



REPUBLIC OF KENYA



**KENYA LAW**  
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**Choge v Republic (Criminal Appeal E044 of 2021)  
[2023] KEHC 19101 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL APPEAL E044 OF 2021**

**TA ODERA, J**

**JUNE 20, 2023**

**BETWEEN**

**ANDREW KIPSIGEI CHOGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon P. K Rugut (PM) delivered at Tamu in Principal Magistrate's Court in Sexual Offences Case No E004 of 2021 on 28th September 2021)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). He was tried and convicted on the main charge by Hon P K Rugut, Principal Magistrate who sentenced him to twenty (20) years imprisonment.
2. Being dissatisfied with the said Judgement, on October 28, 2021, the Appellant lodged an Appeal herein. His Petition of Appeal was dated October 26, 2021. He set out nine (9) grounds of appeal.
3. His Written Submission were dated July 28, 2022 and filed on November 30, 2022 while those of the Respondent were dated September 21, 2022 and filed on January 18, 2023.
4. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt.
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.
8. The court dealt with the two (2) issues under the following distinct and separate heads.

## Proof of Prosecution's Case

### a. Age

9. The Appellant submitted that although the complainant testified that she was born on June 17, 2007 the date of registration of the birth certificate that was produced was on March 27, 2019 and that therefore it was not certain as to whether or not at the time of registration her date of birth was altered to show lesser years of age.
10. On its part, the Respondent submitted that the age of the complainant at the time she was defiled was 13 years as per the Birth Certificate produced as P. Exhibit 3 which indicated that she was born on June 17, 2007. It added that that was corroborated by the evidence of the complainant and GC (hereinafter referred to as PW 2) who was the complainant's mother. It pointed out that the Appellant's submissions that the girl consented into having sex did not hold water as she had no capacity to do so. In this regard, it cited Section 43(4)(f) of the *Sexual Offences Act*. It asserted that the Appellant's assertion that he married the complainant who was a class 5 pupil was so heart-wrenching.
11. Notably, DC (hereinafter referred to as PW 1), the complainant herein, testified that she was 14 years of age and in class 5 at [Particulars Withheld] Primary School. PW 2 stated that PW 1 was her child and was aged 14 years having been born on June 17, 2007. No xxxx PC Rose Loye (hereinafter referred to as PW 4) produced the Birth Certificate of PW 1 as P. Exhibit 3 which proved that indeed she was born on June 17, 2007. Therefore, on the material day January 4, 2021, PW 1 was almost celebrating her 14<sup>th</sup> birthday.
12. It was thus proved PW 1 was a minor aged between 13 and 14 years at the material time .

### b. Identification/ Recognition

13. The Appellant did not submit on this issue.



14. On its part, the Respondent submitted that the complainant stated that she lived together with the Appellant and during the stay they used to have sexual intercourse. It added that the Appellant in his defence did not deny that allegation and further stated that the complainant was his girlfriend and that they had sexual intercourse. It asserted that the complainant pointed at the Appellant in court as the person who had sex with her. It was its contention therefore that the Appellant was therefore positively identified.
15. A perusal of the proceedings shows that PW 1 testified that she knew the Appellant well as he had “married her” and was living with her and that they would have sex. She described that she knew the Appellants house and knew his brothers and would sleep at the Appellant’s house when his wife was away. Notably, the Appellant did not deny the above allegations in his defence. He did not deny knowing PW 1 and having had sexual intercourse with her.
16. This court was satisfied that the Appellant was positively recognized by PW 1 and thus appellant was properly placed at the scene.

### **c. Penetration**

17. The Appellant submitted that the Prosecution is required to prove its case against the accused person beyond reasonable doubt under the law. In that respect, he relied on the case of *Wilson Anderi Kamadi vs Republic* [2005]eKLR. He added that it is trite law that conviction cannot be sustained on suspicion but only on facts on record as was held in the case of *R vs George Mwangi Gachuki* [2005]eKLR.
18. He contended that the clinical officer had confirmed that PW 1 had a previous act of penetration and that PW 1 testified that she had sex with him because she wanted him to look for her another school.
19. On its part, the Respondent submitted that penetration was proved by he evidence of PW 1 and corroborated by medical evidence as highlighted in the case of *Charles Wamukoya vs Republic* Criminal Appeal No 72 of 2013(eKLR ). It contended that PW 1 stated that they started having sex before the material time. It was pointed out that PW 5’s evidence in the P3 form and Post Rape Care (PRC) form from Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH)(sic) revealed that the PW 1’s hymen was absent and that there was a watery discharge with foul smell from her vagina. It argued that that was proof that the minor had been defiled.
20. I have re-analyzed the evidence on penetration, defence and submissions. Pw1 adduced evidence that there was penetration into her vagina. Appellant submitted the penetration did not occur at the material time as the hymen was not found to be freshly broken. The evidence of Pw1 was corroborated by the evidence of the clinician Pw5, the p3 form and the post rape care form. In any event the appellant admitted that he had sexual intercourse with Pw1. I find that penetration was proved.
21. Having said so, the ingredients of the offence of defilement are proof of complainant’s age, proof of penetration and identification of the perpetrator as was held in the case of *George Opondo Olunga vs Republic* [2016]eKLR. The Appellant’s assertions that he was not given legal representation and Trial Court did not explain to him the seriousness of a plea of guilty was neither here nor there and was rendered mute.
22. This court was satisfied that the Prosecution had proved beyond reasonable doubt that PW 1 was a child, she was defiled and the Appellant was identified as the perpetrator of the offence and that the Trial Court had come to a correct determination of convicting him of the said offence.



#### **d. Sentence**

23. The Appellant submitted that PW 1's moral had decayed due to poor upbringing. He therefore urged the court to set aside his sentence and grant him a non-custodial sentence. He argued that the *Sexual Offences Act* prescribes minimum sentences which fetter the discretion of judges in imposing alternative sentences or order. In this regard, he relied on several cases among them the cases of Petition No E017 of 2021 *Philip Mueke Maingi & 5 Others vs Director of Public Prosecutions and Attorney General* and *Francis Karioko Muruatetu & Another vs Republic* (eKLR citation not given). He urged this court to set aside the sentence.
24. The Respondent submitted that the Appellant was a married man of about 39 years of age who was preying on a 13 year old school girl. It added that the sentence was at the discretion of the court based on the circumstances and argued that a sentence should also be used to deter such behavior in the society. It urged the court to uphold the sentence passed by the trial court as it was proper.
25. Notably, Section 8(3) of the *Sexual Offences Act* provides that:-

“A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”

The Appellant's sentence was twenty (20) years imprisonment and his counsel submitted that he was about 40 years old at the material time. He was thus thrice the age of the victim and he clearly took advantage of the innocence of complainant and subjected her to early marriage, defiled her and even moved her to another school. There is nothing like a minor agreeing to sexual intercourse in Kenya as a minor has no capacity to consent to sexual activity. I agree with the learned prosecutor that a deterrent sentence is necessary in this case considering its aggravated circumstances of this case. It is this court's considered view that the Trial Court findings on conviction and sentence were sound and proper in the circumstances. It therefore found no reason to fault the same.

26. In the foregoing reasons, the Appellant's appeal lacks merit and is hereby dismissed and his conviction and sentence upheld.
27. Orders accordingly.

**T. A. ODERA - JUDGE**

**20/6/2023**

**DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;**

APPELLANT PRESENT IN PERSON.

J. OKOTH FOR RESPONDENT.

COURT ASSISTANT; APONDI.

**T. A. ODERA - JUDGE**

**20/6/2023**

