



**Maritim alias Kaplelach v Republic (Criminal Case E026 of 2021)
[2023] KEHC 1244 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL CASE E026 OF 2021
AN ONGERI, J
FEBRUARY 16, 2023**

BETWEEN

JOSEPH KIPROP MARITIM ALIAS KAPLELACH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Original conviction and sentence of 30 years imprisonment
by Hon. E. W. Karani (SRM) in S.O. No. E044 of 2021 delivered on 29/10/2021)*

JUDGMENT

1. The Appellant was sentenced to 30 years imprisonment for the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) (SOA) No.3 of 2006.
2. The particulars of the offence were that on diverse dates between 15/5/2021 and 27/5/2021 in so in Sigowet sub-County within Kericho county, the Appellant unlawfully caused his penis to penetrate the vagina of DC a girl aged 10 years.
3. The prosecution evidence in summary was that the Complainant, a grade 2 pupil at [Particulars Withheld] Primary School was called by the appellant to his house by enticing her with sweets. While inside his house, he chased the other children, undressed her and defiled her.
4. The Complainant said she slept in the appellant's house until the following day when she saw her father standing outside the house.
5. The Appellant tried to run away but he was arrested and the Complainant was taken for treatment.
6. PW.5, - Nancy Wendot who examined the Complainant confirmed sexual activity.
7. The Appellant said in his defence that his family had a dispute with the Complainant's father and that is the reason he was charged.



8. The Trial Court found the appellant guilty as charged and sentence him to 30 years imprisonment.
9. The Appellant has appealed to this Court on the following grounds: -
 - i. That his constitutional rights under article 50(1) and (2) were violated.
 - ii. That penetration was not conclusively proven beyond any reasonable doubt.
 - iii. That the evidence adduced was circumstantial evidence as the doctor's evidence did not point out the accused's guilt.
 - iv. That there were inconsistencies and contradictions that casted reasonable doubts to the prosecution evidence.
 - v. That he preferred to go for a re-trial his constitutional rights having been violated making the hearing unfair.
10. The parties filed submissions as follows:-
11. The Appellant submitted that the trial magistrate conducted a trial that was not fair since he was not able to challenge the expert evidence effectively as the P3 Form was not given to him in good time. He cited Article 50(1) and (2) of *the Constitution* and the case of *Ndegwa v Republic* [1985] eKLR, Nakuru crim app 125 of 84
12. The Appellant submitted that he is dissatisfied by both the conviction and the sentence, that the circumstantial evidence was not proved beyond all reasonable doubt as the complainant did not present the actually clothes, she wore on the material day hence it amounted to hiding exhibit. He cited the case of *Joan Chebichii Sawe v Republic* [2003] eKLR, Nairobi Criminal Appeal 2 of 2002.
13. The Appellant further submitted that there existed contradictions that casted doubts in the matter as the P3 Form concluded that the main indicators of sexual activity, that is discharge and spermatozoa were absent.
14. The Respondent submitted that the element of the complainant being a minor was proved as the complainant who testified as PW1 stated that she was 10 years and her evidence was corroborated by that of PW2 who was her father when he produced in court the Age assessment report which proved beyond any reasonable doubt that the complainant was a minor aged 10 years at the time the offence was committed. It cited the case of *John Mutua Munyoki v Republic* [2017] eKLR, Nairobi Criminal Appeal 11 of 2016 and *Irene Atieno Ochieng v Republic* [2017] eKLR, Migori Criminal Appeal 8 of 2017.
15. The Respondent submitted that the issue of penetration was proved as the evidence of the complainant was corroborated by the evidence of PW5, the clinical officer, who, upon examination of the complainant concluded that it was scientifically evident that resent sexual activity had taken place after finding that there were numerous epithelial cells and that hymen was missing.
16. The Respondent further submitted that the evidence on the identity of the appellant as the perpetrator was overwhelming as the complainant herself testified that it was not the first time the Appellant was defiling her as he used to lure her with sweets and he was their neighbor at home and PW2 the complainant's father found the complainant locked inside the accused's house on the material day.
17. The Respondent submitted that it proved the offence of defilement beyond any reasonable doubt, the Appellant's grounds of appeal lacked merits and should be dismissed and conviction upheld.



18. This being a first appeal, the role of the first Appellate Court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to observe the witnesses.
19. The court of Appeal in *Solomon Mwangi Kinyua Versus Republic* (2006) eKLR, stated the duty of the first appellate court as follows: - “We reiterate that it is, indeed, the duty of the first appellate court to reconsider the evidence, evaluate it itself and draw its own conclusion in deciding whether the judgment of the trial court should be upheld.”
20. In *Gabriel Kamau Njoroge versus Republic* (1987) eKLR, the court of appeal stated as follows:- “As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”
21. The issues for determination in this case are whether the following elements were established.
 1. Penetration.
 2. Identity of the appellant.
 3. The age of the Complainant.
22. On the issue of penetration, *Sexual Offences Act*, Section 2(1) defines the same as follows: -

“the partial or complete insertion of the genital organs of a person into the genital organs of another person.”
23. The Court of Appeal in *Mark Oiruri Mose versus Republic* (2013) eKLR, stated as follows regarding what constitutes penetration: - “In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times, the attacker does not fully complete 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.”
24. The court in *Benjamin Liburu Matwi versus Republic* (2015) eKLR, stated as follows: - “It is significant to point out that penetration need not be complete for it to constitute the offence of defilement. According to Section 2 of the Act, partial penetration would also suffice to establish the offence of defilement.”
25. On the issue of identification of the Appellant, I find that the Complainant and her father (PW.2) knew him as Kaplelach. The Complainant was found in his house and I find that he was properly identified.
26. On the issue of the age of the complainant, I find that she was assessed by the clinical Officer Nancy Wendot who gave an age assessment Report stating she was 10 years.
27. I find that the children act defines a child as any human being below the age of 18 years.
28. I find that the conviction herein is secure and the sentence lawful.
29. I dismiss the appeal and uphold both the conviction and sentence.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF FEBRUARY, 2023.



A. N. ONGERI
JUDGE

