



**Chepkwony v Republic (Criminal Appeal 31 of 2019)
[2025] KEHC 5496 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL 31 OF 2019**

**JR KARANJA, J
APRIL 30, 2025**

BETWEEN

JOEL CHEPKWONY APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant Joel Chepkwony appeared before the Senior Resident Magistrate at Kericho charged with defilement, contrary to Section 8 (1) as read with Section 8(3) of the [Sexual Offences Act](#) in that on the 7TH September, 2018 at [Particulars Withheld] Kericho county he defiled DC, a girl aged seventeen (17) years or alternatively committed an indent act with the girl contrary to Section 11 (1) of the [Sexual Offences Act](#) by touching her private parts.
2. After trial, the Appellant was convicted on the main count of defilement and sentenced to fifteen (15) years imprisonment, but being dissatisfied with the outcome he preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 18th October, 2019, in which he mainly complains that the trial court erred both in law and fact by convicting him on account of the prosecution evidence which was insufficient, unreliable and mostly hearsay. He later, however, amended his grounds of appeal.
3. The Appellant therefore prayed that the appeal be allowed in its entirety. He appeared in person at the hearing of the appeal and re relied on his written submissions.

The state/Respondent through the learned prosecution counsel M/s Chomba opposed the appeal and also relied on its written submissions in calling for the dismissal of the appeal in its entirety.
4. Having considered the appeal on the basis of the supporting and unsupported grounds in the light of the vival submissions, it was the duty of this court to reconsider the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.



5. In that regard, the prosecution case was briefly that the complainant (Pw1), a mentally retarded child aged seventeen (17) years and under the care of her aunty, NB (Pw2) and uncle, JKC (Pw4) was on the material date left at home with MC (Pw3) when she (Pw3) briefly left the house for the farm and upon her return found the Appellant, a neighbour, in the act of defiling the complainant.
6. The incident was reported to N (Pw2) and J (Pw4) while they were away in a hospital taking care of the complainant's grandmother. They in turn reported the matter to the area chief and the police prior to taking the complainant to hospital.
7. On receipt of the report, PC Charles Macharia (Pw5) conducted investigations and referred the complainant to hospital for necessary examination. The Appellant had already been apprehended by members of the public. A clinical officer at Kericho County Referral Hospital Nancy Wendot (Pw6) produced the police medical report (p3 form) completed by her colleague one Robert Lagat.
8. The Appellant was after completion of the investigations charged with the present offence which he denied and stated in defence that he was not at home on the material day having gone to work at a place called Brook when he boarded a pickup vehicle between 6.00pm to 7.00pm heading home. the driver of the vehicle instead took him to Kericho Police station where he was placed in the cells before eventually being arraigned in court.
9. The trial court considered the entire evidence and concluded that the offence of defilement had been proved beyond reasonable doubt against the Appellant who was as a result convicted accordingly.
The issue which arose for determination as could be deciphered from the evidence was whether the complainant was indeed defiled and if so, whether the Appellant was the person responsible for the offence.
10. The prosecution was required to prove firstly, that the complainant was a child aged seventeen (17) years or so at the material time of the offence and secondly, that an act of penetration was committed against her. The third element of the offence would be the identity of the alleged offender.
11. Given that the defence raised by the Appellant was essentially an alibi the prosecution had the obligation to disprove the same by providing credible evidence to place the Appellant at the scene of the offence at the material time.
12. On the question of the complainant's age, there was ample undisputed evidence by way of the medical p3 form (P exhibit 1(a) and the birth registration form (P exhibit 1A) establishing that the complainant had not attained the age of adulthood and was about seventeen years (17) of age as at the material time of the alleged offence.
13. On the question of penetration, the complainant was treated as the first prosecution witness (Pw1), but due to her state of mental incapacity she could not testify and could not therefore inform the court whether or not she was indeed defiled on the material time.
14. The police medical report (P3 form) indicated that the matter was reported to the police on the material date at about 7.15 pm (19.15 hours), but the complainant was taken to hospital on the following day (8th September, 2018) for medical examination. The clinical officer who actually examined the complainant was not called to testify. Instead his colleague (Pw6) testified in court for the sole purpose of producing his report (p3 form).
15. A perusal of the p3 form (P.Exhibit 1 (a) by this court and an interpretation of the same by the substitute clinical officer (Pw6) clearly indicates that there was no penetration on the material dates as alleged by the prosecution even though the complainant had an old broken hymen which



indicated that she had previously been involved or subjected to sexual activities by known or unknown individual' albeit, unlawfully.

16. However, the absence of penetration on the material date did not mean or overrule the fact that the complainant was on that day sexually molested in one way or the other. The question would be whether the Appellant was the person responsible for the unlawful act. His defence was a denial and an alibi. But the prosecution through the evidence of M (Pw3) placed him at the scene on the material date and time thereby disproving his alibi.
17. M (Pw3) said that she saw the Appellant sleeping or lying on top of the complainant with her clothes on but having removed her inner wear. The Appellant was also wearing his clothes but his pants fly (zip) was open. It was then that she (Pw3) screamed, but nobody else arrived at the scene. In essence the evidence by M implied that the Appellant was caught causing an act of penetration against the complainant but in reality he was found committing an indecent act against the complainant given that the medical evidence overruled the fact on penetration of the material date.
18. This court would therefore find, unlike the trial court, that the Appellant committed an indecent act against the complainant contrary to Section 11 (1) of the *Sexual Offence Act*. The conviction of the Appellant by the trial court on the main count of defilement was against the weight of the evidence and is hereby quashed and substituted for a conviction on the alternative count.
19. Accordingly, the sentence of Fifteen (15) years imprisonment imposed on the Appellant is hereby set aside and substituted for a sentence of ten (10) years imprisonment in accordance with Section 11(1) of the *Sexual Offence Act*.
20. Otherwise, the appeal is disallowed.

DATED AND DELIVERED THIS 30TH DAY OF APRIL, 2025.

J.R. KARANJAH

JUDGE.

In the presence of;-

M/s Chomba State Counsel

Appellant in person.

Simon court assistant.

