



REPUBLIC OF KENYA



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**Kiplangat v Republic (Criminal Appeal 362 of 2019)
[2024] KECA 702 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 702 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 362 OF 2019
F SICHALE, LA ACHODE & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

NATHAN KIPKOSGEI KIPLANGAT APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against the judgment of the High Court Eldoret (Kimaru. J)
dated 26th September 2018 in Eldoret Criminal Appeal No. 80 of 2016)*

JUDGMENT

1. This is the second appeal of Nathan Kipkosgei Kiplangat (the appellant) against the judgment of Eldoret High Court, Criminal Appeal No 80 of 2016 delivered on 26th September 2018 by Kimaru J, as he then was.
2. The appellant was charged in the Magistrate's Court at Eldoret with two counts of defilement contrary to section 8(1) as read with 8 (2) of the *Sexual Offences Act*. The particulars of the first count were that on the 24th day of March 2012 at 10.00 a.m. in Keiyo South District, of the then Rift Valley Province, the appellant unlawfully and intentionally caused his genital organ (Penis) to penetrate the genital Organ (vagina) of FJK, a girl aged 8 years. There was a second count whose particulars were the same as those in the first count, save that in the second count the appellant penetrated SJK's vagina, who was aged 10 years old.
3. The appellant pleaded not guilty to the charges and propelled the matter to a full hearing, in which the prosecution presented seven witnesses.
4. The case for the prosecution was that on the material day at around 7 a.m, FJK (PW1), an eight-year-old girl and SJK (PW2), a ten-year-old girl, went to the appellant's house to buy sugarcane. On arrival, the appellant sent them to cut the sugarcane from his farm and followed them there. After they had



- cut the sugarcane, the appellant pulled PW2 into a nearby bush and defiled her. He then sent her to call PW1 into the bush where he was and he defiled her too. Afterwards, the appellant gave PW1 ten shillings and PW2 fifty shillings and warned them not to tell anyone what he had done.
5. However, when PW1 arrived home she revealed to one Cherono, a neighbor's daughter, what the appellant had done. Cherono told PW1's sister M, who in turn reported to their parents.
 6. GJK (PW4), the mother to PW1 took PW1 and PW2 to Chepkorio Hospital and then to Moi Teaching and Referral Hospital the following day, 25th March 2012. She later reported the matter at Kaptagat Police Station and was issued with a P3 form which was filled at the Moi Teaching and Referral Hospital. She told the court that PW1 was eight years old at the time of the offence and produced in evidence a Child Health Card that showed that she was born on 25th March 2003. TCK (PW3), the mother to PW2 testified that PW2 was 10 years at the time of the offence and produced in evidence a Child Health Card to show that PW2 was born on 6th August 2000.
 7. Dr. Jane Yatich (PW5), a medical doctor at the Referral Hospital, produced the P3 forms in respect of PW1 and PW2. The forms had been filled by one Dr. Cynthia Kibet who had since left for further studies abroad, but whose handwriting and signature PW5 was familiar with. The P3 form in respect of PW1 revealed that she had a fresh hymenal tear at position 6 O'clock and there was redness on her vagina. The P3 form in respect of PW2 revealed that she had a fresh tear of the hymen at 9 O' clock and there was redness on the vagina too. The conclusion was that the two children had been defiled.
 8. On 28th March 2012, David Aiyabei Kipsat (PW6) arrested the appellant with the assistance of members of the public and took him to Kaptagat Police Station. PC Charles Omusungi carried out the investigations whose report was produced in court by PC Abraham Tabot (PW7).
 9. It was the prosecution's case that the mother to the appellant, the father of PW1, the mother of PW2 and PW6 are all siblings and therefore, the appellant, PW1 and PW2 are cousins.
 10. At the close of the prosecution's case the appellant was found to have a case to answer on both counts and was placed on his defence. He gave an unsworn statement and did not present any witnesses. He stated that on the material day he was in his farm when PW4 came to his house and accused him of defiling her children. That PW4 reported to the Chief and to the Police. That on the day of his arrest, he was selling chicken and beans when the members of the public arrested him on accusation of defiling PW1 and PW2. He denied having committed the offences.
 11. Upon considering the matter before him, Hon. Barasa (PM) found the appellant guilty on both counts. The appellant did not offer any mitigation. He was sentenced to life imprisonment on the 1st count, and to serve twenty-five years in prison on the 2nd count which sentences were ordered to run concurrently.
 12. Aggrieved and dissatisfied with the verdict, the appellant filed an appeal in the High court. The grounds of the appeal were that the prosecution had failed to establish its case against him to the required standard and that the charges against him were defective for reasons that he was related to the complainants, and ought to have been charged with incest instead of defilement.
 13. Upon considering the appeal before him, the learned judge Kimaru J (as he then was), found that the appeal lacked merit and dismissed it. He also found that the custodial sentence imposed on the appellant by the trial court was legal and upheld it. The determination of the High court triggered this second appeal in which the appellant has raised seven grounds asserting that the learned judge erred in law:
 - (a)in failing to consider that the appellant was denied right to fair trial since no witness statement were availed to the appellant.



- b.in failing to note and hold that the appellant was denied opportunity to legal representation since the charges were of a serious nature and the appellant ought to have been granted the fairest representation.
 - c.in failing to hold that the appellant was not examined by a qualified medical person to establish his ability to defile as charged.
 - d.in concluding as the trial court did that the complainants were minors by relying on the clinical cards tendered before her which are not conclusive evidence of age.
 - e.in failing to give cogent reasons for rejecting the appellant’s defence given the gravity of the matter before court.
 - f. in relying on extraneous issues in dismissing the appellants appeal.
 - g. in failing to consider and hold that the defence had sufficient weight to counter the prosecution’s case.”
14. Prosecution Counsel, Ms. Lydia Kipyego filed written submissions dated 10th February 2023 on behalf of the State.
 15. M/S Amolo Sagasi & Co. Advocates appearing for the appellant filed written submissions dated 3rd July 2020. Counsel urged that PW1 and PW2 gave contradictory evidence on where the appellant was when they arrived at his home; what they went to do at his house and the amount of money he gave them. Counsel also submitted that the respondent failed to call crucial witnesses, Cheron and Mercy, to whom the complainants first gave information of the offences.
 16. It was submitted that contrary to Section 36 of the [Sexual Offences Act](#), the appellant was not examined to prove that he was the one who defiled the minors. He contended that a broken hymen is not exclusively caused by penile penetration and that Dr. Yatich PW5, made no independent examination of the minors. Further, that Dr. Kibet also solely relied on the evidence from Chepkorio Health Centre, and did not examine the minors.
 17. Counsel submitted that the ages of the minors were not proved since their birth certificates were not produced in evidence and the Clinical Cards that were produced were not conclusive as they were not signed and stamped.
 18. Lastly, that the evidence on record does not show that the trial court informed the appellant of his right to legal representation as provided for in Article 50 (2) (g) and (h) of the [Constitution](#) and Section 43 of the [Legal Aid Act](#).
 19. In rebuttal, counsel for the respondent submitted that the ages of the victims were proved beyond reasonable doubt by the testimonies of their mothers and the Child Clinic Cards produced in evidence in support.
 20. On the assertion that crucial witnesses were not called counsel submitted that the prosecution used their discretion to choose which witness to call to prove their case. She relied on this Court’s decision in [Julius Kalewa Mutunga v Republic](#); Criminal Appeal No 31 of 2005 where it was held that the prosecution have the discretion to choose the witnesses to call to prove their case. She asserted that in this case they had called adequate witnesses to prove their case.
 21. Counsel urged that the absence of a DNA test in a sexual offence case does not automatically lead to an acquittal and cited the holding of this Court in [Evans Wamalwa Simiyu v Republic](#) (2016) eKLR, that



- “the fact of rape or defilement is not proved by way of a DNA test but by way of evidence”. Therefore, that the appellant did not have to be examined to prove that he committed the offence.
22. Counsel also argued that the right to legal representation under Article 50(2)(h) of the Constitution, is not absolute and cited this Court’s decision in Delphs Bank Ltd v Chass & 6 others (2005) 1 KLR to buttress her argument. Counsel submitted that nowhere in the proceedings did the appellant seek legal representation and was denied. She urged that the appellant’s rights were not violated.
23. We have carefully considered the grounds of appeal and the rival submissions before us. This being the second appeal, our mandate under Section 361(1) of the Criminal Procedure Code, is limited to considering matters of law only and severity of sentence is a matter of fact and not law.
24. This was well articulated by this Court in David Njoroge Macharia v Republic [2011] eKLR as follows:
- “That being so only matters of law are for consideration -see section 361 of Criminal Procedure Code. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see Chemagong v R (1984) KLR 611”
25. On the first and second grounds of the appeal the appellant submitted that his right under Article 50(2) was violated; that he was not provided with a witness statement, and that he was not informed of his right to legal representation. A perusal of the record shows that these first two grounds were not raised in the trial court, nor did they form grounds of appeal for deliberation in the High court. These are new grounds that sprung up in the second appeal.
26. We decline the invitation to delve into these grounds, to fault the courts below for not making determinations on issues which were not before them. This position was well captured in the case of Katana & another v Republic (Criminal Appeal 8 of 2019) [2022] KECA 1160 (KLR) (21 October 2022) (Judgment) where the Court found itself in the same position as we have, and stated thus:
- “The issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore could not be the basis for vitiating the High Court’s decision.”
- The first and second grounds of the appeal therefore, fall by the way.
27. The appellant’s appeal was on conviction only and not on sentence. He did not raise any grounds nor advance any submission on sentence. We also note that in the trial court the appellant advanced no mitigation although he was given an opportunity to do so. Therefore, the remaining five grounds have been collapsed into one issue for our consideration. That is, whether the prosecution proved its case beyond reasonable doubt to sustain the conviction.
28. The appellant was charged with two counts of defilement contrary to section 8(1) and (2) of the SOA which provides as follows:
- “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 upon conviction be sentenced to imprisonment for life.”



29. This Court has discussed the ingredients of the offence stated above in its decisions without number. In *John Mutua Munyoki v Republic* (2017) eKLR this Court held that:

“For an offence of defilement to be committed, the prosecution must prove each of the following ingredients:

- i. The victim must be a minor
- ii. There must be penetration of the genital organ by the accused and such penetration need not be complete or absolute. The partial penetration will suffice.”

30. In the case before us, the mothers of the minors testified as PW3 and PW4 respectively and stated the ages of the victims. They produced in evidence the Clinical Health Cards that indicate that PW1 was born on 25th March 2003, while PW2 was born on 6th August 2003. Regarding the ages the learned judge held that:

“As regards the ages of the complainants, their respective immunization cards were produced into evidence. In the card, the 1st complainant is indicated to have been born on 25th March 2003 while the 2nd complainant is indicated to have been born on 6th August 2000. The complainants were respectively 8 and 10 years at the time of the sexual assault. The ages of the complainants were established to the required standard of proof.”

31. We note that PW1 was 9 years old and PW2 was 11 years 9 months at the time of the offence. We refer to the decision of this Court in *Edwin Nyambogo Onsongo v Republic* (2016) eKLR where it stated thus:

“...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 guardians 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.” (emphasis ours)

In our view the oral evidence of the minors, or that of their mothers regarding the ages of the minors was sufficient on its own, even without corroboration from documentary evidence. We are satisfied as were the courts below that the evidence concerning the ages of the two minors was credible and reliable and that the ages of the victims were proved to the required standard.

32. The evidence of the minors on penetration was elaborate. PW2 testified that the appellant called her and when she followed him in to the bush she recounted that:

“He told me to lie down. He told me to remove my panty. I removed it. Then he lay on me and did ‘tabia mbaya’ (bad manners).

She pointed at her private part to show where the appellant committed the act that she called ‘tabia mbaya’. PW1 confirmed that the appellant pulled PW2 into the bush telling her to go with him to pick sugarcane.



33. PW1 testified further that when PW2 later reappeared she told PW1 that the appellant was calling her into the same bush. PW1 complied and in her narration to the court she stated that:

“When I went there, he told me to remove my panty. I removed it. He told me to lie down. I lied (sic) on my back. Then he did bad manners to me here (points to her vagina). He lay on me after removing his trouser and underwear.”

The medical report produced in evidence by PW5 reveals that there was penetration in both minors. It concluded that the minors had been defiled.

34. The finding of the learned judge on penetration in the two counts was captured thus:

“The complainants’ testimony coupled with the medical evidence established that indeed the complainants were penetrated. The complainants’ testimony is that of children. Even if this court were to disbelieve their testimonies, the medical evidence adduced clearly confirmed that the complainants were sexually assaulted in the manner in which the complainants described in their testimony. The medical evidence corroborated their respective testimonies.”

We find that the learned judge was correct in reaching this conclusion and find no basis to depart from his holding.

35. On the identity of the perpetrator the learned judge pronounced himself thus:

“The appellant was well known to the complainants prior to the sexual assault. They are close relatives. The identity of the perpetrator of the sexual assault was therefore established to the required standard of proof.”

We look no further than the decision of this Court in *Reuben Taabu Anjononi & 2 others v Republic* 1980 eKLR where the Court held that:

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

These were relatives who interacted with each other. Indeed, the children had gone to the appellant to ask for some sugarcane from him. When he told them to go to the farm and get them, they had no reason to fear, for he was a person well known to them. We therefore agree with the findings of the two courts below that the appellant and no one else, defiled these two children.

36. The appellant faulted the superior court for “failing to consider and hold that the defence had sufficient weight to counter the prosecution’s case.” We have examined the record and are cognizant of the fact that this being a criminal trial the burden of proof rests on the prosecution without shifting. We find no reason to depart from the conclusion of the learned judge that the defence was a mere denial and that it did not dent the prosecution’s evidence in any way.

37. In the end, we are satisfied that the conviction entered by the trial court and upheld by the superior court on first appeal was sound. Ultimately, we dismiss this appeal.

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

F. SICHALE



.....
. JUDGE OF APPEAL

L. ACHODE

.....
. JUDGE OF APPEAL

W. KORIR

.....
.. JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

