Rochoni v Republic (Criminal Appeal E019 of 2024)
[2025] KEHC 11938 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11938 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E019 OF 2024

HI ONG'UDI, J

AUGUST 6, 2025

BETWEEN

JOHN GITHINJI ROCHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of Hon. Y.I. Khatambi (Principal Magistrate) in Naivasha CMCR (SO) No. E044 of 2021 on 26th June, 2024)

JUDGMENT

1. John Githinji Rochoni hereinafter referred to as the appellant was charged and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The particulars being that the appellant on 30th May, 2021 in Gilgil Sub County within Nakuru County intentionally caused his penis to penetrate the vagina of FWK a child aged 11 years old. The appellate faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. He denied the charges and the matter proceeded to full hearing with the prosecution calling seven (7) witnesses. The appellant in his defence called three (3) witnesses including himself. The trial court thereafter delivered a Judgment on 26th June, 2024 whereby the appellant was convicted on the main count. He was on 23rd July, 2024 sentenced to serve 30 years imprisonment.

3. Being aggrieved by the entire Judgment he filed this appeal on the following grounds;

    i. That the learned trial Magistrate erred in finding that the prosecution had proved its case beyond reasonable doubt.

    ii. That the trial Magistrate erred in both law and facts when she relied on contradictory testimonies to convict him.

iii. That the learned trial Magistrate erred in law and fact in failing to take into account, and failed to consider, and or give reason why he disregarded the appellant's defence.

iv. That the learned trial Magistrate erred in both law and fact in failing to give reasons as to why she believed the victim evidence hence contravening Section 124 of the *Evidence Act* Cap 80 Laws of Kenya.

v. That the trial Magistrate erred both in law and in fact in convicting the appellant on flimsy and frivolous allegations that thrived on a grudge.

4. A summary of the evidence is that on 21st May, 2021 PW1 was playing with other children outside their house. Among the other children were PW2 and PW3. While there the appellant whom they knew lured them towards the forest and bought them sweets and Big G. Reaching the forest it was getting dark he asked all of them to lie down, which they did. He then started getting hold of PW1 and dragging them. On seeing this the other children took off and went to their grandmother whom they told what was happening to PW1.

5. Meanwhile the appellant removed PW1's clothes and panty as well as his trousers, and inserted his penis into her vagina. He put a paper in her mouth as she screamed. When he was through, she saw some lights and that is how she was rescued. Those who had come beat him. She was taken to the police station and thereafter to the hospital for treatment.

6. PW4 Monica Njeri was formerly married to the appellant. Her son G was one of the children who were playing with PW 1 and went with her to the forest. She said it was boda boda people who arrested the appellant.

   PW5 JK is PW1's father. On this day he was called by his sisters and informed that PW1 was in a bush being strangled. He went to the bush with others. They were joined by boda boda people. In the bush they found PW1 with a man. On seeing them, the man took off but was caught up. Both PW1 and the man were taken to the police station, then to hospital at Gilgil. He identified the birth certificate of PW1.

7. PW6 – Dr Francis Kamau Chege examined PW1 and filled the P3 form (P Exhibit 2) which he produced, together with the post rape care from (P Exhibit 3) on behalf of Catherine Rono. He confirmed that the contents of P Exhibit 2 & 3 were similar confirming force vaginal penetration. He also produced the age assessment report showing that PW1 was aged 14 years (P Exhibit 1), at the time of the offence.

8. PW7 No. 98xxx PC Beatrice Oduor was the investigating officer. She confirmed what the witnesses had told the court and further that they had taken the appellant to the hospital since he had been injured by members of the public.

9. The appellant gave a sworn statement of defence. He explained his movements from 29th May, 2021 when he picked his son G. On 30th May, 2021 he was to return him to the mother (PW4). He received messages and threats for the delay in dropping the child. He took the child to PW5's house as directed and this was past 6.55 p.m. He was asked where PW5's daughter (PW1) was. PW5 and his brother started beating him. It's the police who came and saved him. He explained the problems he had been through at the hands of PW4.

10. The appellant's father testified as DW2, told the court of the differences between PW4 and appellant because of the child between them which to him is the cause of the problem, before the court. He said the appellant had never committed such an offence before.

11. DW3 Francis Kegondo Njau is a neighbour to the appellant. His evidence showed that there was a truce between PW4 and appellant over the couple's child. He had attended family meetings over the same.

12. The appeal was heard by way of written submissions.

Appellant's submissions

13. The same were filed by the appellant in person on 5th March, 2025. He submitted that the minor's evidence was not corroborated. Secondly the trial court did not give any reasons to explain why she believed the evidence of these minors. On this he relied on the case of Reagan Mokaya v Republic HCCRA No. 49 of 2006 (UR), Chila v Republic (1976) E.A. and Section 169 of the Criminal Procedure Code. Referring to the evidence by the minors he argued that based on the relationship between the witnesses, PW4, PW5 it can be concluded that this was a family affair and they wanted to punish him. He added that PW4 & PW5 had stolen G from school and this was confirmed by the letter from Bondeni ECD, (Page 40 line 13 of the record of appeal).

14. The appellant submitted that his rights under Article 50(2) (b) & (j) of *the Constitution* were violated, since he was not supplied with documents like the O.B., first report and other relevant documents. Further that his application to obtain communication from safaricom on his conversation with PW4 on the material day between 6.45 p.m. – 7.00 p.m. was rejected by the trial, court. Further that failure to call the Rider who took PW1 to the police station as a witness was a big omission.

15. He submitted that the evidence by the witnesses was contradictory, pointing out on the evidence of PW7 who did not carry out proper investigations. He raised issue with the doctor's (PW6) evidence which did not prove penetration.

Respondent Submissions

16. The Respondent filed grounds of opposition plus submissions dated 25th February, 2025 by Dennis Atika – Prosecution counsel. Referring to the evidence counsel submitted that PW1's evidence was assessed and she was found to have been 12 years old at time of offence (P Exhibit 1). Further that penetration was proved by the doctor's evidence (P Exhibit 3). He submitted that the doctor's evidence confirmed PW1's evidence on defilement.

17. Counsel submitted that the appellant was well identified by the evidence of PW1, PW2 and PW3. That PW4 & PW5 confirmed that the child was found in the forest where she had been taken. He thus submitted that all the 3 elements for proof of defilement as laid out in the case of Dominic Kibet v Republic [2013] eKLR, were established.

18. It was counsel's submissions that the appellant's defence was full of lies and an afterthought unlike that of the prosecution. He added that voire dire examination was conducted in respect of PW1, PW2 & PW3 and the witnesses were found to be truthful. This was in compliance with Section 126 of the *Evidence Act*.

Analysis and Determination

19. This being a first appeal this court has a duty to re-evaluate and assess the evidence on record and come to its own independent conclusion. It should bear in mind that it did not hear nor see the witnesses

unlike the trial Court and give an allowance for that. In this regard the court in Okeno v Republic [1972] EA 32 set out the duty of a first appellate "Court in the following words:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

20. Upon consideration of the record of appeal, grounds of appeal, submissions by both parties, cited authorities I find the issues falling for determination to be as follows:-

    i. Whether there was violation of the appellant's rights under Article 50(2) of *the Constitution*.

    ii. Whether there was sufficient evidence to prove the respondent's case against the appellant on the ingredients of;Age of victim.Penetration of the minor's genital organ namely vagina.Identification of the appellant as the perpetrators of the offence.

Issue No. (i) Whether there was violation of the appellant's rights under Article 50(2) of *the Constitution*.

21. It is the appellant's submission that he was issued with certain documents to enable him prepare his defence. I have perused the record herein in particular pages 3, 4, 5, 6, 8, 9, 15 of the record of appeal. I am satisfied that the appellant was supplied with the necessary documents for preparation of his defence. He was supplied with copies of the charge sheet, witness statements (twice) and the investigation diary. The matter was conducted in accordance with the procedures under the Criminal Procedure Code and *Evidence Act*.

22. PW1 – PW3 who were minors were taken through the voire dire procedure and the trial court made its findings and the matter proceeded accordingly. The trial court allowed the appellant to cross – examine PW1 – PW3. I do not therefore find any infringement of the appellant's rights under Article 50 of *the Constitution*.

Issue No. (ii) Whether there was sufficient evidence to prove the respondent's case against the appellant on the ingredients of; Age of victim. Penetration of the minor's genital organ namely vagina. Identification of the appellant as the perpetrators of the offence.

23. The charge sheet showed PW1's age as 11 years. When she testified on 11th August, 2022 she said she was born on 1st April, 2010 and was 12 years old. The offence was committed on 30th May, 2021 which confirms she was 11 years old. An age assessment was conducted on 10th July, 2023 and it confirmed she was 14 years (P Exhibit 1). That means she was 12 years plus few months at the time of the occurrence of this offence, and the penalty clause should have been Section 8(3) of the *Sexual Offences Act* which provides:

> " 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."

24. The next issue is on penetration. It was the appellant's submission that the same was not proved, because no high vaginal swab was taken. What is penetration? Section 2 of the *Sexual Offences Act* defines "Penetration" as;

> " Penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."
>
> In this case the victim (PW1) explained to the court what had happened to her. She said a penis had been inserted into her vagina.

25. She was taken to hospital where she was examined by PW6 (Dr. F.K. Chege) who filled the P3 Form (P Exhibit 2) and Catherine Rono who filled the post rape care form (P Exhibit 3). The two reports were explained by PW6 to be similar. The finding was that PW1 had; Bruises on outer genitalia, broken hymen, bruises/tears on vagina wall, slight bleeding with brown discharge. The finding was forced vaginal penetrating. The medical examination results clearly supported the evidence by PW1. This did not require vaginal swabs to prove penetration as suggested by the appellant.

26. The critical issue is whether the appellant was the perpetrator of the defilement in issue. The appellant has submitted that the court should not have relied on the evidence of PW1 – PW3 without corroboration. Further that the trial court did not give reasons for believing the witnesses PW1 – PW3.

27. Section 124 of the *Evidence Act* provides as follows:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

28. This Court will have to examine the evidence of PW1 – PW3 to satisfy itself as to whether their evidence was sufficient to sustain a conviction in the absence of the evidence of the Rider. The children (PW1 – PW3) were not the only ones who stopped playing outside the house of PW5, to follow a man they knew, and who had promised them sweets.

    On receiving the information on what happened to PW1, PW5 rushed home and went to the scene with others. They found PW1 with a man who took off but was followed and arrested and taken to the police station together with PW1.

29. PW7 P.C. Beatrice Oduor the investigating officer explained how they went to the scene upon receiving a report of boda boda riders assaulting a suspect. They rescued the victim who is the appellant, and they took him to the police station.

30. PW5 told the court that it was him who engaged the boda boda chairman who called other riders to assist him trace the child (PW1) from the bush. The appellant in his submissions contended that the Rider should have been called as a witness. It is not clear which rider he was specifically talking about, since he was beaten by several of them.

31. PW7 told the court that it is police officers who rescued the appellant from those who were assaulting him. In his own evidence the appellant told the court that it was police officers who came and rescued him when PW5 and his brother were beating him. He however did not say from where he was rescued. All this evidence of PW1, PW2, PW3, PW5 and PW7 points to the appellant as the person who committed this offence. Therefore Section 124 of the *Evidence Act* was not violated by the trial court.

32. It is also noted that when the PW1 – PW3 and other children followed the man whom they knew it was still daytime and they had sufficient time of seeing him. Secondly he was not a new person to them. They are even related to him through PW4 and her son G who is their cousin.

33. PW1 may have faulted here and there in identifying the perpetrator at first but the next morning she told the police that the appellant was the culprit. It is also not lost to the court's mind that PW1 was a minor only aged 12 years and what had happened to her was traumatic. Despite that the other minors, PW2 and PW3 clearly identified the appellant. Thirdly the appellant was arrested at the scene. All this evidence put together places him at the scene, of crime. He has not explained what he was doing with an 11 year old child in the bush that late evening.

34. There may have been issues between PW4 and the appellant because of their broken marriage and G. That in itself would not be reason for anyone to punish him especially when the claim of defilement of PW1 was clearly established and the appellant was arrested at the scene. DW2 told the court that his son (appellant) could not have committed the offence because he was a good boy, and had never committed such an offence. That was his evidence as a father which was not supported by any other evidence.

35. The court had to weigh the evidence of DW1 – DW3 against that offered by PW1 – PW7. By all standards the evidence by the prosecution witnesses remained firm and unshaken.

36. After analyzing all the evidence I find no reason to make this court to interfere with the conviction by the trial court which I uphold.

37. On the other hand the sentence meted out on the appellant was under Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 which was an error. I therefore set aside the said sentence and substitute it with a sentence of twenty (20) years imprisonment as provided for under Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The sentence will run from 2nd June, 2021 as ordered by the trial Court.

38. The upshot is that the appeal on conviction lacks merit and is dismissed. It only succeeds on sentence as already set out above.

39. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H.I. ONG'UDI

JUDGE