



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kiplagat v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 19601 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E042 OF 2022**

AC MRIMA, J

JULY 6, 2023

BETWEEN

TITUS KIBOI KIPLAGAT APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising out of the conviction and sentence of Hon. M. I.G
Morang'a (Senior Principal Magistrate) in Kitale Chief Magistrate's
Court Criminal Case (S.O) No. 109 of 2018 delivered on 28th April 2021)*

JUDGMENT

Introduction:

1. Titus Kiboi Kiplagat, the Appellant herein, 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 7th July 2018 in Endebes Location within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of JN a child aged 12 years old.
2. In the alternative, the Appellant was charged with 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 7th July 2018 in Endebes Location within Trans Nzoia County, the Appellant intentionally caused his penis to touch the vagina of JN a child aged 12 years old.
3. When the Appellant was arraigned before the trial Court, he pleaded not guilty to the offences.
4. After full trial, the Court convicted him on the alternative charge of committing an indecent act with a child and sentenced him to ten years imprisonment.



The Appeal:

5. The Appellant was aggrieved by the conviction and sentence. In his Petition of Appeal dated 25th May, 2022 and filed on 30th May, 2022, the Appellant challenged that decision on seven (grounds). In summary, he disputed the findings of the trial Court citing that it was based on insufficient, inconclusive and incredible evidence. He lamented that the trial Court's findings were erroneous since the prosecution had failed to discharge its burden of proof being beyond reasonable doubt.
6. He faulted the trial Magistrate for improperly rejecting his cogent defence. He thus prayed that the appeal be allowed by quashing the conviction, the sentence be set aside and that he be forthwith set free.
7. In his written submissions dated 10th November, 2022 and filed on 11th November, 2022, the Appellant argued that trial Court ought to have considered the fact that the complainant was not of solid mind. He opined that the medical evidence submitted out rightly exonerated him from the offence that he was convicted of. He maintained that all the ingredients to the charge he was convicted of had not been established to the required standard of proof.
8. He pointed out grave inconsistencies between the testimonies of the investigation officer and the complainant's mother thereby casting doubt on the prosecution's evidence. He thus urged this Court to allow his appeal.
9. The Respondent on its part opposed the appeal. It relied on its written submissions dated 14th November, 2022 and filed on 1st November, 2022 (sic). It submitted that all the ingredients of the charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) had been established beyond any shadow of doubt.
10. It observed that the Appellant's defence was properly rejected since it only raised mere denials and was an afterthought.
11. The prosecution thus beseeched this Court to dismiss the appeal by upholding the conviction and affirming the sentence.

Analysis:

12. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See *Okono vs. Republic* [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in [Ajode v. Republic](#) [2004] KLR 81.
13. Having carefully perused the record, this Court is now called upon to determine whether the offence of committing an indecent act with a child was committed, and if so, whether by the Appellant.
14. Before dealing with the said aspects of the offence, I will render a brief recount of the evidence adduced at the trial.
15. The prosecution called six witnesses to prove that the Appellant committed the offences within the framework of the [Sexual Offences Act](#). In establishing that the Complainant was a minor, the Complainant's mother Catherine Nakhumicha (testified as PW1) testified that the Complainant was a mentally-challenged-slow-learner aged 12 years old. She was a class one pupil at Small Home School; a school particularly set up for children suffering from mental disabilities.
16. Further, her Clinic Card was produced in evidence.



17. PW1 continued that in the early evening of 7th July, 2018, the Complainant mysteriously disappeared from home. A search was mounted, but was not fruitful even with the help of her neighbours. However, when PW1 returned home at 8:30p.m., she found the Complainant in fear.
18. PW1 opened the house door, ushered the Complainant in and interrogated her as to her whereabouts. It emerged that the Complainant was at Mama Tracy's home when she was beckoned by one of the Masons who were constructing a house just nearby. She was led into the house which still under construction and was asked to remove her clothes while in the forlorn house. The Mason, later identified as the Appellant, then defiled her with the promise that he would pay her Kshs. 50/=. The incident took place between 7:00 p.m. and 7:30 p.m.
19. After the ordeal, the Mason did not pay her and instead asked her to dress up and go home. Upon being informed, PW1 took the Complainant to the Police Station and reported the incident and later took her to the hospital.
20. PW1 identified the Appellant as the perpetrator of the offence as follows: She stated that prior to the ordeal, she did not know him but would see him around. On the morning after the ordeal, the Appellant approached her shop to buy cigarettes. PW1 recalled that he was in some disturbance state prompting her suspicions on him. Her suspicions were reinforced by the utterances of the Complainant who identified the Appellant as the perpetrator.
21. The Appellant was arrested on 9th July, 2018 in the presence of PW1's husband and PW3, Alex Wamalwa Musimi, a National Police Reservist. He was found sleeping in a house. PW3 stated that the Appellant was identified as the perpetrator by the Complainant who was nearby. The Appellant in their presence admitted that he had committed the offence.
22. PW2 was CN. She testified that on 7th July, 2018 at 6:30p.m., she sent the Complainant, who was in her company as she sold groceries, to her home to get a lamp and for kerosene. The complainant left with PW2's three-year old girl.
23. After a while, as the complainant was yet to return, PW2 went to check up if there was anything amiss. She found that the items had been collected from her home, but the complainant was not at her place thereby raising alarm as to the Complainant's whereabouts.
24. PW2 began looking for her in the neighborhood. She was joined by PW1 and both searched for her. Without any success, they both later retreated to their homes.
25. She eventually learned that the Complainant had been defiled and was later called by the Police to, and recorded, a statement.
26. The Complainant, JN, testified as PW4. She pointed out the Appellant from the witness dock as the perpetrator of the offence. She recognized him as a neighbour, but didn't know much about him, including his name. She testified that the Appellant took her to his house, lay her on his beddings, removed her clothes and he, held her legs and inserted his penis (which looked like her brother's) into her sexual organs on a promise of getting Kshs. 50/=. She felt pain.
27. After the ordeal, the Appellant chased her away refusing to fulfil his promise of giving her the money. The Complainant told her younger sister R of what had happened. She initially testified that her mother PW1 found out about the incident from T's mother but on cross examination stated that the first person she told was her mother. She clarified that she was present with PW3 when the Appellant was arrested.



28. The Complainant was seen by PW5 Lilian Akinyi, a Clinical Officer working at Endebes Sub-county Hospital. She produced her P3 Form and treatment notes in evidence.
29. She testified that on examination, the Complainant had a white discharge and her hymen was missing, broken and old looking. The penile shaft was identified as the probable weapon causing the injury. She observed from the treatment notes that some medical drugs were administered to the Complainant.
30. The matter was investigated by No. 58413 PC Margaret Namusasi who testified as PW6. She identified the witnesses, recorded statements and collected the evidence to press charges against the Appellant.
31. After close of the prosecution's case, the trial Court found that the Appellant had a case to answer. He was placed on his defence.
32. In his testimony as DW1, the Appellant recited that on 22nd June, 2018, an in-law had asked him to construct her house in Endebes. He proceeded to commence the assignment. Upon completion, the Appellant left Endebes on 30th June, 2018 for Kesogon to attend a burial. He would later return to Endebes on 8th July, 2018 only to be arrested on 9th July, 2020 while asleep.
33. He denied committing the offence. DW2, Mary Khisa Kiboi, the Appellant's wife testified that she was with her husband on 22nd June, 2018 and confirmed that he was later arrested on 9th August, 2018.
34. With the foregoing evidence, the Appellant was found guilty of the alternative offence and he was convicted. He was later sentenced.
35. With a view to enable this Court ascertain if the offence of committing an indecent act with a child was committed, it is imperative that the entire evidence be re-looked at.
36. On the issue of age, there is ample evidence to confirm that the complainant was a minor at the time of the alleged assault.
37. Was there penetration? Section 2(1) of the *Sexual Offences Act* defines "penetration" to mean "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
38. This position was fortified in *Mark Oiruri Mose vs R* (2013) eKLR when the Court of Appeal stated thus: -

.... Many times the attacker does not fully complete the 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....** (emphasis added).

39. Later the Court of Appeal, then differently constituted, in *Erick Onyango Ondeng v. Republic* (2014) eKLR held as such on the aspect of penetration: -

In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured.

40. The trial Court opined that although the Complainant was mentally challenged, she was clear in her statement save on minor issues as to her age. The trial Court further found that the complainant was very confident in her responses and gave graphic details concerning the offence. These observations, which this Court adopts, qualifies the evidence of the Complainant deliberate as to the truthfulness of the facts as set out in Section 124 of the *Evidence Act*.



41. PW4 testified that on observation, the Complainant's hymen was torn and old looking. She also had vaginal discharge. In the P3 Form, PW4 outlined that the injuries sustained to the Complainant's private parts were caused by a penile shaft.
42. The Complainant described the Appellant's private parts as the one that defiled her. She testified that the Appellant used his tail, which was similar to that of her brother, and inserted it between her legs. She felt pain.
43. Having found the complainant truthful, and given the description of the ordeal coupled with the rest of the evidence on record, and in view of the guidance by the Court of Appeal in the decisions referred to above, there is no doubt that indeed a male genital organ got into the complainant's female genitalia. That was penetration.
44. On the identity of the assailant, again there is no difficulty in taking the totality of the evidence on record. In arriving at the finding, this Court is alive to the fact the evidence on identification was only by the complainant, but nevertheless the provisions of Section 124 of the Evidence Act come into play.
45. Needless to say, the complainant easily recognized the Appellant as the perpetrator of the offence twice after the ordeal.
46. The defence was also properly considered. To this Court, the defence does not place the Appellant away from the locus quo given the totality of the evidence of the Appellant and that of his wife.
47. Having carefully considered the evidence, this Court finds that the offence of defilement was proved. The Appellant ought to have been found guilty and duly convicted.
48. However, this Court will not interfere with the trial Court's finding of guilty on a less serious offence of committing an indecent act with a child for three reasons. The first one is that the State did not appeal against the decision. Second, the State did not at least give notice of such intention to the Appellant prior to the hearing of the appeal, and thirdly, the offence of defilement is a more serious offence than that of committing an indecent act with a child.
49. The Appellant should consider himself lucky. It is, therefore, for the above reasons that this Court will not disturb the finding of guilt on the offence of committing an indecent act with a child.
50. Next is the sentence.
51. The High Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.
52. The trial Court considered the mitigations. The Appellant pleaded for leniency as a first offender and the sole breadwinner.
53. The trial Court handled the aspect of sentencing appropriately. There was no error that was otherwise demonstrated.



54. Save for restating that the Appellant was lucky having carnally known a mentally-challenged minor, and there being no cross-appeal or notice of intention to enhance sentence, the sentence shall remain as rendered.
55. For clarity, the sentence shall run as from the date of judgement in the trial Court, that is on 28th April, 2021 since the Appellant was substantially out on bond during the trial.

Disposition:

56. Drawing from the above, the appeal is hereby dismissed in its entirety.
Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 6TH DAY OF JULY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Titus Kiboi Kiplagat, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.

