



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cheruiyot v Republic (Criminal Appeal E009 of 2023)  
[2025] KEHC 14811 (KLR) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14811 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPSABET  
CRIMINAL APPEAL E009 OF 2023  
JR KARANJA, J  
OCTOBER 15, 2025**

**BETWEEN**

**KELVIN KIPKEMEI CHERUIYOT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment on CMCR S.O. Case No. E113 of 2021 by Hon. S. Mokuu, Chief Magistrate, dated and delivered on 10th day of January 2023)*

**JUDGMENT**

1. Kelvin Kipkemei Cheruiyot is the Appellant herein. He was presented before the Chief Magistrate at Kapsabet charged with the offence of defilement, Contrary to Section 8[1] as read with Section 8[4] of the *Sexual Offences Act*. It was alleged that on the 3<sup>rd</sup> day of October 2020, at Chepkongony - Nandi South within Nandi County he defiled a child referred to as "J.J." who was at the time aged sixteen [16] years.
2. There was an alternative count of committing an indecent act with a child, contrary to Section 11[1] of the *Sexual Offences Act*, in that the Appellant on the same day and place committed an indecent act of touching the female genital organ of the aforesaid child.  
After denying both counts, the Appellant was tried, convicted and sentenced to fifteen [15] years imprisonment on the main count of defilement.
3. Being dissatisfied with the conviction and sentence the Appellant preferred this appeal on grounds set out in the petition of appeal filed herein in the month of March 2023 in which he generally complains that the trial court erred in both law and facts by convicting him on the basis of the prosecution evidence which was insufficient to prove the charge against him.



4. The Appellant also complains that his right to a fair trial was breached when the trial proceeded in the absence of his advocate and without being given an opportunity to avail him [advocate] or engage a new one.

Further, the Appellant complains that the charge sheet was improperly amended by the prosecution and contends that the matter was reported to the police after he declined to support the complainant's mother whose intention and that of the Complainant was to extort money from him.

5. The Appellant therefore prayed for the appeal to be allowed by his conviction being quashed and his sentence being set aside. He complains that the sentence was too harsh considering that he was a young adult at the material time of the offence and had already enrolled to join a university.

That, the probation report recommended him for a non-custodial sentence.

6. At the hearing of the appeal, Learned Counsel, Mr. Rotich appeared for the Appellant and placed reliance on the written submissions filed by the Appellant.

The Respondent through the Learned Prosecution Counsel, Ms. Asiyo, opposed the appeal and orally submitted that all the necessary elements of defilement were duly proved by the prosecution especially through the evidence of the Complainant Victim [PW1] and that of the Clinical Officer [PW3] on the question of penetration.

7. Further, the Respondent submitted that with regard to identification the Appellant was well known to the Complainant having earlier met and developed a girlfriend/boyfriend relationship which led to several sexual episodes resulting in the Complainant becoming pregnant and giving birth to twins whose father as per DNA analysis and report was the Appellant.

8. With regard to the age of the Complainant, the Respondent submitted that the birth certificate established that the Complainant was sixteen [16] years old as at the material time of the offence.

On sentence, the Respondent submitted that it was lawful in as much as it was the duly prescribed mandatory minimum sentence and as such, the probation report favouring a non-custodial sentence was irrelevant.

9. In response to the foregoing submissions by the prosecution, the Appellant through his Learned Counsel emphasized that the amendment of the charge sheet was prejudicial to the Appellant and that when he proceeded when the trial in the absence of his then advocate on record his right to a fair trial was breached regard being given to the weighty nature of the case against him and the fact that he dropped his guard and proceeded on his own after being forgiven by the Complainant and her mother.

10. The Appellant emphasized further that the Complainant said that she was seventeen [17] years old at the material time of the offence, hence five months shy of adulthood [i.e. 18 years]. That, in any event, her behavior at the material time was that of an adult.

The appellant pleaded for reduction of the sentence emphasizing that he has since learnt his lesson.

11. Having considered the appeal, the supporting grounds and those in opposition thereto as well as the rival submissions, this court had a duty to reconsider the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.

12. In that regard, the prosecution case was briefly that the Complainant [PW1] met and befriended the Appellant in the month of June 2020. Their friendship led them to engage in sexual intercourse at the behest of the Appellant who was already an adult while the Complainant was still a minor of about sixteen [16] years of age as per the birth certificate [P. Exhibit 1] availed by her mother, EM [PW2].



13. The sexual encounters led to the Complainant's pregnancy which resulted in her giving birth to twin baby boys whose father as per the DNA report [P. Exhibit 3[b] produced by the Government Analyst, Sally Cheruto Katukoi [PW4] was confirmed to be the Appellant.  
  
The police medical report [P3 Form] produced by a Clinical Officer at Kaptumo Sub-County Hospital, Benzy Metto [PW3], confirmed that the Complainant was indeed defiled. The report [P. Exhibit 4] further confirmed that the incident occurred when the Complainant was a minor of approximately seventeen [17] years.
14. A Police Officer, Daniel Mwigu [PW5], confirmed that police investigations revealed that the offence was committed and that the Appellant was arrested as the suspect and arraigned in court.  
  
The Appellant denied the offence, but in his defence he only acknowledged that he was charged with defilement and stated that he did not have the means to support the minor born out of marriage.
15. As an offence, defilement is anchored on three key ingredients i.e. penetration, age of the victim and identify of the Offender. All these have to be established and proved by credible evidence if an Accused Person were to be held criminally responsible for the offence.  
  
Herein, as was found by the trial court the prosecution evidence was sufficient, strong and credible as to prove the charge against the Appellant beyond reasonable doubt.
16. On its own consideration of the evidence in its totality this court cannot agree more with the verdict reached by the trial court for reasons that the testimony by the Complainant [PW1] as supported by the documentary evidence of the Clinical Officer [PW3] was cogent and credible enough to establish and prove the defilement ingredient of penetration and coupled with the evidence of the Complainant's mother [PW2] on account of the birth certificate [P. Exhibit 1] the evidence went further to prove the age of the Complainant.
17. In actual sense, there was no substantial dispute that the Complainant was indeed sexually assaulted on the material date or that the offence actually occurred as alleged by the Complainant. Although the Appellant was not under any obligation to prove his innocence, his defence left a lot to be desired. He never actually contested the fact that the Complainant was a minor and that she was defiled. He denied that he was responsible for the offence, yet the suggestion he made in his defence was clearly that he was charged with the offence not because he committed it with the consent of the minor Complainant, but because he was unable to provide and care for the products of his unholy and criminal interaction with the Complainant who was his girlfriend.
18. Indeed, on the ingredient of identification there was no dispute that the Appellant was the person who impregnated the Complainant pursuant to their intimate relationship prompted by the Appellants inability to keep his trouser zip closed or inability to control his carnal itch. There was no doubt that the Appellant took advantage of the Complainant's ignorance and naivety in order to sexually exploit her.
19. He could not therefore be heard to feign ignorance and deny responsibility for the offence. In any event, his identification as the offender was sealed by the Complainants evidence as supported by the DNA report which firmly disclosed and confirmed that the Appellant was the father of the Complainant's twin baby boys known as R and R as per the birth notification forms [P. Exhibit 2a and b].
20. It is for the reasons and factors foregoing that this court must find that the Appellants' grounds of appeal on conviction and the arguments in support thereof are devoid of merit and are hereby dismissed. It is notable that the Appellant placed more weight on the alleged consent by the Complainant to engage in sexual intercourse with him thinking that it may absolved him from the



offence. However, consent is not an ingredient of the offence of defilement as opposed to that of rape which involves adults rather than children.

21. In cases of defilement which primarily revolve around children the factor of consent is immaterial as a child is deemed not to have the capacity to give consent to a sexual act which is committed intentionally and unlawfully. Under Section 43 [4][f] of the Sexual Offence Act, a child is incapable in law of appreciating the nature of an act committed intentionally and unlawfully.

22. It is the finding of this court that the Appellant's conviction by the trial court was sound and safe and is hereby affirmed.

As regards the sentence of fifteen [15] years imposed against the Appellant by the trial court, it was lawful and in tandem with Section 8[4] of the Sexual Offence Act which states that: -

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

23. The provision clearly provides for a term of imprisonment of not less than fifteen [15] years. Thus, the court's discretion to impose a sentence of less than fifteen years is curtailed, but it can impose a sentence of more than the minimum fifteen [15] years.

Herein, the trial court acted lawfully and properly in imposing the prescribed minimum term thereby rendering the Appellant's contention that the sentence was harsh and excessive invalid.

24. Even if the trial court called for a pre-sentence report, the prescribed sentence held sway and could not be altered by dint of the report. In any event, the trial court was not bound by the report and was incapable of acting on it in favour of the Appellant on account of the mandatory nature of Section 8[4] of the Sexual Offence Act.

Therefore, the Appellant's grounds on sentence and the arguments in support therefore are misconceived and dismissed accordingly.

25. This appeal, in as much as it is based on the grounds specified in the Appellant's written submission is devoid of merit on both conviction and sentence. The position would also apply to the initial grounds filed in March 2023 with regard to both conviction and sentence.

The additional grounds contained in the petition relate more or less to the procedure adopted by the trial court when the Appellant was allegedly left in limbo by his then advocate on record and when the charge sheet was amended to accord with the date of birth specified in the Complainant's birth certificate.

26. The Appellant contends that his right to a fair trial in that regard was denied by the trial court which never gave him time to consult his erstwhile advocate or instruct a new one and also to recall witnesses after amendment of the charge sheet. In essence, the Appellant was merely throwing a constitutional spin or bait to the entire appeal. Unfortunately, without much success as the record of the proceedings does not vindicate him.

27. The record shows that on the 8<sup>th</sup> September 2022, the Appellant's advocate on record at the time prayed for an adjournment of the case after the prosecution had called one witness and requested for time to avail other witnesses on the same day. The court indulged the Appellant's Counsel and adjourned the matter to 27<sup>th</sup> October 2022, when he [Counsel] failed to turn up and the hearing of the case proceeded in his absence upto conclusion of the prosecution case after which it was adjourned for ruling and defence case.



28. As per the court record, at no single time or occasion from the 27<sup>th</sup> October 2022 to the 5<sup>th</sup> November 2022 when the Appellant was placed on his defence did he request for time to avail his advocate or instruct a new one before the matter could progress further. He could not therefore claim that his right to a fair hearing was denied in that regard.

Had he applied or requested for time and this was turned down by the court, he would perhaps have had a good reason to say that his fundamental right to a fair hearing or trial was denied or breached or violated.

29. In any event, if he desired to challenge the constitutionality of the trial leading to his conviction and sentence, then such an appeal as this one was not appropriate. Instead, the Appellant ought to have considered filing a constitutional petition.

30. With regard to the re-calling of witnesses after amendment of the charge sheet there was no necessity to do so as the amendment was not prejudicial to the Appellant in as much as it did not remove the age of the Complainant from the age bracket provided under Section 8[4] of the *Sexual Offences Act*.

Nor, did the amendment alter the charge to introduce a new charge for which a fresh plea would be taken and a fresh trial be commenced for which witnesses may be re-called.

31. In sum, this appeal is wanting on merit and is hereby dismissed in its entirety.

Ordered accordingly.

**DELIVERED AND DATED THIS 15<sup>TH</sup> DAY OF OCTOBER, 2025.**

**HON. J. R. KARANJAH,**

**JUDGE**

