



**Chirchir v Republic (Criminal Appeal 3A of 2016)
[2024] KECA 753 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 753 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 3A OF 2016
FA OCHIENG, GWN MACHARIA & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

WESLY KIPNGENO CHIRCHIR APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nakuru,
(M. A. Odero, J.) dated 11th December 2015 in HCCRA No. 182 of 2014))*

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars of the offence were that on 9th February 2012 in Molo District, within the Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis), to penetrate the genital organ (vagina), of NCK a girl, aged 12 years.
3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#).
4. The appellant denied the charges and soon thereafter a trial ensued. At the end of the trial, the appellant was found guilty of the offence, he was convicted and sentenced to 20 years imprisonment. Being aggrieved, the appellant appealed to the High Court. The appeal was dismissed.
5. The prosecution's case was that; the complainant was 13 years old and in class six at [Particulars Withheld] Academy. On the material day, she left school at around 5:00 pm and went home. She then went to her grandmother's homestead to collect a book. She left her grandmother's home at around 7:00 pm together with the appellant, who worked at her grandmother's home and had requested her to wait for him. When they walked past a thicket, the appellant directed her to enter the bushes and then



- ordered her to undress and lie down, which she obeyed. The appellant cautioned her not to scream, and he proceeded to defile her. He then warned her not to tell anyone what had happened. She then went home. The following day when her mother questioned her, she told her what had happened.
6. PW2 was the complainant's mother. She told the court that she had questioned the complainant on 10th February 2012 as to why she had come home late the previous evening. She had gone home at 8:00 pm and the complainant was not home yet. The complainant had then revealed to her what had transpired on her way home from her grandmother's house. She then informed the complainant's father. The matter was reported to the police and the appellant was arrested.
 7. PW3 was the Clinical Officer who had examined the complainant 12 hours after the incident. She informed the court that the complainant's hymen was broken, an indication that penetration had occurred. She also noted a whitish discharge from the complainant's vagina, an indication of a sexual infection.
 8. PW4 was the arresting officer. He told the court that he received a call from the complainant's father who informed him that his daughter had been defiled. He and his colleagues went to the appellant's home. They found him sleeping. They arrested him.
 9. PW5 was the investigating officer. He produced a Birth Certificate which indicated that the complainant was born on 22nd September 1998 and thus she was 13½ years in February 2012. He also produced an immunization card which confirmed the information on the date of birth.
 10. When put to his defence, the appellant informed the court that on 10th February 2012 he went to work as usual, came back home in the evening, and while he was asleep, he was arrested by two police officers. He was informed that he was being accused of defiling the complainant. He had worked for the complainant's father for eight years. In July 2011, he bought a pool table to start his own business, this did not sit well with his employer. On 23rd November 2011, he was given his balance and relieved from work. However, he resumed work on 5th February 2012 but after six days he was arrested. He knew the complainant to be PW2's daughter.
 11. The learned Judge held that while it was true that the appellant had been charged under Section 8(2) instead of Section 8(3) of the *Sexual Offences Act*, and that the charge sheet had not been amended to that effect, the defect was not fatal to the prosecution case as the charge sheet contained the correct provision of defilement, being Section 8(1). According to the learned Judge, this was a human error, and in any event, the appellant suffered no prejudice as a result of the error. The appellant had mounted a strong defence to the charge and he was, therefore, able to fully comprehend the charge he was facing.
 12. The learned Judge held that the age of the complainant was conclusively proved through the evidence of the complainant who stated that she was 13 years old, PW2 who stated that the complainant was born in 1998, and the Birth Certificate and immunization card produced in Court. The learned Judge further held that the Birth Certificate was an official Government document which was properly and validly produced by PW5.
 13. The learned Judge held that the complainant gave clear, consistent, and cogent evidence of her defilement. The appellant was a person whom she knew very well. He was her grandmother's employee. She also gave his name as 'Wesley'. The complainant spent enough time with the appellant while they were walking, and she never lost sight of him. Her evidence also remained unshaken on cross-examination. The learned Judge observed that in the circumstances, the complainant had positively identified the appellant.



14. The learned Judge held that penetration had been proved through the evidence of PW5 that the complainant's hymen was broken, and her vagina had a whitish discharge.
15. The learned Judge held that the trial Court considered the appellant's defence but dismissed the same. She held that it was highly unlikely for the complainant's father to put her through the court case just so he could settle scores with the appellant. There was no proof that the appellant had not been paid wages for 11 months. The defence was just not believable.
16. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following grounds:
 - a. The learned Judge erred in relying on the medical evidence which contradicted the other evidence.
 - b. The learned Judge erred in relying on a defective charge sheet.
 - c. The learned Judge erred in not finding that his defence was dismissed without any cogent reasons.
 - d. The learned Judge erred in failing to find that the prosecution case was not proved beyond any reasonable doubt.
17. When the appeal came up for hearing on 11th March 2024, the appellant was present in person, whereas Mr. Omutelema, Senior Assistant Director of Public Prosecutions was present for the respondent. The parties relied on their respective written submissions.
18. The appellant submitted that both the trial Court and the High Court contravened Section 214 of the Criminal Procedure Code by drawing an inference of guilt to the appellant while relying on a defective charge sheet. The appellant contended that the complainant was over 13 years old and as such he ought to have been charged under Section 8(3) as opposed to Section 8(2) as was the case herein.
19. The appellant was of the view that the complainant's evidence fell short of the litmus test of truthfulness dictated by Section 124 of the *Evidence Act* on the admission of the evidence of a single witness in sexual offences cases. To his mind, the complainant's evidence was unreliable and contradictory. He relied on the case of Abel Morari & Another vs. Republic, Criminal Appeal No. 86 of 1994 to buttress this submission.
20. The appellant submitted that the medical evidence did not place him as the perpetrator of the offence. He pointed out that since only 72 hours had passed when the complainant was examined, the tear on the hymen ought to have been raw, yet the evidence of PW3 was contrary. He argued that a hymen is not only broken through sexual intercourse as was held in the case of Queen vs. Quintanilla, 1999 AQBD 768.
21. While relying on Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR case, the appellant submitted that the prosecution case had inadequacies that ought to have been resolved in his favour.
22. The appellant urged the Court to take into consideration the time he had spent in remand prior to his sentencing under Section 333(2) of the Criminal Procedure Code. He also relied on the case of Ahamad Abolfadhi Mohammed & Another vs. Republic [2018] eKLR in support of this submission.
23. The appellant also urged the Court to reduce his sentence in light of Legal Notice No. 2970 on the Sentencing Policy Guidelines, specifically that Judicial Officers have discretion to look at sentencing in accordance with the impact of the sentence on the society, family, and the entire judicial system, and also promote restorative justice and values of rehabilitation. He pointed out that he had undertaken



several courses that have allowed him to be a better person to be released back into society, and that the skills he had acquired will better his life, and the life of those around him.

24. Opposing the appeal, the respondent admitted that the correct citation in the charge sheet should have been Section 8(3) and not 8(2). However, the error was not fatal as the section merely provides for the penalty and not the substance of the charge. The error did not prejudice the appellant as he understood the charge he was facing, and there was no failure of justice. In any event, the error was curable under Section 382 of the Criminal Procedure Code.
25. The respondent submitted that the medical evidence adduced did not contradict the other evidence but confirmed the same. PW3 confirmed that the complainant's hymen was broken, and indicative of penetration.
26. The respondent pointed out that the learned Judge re-evaluated the complainant's evidence, and then rightly concluded that the testimony was credible. The complainant recognized the appellant because she knew him well and they had also spent a long time walking and talking on their way from the complainant's grandmother's place.
27. The respondent also pointed out that the trial court and the High Court were satisfied that the complainant was telling the truth. The complainant's evidence was also corroborated by the evidence of PW2 and PW3.
28. The respondent submitted that the appellant's defence was considered by both courts and found to be unbelievable. Nonetheless, the appellant did not state anything regarding the incident. He merely narrated how he was arrested, and how he was employed.
29. The respondent urged the Court to uphold the sentence of 20 years imprisonment against the appellant because it was legal and merited.
30. This is a second appeal. Section 361(1) of the Criminal Procedure Code enjoins us to consider only questions of law. In the case of *Karani vs. Republic* [2010] 1 KLR 73 the Court stated thus:
31. We have carefully considered the record of appeal, the submissions by both parties, the authorities cited, and the law. The issues for determination are; whether the charge sheet was defective, whether the prosecution case was proved beyond reasonable doubt, whether the appellant's defence was considered, and whether this Court should interfere with the sentence meted against the appellant.
32. It is trite that an accused person is entitled to not only be charged with an offence recognized under the law but also to be furnished with all the necessary details of the offence, to enable him appreciate the nature of the charge(s) against him and to enable him to prepare an appropriate defence.
33. Therefore, a charge sheet that is deficient in substance would prejudice an accused person's right to a fair trial as provided for in Article 50(2)(b) of *the Constitution*. Section 134 of the Criminal Procedure Code provides that:
34. Whether an anomaly can render a charge sheet defective was determined in the case of *Isaac Omambia vs. Republic* [1995] eKLR, where the court considered the necessary ingredients in a charge sheet as follows:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with



such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

35. In determining whether a charge sheet was defective or not, this Court in the case of *Sigilani vs. Republic* [2004] 2 KLR, 480 stated that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare his defence”.

36. In this instance, we note that the appellant was charged with;

“defilement contrary to Section 8(1)(2) of the *Sexual Offences Act*, No. 3 of 2006”. The charge sheet indicated the statement of the offence that the appellant was charged with. The said offence is known in law. The charge sheet also contained the particulars of the offence. To our minds, the charge sheet was not deficient in substance. The error was with the penalty section, and it could not have been prejudicial to the appellant because he was sentenced in accordance with Section 8(3) and not 8(2) as was quoted in the charge sheet.

37. In the case of *Peter Ngure Mwangi vs. Republic* [2014] eKLR, the court stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, (198) eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charged offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- ii. when for such reason it does not accord with the evidence given at the trial.”

38. Nonetheless, Section 382 of the Criminal Procedure Code provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

39. In the case of *JMA vs. Republic* [2009] KLR 671, the court observed that not all defects in a charge sheet will render a conviction thereunder invalid. Over time, the test of determining whether a charge is fatally defective, to render any conviction a nullity has been established, both in our jurisdiction and



other jurisdictions. In that regard, the Supreme Court of India in *Willie (William) Slaney vs. State of Madhya Pradesh* [A.I.R. 1956 Madras Weekly Notes 391], held that:

40. In the case of *Isaac Nyoro Kimita & another vs. Republic* [2014] eKLR the court stated thus:

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants. In other words, did each appellant appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?”

41. In the case of *John Irungu vs. Republic* [2016] this Court observed that:

“The Code contemplates that there may be variations, so long as there is substantial compliance with the rules. In the same vein section 382 of the Code focuses, not on formal compliance with the rules of framing the charge, but on whether any error, omission or irregularity that has occurred in the charge, has occasioned a failure of justice.”

42. In the case of *Benard Ombuna vs. Republic* [2019] eKLR the court held that:

43. From the foregoing, it is our considered view that the appellant cannot be said to have misunderstood the nature of the charges against him. It is clear from his defence and submissions that he understood that he was being accused of having committed the offence of defilement, against the complainant. In our view, the omissions did not render the charge sheet fatally defective. In so finding, we are guided by the decision in the case of *Willie (William) Slaney vs. State of Madhya Pradesh* (supra), where the court held:

“We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form.

To hold otherwise is only to provide avenues to escape for the guilty and afford no protection to the innocent.”

44. Similarly, in the case of *Samuel Kilonzo Musau vs. Republic* [2014] eKLR the court held that:

“As will be readily apparent, section 8(1) is the offence section; it creates the offence of defilement constituted by committing an act which causes penetration with a child. Section 8(2) is the punishment section and prescribes life imprisonment when the child defiled is aged eleven years or less. The charge would have been properly framed if it charged the appellant with defilement contrary to section (8) (1) as read with sections 8(2) because section 137 of the Criminal Procedure Code requires the statement of the offence to describe the offence in ordinary language and if the offence is one created by enactment, it shall contain a reference to the section of the enactment creating the offence.

In this case, the statement of offence, though lumping section 8(1) and (2) together, contained the ingredients of the offence and the prescribed punishment. The irregularity was one that was, in our view, curable under section 382 of the Criminal Procedure Code. That provision insulates a finding or sentence of the trial court from challenge on account



of any error, omission or irregularity in the charge, unless it has occasioned a miscarriage of justice.”

45. We are also persuaded by the decision in the case of *Thomas Aluga Ndegwa vs. Republic* [2018] eKLR where the court stated that:

“We respectfully agree with the reasoning of the first appellate court. While the charge sheet may not have been drafted in the most elegant of terms, it is clear that the appellant understood the charge against him and participated in the trial. For similar reasons, we find that the appellant’s right to a fair hearing under Article 50 (2)(b) of *the Constitution* was not violated.”

46. Therefore, we find that the error in the charge sheet did not occasion a failure of justice.

47. Section 8(1) of the *Sexual Offences Act* provides that:

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

48. With regard to proof of the offence charged, under the *Sexual Offences Act*, the elements of the offence of defilement are: the victim must be a minor; there must be penetration of the genital organ, but such penetration need not be complete or absolute. Partial penetration will suffice, and the identity of the perpetrator must be established. For the offence of defilement to be established, the prosecution must prove each of the above ingredients. In the case of *Charles Karani vs. Republic*, Criminal Appeal No. 72 of 2013, the court stated that:

“The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration, and positive identification of the assailant.”

49. It is trite that the onus of proof of the age of the complainant resides with the prosecution. Under section 8(1) of the *Sexual Offences Act*, a person is deemed to have committed defilement if he or she does an act that causes penetration with a child. Under Section 2(1) of the *Sexual Offences Act*, the definition of a child is the one assigned in the *Children Act*. This entails any human being of less than 18 years.

50. In the case of *Kaingu Elias Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010, the court emphasized the importance of proving the age of the victim of defilement, as the sentence imposed upon conviction depends on the victim’s age.

51. In this case, the complainant testified that she was 13 years old.

This evidence was corroborated by the evidence of PW2, the complainant’s mother who stated that the complainant was born in 1998. PW5 produced a Birth Certificate and an immunization card in evidence which indicated that the complainant was born on 22nd September 1998. This was conclusive proof that the complainant was about 13½ years old at the time of the incident. The appellant did not object to the production of these documents in evidence during the trial. His contention that they should not have been produced by PW5 was determined by the court when it held that a Birth Certificate is an official Government document which can be produced by a government official.



52. In the case of *Francis Omuron vs. Uganda*, Cr. Appeal No. 2 of 2000, the Court of Appeal of Uganda held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim’s parent or guardian, and by observation and common sense.”

53. In the case of *Richard Wabome Chege vs. Republic, Criminal Appeal No 61 of 2014*, the court held that:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 [the doctor] who examined the complainant, and the complainant herself.”

54. In the circumstances, we find that the age of the complainant was satisfactorily proven beyond reasonable doubt.

55. The evidence of the complainant concerning the incident was that when they arrived at a thicket, the appellant ordered her to enter the bushes. He then ordered her to undress and then, defiled her. This evidence was found to be truthful by the trial court. The High Court in re-evaluating the said evidence also found the evidence to be clear, consistent, and cogent. Furthermore, the evidence was corroborated by the evidence of PW3 who examined the complainant and confirmed through medical evidence that she had been defiled, as her hymen had been broken. We find this evidence to be sufficient proof of penetration.

56. It is common ground that the appellant and the complainant were well-known to each other as the appellant used to work at the complainant’s grandmother’s homestead. This was a case of recognition. The complainant was able to recognize the appellant. The appellant had not denied that he had requested the complainant to wait for him so that they could walk back together. When the complainant told her mother of the events of the previous evening, she mentioned the appellant by the name, ‘Wesley’.

57. In the case of *Cleophas Otieno Wamunga vs. Republic* [1989] eKLR, this Court while dealing with the complexities of an identification of an assailant stated:

“It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

58. This was a case of recognition. The appellant himself confirmed that he knew the complainant, PW2, and the complainant’s father. There was no room for error or mistaken identity.

59. As regards the appellant’s defence, the appellant gave a testimony and chose not to call any witnesses. The appellant testified as to how he was arrested and also brought up the dispute he had with his employer. He told the court that he was being framed. The two courts analyzed the said evidence and dismissed it for being unbelievable as they held that the complainant’s father could not have put his



daughter through a trial, just so he could have his revenge on the appellant. We find that both the trial court and High Court extensively considered the appellant’s defence.

60. From the foregoing, we find no reason to make a finding that is inconsistent with the two courts below on matters of facts. We are satisfied that the appellant’s conviction was safe.

61. Section 8(3) of the *Sexual Offences Act* Provides:

“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.”

62. It is trite that a sentence is passed at the discretion of the judicial officer. In this instance, the trial court had the discretion to sentence the appellant to any term as long as it was not below 20 years, as that was the understanding of the law at the material time. The court sentenced the appellant to 20 years imprisonment. The High Court upheld this sentence.

63. In the case of Christopher Ochieng vs. Republic [2018] eKLR stated thus:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

64. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

65. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, the mitigating factors, and the Sentencing Policy Guidelines, we find no reason to interfere with the sentence and we uphold the appellant’s sentence of 20 years.

66. As the appellant was in custody during the trial, we order, (pursuant to Section 333(2) of the Criminal Procedure Code) the sentence shall be computed from 15th February 2012, the date when the appellant took the plea.

67. Accordingly, we uphold the appellant’s conviction and sentence.

The appeal lacks merit and it is dismissed in its entirety.

Orders accordingly.

DELIVERED AND DATED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. OCHIENG

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JUDGE OF APPEAL

F. W. NGENYE – MACHARIA



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JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

