



**Rotich v Republic (Criminal Appeal E050 of 2022)
[2024] KEHC 9473 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 9473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E050 OF 2022**

RL KORIR, J

JUNE 27, 2024

BETWEEN

HILLARY KIBET ROTICH APPELLANT

AND

REPUBLIC RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 51 of 2020 by Hon. Kiniale L. in the Principal 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 16th August 2020 within Bomet County, he intentionally and unlawfully caused his penis to penetrate the vagina of CC, a child aged 16 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 16th August 2020 within Bomet County, he intentionally touched the vagina of CC, a child aged 16 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 five (5) witnesses in support of its case while the Appellant gave unsworn testimony and did not call any witness in his defence.
4. In a Judgment dated 24th March 2021, 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 20 years’ imprisonment.
5. Being aggrieved with the Judgment of the trial court, the Appellant, Hillary Kibet Rotich appealed against the conviction and sentence and relied on the following grounds reproduced verbatim: -



- i. That the learned trial Magistrate erred in law and fact in convicting me on evidence which did not meet the required standard of proof in accordance with the law.
 - ii. That the learned trial Magistrate erred in law and fact by relying on extrinsic evidence that was not adduced in court during the trial.
 - iii. That the learned trial Magistrate erred in law and fact by depending on evidence which was based on conspiracy theories between me, the complainant (PW1) and PW2 that was not proved beyond reasonable doubt by the prosecuting witnesses.
 - iv. That the learned trial Magistrate erred in law and fact by convicting me on charges that were not tallying and favourable.
 - v. That I wish to be present during the hearing of my Appeal and I also request court proceedings.
6. 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 duty was set out by the Court of Appeal in *Kiilu & Another v Republic* [2005]1 KLR 174.
7. I proceed to consider the case before the trial court in the succeeding paragraphs.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant defiled CC (PW1) on 16th August 2020. PW1 testified that the Appellant defiled her in Chelangat's (PW3) house by inserting his private parts into hers.
9. JC (PW2) who was the victim's mother testified that she had sent her daughter (PW1) to buy sugar from the shops and when she did not return home on time, she got worried and informed Kenneth to search for her. That Kenneth informed her that PW1 had been seen going to Chelangat's (PW3) house and when they proceeded to Chelangat's house, they found PW1 and the Appellant who had no clothes on and was partially covered in a blanket. PW2 further testified that she took PW1 to Longisa Hospital for treatment.
10. Dr. Nixon Mutai (PW4) testified that he examined PW1. He stated that upon examination, he found that PW1 had a broken hymen, bruises on her labia majora and lacerations on her anterior and posterior vaginal wall. He further noted that PW1's cervix and labia minora were inflamed. PW4 further testified that he conducted laboratory tests and found pus cells, yeast cells and spermatozoa. He concluded that PW1 had been penetrated.
11. 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

12. The Appellant, Hillary Kibet Rotich (DW1) testified that on 14th August 2020 he worked the entire day and retired to his home with his family. That around 8 p.m., Kenneth and four other people came and demanded that they go to the police. DW1 testified that they found JC (PW2) at the police station. That he was never informed the reason why he was arrested.
13. It was DW1's testimony that J (PW2) had a grudge with him because of a piece of land she had leased from him. That PW2 had refused to vacate the land after her lease had ended and he called the village elders to discuss the land issue. It was DW1's further testimony that PW2 had warned him that he would not use the land.



14. DW1 further stated that the doctor did not examine him.
15. On 28th September 2023, this court directed the Appeal to be canvassed by way of written submissions.

The Appellant's Submissions.

16. In his undated submissions the Appellant submitted that PW1 was mentally retarded and was not able to express herself during the hearing. The Appellant further submitted that the Prosecution erred when it relied on the birth certificate which showed that PW1 was 16 years of age yet PW1 testified that she was 6 years old.
17. It was the Appellant's submission that the Prosecution failed to establish why PW1 failed to raise an alarm. That PW2 mentioned Geoffrey and Kenneth and they did not appear as witnesses. It was the Appellant's submission that PW2 stated that he was in possession of a panga yet the victim failed to testify on the issue of the panga. That Faith Chelangat (PW3) testified that PW1 was chased by Dennis and not himself.
18. The Appellant submitted that Faith Chelangat (PW3) testified that she did not see the Appellant having sex with PW1. He further submitted that the medical doctor (PW4) only relied on medical evidence which showed penetration but had no evidence of who defiled PW1. That PW4 failed to determine whether the spermatozoa found in PW1 belonged to him or someone else.
19. It was the Appellant's submission that the investigating officer (PW5) failed to bring the panga to court, failed to record witness statements from Kenneth and Geoffrey. That PW5 failed to conduct proper investigations.
20. The Appellant submitted that the Prosecution incorrectly dismissed his defence on the land dispute between himself and the complainant.

The Prosecution's submissions.

21. Through their undated submissions, the Prosecution submitted that PW1 was aged 14 years. That a copy of the birth certificate (P.Exh 1) was produced by the investigating officer as proof. The Prosecution further submitted that it was undisputed that PW1 was a minor.
22. It was the Prosecution's submission that PW1 positively identified the Appellant. That they were both residents of Tegat and PW2, PW3 and PW5 all confirmed that the Appellant and PW1 were neighbours and knew each other before the incident occurred. It was the Prosecution's further submission that the Appellant was found naked with the complainant and was arrested at the scene.
23. The Prosecution submitted that PW1 was penetrated. That PW1 narrated to the trial court how the Appellant defiled her. The Prosecution further submitted that the medical officer confirmed that PW1 had been defiled. That the Appellant did not challenge this evidence.
24. It was the Prosecution's submission that the Appellant gave unsworn testimony and did not call any witness to corroborate his unsworn testimony. That he did not explain how and why he was found naked in the neighbour's house together with the complainant. It was the Prosecution's further submission that the issue of the land dispute was not proved and was a diversionary tactic by the Appellant. That his defence was therefore weak, unsupported and far-fetched.
25. The Prosecution submitted that it was discovered during the trial that PW1 was aged 14 years and not 16 years as captured in the charge sheet. That although the charge sheet was not amended, the



minimum sentence would not have been less than 20 years as per section 8(3) of the *Sexual Offences Act*. They further submitted that the sentence of 20 years was still legal and appropriate.

26. I have gone through and considered the trial court's proceedings, the grounds of Appeal, the undated Appellant's written submissions and the Respondent's submissions filed on 30th November 2023. The following issues arise for my determination:-
- i. Whether the Prosecution proved its case beyond reasonable doubt.
 - ii. Whether the Appellant's defence placed doubt on the Prosecution case.
 - iii. Whether the Sentence preferred against the Appellant was just and fair.

i. Whether the Prosecution proved its case beyond reasonable doubt.

27. 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.
28. The victim (PW1) stated during the voire dire examination that she was aged 5 years old. The trial court however noted that PW1 appeared well above 5 years of age. Her mother JC (PW2) testified that PW1 was born in the year 2006 and was aged 14 years old. NO. 11xxxx PC Eric Mwema (PW5) who was the investigating officer produced a Birth Certificate as P. Exh 1.
29. I have looked at the Birth Certificate (P.Exh1) and it shows that PW1 was born on 9th May 2004. By simple calculation, PW1 was aged 16 years at the time the offence was committed.
30. There are two conflicting ages of PW1 i.e. 14 years and 16 years. In determining between the two, I will be guided by Rule 4 of the Sexual Offences Rules of Court 2014 which 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.
31. The Birth Certificate (P.Exh 1) was produced by the investigating officer and its authenticity or veracity was not challenged. Relying on P.Exh1, it is my finding therefore that PW1 was aged 16 years old at the time of the commission of the offence. The Appellant's argument that the victim was of a younger age was born of ignorance as the younger age would be detrimental to him.
32. With regard to the issue of identification, the victim (PW1) testified that the Appellant came to Chelangat's (PW3) house and defiled her and that Chelangat was present. Faith Chelangat (PW3) testified that they were together (the Appellant, PW1 and PW3) in her house on the material day. That the Appellant who was her boyfriend came to her house drunk and she advised PW1 to sleep and leave for home the following day because it was past curfew hours. PW3 further testified that the Appellant and PW1 were found in her house the following day and were arrested.
33. JC (PW2), the victim's mother testified that the Appellant was found with her daughter at PW3's house. That the Appellant who appeared naked was covered in a blanket. No. 11xxxx PC Eric Mwema (PW5), the investigating officer stated that the Appellant was a neighbour to PW1 and was well known to her
34. The above evidence in totality is overwhelming. It clearly points to the fact that the Appellant and the victim (PW1) knew each other very well. The evidence of recognition as shown in this particular case was convincing and free from any doubt.



35. Flowing from the above, it is my finding that the Appellant was positively identified by the Appellant as the perpetrator of the offence.
36. 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.
37. 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.
38. In the instant case, I proceed to carefully evaluate the medical evidence and the victim's testimony.
39. Regarding medical evidence, Dr. Nixon Mutai (PW4) testified that he examined the victim (PW1) and found that her hymen had been broken. Further, that PW1 had bruises on her labia majora and on her anterior and posterior vaginal walls. That her cervix and labia minora were inflamed.
40. It was PW4's testimony that after carrying out laboratory tests, he found the presence of spermatozoa, pus cells and yeast cells. PW4 produced the P3 Form, PRC Form and treatment notes as P.Exh 2, P.Exh 3 and P.Exh 4 respectively.
41. I have looked at the aforementioned exhibits and they all indicate that PW1 was examined on 17th August 2020 where epithelial cells, pus cells and spermatozoa were seen. The findings on the treatment notes, P3 and PRC Forms mirrored the testimony of PW4.
42. I accept the medical evidence presented by PW4 that there was penetration. He observed bruised genitalia, and the presence of epithelial, pus and yeast cells which in his professional opinion showed vaginal penetration.
43. Regarding the victim's evidence, I have noted from the charge sheet and from the Appellant's submissions to court on 4th November 2020 that the victim (PW1) was mentally challenged. I have noted that the trial court conducted a voire dire examination on her and determined that she was not fit to give sworn testimony.
44. I have keenly gone through PW1's evidence and I have noted that her evidence was cogent. She was able to describe to the trial court how the Appellant defiled her and was able to answer the Appellant's questions on cross examination. Having looked at her testimony as a whole, her evidence was logical and was unshaken during cross examination. I have no reason to disbelieve her (PW1) testimony.
45. Following the testimonies of the victim (PW1) and the medical officer (PW4), I am satisfied that the element of penetration was proved.
46. Having found all the ingredients of the offence (age, penetration) proven, it is my finding that Prosecution proved its case against the Appellant beyond reasonable doubt.

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

47. As already laid out earlier in this Judgement, the Appellant (DW1) denied defiling the victim (PW1). That he was arrested at his home on 14th August 2020 and found JC (PW2) at the Police Station. The Appellant stated that PW2 had a grudge with him over a land issue between them.
48. I have considered the Appellant's defence and it is an afterthought. The Appellant brought up the issue of the land dispute in his defence. If the land dispute was legitimate at all, he would have cross examined PW2 on the same issue when she took the stand but he did not.



49. The Appellant stated that the medical officer (PW4) did not examine him and that PW4 had no evidence to show that the spermatozoa found in PW1 belonged to him. Section 36(1) of the [Sexual Offences Act](#) provides that: -

Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

50. In expounding Section 36(1) of the [Sexual Offences Act](#), the Court of Appeal in the case of Robert Mutungi Mumbi v Republic [2015] eKLR, held that: -

“Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved.”

51. It was not therefore not mandatory for the Appellant to be medically examined to provide a link between him and the offence. What the Prosecution needed to prove in the charge of defilement was among others, penetration, which they have.

52. Furthermore, the law does not require the presence of spermatozoa as proof of penetration. The Court of Appeal in the case of Mark Ouiruri v Republic [2013]eKLR, expressed itself on this matter as follows:-

“..... and the effect that the medical examination was carried out on her on 16th November 2008, five days after the event, and that during that time she must have taken a bath and no spermatozoa could be found. In any event, the offence is against penetration of a minor and penetration does not necessarily end in the release of sperms into the victim. Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and the penetration need not be deep inside the girl’s organ....”

53. After analysing the Appellant’s defence as a whole, it is my finding that the Appellant’s defence was weak and did not create any doubt on the Prosecution’s case which I have already found proven.

iii. Whether the Sentence preferred against the Appellant was severe.

54. 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.

55. The circumstances of this case were that the Appellant took advantage of a vulnerable child. The victim’s mental state was known to the Appellant but he still went ahead and defiled her. I agree with the trial court that the vulnerable nature of the victim should attract a higher sentence.



56. It is my finding that the 20 year sentence imposed by the trial court was sufficient and reasonable. It will serve as a deterrence to other members of the society who think it is proper to take advantage of minors and especially those who were mentally or physically challenged.
57. Flowing from the above, it is my further finding that the Appeal has no merit and it is accordingly dismissed. For avoidance of doubt, I uphold the conviction and sentence as passed by the trial court.
58. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 27TH DAY OF JUNE, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr. Wainaina for the State and Siele (Court Assistant).

