary on 26th September 2018. That was 2 days post the alleged sexual attack. PW1 was then referred to Kapcherop Sub-County Hospital when the matter was reported to the police. She was attended to at the Hospital on 28th September, 2018 where a P3 Form was also filled by PW5.
27. PW5 testified that on examination, he found that PW1’s vagina had bruises and that the hymen was broken, although it was not fresh. PW5 confirmed that PW’s vagina was penetrated by a male penile organ.
28. In view of the evidence of PW1 and what PW4 narrated coupled with the evidence of PW5, there is no doubt that there was penetration in this case.

Identity of the perpetrator:

29. The identification of a perpetrator remains the most critical aspect in criminal cases. Whereas an offence may truly have been committed, it is a cardinal principle in law that the identity of the assailant must be firmly established more so to eradicate instances where innocent persons are convicted and sentenced thereby ending up serving sentences for offences they never committed. As Lord Denning once said, it is better to acquit 10 guilty persons than to convict one innocent person. That is the gravity of identification.



30. The identification aspect in this matter was attested to by the complainant. The Complainant testified that in the evening of 24th September, 2018 at around 6:00pm, she was on her way from school to her home. She walked with PW2 and PW3 who were her fellow school mates. As they walked on a road that passed through some bushes, the Appellant appeared. They all knew him as their neighbour who herded cows. They also saw the cows around the place.
31. Suddenly, the Appellant grabbed the complainant's hand as he threatened PW2 and PW3 who had to run away for their lives. The Appellant pulled the complainant into the bush. He undressed her, fell her on the ground, he also undressed and inserted his penis into the complainant's vagina.
32. The complainant felt excoriating pain. The Appellant then ran away leaving her behind. She was bleeding from her vagina. The complainant, however, managed to walk to her home and found her mother, PW4, away. She took bath three times hoping that the bleeding would stop, but in vain.
33. When PW4 returned home, PW1 readily informed her of what had happened. She also disclosed that it was the Appellant who had her carnal knowledge.
34. The complainant's testimony was corroborated by PW2 and PW3 to the extent that it was the Appellant who grabbed the complainant's hand and threatened them away. PW2 and PW3 also knew the Appellant well.
35. The complainant, PW2 and PW3 testified that by the time they met the Appellant, it was yet to be dark and they were able to see him clearly. None was mistaken on who the attacker was.
36. After the close of the prosecution's case, the trial Court found that the Appellant had a case to answer and was placed on his defence.
37. In his unsworn defence, the Appellant testified on how he was arrested on 27th September 2018. He also stated that he was framed by one Jane and Isaac due to a grudge over some money. He asserted that when he was taken to hospital and examined, there was nothing that connected him with the alleged offence. He denied committing any of the offences and prayed that he be acquitted.
38. Evidence by a single witness must be treated carefully and cautiously. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said: -

.... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

39. The evidence by the single witness ordinarily calls for corroboration as so provided under Section 124 of the *Evidence Act*, Cap. 80 of the Laws of Kenya save for the evidence of a victim in sexual offences.



40. Notwithstanding the foregoing legal position, in this case the evidence of PW2 and PW3 materially corroborated that of the complainant to the extent that they witnessed the Appellant grabbing the complainant and pulling her inside the bushes as he threatened them to flee.
41. This Court has also considered the Appellant's defence. It only centered on the manner he was arrested. Further, nothing of essence came out of the alleged grudge between the Appellant, Jane and Isaac as to outweigh the evidence of PW1, PW2 and PW3.
42. Given the nature of the charges against the Appellant, the defence does not aid the Appellant in any manner whatsoever. It is for rejection as rightly so found by the trial Court.
43. The argument that some potential witnesses, including the investigating officer in the case, were not called does not hold in this matter. The prosecution has a discretion to call witnesses. (Section 143 of the *Evidence Act*). It is only in instances where crucial witnesses are not called, no plausible explanation is given and there are resultant glaring gaps which could not be remedied, when a Court may raise a red flag. (See *Bukenya & Others versus Uganda (1972) E.A. 594*, *Kingi versus Republic (1972) E.A. 280* and *Nguku versus Republic (1985) KLR 412*).
44. However, in this case, the witnesses called were sufficient to prove the offence.
45. The trial Court believed the witnesses as truthful. There is nothing on record for this Court to review that finding. In sum, the evidence affirms the position that the identification of the Appellant as the assailant was not in error.
46. The Appellant also argued that there were contradictions on the evidence on record that led to miscarriage of justice.
47. This Court agrees with the holding in *Twehangane Alfred v Uganda*, that it is not every contradiction that warrants rejection of evidence. The Court stated thus: -

.... 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.
48. In *MTG v Republic [Criminal Appeal No. E067 of 2021]* the Court cited with approval the case of *Uganda v Rutaro* which held that inconsistencies would usually not necessarily result in the evidence of a witness being rejected.
49. The Court has gone through the evidence and did not come across any pronounced contradictions. As this Court has stated in many decisions, minor contradictions are inevitable in a trial. Contradictions that may vitiate a conviction are those that lead to miscarriage of justice. Such are not part of the record in this case.
50. Therefore, the totality of the evidence in this case affirms the position that the Appellant was properly placed as the assailant. He was the one who had carnal knowledge of the complainant, then a minor. As such, the Appellant was rightly found guilty and properly convicted. The appeal against the conviction is, hence, dismissed.

Sentence:

51. The Appellant was sentenced to 10 years imprisonment. The Appellant tendered mitigations and were duly considered by the sentencing Court.



52. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
53. There is no doubt the offence committed by the Appellant was serious and indeed inhumane. It was also committed against an innocent child. There is nothing placed before this Court to the effect that sentencing Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. In fact, the Appellant was favoured with a very lenient sentence in the circumstances of this case.
54. The sentence is lawful. As a result, the appeal on sentence equally fails and is hereby dismissed.

Disposition:

55. As I come to the end of this ruling, I wish to tender my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by pressure of work in the High Court at Kitale and Kapenguria and my appointment into a Presidential Tribunal investigating the conduct of a Judge. Apologies galore.
56. Drawing from the above considerations, the appeal is wholly unsuccessful and is hereby dismissed. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 5TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Chebii

Learned Counsel for the Appellant.

Miss Kiptoo

Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke

– Court Assistants.

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