



**Kurgat v Republic (Criminal Appeal E043 of 2024)
[2025] KEHC 4858 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E043 OF 2024**

JR KARANJA, J

APRIL 25, 2025

BETWEEN

NICHOLAS KIBET KURGAT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of hon. S. M. Mokua Chief Magistrate delivered on 14th October 2024 in CMCR SO NO. E029 of 2023)

JUDGMENT

1. The Appellant, Nicholas Kibet Kurgat, appeared before the Chief Magistrate at Kapsabet facing a charge of defilement, Contrary to Section 8[1] as read with Section 8[2] of the [Sexual Offences Act](#) and in the alternative, committing an indecent act with a child, contrary to Section 11[1] of the [Sexual Offences Act](#).
2. It was alleged that on the 18th February 2023 at around 07:00hours in Lolminingai location within Nandi County, the Appealnt intentionally caused his penis to penetrate the vagina of MJ, a child aged eleven [11] years or that he intentionally touched the vagina of the said child with his penis.
3. After a full trial, the Appellant was convicted on the main count of defilement and sentenced to forty [40] years imprisonment.

Being dissatisfied with the conviction and sentence, the Appellant preferred the present appeal on the basis of the grounds set out in his draft petition of appeal annexed to the Notice of Motion dated 11th November 2024 in which the Appellant prayed for bail/ bond pending the hearing and determination of this appeal.



4. However, the court directed that the application be held in abeyance to pave way for expeditious hearing of the appeal which now means that the application is no longer tenable having been overtaken by events.

In his grounds of appeal, the Appellant basically complains that he was convicted and sentenced on the basis of the prosecution evidence which was insufficient, uncorroborated and failed to link him to the offence.

5. The Appellant also complains that the sentence of forty [40] years imprisonment went against the sentencing policy guidance and was in any event, undesired. However, the Respondent, through the Learned Prosecution Counsel, M/s. Asiyo, opposed the appeal and called for an enhancement of the sentence of forty [40] years imprisonment to imprisonment for life as provided for under Section 8[2] of the *Sexual Offences Act*.
6. Both sides filed their respective submissions for and against the appeal. This court having considered the appeal on the basis of the supporting grounds and those in opposition thereto as well as the rival submissions was obligated 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. [See, Okeno Vs. Republic [1972 EA32].
7. In that regard, the prosecution case was briefly that the Appellant was a neighbour of the Complainant [PW1] who lived with her parents and on the material date the child Complainant proceeded to the house of the Appellant to get some money, but in the process the Appellant pulled her into the house when he opened the house door while naked. He then put her on a bed and defiled her.
8. The Child's father, JK [PW3], appeared at the Appellant's house after a while and found both the child and the Appellant naked in bed with the Appellant being on top of the child, Complainant.
This resulted in a scuffle between the Appellant and the Child's father and in the process the child escaped from the scene through a window.
9. On his return to his home, the Complainant's father took the Complainant to Kilibwoni dispensary. The Appellant also appeared at the hospital from where he was arrested by the police. A Clinical Officer at the dispensary, Kiprop Sego Limo [PW2], examined the Complainant and completed the necessary police medical report [P3 form] [P. Exhibit 1] indicating that the child was sexually offended.
10. The incident after being reported to the police was investigated by one PC Emily Obunga together with CPL. Vincent Opondo [PW4], who visited the scene and established that the Appellant was arrested as the suspect before he was eventually charged with the present offence.
11. The Appellant denied the charge and implied that he was maliciously implicated by the Complainant's father after he threatened to cut him [Appellant] with a panga [machete]. The Appellant indicated that the Complainant had already arrived at the scene saying that she wanted Kshs. 200/- from him. But before he could look for the money the Complainant's father arrived and picked the child complainant and a panga [machete] which was at the scene. He [Complainant's father] after arming himself with the panga threatened to cut him [the Appellant].
12. The Appellant indicated further that the Complainant's father held him by the shirt. They pushed each other upto the bedroom and in the process the child Complainant escaped through a window. Her father then pulled the Appellant outside the house and used the panga to cut the iron-sheet of the Appellant's house while alluding that the Appellant should vacate the place. The Appellant's father arrived at the scene at that juncture and questioned the cutting of the iron sheet roof of the Appellant's



house by the Complainant's father who also threatened the Appellant's father and told him to move out of the village.

13. The Appellant indicated that a land dispute between his father and the Complainant's father was also a reason for being implicated with the present offence by the Complainant's father. He contended that he did not commit the offence and that it was him who was attacked by the Complainant's father. That, he was treated at Kilibwoni dispensary and made a report at the police station against the Complainant's father for malicious damage.

14. The offence of defilement occurs when a person commits an act which causes penetration with a child [See Section 8[1] *Sexual Offences Act*] and if the child is of the age of eleven [11] years or less the offender would be liable upon conviction to a mandatory sentence of life imprisonment as provided in Section 8[2] of the *Sexual Offences Act*.

Under Section 11[1] of the Act, a person who commits an indecent act with a child is liable upon conviction to imprisonment for a term not less than ten years.

15. Having being charged and convicted for defilement of a child, on the material date of 18th February 2023, the Appellant was sentenced to imprisonment for a period of forty [40] years. The conviction was largely founded on the evidence of the child complainant. [PW1] and her father [PW3] which was believed by the trial court as against the Appellant's defence which was a denial of having committed the offence and a contention that he was framed by the Complainant's father who threatened him with a panga [machete] and used the same weapon to maliciously damage the iron sheet roof of his house, a matter which was reported to the police.

16. The trial court, however dismissed the Appellant's defence as an afterthought and stated that the allegation that the Appellant was framed could not be discerned from the evidence.

A reconsideration of the evidence in its totality by this court revealed that the issue which emerged for determination by the trial court was whether the offence of defilement was committed against the Complainant [PW1] on the material date and time and if so, whether the Appellant was the person responsible for the unlawful act.

17. It was therefore incumbent upon the prosecution to avail before court cogent and credible evidence capable of establishing and proving beyond any reasonable doubt that indeed, the Complainant was defiled by the Appellant on the material date and time.

In that regard, the basic ingredients or elements of the offence of defilement had to be established and proved against the Appellant by the prosecution.

18. It is a principle of law that in all criminal cases the burden always remains on the prosecution to prove its case against an Accused person beyond any reasonable doubt as was held in this case of *Mkendeshwo Vs. Republic* [200]1 KLR 461, where the Court of Appeal emphasized that generally the Accused assumes no legal burden of establishing his innocence.

19. In a case of defilement such as the present one, the vital ingredients are Firstly, the age of the Complainant, Secondly, the act of penetration and Thirdly, the identification of the offender.

On the question of age, the trial court rightly found that on account of the birth certificate [P. Exhibit 4] the Complainant was of the age of eleven [11] years at the material time of the alleged incident. This fact was never disputed by the defence.



20. On the question of penetration, the trial court found that there was penetration and in so doing stated as follows: -

“The Complainant was candid enough that she met her attacker who took her to bed. He undressed her and inserted his penis into her vagina. PW2, a medic herein stated that examination disclosed that the vaginal area was disturbed the epithelial cells indicated that there was penetration.”

Clearly, the evidence by the Complainant [PW1] and the Clinical Officer [PW2] is what informed the trial court’s finding on the element of penetration.

21. On the question of identification of the alleged offender, the trial court found that the Appellant was very well known to the Complainant. That, she identified him as a neighbour and a person who introduced her to sex.

Save the allegation that the Appellant was the person who introduced the Complainant to sex, he [Appellant] did not dispute that he was known by the Complainant and indeed her father [PW3] as their neighbour.

22. The Appellant did not also dispute the fact that he was with the Complainant at the alleged scene of the offence on the material date. He however, vehemently disputed that he defiled the Complainant on that date as alleged by the Complainant and her father [PW3] thereby implying that the evidence of penetration adduced against him by the Complainant was false in as much as it was seemingly corroborated by that of her father.

23. What the Appellant suggested in his defence was that even if the evidence of the Clinical Officer [PW2] indicated that there was penetration, he was not the person responsible for causing the act of penetration and was implicated thereof by the Complainant and her father on account of their bad relations with his family.

24. The Appellant went as far as suggesting that the events of the material day as alleged by the prosecution through the complainant and her father had nothing to do with sexual assault against the Complainant, but had everything to do with the Complainant’s father threatening and attacking the Appellant in his home before maliciously damaging the roof of his house.

25. The Appellant thus implied that the actual circumstances of the case were twisted against him on account of an existing land dispute between his father and the father of the Complainant.

Apparently, the police investigations of the matter did not explore all possibilities leading to the events of the material day. The actual investigations officer was not called to testify and show how he/she settled for the Complainant’s version of the event rather than that of the Appellant and why he/she did not deem it fit to avail independent witnesses in the quest to establish the actual truth of the matter.

26. CPL. Vincent Opondo [PW4], did not investigate the matter even though he alleged that he assisted in the investigations. His evidence suggested that he simply witnessed the Complainant and her father reporting that she had been defiled by a person known to her and did nothing substantial in terms of investigating the case. He [PW4] said that he visited the scene and established that the alleged offence was committed. He did not state how he was able to establish the commission of the offence by the Appellant if indeed he assisted in the investigation of the case.

27. Be that as it may, the circumstances of this case from the respective point of view of both the prosecution and the defence necessitated that independent witnesses be availed to corroborate the prosecution’s version of the case and prove beyond reasonable doubt that the Complainant was indeed



- defiled by the Appellant on the material date. It is instructive to note that the evidence by the Clinical Officer [PW2] clearly indicated that the Complainant was a sexually active child and had engaged in several acts of sex with unknown male persons prior to the material date.
28. It was therefore not surprising that the medical evidence indicated and confirmed that the act of penetration was committed against the Complainant but fell short of indicating the actual date and time of the act and the person responsible other than what was indicated in the medical report [P. Exhibit 1] as the history of the case.
 29. By and large, this was a case which pitted the word of the Complainant and her father against that of the Appellant. The conviction of the appellant by the trial court was invariably based on the credibility of the witnesses and in that regard, the trial court found the prosecution evidence to be more credible and reliable against the Appellant notwithstanding the absence of independent witnesses and the existing grudge between the families of the alleged victim and the alleged aggressor which had the potential of creating bias in favour of the first person to make a report at the police station against the last person to do so and also create doubt as to the trustworthiness and reliability of the Complainant's testimony as well as that of her father.
 30. Although under Section 124 of the *Evidence Act* an Accused person may be convicted on the basis of the uncorroborated evidence of the alleged victim of the offence and it was for that reason that the trial court deemed it fit to believe the Complainant and her father and eventually convict the Appellant, this court does not think that the Complainant told the whole truth regarding this matter. Her evidence viewed against that of the Appellant was protective towards her father given that he most probable that not instigated the entire state of affairs leading to this case when he allegedly confronted and attacked the Appellant in his home and maliciously damaged his iron-sheets house roof.
 31. The Complainant's evidence was uncertain to prove that she was defiled on the material date and time by the Appellant. Whereas, the Complainant talked of the offence having occurred at 7:00pm, the charge sheet refers to 7:00am and her father refers to 8:00am and so does the P3 form [P. Exhibit 1].
 32. The evidence by the Complainant's father indicted that the incident was reported to the police almost immediately followed by the medical examination, of the Complainant. However, the P3 form indicates that the incident was reported at about 3:10pm [15:10hours] and as per the stamp on the form the medical examination was actually conducted on 19th February 2023.
 33. Basically the prosecution evidence was rather contradictory, inconsistent and incoherent with regard to the actual date of the offence and the person actually responsible for it on the alleged date. As such, the credibility and reliability of the complainant's evidence together with that of her father was actually put into doubt and rendered unworthy of trust. Indeed, considering the land dispute between the families of the Appellant and the Complainant it may be opined that the Complainant and her father had a clear motive to lie against the Appellant.
 34. In Criminal cases, findings based on witnesses credibility involve the assessment of reliability and credibility of the testimonies of the witnesses on the basis of the factors referred to hereinabove. Thus, the inconsistency and contradictions in the prosecution case such as the date, time of the offence and whether it was actually committed by the Appellant militated against a finding of the Appellant's guilt by the trial court. These were glaring and substantial contradictions and inconsistencies which rendered the evidence of the complainant and her father as unworthy of belief and devoid of a basis for the Appellant's conviction by the trial court.
 35. In the circumstances, this court must hold and hereby holds that the Appellant's conviction was neither safe nor sound. Grounds one [1] to four [4] of the appeal on conviction are therefore upheld



and allowed to the extent that the Appellant's conviction by the trial court be and is hereby quashed and the sentence of forty [40] years imprisonment set aside.

36. It may be pointed out that if the Appellant's conviction was upheld by this court it would have confirmed the sentence of forty [40] years imprisonment on the basis of the emerging jurisprudence at the time on the constitutionality of the mandatory life imprisonment sentence under Section 8[2] of the Sexual Offence Act.

37. With the recent decision of the Supreme Court in the case of Republic Vs. Manyeso Petition No. E013 of 2024 [2025] KESC 16[KLR] and Republic Vs. Evans Nyamani Ayako, Petition No. E002 of 2024 it is now settled that the life imprisonment sentence under Section 8[2] of the *Sexual Offences Act* is neither unconstitutional nor illegal.

However, this court would not have been inclined to enhance the sentence of forty years imprisonment to life imprisonment as requested by the Respondent herein because the Appellant was not made aware before the hearing or at the commencement of the hearing of the appeal that the sentence was likely to be enhanced if the appeal on conviction was dismissed.

38. The information ought to have been conveyed to the Appellant by the prosecution by way of filing a cross-appeal seeking enhancement of the sentence or by filing a notice of enhancement of sentence.

The court could also convey the information by warning the Appellant that if his appeal was dismissed on conviction, the sentence may be enhanced [See, JJN Vs. Republic[2013] eKLR].

39. Other than the foregoing, in grounds six [6] and five [5] of the appeal, the Appellant indicated that Section 211 and Section 213 of the *Criminal Procedure Code* were not complied with by the trial court thereby infringing his rights under those provisions. However, the record of the trial court clearly indicates that Section 211 of the *Criminal Procedure Code* was complied with after which the Appellant elected to make an unsworn statement without calling any witnesses.

40. As regards, Section 213 of the *Criminal Procedure Code*, the Appellant did not demonstrate how his right under the provision was breached by the trial court, neither did he demonstrate that his right to tender final submissions in whatever form was curtailed.

Clearly, grounds six [6] and five 1[5] of the appeal were devoid of merit. Ground seven [7] was on sentence, but has since been overtaken by events.

41. All in all, this appeal succeeds in its entirety. The Appellant shall forthwith be set at liberty unless otherwise lawfully held.

Ordered accordingly.

DELIVERED AND DATED THIS 25TH DAY OF APRIL 2025

HON. J. R. KARANJAH,

JUDGE

