



**Ngetich v Republic (Criminal Appeal E030 of 2022)
[2024] KEHC 4142 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4142 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E030 OF 2022**

**RL KORIR, J
APRIL 30, 2024**

BETWEEN

LEONARD KIPRONO NGETICH APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Sexual Offence Case Number
28 of 2019 by Hon. Wamae M. in the Magistrate's Court in Bomet)*

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the Charge were that on diverse dates in May 2019 a in Kyogong Location within Bomet County, he intentionally caused his penis to penetrate the vagina of SC, a child aged 17 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 on diverse dates in May 2019 in Kyogong within Bomet County, he intentionally touched the breasts of SC, a child aged 17 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case and the Appellant gave unsworn testimony and did not call any witness.
4. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusions. This was set out by the Court of Appeal in *Kiilu & Another vs. Republic* (2005)1 KLR 174.
5. I proceed to consider the case before the trial court in the succeeding paragraphs.



The Prosecution's Case.

6. It was the Prosecution's case that the Appellant defiled SC (PW1). PW1 testified that the Appellant was her boyfriend and they had sexual intercourse in the month of May 2019 when she had visited him. Her father WY (PW2) reported to the Chief and a Nyumba Kumi elder that his daughter (PW1) was missing. Later on, PW1 was found with the Appellant and they were both arrested.
7. No. 96xxx Inspector Mercy Chepkorir (PW4) who was the Investigating Officer testified that the Appellant and PW1 were arrested and brought to the Police Station by members of the public. That after learning what happened, she took PW1 to hospital for medical attention. PW4 stated that from her investigations, she established that the Appellant and PW1 had an existing relationship and that PW1 stayed in the Appellant's home from 26th May 2019 to 4th June 2019.
8. Julius Magut (PW3) a clinical officer at Longisa Hospital testified that he examined PW1 and found that she had no bruises or lacerations but had an old broken hymen. He further testified that PW1 had pus cells and trichomonous vaginalis which indicated that she had Urinary Tract Infection and a Sexually Transmitted Infection respectively.
9. The clinical officer's (PW3) opinion was that he was unable to find evidence of penetration because PW1 came for medical examination 10 days after the alleged incident.
10. 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.

Appellant's Case

11. The Appellant, Leonard Kiprono Ngetich (DW1) testified that he did not defile PW1. That he was arrested in his home on 5th June 2019 by Community Policing officials and informed that he had been arrested because he had a romantic relationship with a student.
12. In a Judgment dated 29th June 2022, the trial court convicted the Appellant of the charge of defilement contrary to section 8(4) of the [Sexual Offences Act](#). He was consequently sentenced to serve 15 years' imprisonment.
13. Being aggrieved with the Judgment of the trial court, the Appellant, Leonard Kiprono Ngetich through an undated home-made Petition of Appeal appealed against his conviction and sentence on the following grounds reproduced verbatim: -
 - i. The learned Magistrate erred in law by not following the right procedure in entering the plea.
 - ii. The learned Magistrate erred in fact by not considering evidence that was not adduced in court.
 - iii. The learned Magistrate erred in law by making a conviction based on a duplex charge.
 - iv. The learned trial Magistrate erred in law by sentencing me without convicting me.
 - v. The learned trial Magistrate erred in law by not signing and dating the Judgement.
14. On 24th January 2023, this court directed the Appeal to be canvassed by way of written submissions.

The Appellant's Submissions.

15. In his undated submissions the Appellant submitted that he had not been linked to the offence as PW1 had testified that they were at two different places when they were arrested. That she (PW1) was at her friend's (L) place while he was in his house. He further testified that PW1 failed to state exactly



when she was arrested because she said that she was arrested on 29th May 2019 then changed to 4th June 2019.

16. It was the Appellant's submission that PW2 (WYC) testified that he searched for his daughter at L's home and not his home. That PW2 reported the matter to the police yet he was the one who was investigating the matter. It was his further submission that PW2 testified that he never asked his daughter where she was during the period she went missing.
17. The Appellant submitted that the clinical officer (PW3) testified that he did not find evidence of penetration. That the clinical officer also failed to medically examine him to find the presence of sexually transmitted diseases. The Appellant further submitted that it could not be ruled out that PW1 had been infected by someone else.
18. It was the Appellant's submission that the Investigating Officer (PW4) failed to convince the trial court that PW1 stayed with him between 26th May 2019 and 4th June 2019. It was his further submission that none of the witnesses saw him committing the offence.
19. The Appellant submitted that there was no evidence to ascertain PW1's age. The Appellant further submitted that none of PW1's family members who claimed to know of their relationship recorded any statements or testified in court.

The Prosecution's submissions

20. Through their submissions dated 10th February 2023, the Prosecution submitted that penetration had been proved. That PW1 informed the trial court that the Appellant had inserted his private parts into her private parts and further touched her breasts. The Prosecution further submitted that the clinical officer (PW3) testified that PW1's hymen was missing and that she had a sexually transmitted infection.
21. It was the Prosecution's submission that they proved the age of PW1. That PW1 testified that she was born on 3rd December 2002 and produced her birth certificate in support of that claim. It was their further submission that the victim's father (PW2) confirmed that she was a school going child.
22. The Prosecution submitted that the Appellant had been PW1's boyfriend for 2 years and they knew each other well. That the victim's father (PW2) stated that the Appellant was their neighbour and that according to the Investigating Officer (PW4), the Appellant was arrested by members of the public in the company of PW1 in his home. They further submitted that the Appellant was arrested at the crime scene and there could be no doubt in regard to identification.
23. It was the Respondent's submission that the Appellant gave unsworn testimony and did not avail any witness to corroborate his evidence. That the Appellant's defence did not challenge its overwhelming evidence.
24. I have gone through and considered the trial court's proceedings, the undated Petition of Appeal, the Appellant's undated written submissions and the Respondent's submissions dated 10th February 2023. The following issues arise for my determination:-
 - i. Whether there were procedural issues affecting a fair trial.
 - ii. Whether the Prosecution proved its case beyond reasonable doubt.
 - iii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iv. Whether the Sentence preferred against the Appellant was just and fair.



Whether there were procedural issues affecting a fair trial.

25. It was a ground of the Appeal that the trial court did not follow the correct procedure in entering the plea. The process of plea taking is provided under Section 207(1) and (2) of the Criminal Procedure Code which states :-

- (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
- (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

26. I have gone through the trial court proceedings and I have noted that the Appellant took plea on 7th June 2019. On that day, the substance of the charge was read and explained to him in a language he understood and he pleaded “it is not true”, a response which was recorded by the trial court which also entered a plea of not guilty. The alternative charge was also read out to him in a language he understood and he pleaded “it is not true”, a response which the trial court recorded before entering a plea of not guilty.

27. I do not find any ambiguity in the way the trial court undertook the plea process. It is my finding that the trial court complied with all the requirements and followed the proper procedure in taking the Appellant’s plea. The Appellant’s plea was therefore unambiguous and unequivocal. I therefore dismiss this ground of the Appeal.

28. It was a ground of Appeal that the trial court convicted the Appellant on a duplex charge. A duplex charge was defined in Ankush Manoj Shah v Republic (2016) eKLR, where the court held:-

“.....A charge is said to be duplex when it contains more than one offence in a single count. It is simplified in the definition given in Arcbold Criminal Pleading, Evidence and Practice, 2010 at pg 9 in the following words:

“the indictment must be double; that is to say, no one count of indictment should charge the defendant with having committed two or more separate offences...”

The question on whether a count breaches the general rule against duplicity is a question relating to the form of the count not the underlying evidence... thus if the particulars set out in the count allege only one offence, the fact that the evidence at trial may reveal more than one offence does not make the count bad for duplicity”.

29. Similarly, Nyamweya J. (as she was then) in Hassan Jillo Bwanamaka & another v Republic (2018) eKLR, held:-

“.....the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.



Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.”

30. Flowing from the above, if one count revealed more than one offence, it would make it a duplex charge and that would render the Charge Sheet defective. The law on Charge Sheets is contained in Section 134 of the *Criminal Procedure Code* which provides as follows:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

31. In the present case, the Appellant was charged with defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the offence were contained in the charge. This first count revealed one offence.
32. In the second count, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of that offence were also contained in the charge. This second count equally revealed one offence which was separate from the first count of defilement.
33. It is my finding that there was no duplicity of charges in the Charge Sheet. The offences were distinctly separate as Appellant was charged with the offence defilement contrary to section 8(4) of the *Sexual Offences Act* and the alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. Accordingly, this ground of the Appeal is dismissed.

Whether the Prosecution proved its case beyond reasonable doubt.

34. 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.
35. The victim (PW1) testified that she was born on 3rd December 2002. She produced her birth certificate as P.Exh 1. Additionally, the Investigating Officer (PW4) stated that she ascertained from the victim’s birth certificate that she was 17 years old. The Appellant did not challenge the testimonies of PW1 and PW4 regarding PW1’s age during cross examination.
36. I have looked at the Birth Certificate (P.Exh1) and it shows that PW1 was born on 3rd December 2002. It is my finding that the Prosecution satisfactorily proved the age of the victim. It is my further finding that at the time of the commission of the offence being the month of May 2019, PW1 was aged 16 years old and not 17 years old as found by the trial court.
37. With regard to the issue of identification, the victim (PW1) testified that she had sex with the Appellant who had been her boyfriend for a period of two years. She also testified that on the day they were arrested, they were arrested together with the Appellant.
38. The Investigating Officer (PW4) testified that the Appellant and PW1 had been arrested by members of the public and brought to the Police Station. That she conducted investigations and found that the Appellant and the victim had an existing relationship. When she (PW4) was cross examined by the Appellant, she stated that the victim reported that she had been in the Appellant’s house from 26th May 2019.



39. The victim's father WYC (PW2) testified that the Appellant was his neighbour. This fact was confirmed by the Appellant who in his defence stated that the victim (PW1) was her neighbour.
40. The above evidence in totality is overwhelming. It clearly points to the fact that the Appellant and the victim knew each other very well. The evidence of recognition as shown in this particular case was convincing and free from any doubt.
41. Flowing from the above, it is my finding that the Appellant was positively identified by the Appellant as the perpetrator of the offence.
42. With regard 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.
43. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
44. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
45. Regarding medical evidence, Julius Magut (PW3) testified that he examined the victim (PW1) and found that she had an old broken hymen. Further, that PW1 had no bruises but had pus cells and trichomonous vaginalis which were indicative of a Urinary Tract Infection and a Sexually Transmitted Infection. PW3 produced the P3 Form and PRC Form as P.Exh 2 and P.Exh 3 respectively.
46. I have looked at the aforementioned exhibits and they all indicate that PW1 was examined on 6th June 2019. The findings on the P3 and PRC Forms mirrored the testimony of the clinical officer (PW3).
47. The clinical officer (PW4) concluded that he could not find evidence of recent penetration as the victim (PW1) had been brought for medical examination 10 days after the defilement.
48. I have considered the evidence of the clinical officer (PW4) and the P3 Form (P.Exh 2) and PRC Form (P.Exh 3) and it is my finding that there was no evidence of recent penetration when the victim was examined on 6th June 2019.
49. The above finding however is not fatal as the law allows the court to base a conviction solely on the testimony of the victim if the court is convinced and satisfied in the victim's truthfulness. Such testimony need not be corroborated. Section 124 of the Evidence Act provides:-
- 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. (Emphasis mine)
50. I have keenly gone through the victim's evidence. She stated that the Appellant had been her boyfriend for a period of 2 years between the years 2017-2019. That she (PW1) visited the Appellant twice in the month of May where they engaged in sexual intercourse. She told the trial court that she knew what sex was and further described in detail how they had sexual intercourse with the Appellant. When she was



cross examined by the Appellant, she denied the Appellant's contention that they had been celibate for the 2 year period and insisted that they been engaging in sexual intercourse.

51. Even though the medical evidence tendered by the clinical officer (PW3) stated that there was no evidence of recent penetration, PW3 found that the victim had an old broken hymen and had infections in her private parts. These were indicative of exposure to sexual activity.
52. The trial court in its assessment of the evidence stated that it found that there had been an improper, intentional and unlawful penetration of the victim's (PW1) vagina. That the victim was categorical that the Appellant was her boyfriend and she stayed with him for two weeks where they had sexual relations.
53. Flowing from the above, I am convinced that the victim was truthful when she stated that the Appellant was her boyfriend and that they engaged in sexual intercourse. Her testimony was cogent and she was able to explain to the trial court that they had sexual intercourse with the Appellant. Her testimony remained unshaken during cross examination. It is my finding therefore that the element of penetration was proved.
54. Having found all the ingredients of the offence proved, it is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt. I affirm the conviction by the trial court.

Whether the Appellant's defence placed doubt on the Prosecution's case.

55. As already laid out earlier in this Judgement, the Appellant (DW1) denied defiling the victim (PW1). That he was arrested at his home on 5th June 2019 on account of having a romantic relationship with a student. He further testified that the victim was called to his house where they were both interrogated before they were taken to the Police Station.
56. I have considered the Appellant's defence and it is a mere denial. The Appellant did not address the events of the month of May 2019 where he was accused of having sexual intercourse with the victim. After analysing the Appellant's defence as a whole, it is my finding that his defence was weak and did not create any doubt on the Prosecution's case which I have already found proven.

Whether the Sentence preferred against the Appellant was severe.

57. The penal section for this offence is found in section 8(4) of the [Sexual Offences Act](#) which states that:-

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
58. From the wording above, the sentenced was couched as mandatory terms. However, this court is keenly aware of jurisprudence in which superior courts have hesitated to affirm the mandatory sentences where the justice of the case so demanded. This was the Court of Appeal's position in [Evans Wanjala Wanyonyi v Republic](#) (2019) eKLR, where it held :-

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in *Christopher Ochieng – v- R* [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in *Jared Koita Injiri – v- R*, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the [Sexual Offences Act](#). This Court noted that the Supreme Court in *Francis Karioko Muruatetu & another – v- Republic* SC Petition No. 16 of 2015 held the



mandatory death sentence prescribed for the offence of murder by Section 204 of the *Penal Code* was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in *Christopher Ochieng – v- R* (supra) stated:

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court’s decision in *Francis Karioko Muruatetu & another – v- Republic* (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

59. From the evidence on record, it is clear to me that the Appellant and the victim (PW1) were engaged in a romantic and sexual relationship. This appears to be a disturbing trend in this County as more and more men are engaged in illicit sexual relationships with underage girls as in the present case.
60. The circumstances of this case point to the fact that the sexual intercourse was “consensual”. That however does not extinguish fault on the Appellant who clearly took advantage of PW1. It is my finding that the Appellant deserves the sanction of the law. A prison sentence would serve as a deterrent to other like-minded persons.
61. Consequently, while I uphold the conviction, I find it just and fair to interfere with the sentence. I hereby reduce the sentence from fifteen (15) years to seven (7) years imprisonment from the date of the sentence by the trial court being 27th July 2022.
62. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting In person, Mr Wainaina for the state and Siele (Court Assistant)

