



**Nchochorio v Republic (Criminal Appeal E053 of 2023)
[2024] KEHC 17062 (KLR) (5 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 17062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E053 OF 2023
RPV WENDOH, J
JULY 5, 2024**

BETWEEN

FRANCIS NCHAMA NCHOCHORIO APPELLANT

AND

REPUBLIC RESPONDENT

*((From original conviction and sentence by Hon. M. Obiero – Senior Principal Magistrate in
Kehancha Senior Principal Magistrate’s Court S.O. No. E242 of 2022 delivered on 25/08/2023))*

JUDGMENT

1. Francis Nchama Nchochorio has filed this appeal against the judgment of the Senior Principal Magistrate, Kehancha, in which he was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. In the alternative, the appellant faced a charge of committing an incident Act with a child contrary Section 11 (1) of the *Sexual Offences Act*.
2. The particulars of the charge are that on diverse dates between 6th February, 2022 and 28th March, 2022 in Kuria East Sub County within Migori County, intentionally and unlawfully caused his penis to penetrate the vagina of C.R. a child aged 16 years old or intentionally touched the vagina of C.R.
3. The appellant denied the offence and the case proceeded to full hearing with the prosecution calling a total of five witnesses in support of their case namely PW1 complainant child C.R.; PW2 Allan Odhiambo a clinical officer at Kegonga Sub-County Hospital; PW3 Elizabeth Robi, the area Assistant Chief Sakuri Sub-location, PW4 PC Willy Sang, the Investigating Officer attached at Kegonga Police Station and lastly PW5, Margaret Boke the victim’s mother.
4. When placed on his defence, the appellant gave a sworn statement and did not call any witness.



5. Upon conviction, the appellant was sentenced to serve fifteen (15) years' imprisonment. He is aggrieved by both the conviction and sentence which has culminated in this appeal. The grounds of appeal filed in court on 29/08/2023 are as follows: -
 1. That the plea as taken was not unequivocal.
 2. That the trial magistrate misdirected himself when he failed to critically analyse the entire evidence and realize that the inconsistencies could not sustain a conviction.
 3. That the sentence meted is illegal in its entirety
6. The appellant therefore prays that the Appeal be allowed, conviction quashed, sentence set aside.
7. The Appeal was canvassed by way of written submissions. The appellant filed written submissions dated 18/08/2023 while the Prosecution counsel Ms. Tanui opposed the appeal through their submissions dated 14/11/2023.
8. This being a first appeal, this court is required to re-examine all the evidence tendered in the trial court, evaluate and analyse it, and arrive to its own conclusion. The court has to however make allowance for the fact that this court neither saw nor heard the witnesses testify, an opportunity which the trial court had. This court is guided by the decision of *Okeno vs. Republic* (1972) EA 32 where the Court of Appeal said: -

“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 v. R.*, [1957] 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 function 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*, [1958] E. A. 424.”
9. PW1, having been taken through the *voire dire*, she proceeded to give her testimony on oath. She told the court that she is 16 years born in the year 2006, a form II student at [Particulars Withheld] Secondary School. She produced her Birth Certificate as Pexh. 1. She stated that she knew the appellant, who was her boyfriend, having met him for the first time in the month of February 2022; that she left her home on 20.2.2022 and met the appellant, she spent the night at his house and had sex; she lived at the appellant's house for 2 weeks as husband and wife and they had sex on several occasions during that time; later her mother went to the appellant's home where they had been hiding accompanied by the police and they were arrested. She was then taken to the hospital and treated. She also stated that she did not want to go back home since she was married to the appellant.
10. PW2 who examined the victim stated that the hymen was torn but not freshly. She was not pregnant, she did not have any infections, there was evidence of penetration. He produced the Treatment Notes for the victim, P3 Form, PRC Form and the Treatment Notes for the appellant as Pexh. 1 – 4 respectively.
11. PW3, the Area Assistant Chief of Sakuri Sub Location stated that on 21.2.2022 the victim's parents reported the disappearance of their daughter and she asked them to report the same to the police station. They returned on 28.3.2022 and reported that their daughter had been married to the



- appellant. They then visited the appellant's homestead on the same day in the company of the police officer and found the appellant, his mother and the victim, they were arrested and appellant charged. She denied that the victim took herself to the appellant's home.
12. The investigating officer (PW4) stated that on 28.3.2022, the victim's mother reported of her missing daughter, and learnt that her daughter had been married by the appellant and they had lived together for about one month, They proceeded to the appellant's home accompanied by the Area Assistant Chief, PW3 and found the appellant, his mother and the victim hiding. He issued a P3 Form to the victim's mother and the victim was escorted to the hospital. He obtained the victim's birth certificate and confirmed that the victim was 16 years old, produced the birth certificate as Pexh. 5.
 13. PW5 the victim's mother stated that on 6.2.2022 at around 4.00pm, the complainant left home and did not go back. They later found out that she was at Chonchorio's home; when they went to look for her at the said home four times they were told that the girl was not at the home by both the appellant and his mother. She later reported the same to the police. The police and the area assistant chief accompanied them to the said home where they found the victim and the appellant hiding in the ceiling and they were then arrested. That at the time of the incident, the victim was 16 years old,
 14. The appellant denied committing the offence. It was his testimony that he met the victim for the first time on 6.2.2022. She went to their home but after a few days his mother took her back to her home; that the victim later returned to his home after one week and told him that she wanted to be married, he told her that he was not ready but that insisted and stayed at his home for 3 weeks. He maintained that during the said time he never had sex with the girl. On cross-examination he conceded that he had sex with the victim when she went to their home for the second time.
 15. Further to the grounds of the appeal, the appellant submitted that the trial court was not fair to critically observe that the whole temptations to engage in sex were caused by the complainant herself; particularly where she quoted in her testimony that "I am the one who approached the 2nd accused" at page 10 line 24 of the proceedings. He also submitted that at the time of the incident the complainant was 16 years while he was 19 years meaning that they were aemates. He thus urged the court to consider the incident as a consensual sex and allow the appeal, quash the conviction and set aside the sentence.
 16. In her submissions, Ms. Ikol - Esaba for the Prosecution submitted that the ingredients of the offence of defilement had been proved to the required standard. On whether penetration had been proved, it was her submission that the testimony of the victim was corroborated by PW2 who produced the PRC Form and the treatment notes and which clearly indicated that the hymen was torn but not freshly torn and further that there was evidence of penetration. She stated that the testimony of the victim was cogent and corroborated by that of PW2, thus penetration was sufficiently proved.
 17. On the age of the victim, it was counsel's submission that PW5 produced the victim's Birth Certificate which indicated that the victim was born in the year 2006 and she was 16 years at the time of the incident; (page 18 line 19.)
 18. Lastly, on identification of the assailant, Counsel submitted that the victim testified that the appellant was her boyfriend. It was also her testimony that the appellant had married her and that they were living as husband and wife and that they had sex on several occasions. She could therefore identify the appellant well. She thus maintained that the proof of identification of the perpetrator had been sufficiently proved.
 19. As to the allegation that it is the victim who approached and tempted the appellant to engage in sex, counsel she submitted that the appellant did not take any action to report to the authorities that the victim was at his home. Further, that even though the appellant was 19 years old at the time of the



incident, he was an adult and the victim was a minor, the close age difference between the two is immaterial. The victim could not legally consent to sex.

20. I have carefully considered the amended grounds of appeal, record of appeal and the rival submissions. This being an offence of defilement, the prosecution had the duty to prove beyond any reasonable doubt the following: -
1. Proof that the complainant was a minor;
 2. Proof of penetration;
 3. Proof of identification of the perpetrator.
21. See the case of Charles Wamukoya Karani vs Republic Criminal Appeal No. 72 of 2013.

Proof that the Complainant is a minor.

22. Rule 4 of the Sexual Offences Rules, 2014 provides that:-

When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar documents.”

23. PW1 stated that she was 16 years old at the time of the incident, PW5, her mother also stated that the victim was 16 years at the time of the offence. PW4 the Investigating Officer also confirmed that the victim was 16years old and produced the Birth Certificate as Pexh. 5 which showed that the victim was born on 22/3/2006 and was therefore a minor at the time of the incident.

24. In the case of Mwalango Chichoro Mwajembe vs. Republic Criminal Appeal No. 24 of 2015the Court of Appeal when dealing with the issue of proof of age said:-

The question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary 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.

25. In Fappyton Mutuku Ngui vs. Republic (2012) eKLR the court also said:-

that ‘conclusive’ proof of age in cases under the *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.”

26. In Francis omuroni vs. Uganda Criminal Appeal No. 2 of 2000, the Uganda Court added its voice when it said that age can be proved by inter alia, common sense.

27. I therefore find that the birth certificate produced as Pexh. 5 is a prima facie proof of the age of the victim, who was 16 years old at the time of the offence and hence a minor. Consequently, I find that age of the victim was sufficiently proved to the required standard.



Proof of penetration.

28. Penetration has been defined under section 2 of the [Sexual Offences Act](#) as Penetration is defined under Section 2 of the [Sexual Offences Act](#) as: -

The partial or complete insertion of the genital organs of a person into the genital organs of another person.” While, “genital organs” includes the whole or part of male or female genital organs and for purposes of this Act includes the anus.”

29. It was the testimony of PW1 that she moved into the appellant’s house sometimes on 20/2/2002 where they lived as husband and wife for about 3 weeks. During the said period, they had sexual intercourse on several occasions. PW2 corroborated this testimony because upon examination of PW1, he found that the hymen was torn but not freshly torn, he also confirmed that there was evidence of penetration and produced the treatment notes, P3 Form and the PRC Form as Pexh. 1, 2 and 3 respectively. Further, the appellant also confirmed during cross-examination that they had sex with PW1 when she went to his home for the second time. Though PW1 did not define sex, she told the court that they lived as husband and wife and hence must have engaged in penetrative sex as defined in Section 2 of the [Sexual Offences Act](#).
30. I therefore find that the testimony of PW1 was cogent and the same was corroborated by the testimony of PW2 and the appellant. There was sufficient proof of penetration.

Proof of Identification of the Perpetrator.

31. There is no dispute that the appellant was very well known to the victim. This fact was confirmed by PW1, PW3, PW4, PW5 and the appellant himself. PW1 testified that she first met the appellant in the month of February 2022 and they agreed to be in a relationship. She later left her home and moved into the appellant’s home they lived as husband and wife for 3 weeks. PW3, 4 and 5 in their testimonies stated that when they went to the appellant’s home on 28/3/2022, they found the appellant, his mother and the victim. In addition, it was the testimony of the appellant that he only had sex with the victim once when she visited his home for the second time and that PW1 had insisted on staying with him and getting married.
32. From the evidence tendered particularly by PW1 and the appellant, there is no doubt that the appellant was the perpetrator it is clear that they knew each other well, they had lived together for about 3 weeks as husband and wife. The same was sufficiently proved to the required threshold.
33. In the totality of the evidence, , the prosecution proved its case and satisfied the essential ingredients for the offence of defilement to the required standard of beyond reasonable doubt. The analysis of the evidence by the trial court was therefore sound and the subsequent conviction was safe.
34. I must state that even though the appellant submits that he was tempted by PW1 and that they were close in age at the time of the incident, the law is clear on the age of the consent. At 16 years of age, the victim was a minor and could not consent to sexual intercourse. The Appellant’s defence is therefore baseless and does not hold water and the same is disregarded.
35. For the above reasons, I find the conviction to be safe and I affirm it. As for the sentence, it is legal. However, in line with the court’s decision to move away from mandatory sentences, I hereby set aside the 15-year imprisonment and in exercise of this court’s discretion, I substitute the same with 10 years’ imprisonment. The Appeal only succeeds to that extent. Sentence to commence on 30/3/2022.

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



R. WENDOHO

JUDGE

In presence of; -

Ms. Ikol for the state

Appellant Present

Ms. Emma/ Phelix –Court Assistants

