



REPUBLIC OF KENYA



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**Yegon v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 3909 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E023 OF 2023
JK NG'ARNG'AR, J
MARCH 27, 2025**

BETWEEN

FELIX KIBET YEGON APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
E055 of 2022 by Hon. Wamae E. in the Magistrate's Court at Bomet)*

JUDGMENT

1. Felix Kibet Yegon (now Appellant) was charged with the first count of defilement contrary to Section 8 (1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 28th and 30th August 2022 in Chepalungu Sub-County within Bomet County, the Appellant intentionally caused his penis to penetrate the vagina of DC, a child aged 12 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that that on diverse dates between 28th and 30th August 2022 in Chepalungu Sub-County within Bomet County, he intentionally and unlawfully touched the vagina of DC, a child aged 12 years.
3. The Appellant was charged with the second count of kidnapping from lawful guardianship contrary to section 257 of the *Penal Code*. The particulars of the charge were that on that on diverse dates between 28th and 30th August 2022 in Chepalungu Sub-County within Bomet County, he unlawfully kidnapped DC, a child aged 12 years from the guardianship of her parents.
4. The Accused/Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called five (4) witnesses in support of its case.



5. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence. The Appellant gave unsworn testimony and closed his defence.
6. At the conclusion of the trial, the Appellant was convicted of the first count of defilement and sentenced to serve twenty (20) years in prison. The trial court dismissed the second count of kidnapping from lawful guardianship.
7. Being dissatisfied with the Judgment dated 26th April 2023, Felix Kibet Yegon appealed against the trial court's conviction and sentence on the following grounds reproduced verbatim:-
 - i. That, I pleaded not guilty at the trial and I still maintain the same.
 - ii. That the trial Magistrate erred in the law and facts by failing to realize that the main ingredients of the present offence was not proved to the required legal standards.
 - iii. That the trial Magistrate erred in law and fact by basing his conviction on evidence that as marred with contradictions, inconsistencies, discrepancies and glaring gaps.
 - iv. That the learned trial Magistrate erred in law and fact by failing to analyze that the evidence was manufactured, manipulated and framed to meet the predetermined goal of fixing the Appellant.
 - v. That the learned trial Magistrate erred in law and fact by rejecting his plausible defence without any explanation.
8. This being the first appellate court, I am conscious of the duty to re-evaluate the evidence given at the trial court. See *Pandya vs. Republic* (1957) EA 336.
9. I now proceed to summarize the prosecution's case and the Appellant's defence in the trial court and their respective submissions in the present Appeal.

The Prosecution's/Respondent's Case.

10. It was the Prosecution's case that the Appellant defiled DC (PW1) on diverse dates between 28th to 30th August 2022. PW1 testified that she ran away from home and went to the Appellant's house on 28th August 2022 and they had sexual intercourse on 28th, 29th and 30th August 2022.
11. Mercy Langat (PW4) who was the clinical officer at Siongiroi Health Centre testified that upon examining PW1 she determined that she had been penetrated due to the presence of spermatozoa and the broken hymen.
12. In their written submissions dated 12th August 2024, the Respondent submitted that they proved that the age of the victim was 12 years old at the time of the commission of the offence. That they produced a Birth Certificate and the same was not challenged by the Appellant.
13. On the issue of penetration, the Respondent submitted that it was clear from the victim's (PW1) and clinical officer's (PW4) testimonies that penetration had been established. That PW1 narrated how they engaged in sexual intercourse with the Appellant and the same was confirmed by PW4's observation of PW1's broken hymen and the presence of spermatozoa.
14. It was the Respondent's submission that the identity of the Appellant as the perpetrator was not in doubt. That PW1 and the Appellant were well known to each other and were in a relationship. It was their further submission that the identification was through recognition.



15. The Respondent submitted that the Appellant merely denied committing the offence and acknowledged that PW1 was known to him.

The Accused's/Appellant's Case.

16. The Appellant, Richard Langat denied committing the offence. He stated that he was at home and did not meet the victim (PW1) as he only saw PW1 at the police station. It was DW1's defence that PW1 was not found in his house.
17. From the Appellant's written submissions filed on 11th November 2024, I have noted that his submissions centred around his sentence and he provided further mitigation. The Appellant submitted that he wished this court to order that he serves the remainder of his sentence under Community Service Order or Probation.
18. It was the Appellant's submission that he had reformed, was remorseful and he regretted his actions. That he had not completed his education as the offence occurred when he was in form 2. It was his further submission that he had a deteriorating health condition.
19. The Appellant submitted that this court should consider the time he spent in remand in accordance to section 333(2) of the [Criminal Procedure Code](#).
20. I have gone through and given due consideration to the trial court's proceedings, the home-made Petition of Appeal filed on 15th May 2023, the Appellant's undated written submissions and the Respondent's written submissions dated 12th August 2024. The following issues arise for my determination:-
- i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Defence placed doubt on the Prosecution case.
 - iii. Whether the sentence preferred against the Appellant was harsh.

Whether the Prosecution proved its case beyond reasonable doubt.

21. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
22. Rule 4 of the Sexual Offences Rules of Court 2014 provides that:-
- When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a birth certificate, any school documents or in a baptismal card or similar document.
23. The victim (PW1) stated during voir dire examination that she was aged 12 years. PW1 produced a Birth Certificate as P.Exh1. I have looked at the Birth Certificate and it indicated that PW1 was born on 4th July 2010. The production and authenticity of the Birth Certificate was not challenged by the Appellant during cross examination. It is my finding therefore that at the time the offence was committed, the victim (PW1) was aged 12 years old.



24. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga vs Republic*(1989) eKLR expressed itself as follows:-

“ Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.....”

25. The victim (PW1) testified that he knew the Appellant as his neighbour and boyfriend. The victim’s mother, MC (PW2) also testified that the Appellant was their neighbour. Richard Kiplangat Maritim (PW3) testified that he was a Nyumba Kumi official and that he arrested the Appellant and the victim on 31st August 2022 in the Appellant’s house. This testimony was corroborated by the victim and this placed the Appellant in the scene of the crime. Additionally, in his defence, the Appellant admitted that the victim (PW1) was his neighbour and that on 31st August 2022, he was arrested by Nyumba Kumi officials.

26. From the evidence above, it is clear to me that this was more of recognition than identification. The Appellant, PW1 and PW2 all knew each other by virtue of being neighbours and their constant interactions. Further, from the victim’s uncontroverted evidence, she was romantically involved with the Appellant and such kind of relationships can only be classified as personal. Therefore, I have no reason to disbelieve or doubt that the Appellant was identified by the victim (PW1) as the perpetrator of the offence.

27. Flowing from the above, I am satisfied that the Appellant was positively identified by the victim (PW1). There was no possibility of mistaken identity.

28. With regards to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. The Prosecution has to prove penetration or act of sexual intercourse to sustain a charge of defilement.

29. Penetration can be proved through the evidence of the victim corroborated by medical evidence. In the instant case, I shall carefully evaluate the victim’s testimony and the medical evidence tendered.

30. D.C (PW1) testified that she engaged in sexual intercourse with the Appellant on 28th, 29th and 30th August 2022 at the Appellant’s house. When she was cross examined, PW1 stated that the Appellant did not force her to visit him and that her parents did not know that she lived with the Appellant. The victim’s testimony on the sexual intercourse remained unshaken during cross examination.

31. On the medical evidence, Mercy Langat (PW4), a Clinical Officer at Siongiroi Health Centre testified that she examined the victim (PW1) and found that she had been penetrated due to the presence of spermatozoa and a broken hymen. PW4 testified that she also found a whitish foul-smelling discharge from PW1’s vagina. When PW4 was cross examined, she stated that she found spermatozoa upon a high vaginal swab and in proved penetration.

32. PW4 produced treatment notes and a P3 Form and the same were marked as P.Exh 2 and 3 respectively. I have gone through the treatment notes and the P3 Form and both confirm the findings as testified by PW4. I accept the medical evidence presented by PW4 that there was penetration.

33. In light of the above and in addition to the victim’s testimony, it is my finding that the victim (PW1) was penetrated by the Appellant.

34. Based on the totality of the evidence before me, it is my finding that the Prosecution satisfactorily established the age of the complainant, proof of identification and penetration. It is also my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.



Whether the Defence placed doubt on the Prosecution’s case.

- 35. The Appellant’s (DW1) defence was aptly captured in detail earlier in this Judgment. He denied being with PW1 in his house and further denied committing the offence.
- 36. I have considered the unsworn testimony of the Appellant and it is my finding that it is weak. The Appellant was placed in the scene of the offence by the victim (PW1), Nyumba Kumi official (PW3) and the Appellant himself. His testimony that the victim was not in his house when he was arrested was countered and defeated by the victim’s (PW1) and Nyumba Kumi’s (PW3) testimonies which placed the Appellant and the victim in the Appellant’s house on the day they were arrested (31st August 2022).
- 37. Flowing from the above, it is my finding that the Appellant’s defence as a whole, did not cast any doubt on the Prosecution’s case which I have already found proven.

Whether the sentence preferred against the Appellant was harsh.

- 38. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles.
- 39. The penal section for this offence is found in section 8(3) of the *Sexual Offences Act* which states that:-

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.
- 40. As earlier stated, the trial court sentenced the Appellant to serve 20 years imprisonment.
- 41. I have considered the circumstances of this case and the fact that the victim was aged 12 years old at the time the offence was committed. Though the Appellant was rightly convicted and serving a custodial sentence, he will benefit from the mercy of this court.
- 42. Flowing from the above, it is my finding that the Appeal against conviction has no merit. I hereby affirm the Appellant’s conviction. I however but reduce the sentence from 20 years imprisonment to 15 years imprisonment. In accordance to section 333(2) of the *Criminal Procedure Code*, the sentence shall start running from 31st August 2022 being the date of his arrest and pre-trial custody.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 27TH DAY OF MARCH 2025.

.....
J.K.NG’ARNG’AR
JUDGE

Judgement delivered in the presence of the Appellant, Njeru for the Respondent and Susan (Court Assistant).

