



**Kirui alias Hillary Kirui v Republic (Criminal Appeal  
E005 of 2023) [2024] KEHC 9942 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CRIMINAL APPEAL E005 OF 2023  
F GIKONYO, J  
JULY 29, 2024**

**BETWEEN**

**GEOFFREY KIPKOECH KIRUI ALIAS HILLARY KIRUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence of Hon. D. Ngayo (R.M)  
in Narok CM SOA No. 56 of 2019 on 8 th July 2023)*

**JUDGMENT**

1. The trial court convicted the appellant and sentenced him to serve life imprisonment for the defilement of a 10-year-old girl.
2. Being dissatisfied with the said conviction and sentence he preferred an appeal vide the petition of appeal dated 11/07/2023 and filed on 13/07/2023. The appellant cited the following grounds of appeal;
  - i. That the trial magistrate erred in law and fact in convicting the appellant on the evidence of PW1 which was unreliable, not credible, and inconsistent.
  - ii. That the learned trial magistrate erred in both law and facts by convicting the appellant based on coerced and intimidated testimony given by PW1.
  - iii. That the learned magistrate erred in fact and law by convicting the appellant without properly ascertaining the age of the PW1.
  - iv. The trial magistrate erred by convicting the appellant despite the uncertainty on when the offence was committed as depicted on the face of the charge sheet and the evidence adduced at the prosecution hearing.



- v. The learned magistrate erred in fact by totally disregarding the appellant's entire defence without cogent reasons.
- vi. The learned magistrate erred in law in sentencing the appellant to serve a life sentence.
- vii. The learned magistrate erred in law and fact in convicting and sentencing the appellant on contradictory evidence given in trial by the prosecution witnesses.
- viii. The learned magistrate erred in fact and law in failing to advance cogent reason in his conviction and sentencing.
- ix. The learned magistrate erred in failing to consider the mitigation pleaded by the appellant

### **Brief facts**

3. On 25<sup>th</sup> December 2016 at (Particulars withheld) Village in N(Particulars withheld) sub-county within Narok county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of F.C. a child aged 10 years.
4. PW1 in her evidence during the trial was that she had left a youth party at her neighbour's place (Joan) at around 5.00 p.m. on her way home with her younger brother, the appellant grabbed her from behind and held her by her left hand and lifted her, thus, she let go of her brother's hand. This happened by the side of a shamba. The appellant took PW1 to the bushes while her brother went back to Joan's place. The appellant took her to a bushy area which was a bit far and there was no one nearby. She was wearing a dress but she could not see the colour of the clothes the appellant was wearing since it was dark. The appellant removed his clothes and hers and then lay on PW1. She felt pain in her female reproductive part. The appellant inserted his penis; the one he uses to urinate; into her private part. She screamed and a neighbor by the name of Samson went to her rescue but the appellant fled when he saw Samson.
5. Samson and another neighbor called Ezekiel tried to chase the appellant but he escaped. Samson then took PW1 home. Samson then escorted her to Mulot police station and later to Longisa and Ololulunga Hospital where she was examined and treated.
6. The appellant was found guilty of the offence and was sentenced to serve life imprisonment.

### **Directions of the court.**

7. The appeal was canvassed by way of written submissions.

### **Appellant's submissions.**

8. The appellant submitted that the Prosecution has failed to prove their case beyond reasonable doubt as required under the law on the charge of Defilement against the applicant. The appellant contends that the evidence of PW1 was inconsistent, coerced, not credible, and contradictory. The complainant was not consistent on the time she was defiled and whether she was treated at the hospital. Thus, the particulars of the offence as contained in the charge sheet and other documentation are uncertain and failed to consider these contradictions. The trial magistrate in his judgment did not address the contradiction, the uncertainty, and the coercion which emerged during the trial. Therefore, in the absence of identification by PW1, the P3 form and all other medical documents lack evidential value thus this court ought to disregard the said documents. The appellant urged this court to find that PW1 was untruthful and not a straightforward person thus the prosecution's case has not been proved beyond reasonable doubt. The appellant relied on *Ndungu Kimanyi Vs. Republic* [1979] KLR 282, *John Mutua Munyoki v Republic* [2017] eKLR, *Igiro V Republic (Criminal Appeal 41 of 2022)* [2023]



KECA 926 (KLR), Mwangi V Republic (Criminal Appeal 11 of 2016) [2021] KECA 345 (KLP)(17 December 2021) (Judgment), Guni Musungu Mwandia v Republic [2017]eKLR , and David Ochieng Aketch v Republic [2015]eKLR.

9. The appellant submitted that the sentence itself was excessive and illegal. The appellant contends that the trial magistrate failed to consider mitigation as pleaded by the appellant. The trial magistrate noted the mitigation but the same is not reflected in the sentence imposed since it is harsh. The proceedings of another criminal trial that the appellant was alleged to be facing were not produced before court and the trial court should not have considered the same. Further, the trial court did not consider the fact that the appellant has been in custody since 05/10/2021. The appellant urged this court to interfere with the sentence given the recent rulings by the Court of Appeal and Supreme Court which bars life imprisonment. The appellant relied on *Igiro V Republic (Criminal Appeal 41 of 2022)* [2023] KECA 926(KLR) (28 July 2023) (Judgment) and Joseph Muchura Kimathi V Republic [2006] eKLR.
10. The appellant submitted that the learned trial magistrate failed to consider mitigation as pleaded by the appellant. The appellant contends that the trial magistrate noted the mitigation but the same is not reflected in the sentence imposed since it was harsh given remorsefulness by the appellant and his right to a fair trial was infringed. He further contends that the trial court should have considered that he is a family man and has a child who depends on him. The appellant relied on Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15/2015.

#### **The respondent's submissions.**

11. The respondent submitted that the age of the child was conclusively proved. The respondent relied on a child health card, evidence of PW1 and PW2, and section 2 of the *sexual offences act*.
12. The respondent submitted that the evidence produced during the trial proved the element of penetration to the required standards. The prosecution relied on the evidence of PW1, PW3, and PW4, P3 forms, treatment notes, and lab results.
13. The respondent submitted that from the evidence that was adduced during the trial, it is clear that the appellant is a person who defiled the victim and there was no possibility of mistaken identity, the appellant was well known to the victim. The respondent relied on evidence of PW1, PW3, and PW4.
14. The respondent submitted that the life imprisonment meted out to the appellant was within the provisions of the law. The respondent contends that the trial court before passing its sentence considered all the aforementioned matters and noted that the appellant was not remorseful, the appellant had a criminal record, and the impact of the offence on the victim who was a child of tender years. The appellant relied on Abdala; Republic (Respondent) (Criminal Appeal 44 Of 2018) [2022] KECA 1054(KLR) (7 October 2022) (Judgment), Section 8(2) Of The Sexual Offences Act, Francis Karioko Muruatetu & Another Vs Republic, Petition No. 15 Of 2015.
15. In the end, the respondent submitted that grounds of appeal on evidentiary issues have no merit. All evidentiary issues on the offence of defilement were well proved beyond reasonable doubt by the prosecution. Further, the evidence tendered in by all prosecution witnesses was consistent, reliable, credible, and not contradictory as alleged by the appellant. The case was proven beyond reasonable doubt. The trial magistrate did not error in conviction and sentence as the evidence adduced was solid. The respondent prayed that the appeal be dismissed in its entirety and the conviction and sentence be upheld as it is within the law.



## Analysis And Determination.

### Court's duty

16. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
17. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
  - i. Whether the prosecution proved its case beyond a reasonable doubt.
  - ii. Whether the sentence was manifestly harsh and excessive

### Elements of the offence of defilement

18. The appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:
  - “8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - 8(2) “A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
19. The prosecution must prove beyond reasonable doubt that:
  - 1) The complainant was a child- Age;
  - 2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, did occur of the child. See *Mark Oiruri Mose v R* [2013] eKLR; and
  - 3) The appellant caused penetration of the child.
20. See the case of *Charles Wamukoya Karani Vs: Republic*, Criminal Appeal No. 72 of 2013.
21. The trial court noted that FC understood the consequence of an oath. She therefore gave sworn evidence.
22. PW1 testified that she was 10 years old and in standard 7 at the time of the offence.
23. PW2, a mother of PW1 testified that his child was aged 10 years. She produced her clinic card. The clinic card (P Exh1) showed that she was born on 20/11/2006.
24. Based on the evidence adduced, the victim was 10 years old. Therefore, a child in terms of the *Children Act*.
25. PW1 in her evidence during the trial was that she had left a youth party at her neighbour's place (Joan) at around 5.00 p.m. On her way home with her younger brother, the appellant grabbed her from behind and held her by her left hand and lifted her thus she let go of her brother's hand. This happened by the side of a shamba. The appellant took PW1 to the bushes while her brother went back to Joan's place. The appellant took her to a bushy area which was a bit far and there was no one nearby. She was wearing a dress but she could not see the colour of the clothes the appellant was wearing since it was dark. The appellant removed his clothes and hers and then lay on PW1. She felt pain in her female



- reproductive part. The appellant inserted his penis; the one he uses to urinate into her private part. She screamed and a neighbor by the name of Samson went to her rescue but the appellant fled when he saw Samson.
26. Samson and another neighbor called Ezekiel tried to chase after the appellant but he escaped. Samson then took PW1 home. Samson then escorted her to Mulot police station and later to Longisa and Ololulunga Hospital where she was examined and treated.
  27. PW3 testified that he followed PW1 and the appellant into the bush. He found the appellant with PW1. He had lowered his trousers and was on top of PW1 defiling her. PW1 was also undressed. He was able to see the appellant because there was moonlight. When the appellant saw him he ran away and disappeared into the bush.
  28. PW4 testified that he found PW1 being dragged by someone into the bush. He called PW3. They rushed to the bush with PW3 where they found the appellant defiling PW1. They used mulika mwizi for light. The appellant ran away when he saw them.
  29. PW4 a medical practitioner testified that upon examination of the minor, her genital area had bruises on her labia and Majora, her hymen was freshly broken and had a whitish discharge, and numerous pus cells were seen. He produced treatment notes, lab results, and P3 form as P Exh 2, 3, and 4 respectively. The medical evidence concluded that penetration did occur of the child.
  30. The analysis of the evidence yields the conclusion that the prosecution proved to the required standard that penetration did occur of FC.
  31. Accordingly, the medical evidence supports the claim that there was a penetration of the child. But by whom?
  32. PW1, PW3, and PW4 confirmed knowing the appellant as a neighbour to PW1. The appellant in his unsworn defence did not dispute this fact.
  33. Based on the evidence adduced, the appellant caused the penetration of FPM.
  34. The appellant gave unsworn testimony and did not call any witnesses. The appellant testified that there was a dispute between him and PW2 since 2014. He was arrested and asked to pay Kshs. 30,000. He contended that he was framed.
  35. The appellant did not cross-examine the prosecution witnesses on this aspect of his defense. The defense by the appellant was, therefore, an afterthought; it did not dislodge the prosecution's case. This court does not find any credibility in the alibi defense as the issue never came up during the prosecution's case.
  36. The claim that the appellant was framed did not also arise during the cross-examination of PW2 making it an afterthought and hollow.
  37. The court does not find anything that shows that there was a grudge between the complainant's mother and the appellant.
  38. The court does not also find anything which shows any collusion between FC, and PW2 to frame the appellant for the offence herein.
  39. The evidence by the prosecution places the appellant at the scene and identifies the appellant as the person who defiled FC. In totality, the evidence adduced by the prosecution unravels the appellant's defense of alibi or that he was framed for the offence by PW2. The defense was a red herring and an afterthought. It is dismissed.



40. It is this court's finding that the appellant was properly convicted on the basis of evidence adduced which proved the guilt of the accused beyond reasonable doubt.
41. In the upshot, the appeal on conviction is dismissed.

**On sentence.**

42. The relevant penalty clause under which the appellant was sentenced is Section 8 (2) of the *Sexual Offences Act* which provides that:

8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

43. The prosecution submitted that the sentence was within the law.
44. This court has held before that section 8(2) of the *Sexual Offences Act* prescribes a mandatory sentence of life, which by dint of section 7 of the Transitional provisions of the Sixth Schedule of *the Constitution*, should be interpreted to prescribe life sentence as the maximum sentence.
45. See also the Court of Appeal in *Dismas Wafula Kilwake vs. Republic* [2018] eKLR that: -

"We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter the commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

46. The trial magistrate considered all the necessary factors and the sentencing policy guidelines. The trial court, therefore, exercised its discretion in sentencing the appellant.
47. This court has considered the fact that the accused is a repeat offender having been convicted of stealing, and was not remorseful as was noted by the trial court.
48. The court has also considered that the offence is serious. The victim was a child of tender age- she was 10 years old. The manner the offence was committed was brutality causing her injuries. These kinds of offences also bring to bear long-term post-traumatic effects; loss of personal worth and integrity of person apart from agonizing memories of the incident. Moreover, defilement has become quite prevalent. These factors make a deterrent sentence necessary and appropriate.
49. Be that as it may, whereas punishing the offence as well as deterring others from committing similar serious offences is important, a sentence should also give a person an opportunity to be reintegrated back into society and eke a living as a free man at some point.
50. In the circumstances, the life sentence imposed is harsh as it will not afford him any opportunity in life or to realize full potential as a human being. Life sentence is hereby set aside. And, in lieu thereof, he is sentenced to serve 30 years in prison. Such is a long period of imprisonment which will punish for



the offence, deter others from committing similar offence as well as give him an opportunity to reform and be re-integrated back into society, and hopefully be a responsible citizen Section 333(2) CPC.

51. Except, the court has perused the trial court record and found that the appellant was first arraigned in court on 16/08/2019. He was released on bond on 25/09/2019. The surety withdrew on 05/10/2021. The appellant thereafter remained in custody through the trial. The sentence shall commence from 05/10/2021.

## **52. Conclusion and orders**

53. The appeal on conviction is dismissed.
54. The appeal on sentence succeeds to the extent that life sentence is hereby set aside; and in lieu thereof, he is sentenced to 30 years' imprisonment.
55. The sentence shall commence from October 5, 2021.
56. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 29<sup>TH</sup> DAY OF JULY, 2024.**

.....

**HON. F. GIKONYO M.**

**JUDGE**

In the Presence of: -

C/A: Mr. Otolo

Langat for Appellant – Present

Appellant – Present

Ms. Saoli for DPP – Present

