



**Chirchir v Republic (Criminal Appeal E023 of 2023)
[2024] KEHC 13733 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13733 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E023 OF 2023
F GIKONYO, J
NOVEMBER 6, 2024**

BETWEEN

JOSEPH KEMBOI CHIRCHIR APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. H.M. Moranga
(S.P.M) in Kilgoris CM SOA No. E010 of 2022 on 04/10/2023)*

JUDGMENT

Playing sexual rotary on a child

1. The appellant is challenging his conviction and sentence to serve 20 years imprisonment for the defilement of a 15-year-old girl.
2. The petition of appeal dated 06/10/2023 cited the following grounds of appeal: -
 - i. The learned trial magistrate erred in fact and law in finding and holding that the respondent herein/ prosecution had proved it is the case beyond the requisite standi, whilst the evidence tendered and/ or rendered by the prosecution was riddled and/or replete with pertinent and material contradictions which negated the probative value of the evidence tendered and/ or offered.
 - ii. The learned trial magistrate erred in law and fact in finding and holding that the contradictions evident and/ or apparent in the evidence of the clinical officer were immaterial and inconsequential, the learned trial magistrate misconceived and/ or misapprehended the substance of the contradictions which in any event were material and significant to the extent that same casts doubt on the veracity of the evidence.



- iii. The learned trial magistrate erred in law and fact in failing to properly evaluate, appraise and/ or analyze the evidence on record and thereby failed to appreciate the material and relevant contradictions and/ or discrepancies which were apparent and evident in respect of the prosecution witnesses which contradictions defeat proof of the offence charged beyond a reasonable doubt.
- iv. The learned trial magistrate erred both in fact and law in finding and holding that the evidence tendered by the appellant had failed to dislodge the solid prosecution case, the learned trial magistrate erred in law in shifting the burden of proof upon the appellant and thereby requiring the appellant to prove his innocence contrary to and in contravention of the established criminal principle that the burden of proof rests upon the prosecution and same does not shift, whatsoever. In this regard, the judgment at the trial magistrate is coloured with serious misdirection and error in law and hence same is substantially vitiated.
- v. The learned trial magistrate treated the evidence of the appellant in a casual and perfunctory manner and thereby disregarded the salient features and/ or aspects of the defence.
- vi. The learned trial magistrate erred in law and failed in proceeding to and indeed in convicting the appellant on the basis of a defective duplex charge and thereby depriving the appellant of the constitutional right of equal protection and benefit of the law.
- vii. The learned trial magistrate erred in law and fact by relying on speculations and hearsay on the evidence adduced by the prosecution witnesses.
- viii. The learned trial magistrate erred in law and fact by failing to understudy that the appellant herein was a case of setup as there was no concrete evidence which was to determine the charge(s) therein.
- ix. The learned trial magistrate did not understudy that the prosecution documents, evidence and other materials relied by the prosecution were of no legal consequences and thereby the trial magistrate arrived at a wrong judgment.
- x. The sentence meted out by the trial court was excessive in the obtaining circumstances.

Brief facts

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. No. 3 of 2006 and an alternative charge of indecent act with a child contrary to section 11(1) of the same act.
4. The particulars were that on diverse dates between 27/01/2022 and 08/02/2022 at (Particulars withheld) Township in (Particulars withheld) Sub County within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of C.S.T. a child aged 15 years.
5. On the alternative charge of indecent act with a child, the particulars were that on diverse dates between 27/01/2022 and 08/02/2022 at (Particulars withheld) Township in Transmara West Sub County within Narok County intentionally and unlawfully touched the vagina of C.S.T. a child aged 15 years with his penis.
6. The appellant was tried and convicted on the main charge. The appellant was sentenced to 20 years imprisonment.



Directions of the court.

7. The appeal was canvassed by way of written submissions.

The Appellant's submissions.

8. The appellant submitted that the appellant was detained for 5 days without being taken to court which is unconstitutional. The appellant relied on Article 49(1)(f) of *the Constitution*, Albanus Mwasia Mutual Vs Republic, Criminal Appeal No. 120 of 2004(unreported).
9. The appellant submitted that the two girls were notaries and sneaked out to seek sex. Therefore, should not be trusted. The appellant relied on the case of Eliud Waweru Wambui V Republic [2019] eKLR Appeal No. 102 of 2016.
10. The appellant submitted that he was not accorded a fair trial as he was not reminded of the right to be represented by an advocate. The appellant relied on the case of Waita Munyoki case.
11. The appellant submitted that the prosecution's case was full of contradictions. The appellant relied on the case of David Ojeabuo Vs Federal Republic of Nigeria [2004] LPELR-22555(CA), Ramkrishana Denkerai Pandya Vs Rep. App No. 06 of 1990 EACA 93.
12. The appellant submitted that the medical evidence adduced did not link the appellant to the offence. The appellant relied on the Waita Munyoki case and JOO V Rep [2015] eKLR, and Ndarugu Vs Republic [2016] eKLR
13. The appellant submitted that in Machakos petition E017 of 2021 Maingi & Others Vs Republic the mandatory minimum sentence was termed as unconstitutional.

The respondent's submissions.

14. The respondent submitted that the age of the complainant was proven. The respondent relied on a certificate of birth (P Exh2), evidence of PW1, and Francis Omuroni Versus Uganda, Court of Appeal No. 2 of 2000.
15. The respondent submitted that the evidence produced during the trial proved the element of penetration beyond reasonable doubt. The prosecution relied on the evidence of PW1, PW4, and *Onzare Versus Republic (Criminal Appeal 15 of 2023)* (2024) KEHC 494(KLR) (25 January 2024)
16. The respondent submitted that the appellant lived with the complainant for two weeks which was enough time for proper identification. The respondent relied on the case of Anjononi And Others Vs Republic [1989] eKLR quoted in Daniel Muthomi Marigu & 4 Others Vs Republic [2021] eKLR, Evidence of PW1 and PW5.

Analysis And Determination.

Court's duty

17. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32
18. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;



- i. Whether the prosecution proved its case beyond a reasonable doubt.
- ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of defilement

19. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) which provides:
 - “8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - 8(3) “A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years.”
20. The specific elements of the offence of defilement arising from Section 8 (1) of the [Sexual Offences Act](#) which the prosecution must prove beyond reasonable doubt are:
 - 1) the complainant is a child- Age below 18 years;
 - 2) Penetration in accordance with Section 2(1) of the [Sexual Offences Act](#), see Mark Oiruri Mose v R [2013] eKLR; and
 - 3) The accused caused the penetration.
21. See the case of Charles Wamukoya Karani Vs: Republic, Criminal Appeal No. 72 of 2013.
22. PW1 testified that she was in class 6 term 3 at her school.
23. PW6, the investigating officer produced a certificate of birth as P Exh2.
24. The certificate of birth showed that the complainant was born on 10/05/2007.
25. Based on the evidence adduced, the age of the victim was 15 years at the time of the defilement.
26. PW1 in her evidence during the trial was that she met the appellant on 27/01.2022 when she was in the company of her friend Melvin. The appellant sent a motorcycle to pick them up from school. The boda boda dropped the two girls at the house of the appellant and went to bring the appellant. After lunch her friend left and she remained with the appellant. They had intercourse and stayed with him up to 08/02/2022.
27. PW1 decided to go home. Her irate father beat her up and her brother ordered her to take them to where she had been. She led them to the place where they found her friend Melvin with Brian. The accused was not in.
28. PW1 acknowledged that she did not go to school for two weeks and she had an extra pair of clothes in her bag (P EXH 4). She identified her uniform and home clothes for both herself and her friend Melvin.
29. PW2 an uncle to the complainant testified that when the complainant failed to come home after school, they began searching for her. The school’s head teacher informed them that, they had gone to school but left soon thereafter.
30. PW3 the headteacher confirmed that Melvin and the complainant had failed to attend school after lunch on 26/01/2022. On 27/01/2022, they had prepared to interview her on her absence but she escaped. The complainant resurfaced on 08/02/2022.



31. PW4 an assistant chief testified that he received a report that the complainant and her friend Melvin were missing from school. On 08/02/2022 the complainant resurfaced and helped in arresting the appellant by directing the relatives and police to his residence. Upon searching, they found the complainant's bag of clothes and uniform in the appellant's house.
32. PW5 a clinical officer testified that she examined the complainant on 09/02/2022. She found her hymen missing but old-looking. She had a discharge. She filed a post-rape care form and a P3 form. She produced treatment notes (P Exh 1(a), p 3 form (P Exh 1(b)., post-rape care form (P Exh 1(c), and lab results for the appellant (P Exh 1(d)).
33. PW6 an investigating officer confirmed that a report was made at Kilgoris police station about the missing complainant. She recovered the uniforms and bag used by the complainant.
34. Accordingly, the medical evidence supports the claim that there was a penetration of the child.
35. The analysis of the evidence yields the inescapable conclusion that the prosecution proved to the required standard that penetration did occur of C.S.T.
36. But by whom?
37. PW1 in her evidence during the trial was that she met the appellant on 27/01.2022 when she was in the company of her friend Melvin. The appellant sent a motorcycle to pick them up from school. The boda boda dropped the two girls at the house of the appellant and went to bring the appellant. After lunch her friend left and she remained with the appellant. They had intercourse and stayed with him up to 08/02/2022.
38. PW1 testified that she had been living with the appellant at all material time and were having sexual intercourse. She also identified the place where they lived with the appellant during the material time and her bag and clothing.
39. The evidence by the prosecution; places the appellant and the complainant at the scene; were together during the material time; and identifies the appellant as the person who defiled C.S.T. The girl knew the appellant well and gave such a succinct account of the sexual intercourse with the appellant. This is a person she knew. There was no mistaken identity whatsoever of the appellant as the person with whom she had sex. Thus, who defiled her?
40. The submission by the appellant that the two girls were notaries and sneaked out to seek sex; and, therefore, should not be trusted; is simplistic, unfortunate and an insult to children who fall victim of sexual assault by inconsiderate sex predators; and is a sort of justification for sexual debauchery of young children- in this case, a girl. Such proclamation will not offer any defense to the appellant who happily quenched his sexual thirst upon a child. He played sexual 'rotary' with a child; committed defilement; now at the right place- the prison.
41. Based on the evidence adduced, the appellant caused the penetration of C.S.T.
42. The court, therefore, finds that the appellant was properly convicted on the charge of defilement based on evidence that proved the case against him beyond reasonable doubt.
43. In the upshot, the appeal on conviction is dismissed.

On sentence.

44. The relevant penalty clause under which the appellant was sentenced is Section 8 (3) of the [Sexual Offences Act](#) which section provides that:



8(3) “A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years”.

45. The appellant urged that the trial court did not exercise discretion in sentencing because of the fetter placed by the minimum sentence prescribed in section 8(3) of the *Sexual Offences Act*
46. The prosecution submitted that the sentence was within the law.

New jurisprudence on minimum sentences

47. There is new jurisprudence from the Supreme court; Minimum sentences set the floor rather than the ceiling when it comes to sentence. What is prescribed is the least severe sentence a court can issue leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. Republic Vs Joshua Gichuki Meangi And Initiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.
48. But, the Supreme Court did not foreclose interrogation of constitutionality or otherwise of minimum sentences in ‘a proper case’, or whether trends elsewhere in dealing with the subject could apply to Kenya. It may profit the debate to have a discussion around; the teleological exercise of discretion towards ‘the ceiling’; whilst limiting the exercise of discretion below ‘the floor’ in sentencing; whether such an approach fits within the constitutional concept of least severe sentence; as well as what it means or entails that, ‘it is Parliament...that sets the parameters of sentencing for each crime in statute’; setting the stage for proper situating of the legislative function to prescribe penalty for an offence in a contest between judicial sentencing, and ‘legislative sentencing’.
49. The ‘proper case’ should not also be taken to mean that, there is no work that has been done on the subject of minimum or mandatory minimum sentences by courts, lawyers, and other multi-disciplinary eminent scholars and practitioners in Kenya. And, the wisdom in tapping into such a body of work as we craft the final hemming on the dress.

Relevant considerations in sentencing

50. The trial court called for a pre-sentence report. She noted that the offence had become rampant in the Transmara region. The trial court considered the conduct of the appellant of holding and detaining a child he knew was a minor for two weeks.
51. The court has also considered that the offence is serious. The victim was a child- she was 15 years old. The manner the offence was committed was by taking advantage of a child. In addition, the prevalence of the offence justifies a long period of incarceration for deterrence purposes.
52. Be that as it may, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free person at some point of meaningful days of life
53. In the circumstances, the 20-year imprisonment sentence is appropriate and is upheld.

Conclusion and orders

54. The appeal on conviction and sentence is dismissed.
55. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS6THDAY OF ...NOVEMBER....., 2024.



F. GIKONYO M.

JUDGE

In the Presence of:

1. Court Assistant – Mr. Nyangaresi
2. Mr. Okeyo for DPP – present
3. Appellant - present

