

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & ACHODE JJ. A.)

CRIMINAL APPEAL NO. 7 OF 2020

BETWEEN

ROBERT CHERUIYOT.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of the High Court of
Kenya at Kisii (Ougo, J.) dated 1st February, 2019*

in

HCCRA No. 34 of 2017)

JUDGMENT OF THE

COURT

1. The appellant, Robert Cheruiyot was convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the sexual offences Act and was after conviction sentenced to life imprisonment on 28th August 2014 in the Principal Magistrate's Court at Kilgoris. The case against him was that on the 13th November, 2013 at Kondamet area in Transmara District of

Narok County unlawfully and intentionally caused his penis to penetrate the vagina of RC¹ a girl aged 4 years.

2. In the alternative, he was charged with indecent assault contrary to section 11(1) of the Sexual Offences Act, where the particulars were that he indecently assaulted the child by touching her private parts namely vagina.
3. The appellant pleaded not guilty and the prosecution called 6 witnesses. Upon considering the evidence, the trial magistrate found the appellant guilty convicted him of the main offence and sentenced him to life imprisonment.
4. Dissatisfied with the conviction and the sentence, the appellant appealed to the High Court which dismissed the appeal and upheld both the conviction and the sentence.
5. The appellant is now before this Court in this second appeal challenging his conviction and sentence on the grounds that the offence was not proved; the evidence was not re-evaluated; that his evidence was not considered; and that the sentence was

¹Initials used to protect the minor's identity

unconstitutional, harsh and excessive in the circumstances of this case.

6. Briefly, the facts of the prosecution's case were that on 13th November 2013 at 11:00 am WC², the complainant's mother PW1 left RC [the complainant herein] with her sister Miriam and went to fetch water at the River. On returning, Miriam told her that the appellant had asked her to give the complainant drinking water to take to him in a certain house. While washing the complainant, Miriam noticed a lot of sperms coming from her vagina and her pants too had sperms. On further examination, Miriam noted that the complainant's vagina was red with no blood. On asking the complainant, she stated that the appellant defiled her. Since the child was in pain, she was taken to Lolgorian hospital; then the matter was reported to the police; upon which the appellant who was her herds boy, was arrested. WC informed the court that although the complainant was in court, she could not talk as she was afraid of people.

²Initials used to prevent tracing identity of the minor

7. BC³ (PW2) the complainant's father told the court that on 13th November 2013, he returned home at around 12 p.m. and found his wife (WC) carrying RC. She informed him that the appellant had defiled the child. He instructed her to take the child to the hospital while he went to look for the appellant. Although he did not find him at home, he later located and arrested the appellant before handing him over to the police. At the police station, stains were observed on the appellant's underwear, which was collected by the police. The appellant had been working as a herds boy for him for four years.
8. Police Constable Evans Munene (PW4) gave an account of his investigations into the matter, which led to the arrest and prosecution of the appellant. Dr Mutei Nicholas (PW4) filled the P3 Form upon examination of the minor, which revealed that the hymen was intact but reddish in colour due to trauma. A high vaginal swab indicated the presence of sperm. The doctor concluded that there was partial penetration. He assessed the age of the complainant and found her to be five years old.

³ Initials used to protect tracing identity of the minor through the parentage

9. Placed on his defence, the appellant gave sworn evidence and testified that he was a herdsman in Angata, and claimed he was arrested without any reason. He stated that he had only asked the complainant's mother for his wages to support his siblings and parents, as his older brothers were drunkards. He added that since his arrest, his social affairs at home had deteriorated, and that he had left school to help his family. He denied any knowledge of the offence.
10. Before delivering the judgment, the court called the complaint and Miriam to testify. Upon conducting voire dire examination, RC testifying as PW5, gave unsworn evidence and testified that the appellant was their cattle herder and that he did bad manners to her on Geoffrey's bed. She further stated that he had previously done bad manners to her.
11. On her part, Miriam Chepngeno, a minor testifying as PW6, gave unsworn testimony, and stated that on 13th November 2013, she was at home with RC and Victor while her parents were not at home. The appellant called the complainant and asked her to bring him drinking water. The complainant took the water to him at Geoffrey's house. She saw RC coming

out of the house and

noticed her putting on her clothes. RC had a whitish discharge on her thighs and told Miriam that the appellant, their herdsman, had told her they should sleep together. She washed RC's head and legs after returning home. RC was taken to the hospital.

12. In support of the appeal, the appellant contends that the offence was not proved to the required standard. Regarding the first ingredient, the appellant contends that penetration was not proved. PW4 testified that upon examining the complainant's genitalia, he noted a whitish discharge and that the hymen, though intact was reddish in colour due to trauma.
13. The appellant contends further that the age of the complainant was not proved as no evidence in the form of the age assessment report or birth certificate was produced. Further, in their testimony, the victim's parents did not state her age as they did not have the birth certificate, although a copy had been given to the police. The copy was marked for identification but was never produced.
14. On sentence, the appellant submits that he was sentenced to

a mandatory sentence which is harsh, excessive, degrading,
unfair

and unconstitutional. Urging the Court to set aside the sentence, the appellant contends that he has been in custody for a period of ten years during which he has undertaken life courses, he is reformed, rehabilitated and ready to integrate into society.

15. Opposing the appeal, the respondent contends that all the ingredients of the offence of defilement were established. The evidence presented at trial, reviewed by both the subordinate court and the High Court, established that the complainant was about 4½ years old at the time of the offence. This was confirmed by the testimonies of her mother (PW1), father (PW2), and a medical officer (PW4), who assessed her age as being under five years. The evidence, upheld by both lower courts, confirmed through parental testimony and medical assessment that the complainant was approximately 4½ years old and under five.

16. Regarding penetration, it is contended that in her testimony, PW4 stated that she observed redness, trauma, and spermatozoa in the complainant's vaginal area despite an intact hymen, proving sexual activity. The trial magistrate

held that under section 2 of the Sexual Offences Act, even partial penetration meets the legal definition. Relying on the case of **DGK vs.**

Republic the respondent contends that the medical evidence was unequivocal and the complainant's injuries were consistent with defilement.

17. Turning on identification, it is contended that both the complainant and PW6 were categorical that the appellant committed the act in broad daylight in a house they referred to as Geoffrey's house. The appellant was well known as he had been the family's herdsman for about four years.
18. Regarding the statutory power to summon witnesses by the trial judge, the respondent contends that section 150 of the Criminal Procedure Code grants the court power to summon witnesses who were not called by the prosecution and whose testimony was believed to be incidental to the just disposition of the case.
19. In the instant appeal, the summoned witness included the minor victim as well as her sister who is said to have been with the victim around the time the offence is said to have been committed. Their evidence was crucial and the appellant was not prejudiced as he was given a chance to cross-examine them.

20. In his determination, the learned judge rejected the appellant's

claim of fabrication, upholding his conviction under Section 8(1)

& (2) of the Sexual Offences Act. The High Court independently reassessed the complainant's credibility, medical evidence, and testimony consistency as required by Section 354 of the Criminal Procedure Code, finding no error in its re-analysis and dismissing the appeal as lacking merit.

21. Lastly, on the sentence, it is argued that the appellant was convicted under Section 8 (1) of the Sexual Offences Act for defiling a child under the age of eleven years. As a result, the trial court imposed a sentence prescribed by section 8(2). The sentence is expressed in mandatory terms, and neither the trial court nor the High Court had the discretion to depart from the sentencing outlined under section 8(2). Both courts' decisions were based on clear and uncontested evidence that the complainant was under the age of eleven at the time of the offence. Therefore, the sentence of life imprisonment is both legally justified and proportionate.

22. This being a second appeal, the mandate of the Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters, they should not have considered, or failed to consider matters they should

have

considered, or looking at the entire decision, it is perverse. See Section 361(1) of the Criminal Procedure Code (CPC). In the case of ***Kaingo vs. Republic [1982] KLR 213***, this Court stated thus:

“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did. See (Reuben Karoti S/O Karanja versus Republic [1956 17EACA 146].”

23. Having considered the record, the grounds of appeal, and the rival submissions set out above and in light of this Court’s mandate, the issues of law that fall for determination are whether the prosecution proved its case to the required standards and whether the sentence meted out was proper.
24. As to whether the offence was proved, it is trite that to reach a finding of defilement, the prosecution must establish three main ingredients which are; the age of the victim, penetration and the proper identification of the perpetrator. These ingredients are provided for under sections 8(1) and (2) of the Sexual Offences Act which stipulates;

- (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.**
- (2). A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life”.**

25. Regarding the first element of age, this Court in the case of **Justin Kubasu vs. Republic [2020] eKLR** cited **Edwin Nyambogo Onsongo vs. Republic [2016] eKLR** in which the Court cited with approval **Mwolongo Chichoro Mwanyembe vs. Republic, Mombasa Criminal Appeal No. 24 of 2015**, that;

“... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim’s age, it has to be credible and reliable.”

26. In the instant case, RC and BC the complainant’s mother and father respectively gave her age as 4^{1/2} years at the time of the incident. Dr. Mitei produced the P3 Form and the age assessment report which indicated that she was 5 years old.

This was

sufficient credible evidence that proved the age of the minor complainant as 5 years.

27. As to whether penetration was proved, penetration is defined under Section 2 of the Sexual Offences Act as **“the partial or complete insertion of the genital organs of a person, into the genital organs of another person.”** To establish the charge of defilement against the appellant, it must be proved that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant, that the minor complainant was a child under eleven years of age and that the appellant had been positively identified as the person who committed the act of penetration.

28. In ***Bassita vs. Uganda S. C. Criminal Appeal No. 35 of 1995***

the Supreme Court of Uganda held that:

“The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence. Though desirable it is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or

penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such

that is sufficient to prove the case beyond a reasonable doubt.”

29. The complainant's evidence was that the appellant took her into Geoffrey's house and sexually assaulted her. She stated that it was not the first time, as she had been sexually assaulted by him before. Her evidence was consistent with that of Miriam who examined her private parts and noticed that there was a whitish discharge in her vagina and the P3 form which confirmed that there were injuries on the minor complainant's vagina and that sperm were present. The trial court found her testimony to be cogent and consistent as was corroborated by the medical reports which indicated that she had bruises on her vagina. There was, therefore, sufficient credible evidence that penetration had taken place.
30. As regards the identity of the person who committed the offence, the appellant was identified by the minor complainant who knew him well. The complainant was categorical that the appellant was their herdsman. Similarly, in her evidence, Miriam told the court that she knew the appellant as their herds boy. The identification was therefore by recognition.

31. In support of the foregoing proposition, we refer to the pronouncements by this Court in **Longole & another vs. Republic (Criminal Appeal 5 of 2016) [2024] KECA 483 (KLR) (9 May 2024) (Judgment)** cited with approval the decision in **Rotich Kipsongo vs. Republic [2008] eKLR** where the Court held that:

“This Court had occasion to deal with the issue of identification by recognition in several cases, one of them being Kenga Chea Thoya vs. Republic Criminal Appeal NO 375 OF 2006 (Unreported) where it said, “On our own re-evaluation of the evidence, we find this to be a straightforward case in which the appellant was recognized by the witness (PW 1) who knew him. This was clearly a case of recognition rather than identification and as it has been observed severally by this Court, recognition is more satisfactory more assuring and more reliable than identification of a stranger - see Anjononi vs. Republic [1980] KLR 59.”

32. Similarly, in **Waingwe vs. Republic (Criminal Appeal 142 of 2016) [2023] KECA 401 (KLR) (31 March 2023) (Judgment)** this Court held that:

“It is commonplace that recognition of an assailant is more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

33. We are satisfied that the identification was proper, thus this element was also established to the required standard. In view of the foregoing findings, the offence was proved to the required standard and the first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard against the appellant, and his defence was properly rejected. His conviction was safe.
34. The appellant raised the additional grounds that touched on the court's discretion to call witnesses not called by the prosecution. We take note that these issues were not raised before the trial court, nor were they grounds for appeal before the High Court. The appellant is, accordingly precluded from raising it in this appeal. In the case of **John Kariuki Gikonyo vs. Republic [2019] eKLR** this Court differently constituted cited with approval the decision in **Alfayo Gombe Okello vs. Republic [2010] eKLR Criminal Appeal No. 203 of 2009**; where it was held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do

so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

35. Be it as it may, Section 150 of the Criminal Procedure Code provides that

“ 150. Power to summon witnesses, or examine a person present.

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case: Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

36. It is clear that the court has the authority to summon or recall any witness at any point during the trial if their evidence is essential for reaching a fair determination of the case. Granted that identification is a vital ingredient of the offence with which the appellant was charged, the evidence of the

complainant and

PW6 was essential to the case. PW6 was with the complainant when the appellant requested water and was categorical that the complainant take it to him. Further, when Miriam noticed the complainant had taken long, she went to look for her and met her dressing up. The complainant confided in her that the appellant had asked her to sleep with him and observing her, she noticed whitish discharge on her thighs and vagina. In the circumstances, the trial court properly exercised its discretion within section 150 of the Criminal Procedure Code in summoning the complainant and her sister to confirm the identity of the appellant.

37. The next point of law is whether the learned judge properly discharged his duty as the first appellate court to re-evaluate the entire evidence in a fresh and exhaustive manner and arrive at her own independent conclusions of fact. Upon consideration of the record, it is clear that the learned judge did so, and the criticism that he failed in this regard is, therefore, unwarranted. It is thus clear that the appellant's conviction was based on sound and solid evidence leaving no doubt as to his guilt and

there is no basis upon which to disturb the judgment of the High Court.

38. In regard to the appeal against sentence, the Supreme Court in **Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)** [2024] KESC 34 (KLR) held that;

“57. ... Minimum sentences however set the floor rather than the ceiling when it comes to sentences. 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...”

67. We must also reaffirm that, 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. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law.... Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.”

39. The Supreme Court clearly stated the position of the law to

the effect that the sentences under the Sexual Offences Act are

constitutional. The appellant, having been charged, tried, and convicted under section 8(1) of the Sexual Offences Act for defiling a child under the age of eleven years, the only punishment provided under section 8(2) of the Act is life imprisonment.

The sum total of our finding is that this appeal lacks merit in its entirety, and is dismissed.'

Dated and delivered at Kisumu this 24th day of October, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

DEPUTY REGISTRAR