



**Korir v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 2222 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E010 OF 2022
SM MOHOCHI, J
MARCH 17, 2023**

BETWEEN

PAUL KIMTAI KORIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against conviction and sentence in CR. Case No.302 of 2016
delivered on 13.08.19 by Hon. Barasa at the SPM's Court, Eldoret.)*

JUDGMENT

Introduction

1. The appellant was convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No.3 of 2006.
2. Being dissatisfied with the decision of the trial Court he has preferred this instant appeal.
3. The Appeal is grounded on five (5) main grounds as is contained in the memorandum of appeal and supplementary memorandum of appeal as follows: -
 - i. That, learned trial magistrate erred in both law and facts by failing to hold that the charge sheet was fatally defective.
 - ii. That, learned trial magistrate erred in both law and facts by failing to hold that the evidence of identification and recognition was not conclusive.
 - iii. That, the learned trial magistrate erred in law and facts by shifting the burden of prove from the prosecution's backyard to the Appellant when the evidence failed to link him to the offence.



- iv. That, the learned trial magistrate erred in both law and facts by failing to observe that the witness evidence was inconsistent and uncorroborated.
- v. That, the trial magistrate failed to consider the unconstitutionality of the minimum-mandatory sentence; Provisions under section 8 of the [Sexual Offences Act](#) No.3 of 2006.

4. The Appellant and Respondent filed written submissions they both orally highlighted.

Appellants Case

5. Counsel Magut for the Appellant adopted the entire written submission and reduced is oral highlight to six (6) principal issues that I have further refined into four (4) issues as three issues are on inconsistencies;-

- i. Firstly, that the identification evidence by all witnesses was that the culprit was “Benard” which is not the Appellant’s name save for PW5 the investigating officer who referred to the Appellant as alias “Benard” without any qualification and despite identifying himself at the point of arrest including denying the name “Benard” he was still arrested, arraigned and charged.
- ii. Secondly that there were inconsistencies in the prosecutions case by three witnesses (PW1, PW2, PW3) who referred to the time of the commissioning of the offence as being 8pm, 10pm, and 10pm respectively, inconsistencies between PW1, PW2, PW4 and PW5 where PW1 claimed to have been accompanied by 4 people, PW2 claimed that she and her brother accompanied PW1, PW4 said he was with the Complainant and her sister while PW5 referred to 3persons, inconsistency between PW1, PW2 both of whom testified that they went to look for the Complainant at 10pm while PW4 testified of going back home at 10pm
- iii. Thirdly that the charge sheet referred to the Complainant’s name as “CK” while PW5 referred to the Complainant as Z
- iv. Fourthly that with regards to the arrest of the Appellant, no evidence was tendered of visiting the scene of crime, or place of arrest and that there was no identification parade conducted.
- v. On the Issue of fatality of the charge sheet The Appellant argues he was tried convicted and sentenced on the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the [Sexual Offences Act](#) while the evidence on age of the Complainant was twelve years which would fall under Section 8(3) of the act and that the same cannot be cured by section 389 of the criminal procedure code
- vi. The Appellant further submitted that he was sentenced on a mandatory minimum sentence that in his opinion was unconstitutional harsh and excessive and unjustified as the trial Court was deprived off its discretion to make its free analysis and determination based on the evidence and surrounding circumstances He Sought reliance of Odunga J. (as he then was in Maingi & 5 others v Director of Public Prosecutions & another. Petition No E017 of 2021 where the judge found the mandatory minimum sentences



under the sexual offences act to be offending judicial discretion. He sought support in the case of S VS Mchunu & Anor AR24/11 (2012) ZAKZPH 6 holding that excessive punishment serves neither the interest of justice nor those of society.

- vii. The Appellant further submitted that his fundamental rights have been infringed and that the Court should remedy the same by allowing the appeal, set aside the conviction and set him free.

Respondents Case

6. The Respondent argued in submissions that all the ingredients, being proof of age, proof of penetration and positive identification of the accused, of the offence were proved beyond reasonable doubt and relied on the Court of Appeal case Anjononi & others vs R (1976-1980) which drew a distinction between recognition and identification, stating that the issue of identification was never brought out by the Appellant in trial (cross examination), save for in defense as mistaken identity which it submitted was an afterthought on the part of the Appellant.
7. On the issue of the defect on the charge sheet, the Respondent conceded to an error framing the particulars to the charge and indicating that as at 23rd December, 2016 the Complainant was in fact 11 years and 5 months old hence still within the ambit of Section 8(2) of the Sexual Offences Act however the Respondent was of the view that the error was not fatal but curable by Section 382 of the Criminal Procedure Code, reliance was placed on the case of Obedi Kilonzo Kevo Vs R(2003) eKLR where the Court of Appeal held that it is not in all cases where a conviction based on a defective charge sheet would be rendered invalid unless miscarriage of justice and a great prejudice has been occasioned.
8. On the issue of harshness of sentence, the Respondent urged that the maximum sentence under Section 8(2) of the Sexual Offences Act is life imprisonment and that it is obnoxious for the Appellant to argue that the same was excessive and sought reliance on the case of Safari Ngao Vs R Cri. Appeal No5 of 2020 that held that upon conviction Court must pass the mandatory sentences that are prescribed by the law.
9. The Respondent Urged the Court to find the appeal to be without merit and dismiss it in its entirety.
10. This Court has a legal obligation to re-analyze, re-evaluate and assess the evidence adduced in the Lower Court so as to form its own conclusion(s) in line with the settled principles established in the case of Okeno vs Republic {1972} E.A, 32 at page 36 EA 424,

“An Appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the Appellant’s Court own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses.”

Trial Court Proceedings

11. To prove its case, the prosecution called five witnesses, namely, SC (PW1), Sabina Buses (PW2), Alfred Marusoi (PW3), FK (PW4) and P.C Wycliffe Obianga (PW5).



12. PW1, a minor aged fourteen years, testified that on the 23rd day of December 2016 she was at home but later decided to attend a circumcision ceremony at their neighbor's place. She was in the company of her brother, namely FK, her sister, SC, and her Aunt, namely, J. As they were going to the said ceremony, someone pulled her. She screamed and her sister and brother went back home and reported to her parents what had happened.
13. They came to look for her they did not find her. She went back home at 6.00am and when her mother asked her where she was from, she was afraid of telling her. She simply told her that someone pulled her on the way as they were going for the said circumcision ceremony. Her mother then told her father and when they asked her again about the incident, she told them that the accused is the one who pulled her and took her to his brother's kitchen where he defiled her and where she stayed until 6.00am. She told them that the accused removed her clothes and when she was about to scream, he told her he would kill her. She said that her mother beat her up and ordered her to tell her where she had been. When her mother told her father, they took her to Rurigi Police Station where she recorded a statement. She was later taken to Burnt Forest Hospital for examination and treatment.
14. PW2, the Complainant's mother produced in evidence Certificate of Birth which showed that the Complainant was born on 3rd July 2005. She testified that on the 23rd day of December 2016 at around 10.00pm, the Complainant and her brother went for a ceremony at their neighbor's place. Later the brother and the other children she had gone with came and reported that someone had pulled the Complainant away. They went back to the scene but they did not find her.
15. The following morning, she found that the Complainant had come back to her room. She asked her where she had gone but she kept quiet. She then slapped her and that is when she told her that the Appellant herein is the one who pulled her and took her to his place where he defiled her until 6.00am. She then asked her why she did not scream and she told her that the Appellant threatened to kill her. She also talked to the Complainant's brother who confirmed that the Appellant is actually the one who pulled the Complainant and went with her to his place. They then reported the matter at Rurigi Police station. The Complainant was subsequently escorted to Burnt Forest Hospital where she was examined and found to have been defiled. The Complainant was duly issued with a P3 Form which was filled at the said facility
16. PW3, a Clinical Officer working at Burnt Forest Hospital, testified that on the 24th day of December 2016, the minor herein was presented to their said facility at around 10.00pm with a history of having been defiled by someone known to her. She then carried out a physical examination on her. Her pant was blood stained and had both dry and fresh blood stains. She had bruises on both labias but there were no lacerations on the vaginal wall or cervix. There was bleeding on the vaginal orifix. Her hymen was broken. She then came up with the conclusion of possible penetration and referred her for urinalysis, pregnancy, VDRL and H.L.V tests after which she put her on medication.
17. All the said tests turned out to be negative. After examining her, she filled her P3 Form which document she produced in evidence before this Court along with an out-patient consultation card.
18. PW4, a minor aged 16 years, testified that on the 23rd day of December 2016 at about 10.00pm, he was walking to the venue of a certain ceremony with one S and the Complainant. They then met the Appellant who got hold the Complainant and pulled her. He then told them to go back home which they did. In the morning at around 6.00am, the Complainant arrived. They then asked her where she was and she told them she had been at the Appellant's place. He explained that they were almost at the venue of the ceremony they were going for when they met the Appellant. He saw him since there was electric light coming from the house where they were headed to.



19. PW5, a police officer attached to Tarakwa Police Station, is the one who investigated this case and preferred the present charge against the Appellant. She basically recorded witnesses' statements and issued a P3 Form to the Complainant. She is also the one who arrested the Appellant.
20. In his sworn statement of defense, the Appellant told the Court that he is a driver by training. He denied the allegations levied against him and told the Court that on 23rd November 2016 he was at home when police officers came at around 1.00pm and arrested him. They told him that they were looking for one Bernard but they still arrested him even after he showed them his National Identity Card which showed that his name was Paul Kimutai Korir. They took him to the Police station where he was locked up in the cell. He told the Court that he was a Christian and was married to one wife with who he has children. He said that he was not taken to hospital for any medical examination and neither was he subjected to an identification parade.

Issues for Determination

21. The Court has refined as issues for determination from the appeal canvassed as: -
 - i. Whether the charge sheet was fatally defective?
 - ii. Whether the conviction and sentence was safe and sound?

Analysis/Determination.

Whether the charge sheet was fatally defective.

The Law,

22. Section 8 (1) of The *Sexual Offences Act* under which the Appellant was principally charged provides: -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”
23. Section 8 (2) of The *Sexual Offences Act*, under which the alternative charge was brought provides: -

“A person who person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
24. The Court of Appeal in *Sigilani –vs- Republic* (2004) 2 KLR, 480 held as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence”.
25. On the same vein, Section 134 of the Criminal Procedure Code provides for what the components/ ingredients of the charge sheet constitute as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged”.



26. The Appellant was represented by counsel in the Trial Court and at no time did he raise the issues of defectiveness of the charge, the Concession by the Respondent on the converse clarifies the particularization that erroneously referred to the Complainant as being 12 years of age while she was not yet 12 but rather 11years and 5 months old.

27. The Court of Appeal in *Peter Ngure Mwangi v Republic* [2014] eKLR, held that: -

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *Yongo v R*, [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- (i) when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- (ii) when for such reason it does not accord with the evidence given at the trial.”

28. Section 382 of the Criminal Procedure Code provides as follows:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the Court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

29. The Court has considered the trial evidence, exhibit PMFI1 in the nature of the birth certificate of the Complainant, the arguments by the Appellant and the concession by the Respondent and finds that the error as contained in the particulars of the offence was not in variance with the evidence adduced and no discernable prejudice or miscarriage of justice was occasioned upon the Appellant by the error.

30. The Appellant ought to have raised objection in the subordinate Court to cure the error.

Whether the conviction and sentence was safe and sound?

31. The sum effect of the Court analysis reveals that the Appellant was a neighbor to the victim within a 500-meter radius, the familiarity and recognition of the Appellant, the testimony of PW1 identifying her assailant at 8pm when she was waylaid, her description of where she was dragged to and her further identification of the Appellant at 6.00am when she was freed would thus vitiate any need for an identification parade as argued by the Appellant.



32. The evidence of defilement by the Complainant PW1 and graphic description of the same in Kalenjin language corroborated by expert medical examination and report which basically showed the nature of the injuries she sustained following the incident. Regarding the physical state of and injuries to genitalia with special reference to labia majora, labia minora, vagina and cervix and conclusion, it was stated as follows: -Some slight bruises on both labia minora.No lacerations to vaginal wall/cervix.Conclusion: possible penetration.
33. This Court finds that the child of tender years was defiled.
34. The Appellant alleged that the burden of proof was shifted to him by the trial Court, this is far from the truth, the Appellant fully participated in his trial and was on most occasion represented by counsel. His defense evidence was diversionary, denying his alibi name of Bernard, alleging to know the Bernard in question, denying involvement in the offence could not in any way displace the prosecution evidence.
35. The Appellant attacked the entire Section 8 of the *Sexual Offences Act* as being unconstitutional without actually advancing any arguments thereby, the Court finds that the Appellant upon Conviction elected to mitigate, the trial Court considered the aggravating or mitigating circumstances before imposing the sentence and this Court cannot disturb the sentence.
36. I find the appeal to be without any merit and dismiss the same.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 17TH MARCH, 2023

MOHOCHI S.M

JUDGE

17.3.2023

In the Presence of: -

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A

