



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kipchumba v Republic (Criminal Appeal E064 of 2022)  
[2023] KEHC 964 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CRIMINAL APPEAL E064 OF 2022  
JWW MONG'ARE, J  
FEBRUARY 16, 2023**

**BETWEEN**

**FREDRICK KIPCHUMBA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Conviction and Sentence of Hon. E. Kigen in Eldoret  
Chief Magistrates' Criminal Case No. 252 of 2019 delivered on 25th March 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*. The particulars of the offence were that on the 5<sup>th</sup> day of October, 2019 at an unknown time at [Particulars Withheld] village, Moiben sub-County within Uasin Gishu County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the vagina of JK, a child aged 8 years old.
2. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual offences Act*. The particulars of the offence were that on the 5th day of October, 2019 at an unknown time at [Particulars Withheld] village, Moiben sub-county within Uasin Gishu County, he intentionally touched the vagina of JK a child aged 8 years with his penis.
3. The Appellant pleaded not guilty and the matter proceeded to full trial. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial magistrate convicted the appellant of the main count and sentenced him to life imprisonment.
4. The Appellant being aggrieved with the sentence and conviction instituted this appeal vide a petition of appeal filed on March 31, 2022. The petition is premised on the following grounds;



1. That the trial magistrate grossly erred in law and in fact by convicting (me) based on hearsay, fabricated and far-fetched evidence.
2. That the trial magistrate greatly erred in law and in fact by convicting (me) without proper evaluation of (my) defence of *alibi* despite (my) defense witnesses shedding more light of (my) whereabouts on the material offence day and venue.
3. That the trial magistrate grossly misdirected himself on law and facts by convicting (me) based on the victim evidence especially PW1 thereby breaching section 124 of the *evidence act*.
4. That the trial magistrate grossly misdirected himself in law and facts by convicting (me) based on the evidence that grossly breached sections 35 and 36 of the *Sexual Offences Act* regarding subjecting the Appellant to a medical test.
5. That the trial magistrate grossly erred in law and in facts by convicting (me) without proper evaluation of the fact that there existed great grudge concerning default of payment of tuition money between the victim's mother and the Appellant.
6. That the trial magistrate grossly erred in law and facts by convicting (me) based on a single P3 form to address the degree of injury of two victims which is in contravention of the law.
7. That more grounds to be adduced at the hearing of this appeal after being furnished with law court proceedings.

The parties filed submissions on the appeal.

#### **Appellant's case**

5. The Appellant submitted that the voir dire examination of the minor did not meet all the requirements of the law and that the evidence of the complainant was not credible. He further stated that the investigating officer did not visit the crime scene to establish whether the window that the Appellant was alleged to have entered the house through had grills or was open to allow a grown person to pass through. He again stated that the clothes that the complainant was supposed to have worn were not brought to court as exhibits, weakening the prosecution's case against him. He maintained that the complainant was coached to testify against him and questioned why it took 17 days for the offence to be reported to the police.
6. The Appellant further argued that the charge sheet referred to a different date from the one the complainant testified to have been defiled and thus rendering the evidence contradictory and of no probative value. According to the appellant, the P3 forms, showed a contradiction in the dates and further the same failed to link him to the offence. It was his submissions further that the P3 form did not indicate the age of the injuries and also did not clearly state what type of a blunt object caused the injuries, if any.
7. To buttress his arguments and support his petition the Appellant relied on the decisions in Petition No. E017 of 2020 at Machakos High Court and Petition No. 97 of 2021 at Mombasa High Court on the issue of mandatory sentences. He urged the court to find that the evidence was contradictory and allow his appeal.

#### **Respondents' case**

8. Learned Prosecution Counsel for the Respondent opposed the appeal and submitted that the prosecution had proved its case beyond reasonable doubt. He submitted all the elements of defilement



being age of the complainant, proof of penetration and identification of the accused had been established through the evidence produced by the witnesses called by the prosecution. Counsel submitted that the element of age was proved by the testimony of PW1 and collaborated by the production of her birth certificate. Further, that the element of penetration was proved by the testimony of the complainant and corroborated by the evidence of PW3, the clinical officer who produced a medical report to establish the same. On identification, he submitted that evidence called supported the fact that he was a familiar person and that, according to the testimony of PW1, the Appellant used to work as a houseboy in the complainants' home which was corroborated by PW2. Identification was therefore established by recognition and counsel submitted that the same had been therefore proved to the required standard. He urged the court to find that the prosecution had proved its case to the required standard that of beyond reasonable doubt.

9. In responding to the appeal on sentence, learned prosecution counsel for the Respondent submitted that the trial magistrate meted out the most suitable sentence by law provided and urged the court to uphold it.

### **Analysis and determination**

The duty of an appellate court was set out in *Okeno v. Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala -V- R.* (1975) EA 57). 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.”

10. Upon considering the petition of appeal and the submissions of the parties, the following issues emerge for determination;
  1. Whether the prosecution proved its case to the required standard
  2. Whether the sentence was harsh and excessive.

### **Whether the prosecution proved its case to the required standard**

11. 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.

### **Age- was the victim/complainant a minor?**

12. The prosecution in order to prove that the complainant/victim was a minor adduced evidence to support the same. This was done through the production of the complainant's birth certificate in court as evidence that she was 8 years old at the time of the offence. Therefore, the element of age was proved.

### **Penetration**

13. Evidence tendered in court by the complainant was to the effect that the Appellant removed her clothes and did bad manners to her. Further, PW3, the doctor who examined the complainant, found that



there was penetration thus corroborating the testimony on penetration and hence this element to the offence was established.

### **Identification**

14. The Appellant was a person known to the complainant prior to the commission of the offence. Identification of the Appellant was therefore by way of recognition as he used to work in their home as a houseboy. The same was corroborated by the testimony of PW2, the mother to the complainant. This means that there was no additional evidence to establish the element of identification as required by law. I find that this ingredient was proved to the required standard.
15. In the premises, all the ingredients required being Age of the victim, penetration and a positive identification to prove the offence of defilement were proved beyond reasonable doubt.

### **Whether the sentence was harsh or excessive**

16. The sentence of the offence of defilement is provided under section 8 of the offences act is as follows;
  - (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
17. Recent developments of the law from emerging jurisprudence point to the fact that Courts have unfettered discretion to determine a sentence in Sexual offence cases where the law prescribes a mandatory sentence. In *Maingi & 5 others v Director of Public Prosecutions & another* Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) where G.V Odunga J (as he then was) stated as follows;

To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the Constitution. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences. (emphasis mine)

18. I have considered the circumstances of the case, the mitigation of the Appellant and the grounds of appeal and I find no reason to interfere the sentence. I find that the victim was a child of tender years and that she shall bear the scars and suffer from the acts of the Appellant for the rest of her life. However, in line with the provisions of Section 333(2) of the *Penal Code*, it is prudent to point out that the sentence so imposed on the Appellant must take into account any time spent in custody during the trial. The conviction and sentence are hereby upheld. The Appellant having been sentence to life imprisonment, I find no good reason to disturb the same and order that the sentence shall run from 6<sup>th</sup> November, 2019 in accordance with the provisions of section 333(2) of the *Criminal Procedure Code*. The appeal is hereby dismissed.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023**

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**J.W.W.MONGARE**

**JUDGE**

**Judgment delivered virtually in the presence of;**

1. Appellant is Present
2. Ms Anguria holding brief for Ms okok- Prosecution Counsel



3. Loyanae- Court Assistant.

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**J.W.W.MONGARE**

**JUDGE**

