Chesebe v Republic (Criminal Appeal E143 of 2024)
[2026] KEHC 6203 (KLR) (7 May 2026) (Judgment)

Neutral citation: [2026] KEHC 6203 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E143 OF 2024

REA OUGO, J

MAY 7, 2026

BETWEEN

PHILEMON NDIWA CHESEBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment & conviction of Hon. J.O. Manasses RM delivered on the 6/11/2023 in SO CRC No. E039 of 2021 PM'S Sirisia Court)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the charge were that, between 2/11/2021 and 3/11/2021, at [Particulars Withheld], Chepyuk location, in Cheptais sub-county, within Bungoma County, the appellant intentionally caused his penis to penetrate the vagina of P.C.N., a child aged 13 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

3. The appellant pleaded not guilty, and the matter proceeded to trial. The prosecution called four (4) witnesses, while the appellant elected to exercise his constitutional right to remain silent and not testify.

4. In its judgment dated 6/11/2023, the trial court found the appellant guilty of the main charge and sentenced him to 20 years' imprisonment.

5. Dissatisfied with that decision, the appellant filed his appeal petition dated 23/10/2024, raising five (5) grounds summarised as follows: -

    a. That the learned trial magistrate erred in law and in facts by failing to consider that the ingredients forming the offence were not proved to the required standard.

b. That the trial court erred in law and in fact in not weighing the conflicting evidence in the prosecution case that was inconsequential to conviction.

c. That the trial court erred in law and in fact in not appreciating the appellant's cogent defence that overwhelmed the prosecution case.

d. That the learned trial magistrate erred in law and facts by failing to deal with contradictions and inconsistencies in prosecution evidence.

e. That more grounds to be adduced after perusal of court proceedings.

6. The appeal was disposed of by way of written submissions. The appellant submitted that the medical evidence of a broken hymen was insufficient to corroborate penetration. The appellant further submitted that, subsequently, the victim's evidence was paramount if the court was to determine the suit, but the trial court failed to record in its judgement why it believed that the complainant was telling the truth. The trial court also failed to address the complainant's demeanour. The complainant was not an honest witness, and the court ought to have rejected her testimony. The trial court failed to inform him of his right to legal representation or to appoint an advocate, thus occasioning a substantial injustice. That the trial court delivered a defective judgement with no analysis, no points for determination, and no section under which he was convicted, thus in violation of section 169 of the Criminal Procedure Code. That the trial court erred in not making a finding that his sentence should run from the date of arrest, thus he lost his liberty.

7. On its part, the Respondent submitted that the charge against the appellant and each of its elements was proved beyond reasonable doubt, and that the instant appeal did not raise any legal or factual error warranting interference. That the trial court noted that the appellant's demeanour was "care-less" and that the court ought to consider this. The appellant failed to defend himself before the trial court, and his appeal is an attempt to do so without his allegations being tested on cross-examination.

Analysis And Determination

8. This being the first appellate Court, its duty is well spelt out, namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to arrive at its own independent conclusions and findings but at all times bearing in mind that it did not see the witnesses testify. (See Okeno v Republic [1972] EA 32.)

9. Pw1 P.C.N, the complainant, testified that she was 15 years old, having been born in May 2008. On 1/11/2021, she was sent home from school for unpaid fees. The following day, 2/11/2021, her parents gave her the fees and sent her back to school. On her way back, she met the appellant, a neighbour, who took the Kshs. 2,000 her mother had given her as fees and asked her to follow him to his house. She slept at the appellant's house that night. The following day, 3/11/2021, she went to her elder sister's place instead of school. During her stay at the appellant's house, they engaged in sexual intercourse on the night of 2/11/2021. Although they used protection, the appellant forced her into it and never returned the money he had taken from her.

10. The complainant further stated that the appellant used his penis to penetrate her vagina. Each one of them removed their own clothes after being forced by the appellant. Her elder sister eventually called her grandmother, who ended up calling her mother, and they proceeded to the Police Station and subsequently to the hospital. She identified the appellant as her assailant and stated that he had been holding her against her will, including when he had gone for her school uniforms from her sister.

11. In cross-examination, the complainant reiterated that the appellant took the school fees from her.

12. Pw2, David Wataka Khisa, a clinical officer at Kopsiro Health Centre, presented the complainant's medical notes and stated that at the time of examination, the complainant was 14 years old. The complainant was examined by his colleague, who had since left to study. Upon examination, there were no bruises on the vaginal walls. The hymen was broken, and she tested negative for syphilis, pregnancy and HIV. They made an impression of defilement and estimated her age at 13 years old.

13. In cross-examination, Pw2 testified that they did not test the appellant because he was never presented to the facility.

14. Pw3, VCK, the complainant's mother, testified that the complainant was born on 5/5/2008 and was 15 years old at the time of the testimony. The complainant was sent home from school on 1/11/2021 and arrived home on 2/11/2021. She gave her Kshs. 2,000 and sent her back to school, but the complainant was to pass by her grandmother's house and never went to school. On the evening of 2/11/2021, she received a call from the complainant's grandmother, MC, informing her that the complainant was nowhere to be seen. They searched for her and only found her on 4/11/2021 at her cousin Esther's place. On inquiry, the complainant informed her that the appellant had taken Kshs. 2,000 from her, detained her at his house, and defiled her. She identified the appellant as her neighbour.

15. Pw4 No. 65494, PC Josephat Ongoki from Kipsigon Police Station, testified that he took over the investigation from PC Lumuiria. On 8/11/2021, they received information of the appellant's arrest on the accusation of defilement. His investigation led him to confirm the testimonies of the Complainant and her mother, Pw3. On 17/7/2023, when the case had been brought to court, he learned that the appellant was still cohabiting with the complainant, during which time the appellant would complain that the case was not proceeding.

16. He established that the appellant had locked the complainant in his house while pretending to seek justice in court. The complainant was subsequently escorted to the hospital. He produced the complainant's birth certificate as P exhibit 1, which showed that the complainant was 13 years old at the time of the offence but 15 years old at the time the case was going on. The prosecution closed its case.

17. When placed on his defence, the appellant elected to remain silent and not say anything in his defence.

18. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him accordingly.

19. Section 8 (1) as read with section 8 (3) of the *sexual Offences Act* establishes the offence of defilement as follows: -

> " 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 between the age of twelve and fifteen years is liable upon conviction to imprisonment for a 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: -

    a. Age of the complainant;

    b. Proof of penetration in accordance with section 2(1) of the *Sexual Offences Act*; and

    c. Positive identification of the perpetrator.

21. The age of the victim of defilement is an essential element because defilement is a sexual offence committed against a child, who, under the Children's Act, is a person under the age of 18 years. In addition, the age of the child is an aggravating factor for purposes of determining the sentence to be imposed, as per the penalty clauses in the *Sexual Offences Act*. The younger the child, the more severe the sentence.

22. In this case, there was no dispute about the complainant's age. Pw4 testified that the complainant was 13 years old at the time of the offence and produced her Birth Certificate, which showed that she was born on 5/5/2008 and was therefore 13 years old at the time of the offence.

23. On penetration, section 2 of the Act defines penetration as follows: -

> " the partial or complete insertion of the genital organs of a person into the genital organ of another person."

24. The complainant testified how the appellant had defiled her. The appellant took the money she had got from her mother for fees and lured her to his home. At his home, the appellant forced her to take off her clothes and "used his penis to penetrate her vagina." That they used protection. On this issue, it has been held on several occasions that a fact of rape or defilement can be proved by oral evidence and circumstantial evidence without necessarily calling for medical evidence. This is in line with section 124 of the *Evidence Act* , which states that corroboration is not necessary in sexual offences.

25. In the present case, the findings of the clinical officer who testified as Pw2 were that the complainant had been penetrated and that her hymen was broken, corroborating the complainant's testimony. The complainant was firm in her testimony and reiterated it during cross-examination. This is prima facie evidence of penetration; hence, there can be no doubt that the complainant was penetrated.

26. The final issue is whether the appellant was positively identified as the perpetrator. The appellant was well known to the complainant, who testified that the appellant was her neighbour, a fact corroborated by her mother, Pw3. From the foregoing, it is clear that the appellant was not a stranger.

27. The prosecution satisfied all the elements of the offence of defilement as charged against the appellant.

28. The appellant impugned the trial court's conviction and sentence for failure to inform him of his right to legal representation as enshrined in Article 50 (2) (g) (h) of *the Constitution*. Article 50(2)(h) of *the Constitution* guarantees the right to legal representation at state expense if substantial injustice would otherwise result. The *Legal Aid Act*, 2016, in Section 43, mandates courts to inform accused persons of this right.

29. In David Njoroge Macharia v Republic [2011] eKLR, the Court of Appeal stated that: -

> " Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a

re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

30. In Republic v Karisa Chengo and 2 others [2017] eKLR, the Supreme Court expressed that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more but that "in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result". The Supreme Court went on to say that the right to legal representation is not limited to cases where the accused person is charged with a capital offence; that the operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result...." and that "the protection embedded in Article 50 (2) (h) goes beyond capital offence trials".

31. Accordingly, it should be a standard procedure for the accused to be informed prior about their right to legal representation. This is mandated by *the Constitution*. In the present case, it is unclear from the record whether the trial court made the Appellant aware of these rights. Nevertheless, aside from the fact that these issues were not addressed in the trial court, the way the Appellant cross-examined the prosecution witnesses and his overall conduct during the trial indicate that no injustice, let alone substantial injustice, stemmed from the trial court's failure to inform the appellant of his rights under Articles 50(2)(g) and 50(2)(h) of *the Constitution*. Therefore, the trial court's omission in notifying the appellant of his rights should not serve as grounds for invalidating his trial. Ultimately, I am convinced that the conviction is justified, and I see no reason to alter it.

32. The appellant complained that the trial court failed to appreciate his cogent defence; however, the record reveals that the appellant elected to exercise his right to remain silent under Article 50(2) of *the Constitution*, and as such, there was nothing for the trial court to consider.

33. The appellant further complained that his conviction relied on contradictory evidence; however, he failed to specify which particular evidence was contradictory.

34. In MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment), the court cited with approval the case of Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 as follows: -

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

35. In the present case, this Court has carefully considered the evidence of the prosecution witnesses but is unable to find any contradictions or inconsistencies in their testimonies. And, if at all there were any, the same were not material enough to warrant interference with the conclusions arrived at by the trial court.

36. The appellant further impugned the judgment entered against him on the ground that it was in contravention of Section 169 of the Criminal Procedure Code. The provision referred to provides that:

> "169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the

reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence which the accused person is acquitted, and shall direct that he be set at liberty."

37. A perusal of the judgment shows that although the trial magistrate appended a signature to the judgment and indicated that it was delivered on 6/11/2023, he failed to set out the points of determination, stating that he had set them out in the ruling on a case to answer dated 25/10/2023.

38. In relation to this aspect of the appeal, it cannot be said that the trial magistrate's failure to set out the points of determination prejudiced the appellant in any way. Consequently, I affirm the conviction.

39. As regards the appellant's sentence, it was his submission that the court erred in failing to order that his sentence ought to run from the time of his arrest. Section 333(2) of the Criminal Procedure Code provides that: -

"Subject to the provisions of section 38 of the Penal Code (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

40. I have considered the entire record, including the proceedings of the trial court. The appellant was arrested on 8/11/2021 and released on bond on 26/4/2022. This is a period of 5 months and 22 days that the appellant spent in custody prior to receiving bond. On 17/7/2023, the appellant's bond terms were temporarily suspended, and it is not clear whether the appellant was ever released again until his conviction and sentence on 20/11/2023, a period of 4 months and 3 days. The trial court failed to indicate that it had considered the time the appellant had been in custody in arriving at the sentence.

41. Consequently, it is necessary to clarify that, in computation of the appellant's 20-year sentence, the sentence will take into account the time the appellant spent in custody. Save for that variation, the appellant's appeal is without merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THE 7TH DAY OF MAY 2026.

R. E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Matere -For the Respondent

Wilkister - C/A