



**Changirwa alias Chege v Republic (Criminal Appeal
186 of 2017) [2024] KECA 946 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 946 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 186 OF 2017
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 26, 2024**

BETWEEN

NEWTON CHANGIRWA ALIAS CHEGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of the High Court of Kenya at Kakamega
(Majanja, J.) dated 1st September, 2017 in HCCRA No. 99 of 2016)*

JUDGMENT

1. The appellant, Newton Changirwa Alias Chege, is before this Court on a second appeal, his first having been dismissed in entirety by the High Court sitting at Kisumu (Majanja, J.) on 1st September, 2017. He had appealed to that Court against his conviction and sentences of life imprisonment passed by the Senior Principal Magistrate’s Court at Hamisi, following a trial on three counts of the charge of defilement contrary to “Section 8(1) (2) of the Sexual Offences Act, No. 3 of 2006.”
2. The particulars of the offence, which the two courts below found to have been proved, were as follows. For Count I, it was alleged that on the 12th day of June, 2015, within Vihiga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VA¹, a child aged 6 years. The particulars of Count II were that on the 12th and 13th day of June, 2015, within Vihiga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of DS.², a child aged 8 years. The particulars of Count III were that on the 11th day of June, 2015, within Vihiga County, the

¹ Initials used to protect the identity of the minor.

² Initials used to protect the identity of the minor.



- appellant intentionally and unlawfully caused his penis to penetrate the vagina of A.I.³, a child aged 10 years.
3. The appellant denied the charges and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment for each of the offences as the Sexual Offences Act prescribes, but held in abeyance two life sentences on the ground that they could not be served concurrently.
 4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Kakamega via Criminal Appeal No. 99 of 2016.
 5. In a judgment dated 1st September, 2017, the High Court (D.S. Majanja, J.) dismissed the appeal and upheld the conviction. However, he set aside the two (2) life sentences held in abeyance and directed that all three (3) life sentences were to run concurrently.
 6. The appellant was, again, dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised five (5) grounds in his self-crafted Memorandum of Appeal. Reproduced verbatim, they are that:
 - 1) Both the trial and first appellate courts erred in law by appreciating the evidence of PW3, a minor, which was given without conducting a *voire dire*.
 - 2) Both the trial and first appellate courts erred in law by failing to appreciate that the evidence of PW1 and PW2 were uncorroborated.
 - 3) The trial and first appellate court erred in law by failing to observe that the prosecution case was marred with contradictions and inconsistencies hence unsafe to base a conviction upon.
 - 4) Both the trial and first appellate court erred in law by failing to consider that the sentence imposed was unconstitutional due to its mandatory nature.
 - 5) The trial and first appellate court erred in law by failing to consider that the charge did not meet the tenet of section 179 CPC and the equivocal admission of the offence.
 7. The facts of the case as they emerged at trial and re-evaluated by the first appellate court were as follows. The victims in Count I, II and III, testified as PW1, PW2 and PW3, respectively. All of them were primary school-going children.
 8. PW1 told the court that she was playing outside with PW2 when the appellant called and asked her to enter his house. When she did, the appellant told her to sleep on the bed and removed her panties. He then “put his urine thing in her urine thing”. She felt pain and cried as a result but he told her to keep quiet. Thereafter, she left his house and went home and reported the incident to her grandmother, who took her to hospital. PW1 testified that a similar incident had occurred between her and the appellant previously.
 9. PW2’s testimony was identical to that of PW1: She was playing outside with PW1 when the appellant called them in to his house and proceeded to “to remove his urinating thing and put it in PW2’s urinating thing”. She, too, was afraid to scream or tell anyone because of the appellant’s threats.
 10. PW3’s testimony differed from that of PW1 and PW2 only in terms of the date and place of the defilement: she was washing dishes outside their house when the appellant asked her to go into a toilet whence he put “his urinating thing in her urinating thing”. She, too, was threatened with death if she

³ Initials used to protect the identity of the minor.



- disclosed what had happened. However, she got the courage to tell her aunt, Phyllis, who, in turn, reported the matter to the village elder and chief. She was later taken to hospital by one Madam Pamela.
11. TS, testifying as PW4 told the court how, on the material day, PW1 came back from playing outside walking with a visible limp; and a foul smell. The following Sunday morning, she received a phone call from her sister-in-law, Beatrice calling her to go to her house urgently. PW1 was with B, and it is there that she discovered that PW1 had been defiled upon being asked to physically examine her. PW1 also told PW4 that it was the appellant who had defiled her. Beatrice, a neighbour she called after noticing PW1's situation (MM); and the village elder they called afterwards (Karen Luvanga) all testified. So did Pamela Lanayo, a teacher who first learnt about the defilements from a Facebook posting. At school, she interviewed the three children and helped process their access to hospital where they were each seen and treated by Emmanuel Oranga, a Clinical Officer. Emmanuel medically confirmed the defilements and testified as much and produced P3 forms with respect to each.
 12. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He denied the charges and testified that he was arrested on 15th June, 2015, while he was on his way home. On reaching the police station, he found several women who were in the company of young children. The police asked him what he had done to the children and his response was that he had done nothing to them. The following day, he was arraigned in court and the charges were read to him, which he denied. He narrated that a few days prior to his arrest, he was at his farm weeding when PW4 went to him and told him to create a boundary in the farm. He told her that he could not subdivide the farm since it belonged to his father. An argument ensued between them and PW4 went to the farm and started abusing him. They both insisted that he leaves, which he did as he did not want to quarrel with them. During cross examination, he stated that his father does not get along with the complainant's parents since they have a land dispute.
 13. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions.
 14. First, the appellant faulted the two lower courts for considering the evidence of the minors on the ground that they did not undergo voire dire examination. He relied on this Court's decision in the case of John Otieno Oloo vs. Republic, Criminal Appeal No. 350 of 2009 arguing that relying on the evidence of the minors occasioned a miscarriage of justice since they were only eye witnesses.
 15. Second, the appellant faulted the two lower courts for convicting him without necessary caution and skepticism, based on the unsworn evidence of the minors. He argued that it was wrong for the two courts to rely on the uncorroborated evidence of the minors without giving a reason for believing them as required in in section 124 of the Evidence Act. He cited Reagan Mokaya vs. Republic, HCCRA No. 49 of 2006 (UR) and Johnson Muiruri vs. Republic (1983) KLR 445 in this regard.
 16. Third, the appellant argued that the two lower courts erred by relying on evidence which was marred with contradictions and inconsistencies. In this regard, he submitted that PW1 did not state that: she went to PW5 at 7.00am to report that the appellant had defiled her; and on 15th June, 2015, her grandmother went to PW5 and found her there and they both checked her. The appellant argued that on the contrary, PW1 testified that she reported the incident to her grandmother immediately after leaving his house; and yet her grandmother testified that she only learnt about the incident when she was informed by PW5. The appellant contended that it was a wonder how a child aged 6 years could wake up at 7.00 am and be in another person's house without a proper reason or being sent; and how PW4 could not bathe PW1 for four days despite observing that she was stinking. The appellant further contended that while PW2 testified that she did not tell anyone about the incident since she



was threatened, how then could it be that PW7 told the court that PW2 was the one who informed her that the appellant defiled her. The appellant also contended that: all the minors did not know the date when the incident occurred; while PW1 stated that the appellant called them to pick guavas, PW2 stated the appellant called them to pick sweets; it was hard to understand how PW2 waited for PW1 to be defiled before her turn came; and it was difficult to understand how the appellant could wake up one day and defile three minors, something he had never done before despite being a neighbour. The appellant argued that all these disparities cast a reasonable doubt on the veracity of the evidence adduced.

17. Fourth, the appellant faulted the two lower courts for failing to review his sentence in line with the Supreme Court advisory opinion in *Francis Muruatetu & Another vs. Republic* (2017) eKLR.
18. Fifth, the appellant argued that the two lower courts erred by convicting him on a defective charge sheet. The defect, he contended, was that he was charged under “section 8(1)(2)”, which was a non-existent charge in law; whilst he was convicted for defilement under section 8(1) as read with 8(2). He cited *Nkerote vs. Republic*, HCCRA No. 166 of 2006 to aid his argument in this regard.
19. Opposing the appeal, Ms. Busienei reminded this Court of its role as the second appellate court, which is to deal with matters of law only and not delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court and relied on this Court’s decision in *Njoroge vs. Republic* (1982) KLR 388.
20. On the issue of PW3 not undergoing *voire dire* examination, counsel argued that the same was not fatal with regard to her evidence.
21. On the issue of the evidence of the minors being corroborated, counsel argued that section 124 of the Evidence Act allows trial courts to convict an accused person on the evidence of a complainant in sexual offence cases. She submitted that in the instant matter, the trial magistrate clearly recorded his reasons for believing the complainants in his judgment and relied on the case of *Bernard Kebiba vs. Republic* (2000) eKLR, wherein it was held that in appropriate circumstances where the trial court is satisfied that the complainant is speaking the truth, the court may convict without corroboration. However, in such a situation, the court must warn itself of the danger of basing a conviction upon uncorroborated evidence of the complainant. Where however, the court feels that there is need for corroboration, it must expressly say so in the judgment and must then look for corroboration from the evidence led and recorded and if the court finds it, the court must mention it expressly in its judgment.
22. As regards the issue of constitutionality of the appellant’s sentence, counsel submitted that the directives given in *Francis Muruatetu & Another vs. Republic* (2017) eKLR, only applied to murder cases and not offences under the Sexual Offences Act.
23. On whether the charge met the tenets of section 179 of the Criminal Procedure Code, counsel submitted that the charge indeed met the tenets therein and the prosecution proved all the elements of the defilement as laid down in the case of *Charles Wamukoya Karani vs. Republic*, Criminal Appeal No. 72 of 2013, which are: age of complainant, proof of penetration and positive identification of the assailant.
24. As rightly stated by the respondent’s Counsel, this being a second appeal, our jurisdiction is indeed limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi vs. Republic* [2016] eKLR, it was held as follows:

“This is a second appeal and 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 *Chemangong -vs- R*, [1984] KLR 611.”

25. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. Drawing from our mandate as a second appeal court as held in *Samuel Warui Karimi vs. Republic* (2016) eKLR (supra) and *Njoroge vs. Republic* (1982) KLR 388 (supra), we have taken note that four out of the five grounds of appeal laid down by the appellant were sufficiently dealt with by first appellate court. They are grounds 1, 2, 3 and 5.

26. As regards the first ground, the learned judge indeed noted that the trial magistrate fell in error by not conducting *voire dire* examination before recording the evidence of PW3 on oath. In addition, he also found that the *voire dire* examination conducted on PW1 and PW2, was defective on the ground that they were not examined on whether they understood the meaning and nature of an oath. In the circumstances, the learned Judge relied on the provisions of section 19 of the Oaths and Statutory Declaration Act and section 124 of the Evidence Act which provide as follows:

Section 19 of the Oaths and Statutory Declaration Act:

Provided that, where evidence admitted by virtue of this Section is given on behalf of the prosecution in any proceedings against any person for any offence, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.”

The provision to Section 124 of the Evidence Act provides that:

Provided that where in a criminal case involving a sexual offence the only evidence is that of a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth.”

27. The learned Judge concluded that the *voir dire* was not competently carried out with respect to all three minors who testified. However, he reasoned that the error did not vitiate the trial and conviction. He relied on the decisions of this Court in *Patrick Kathurima vs. Republic*, CA NYR CR App. No. 131 of 2014 [2015] eKLR and *Maripett Loonkomok vs. Republic*, CA MSA Criminal Appeal No. 68 of 2015 [2016] eKLR. In both cases, this Court held that where *voire dire* is not appropriately carried out, an appellate court can still uphold a conviction if there is sufficient independent evidence to support the charges.

28. On our part, we have no hesitation in confirming that legal position as correct. We have, further, no hesitation in confirming that in the present case, there was sufficient independent evidence available to support the convictions. That compelling circumstantial evidence is supplied in the testimonies of PWs 4

– 10. As correctly analyzed by the High Court, the evidence available pointed unerringly to the conclusion that the three minors were defiled; and that it was the appellant who did it.

29. Turning to the argument that the evidence was mired in fatal contradictions, we simply point to the very elaborate and comprehensive analysis of the High Court – which converged with that of the trial court – that the discrepancies, if any, were immaterial.

“22. In order to prove defilement, the prosecution must show that the accused did an act that amounted to penetration of a child. “Penetration” under section



2 of the Act means, “the partial or complete insertion of the genital organs of a person into the genital organs of another person.” PW 1, PW 2 and PW 3 clearly described the ordeal they went through with the appellant. They each gave a description of the sexual act which left no doubt that there was penetration. Their testimonies were not shaken on cross-examination and if corroboration were required, it was readily available from the testimony of other witnesses. The fact that PW 1 was defiled was confirmed by both PW 4 and PW 5 who, not only saw her in a distressed state from the manner she was walking and examination of her genitalia, but also from the medical evidence of PW 9. PW 2’s state after her ordeal was confirmed by PW 7 and by the medical evidence of PW 9 while the testimony of PW 3 was corroborated by the medical evidence of PW 9.

23. The appellant submitted that the medical evidence was inconclusive and could not be relied upon. He suggested that since PW 1 had some infection, it was possible that PW 1 was defiled by someone else as he was found not to have any infection when he was examined. I reject this argument as the issue for determination is whether there was penetration. Clearly the medical evidence established penetration, which is the crux of the offence. This argument does not take the appellant’s case any further, as the proviso to section 124 of the Evidence Act entitled the court to convict the accused even without corroborative evidence. In this case, the trial magistrate was satisfied that the children were telling the truth. He held as follows;

PW 1, PW 2 and PW 3 were consistent in their testimonies. Their testimonies were subjected to cross-examination and their response to the question put to them were precise. I was equally impressed with their demeanor. The information the minor first gave to the people in authority they first met was the same and remained so through the trial.

24. The appellant submitted that there were inconsistencies in the prosecution case as the children could not recall the dates on which they were sexually assaulted. It is true and understandable that the children could not remember the dates on which the incidents took place. However, the testimony of the other witnesses to whom the children reported and the investigating officer were able to place the incidents on specific dates and the entire evidence formed a seamless series of events.
25. When considered alongside the prosecution evidence, the appellant’s defence that he was being framed could not hold any water as the specific incident he referred to was not put to PW 4 or PW 5 in cross-examination. His testimony did not in any way cast doubt on the facts narrated by each complainant. I therefore find and hold that the prosecution proved the elements of penetration by the appellant beyond reasonable doubt.”

30. We need not add anything to this analysis except to point out that the two courts below converged on these findings of fact; and we have no basis for departing from them.
31. The same is true of the ground of appeal urging that the charge sheet was defective. The learned Judge accepted that it was; but not fatally so. We agree. In *Nyamai Musyoki vs. Republic* [2014] eKLR, this Court, differently constituted, held that the test for whether a defective charge sheet caused prejudice



to an accused person is a substantive not formalistic one: the question to ask is whether the accused person was charged with an offence known to law; and whether the charge sheet, as framed, gave him sufficient notice and information about the allegations he was facing in order for him to defend himself. The Court clarified that “if a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person or the defect goes into the root of the charge and distorts it in a way that the accused cannot understand the charge, then the court ought to be reluctant to apply section 382 of the Criminal Procedure Code to cure the defect.” In the present case, we agree with the High Court’s analysis that the defect in the charge sheet was a harmless error as it did not cause any failure of justice. Consequently, the charge sheet was curable under section 382 of the Criminal Procedure Code.

32. Finally, the appellant attacks the High Court judgment for imposing an unlawful sentence. He is partly right. We begin by acknowledging the shift in our jurisprudential landscape on mandatory minimum sentences of the kind imposed on the appellant. It was the famous Supreme Court decision in *Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 (*Muruatetu 1*) where the shift began. The jurisprudence has found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the Sexual Offences Act in cases such as *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others v Republic – Mombasa* Petition No. 97 of 2021, Mativo J. (as he then was).
33. In part inspired by this jurisprudential shift, this Court, differently constituted, in *Julius Kitsao Manyeso vs Republic Malindi Criminal Appeal No. 12 of 2021* (Nyamweya, Lesiit & Odunga, JJAs) held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person.
34. Taking the jurisprudential turn further in *Evans Nyamari Ayako v. Republic – Kisumu Criminal Appeal No. 22 of 2018*, this Court, in applying Articles 27 and 28 of the Constitution to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.
35. Consequently, we must allow the appellant’s appeal herein to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of section 8(2) of the Sexual Offences Act, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.
36. Having done so, however, we agree with the respondent that the circumstances of this case: serial defilements committed on very young girls and done with menaces – coupled with the absolute lack of remorse on the part of the appellant make the life sentence a commensurate sentence for each of the three convictions even after considering that the appellant is a first offender. We would only point out, as the High Court did, that in the circumstances of this case, the sentences will run concurrently.
37. In that regard, in accordance with our decision in *Evans Nyamari Ayako v Republic* (supra), translating life imprisonment to a term sentence of 30 years’ imprisonment, we allow the appellant’s appeal on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant for convictions on each of the three counts of defilement with a term sentence of 30 years’ imprisonment for each conviction. The sentences shall run concurrently. The record shows that the appellant was in custody since he was arraigned in court on 16th June, 2015. By dint of Section 333(2) of the Criminal Procedure Code, the imprisonment term of 30 years shall be computed to begin running from that date.
38. Orders accordingly.



DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF JULY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

