



**Karanja v Republic (Criminal Appeal E040 of 2022)  
[2024] KEHC 13407 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13407 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E040 OF 2022  
PN GICHOHI, J  
OCTOBER 29, 2024**

**BETWEEN**

**JOHN NJOROGE KARANJA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence of 15 years imprisonment in Criminal Case No. ACR 154 of 2016 Chief Magistrates Court at Nakuru on 13th May 2022)*

**JUDGMENT**

1. The Appellant herein John Njoroge Karanja was charged with the offence of Defilement contrary to Section 8 (1) (4) of the *Sexual Offences Act* of 2006. The particulars of the offence are that on the 30<sup>th</sup> day of August 2016 in Nakuru East District within Nakuru County, unlawfully and intentionally caused his penis to penetrate the vagina of FN a child aged 16 years.
2. He also faced an alternative charge committing indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No.3 of 2006. Particulars were that on the 30<sup>th</sup> day of August 2016 in Nakuru East District within Nakuru County, intentionally touched the vagina of FN a child aged 16 years with his penis.

**Respondent's Case**

3. FN (PW1) was the complainant. Her evidence was that on 30/08/2016, she was alone at their house except for the two fundis working on the outer house. She was preparing to go back to school when the Appellant who was one of the two fundis and who he had only known physically for the three days he worked there, came back to the house, asked her for water and left. As she was cleaning the house, the Appellant came back and asked her for pliers. He took her to the bedroom and undressed



- her. He undressed himself. He put his private part into her private part and did the sexual act. She did not scream as he warned her not to scream or tell anyone or else, he would kill her.
4. After the act, she took a shower and dressed. She picked her school items and left for her cousins' place on her way to school. She reported the matter to her cousin W who took her to Mediheal as she also called the complainant's parents.
  5. By the time the parents arrived, the complainant was back to her cousin's house having already come back from hospital. The complainant's parents took her to Mwariki Police Station. They were referred to Nairobi Women Hospital and they were issued with a P3 form. They took it to Provincial General Hospital Nakuru (PGH) the following day and it was filled. She was also issued with a PRC form.
  6. While in company of another fundi and small children, the Appellant came to the complainant's home. Out of the two fundis, her father asked her to point out who had defiled her. She pointed at the Appellant. Her father left and came back with the police. The Appellant was trying to ask for forgiveness but the police arrested him.
  7. TWK (PW2) was at Subukia when she received a call from W that the complainant (PW1) had been raped. She therefore instructed her eldest daughter to call their father (PW3). PW2 travelled to Nakuru where she found the complainant and W. By then, W had already taken the complainant to Family Care Medical Centre. PW3 arrived and the complainant told them she was defiled by one of the fundis at their home.
  8. They proceeded to Mwariki Police Station where they reported the matter. They were referred to PGH where the complainant was treated and both the P3 Form and PRC form were filled. They returned them to the Police Station and recorded statements and handed over the documents to the police.
  9. She testified that Appellant who was communicating with her husband came home to apologise. The complainant pointed him as the person who defiled her. PW2 did not know the Appellant's name but he identified himself to her as JN and confessed having defiled the complainant. The police arrested him.
  10. Upon receiving the call from W reporting how the complainant had been defiled and taken to hospital, PW3 (DKM) called the Appellant who he had left as in charge of his (PW3's) project. Unaware that it was the Appellant who had defiled the complainant, PW3 asked the the Appellant why his men had defiled his daughter.
  11. He travelled to Nakuru and found that his cousin W had taken the complainant to Family Care Hospital for first aid. He was joined by his wife (PW2) and they report the matter at Mwariki Police Station. They were referred to Nairobi Women Hospital from where they were referred to PGH where the complainant was treated.
  12. The Appellant came to PW3's home at 7.30 pm while accompanied by his wife and two children. PW3 called two elders namely N and M and their presence, the complainant pointed at the Appellant as the person who had defiled her. The Appellant confessed having defiled the complainant. PW3 went to Mwariki Police Station and was accompanied back home by two police officers. They arrested the Appellant.
  13. PW4 (Dr. Stephen Onyango) produced the P3 Form on behalf of his colleague Dr. Kanyotu with who he worked for 3 years at PGH and familiar with his handwriting. He testified that the P3 Form filled on 1/9/2016 revealed that the complainant's hymen was freshly torn.
  14. On behalf of Dr. Murage with who he worked for 4 years and hence familiar with her handwriting, PW4 produced the PRC Form that Dr. Murage had filled on 31/8/2016. The complainant had told



Dr. Murage that she was alone at home with construction workers when one of them came to the house and had penetrative intercourse with her. She had freshly torn hymen, around 7 O' clock position vagina tenderness which was evidence of defilement.

15. PW5 No. 95xxx PC Rosemary Muiru, an investigator based at Bodeni Police station took over this case on from CPL Wanjiku. CPL Wanjiku briefed her on the matter before going on transfer. Statements had been recorded and the scene visited. She produced the copy of the Complainant's birth certificate as the original was with the parents.

### **Appellant's Case**

16. He was duly represented by counsel and in his sworn statement in defence, the Appellant explained that he was plastering PW3's house where he had worked for six months. He did not know his children. That he saw the complainant two days before she complained. That he was to work for six days and was to be paid Kshs. 22,500/= but PW3 had paid him only Kshs. 4,000/=.
17. He testified that this was the last day he was to work and had called his cousin JN M to assist him with the work but he did not see anyone else in the compound except the complainant.
18. He explained that at about 3.00 pm, PW3 called him saying that he had heard that a fundi had raped the complainant. He responded that he had not heard of it. He had seen the complainant in school uniform and leaving the compound at 11.00 am. PW3 told him to wait for him in the compound but he and JN left at 5.30 pm having waited for PW3 in vain.
19. It was his testimony that 31/5/2016, he was accompanied by his wife and children and went to PW3's home. They found the PW3 and his wife, the complainant and two elderly men namely K and M J. That PW3 called the complainant and asked her who had defiled her. She looked at the Appellant and J and told PW3 that it was the Appellant who had defiled her.
20. It is then that PW3 left and came back with police officers who arrested the Appellant and took him to Mwariki Police Station. He denied defiling the complainant. His defence was that he had disagreed with PW3 over the balance of the payment for the work done.
21. In cross -examination, he told the court that on that day, he met the complainant twice in the compound. She was drawing water at the tank opposite the house where they were working on. That she knew them as masons and they would greet her whenever they arrived in the compound. The schools were closed and were to open on 30/08/2016. He had no disagreement with the complainant.
22. At the conclusion of the case, the trial court found the Appellant guilty, convicted and sentenced him to serve to 15 years imprisonment. He was aggrieved by both the conviction and sentence hence this appeal which he handled in person. He listed six grounds as per the Amended Grounds of appeal filed on 4/07/2023 as follows: -
  1. The learned trial magistrate erred in law and fact by relying on the evidence of PW1 which was not proved.
  2. The learned trial magistrate erred in law and fact by putting more reliance on PW5's evidence which was not proved.
  3. The learned trial magistrate erred in law and fact failing to note that no exhibits were produced to prove the allegations.
  4. The learned trial magistrate erred in law and fact by allowing and relying on PW3's evidence on a parade he conducted at his home.



5. The learned trial magistrate erred in law and fact by relying on PW4's evidence which was not complete according to trial court procedure as investigator.
  6. The learned trial magistrate erred in law and fact when he rejected the Appellant's sworn defence without giving concrete reasons.
23. He therefore urged that the appeal be allowed, the conviction quashed, sentence set aside and he be set at liberty.

### **Appellant's Submissions**

24. These are contained in the body of the Amended Grounds of Appeal. While merging grounds 1,2 and 3, the Appellant broadly focused on the evidence in relation to the identity of the defiler. Regarding the evidence by the five-prosecution witness, the Appellant questioned the failure by the complainant to scream or tell any of her friends or other persons working with the Appellant or even report to any of the neighbour's yet the nearest house was about 20 m away. Further, he questioned her bathing after the act.
25. Further, the Appellant submitted that the complainant did not know the name of the person who defiled her and she did not give his description either. He questioned the alleged parade conducted by PW3 and submitted that PW3 was trying to fix him.
26. On the issue of age, the Appellant questioned the credibility of the evidence adduced and submitted that the doctor who produced the P3 form testified that the complainant was aged 10 years which evidence was contradicted by other evidence on record that the complainant was 16 years. That further, the complainant testified that she was 17 years old. He termed this evidence as an indicator that the witnesses lied.
27. On the issue exhibits, the Appellant submitted that there was need for such evidence to prove defilement yet no exhibits were produced. That though the complainant testified that she was bleeding no clothes were produced in court as evidence.
28. Regarding investigations, the Appellant submitted that they were poorly done. He submitted that the two elders namely N and M called by PW3 during the parade were not called to testify and prove that indeed, the Appellant was positively identified by the complainant (PW1).
29. Further, the Appellant revisited the issue of age. He submitted that with the complainant having testified that she was aged 16 years, the prosecution must prove the age of the complainant and the fact that the accused had knowledge that the complainant was below age.
30. Regarding his defence, the Appellant maintained that this case was about money even if PW3 denied during cross examination that he was using this case to avoid paying the Appellant his money.

### **Respondent's Submissions**

31. The Respondent opposed the appeal vide submissions filed on 30/01/2024 by Mr. Kihara, the learned prosecution Counsel. It is noted that he has submitted while referring to both the "6 grounds of appeal and further supplementary 5 grounds of appeal." However, what is before Court is Petition of Appeal dated 30/06/2022 containing 6 grounds of Appeal. The Appellant then filed Amended Grounds of Appeal on 08/06/2023 also containing 6 grounds but differently framed.
32. The Respondent's submissions show that the contents of what he terms as supplementary grounds of appeal is actually replica of the Amended Grounds of Appeal.



33. It was the Respondent's submissions that the prosecution had to prove the three ingredients of the offence of defilement being age of the victim, that there was penetration and the identity of the offender. It is the Respondent's submissions that the age of the minor and identity are not in doubt. That the issue in contention is whether the Appellant did have sexual intercourse with the minor.
34. Despite the above, the Respondent submitted on identity of the perpetrator. It was the Respondent's submissions that the act happened during the day; that the Appellant had a conversation with the complainant in that he requested her for water and later came back and asked for pliers.
35. It was submitted that the incident happened over several minutes and therefore, the complainant was able to register the Appellant's face and physic. That there was no contradiction in this evidence even on cross-examination.
36. Further, the Respondent submitted that without any hesitation, the complainant also identified the Appellant in the informal parade conducted in her home. That considering there were workers in that compound, then it was in order for PW3 to carry informal parade for purposes of clarification. That in the circumstances herein, the fact that no identification parade was carried out at the police station was neither here nor there. That nothing bars the public from making such identification.
37. Further in regard to the credibility of the complainant's evidence, the Respondent submitted that from close scrutiny, she was telling the truth and this was tested in cross examination. That the trial court had the opportunity to observe demeanour and was satisfied that she told the truth.
38. Regarding penetration, the Respondent submitted that the P3 form and PRC Form produced herein confirmed that the complainant's hymen was freshly torn. It was the Respondent's submissions that though the PRC Form indicated that there was a white discharge while P3 Form indicated "Nil" and that the age of injury was not indicated in the P3 Form, that discrepancy could not affect the prosecution evidence when considered in its entirety.
39. Regarding the issue that investigations were marred by contradiction, the Respondent submitted that the investigations were above board and that the Appellant did not explain how it was contradictory.
40. On failure to call some witnesses, the Respondent submitted that the witnesses availed in this case met the threshold of availing evidence that proved the case beyond any reasonable doubt thus secured a conviction.
41. On failure to avail exhibits in this case, the Respondent submitted that the Prosecution availed the P3 Form and PRC form to prove penetration. That the victim's clothing was not necessary in this case.
42. On the issue that the trial rejected or rather did not consider the Appellant's defence, the Respondent submitted that the court record reveals the Appellant's defence and sentiments were well captured. Further, it was the Respondent's submissions that the Appellant never questioned the complainant on the issue of being framed.
43. The Respondent therefore urged the Court to dismiss the Appeal and uphold the conviction and not to interfere with the sentence.

### **Analysis And Determination**

44. As the first Appellate Court, this Court is duty bound to re-evaluate the evidence adduced before the trial court and come up with its own conclusions bearing in mind that this Court never saw or heard the witnesses as they testified. (See *Okeno v Republic* [1972] EA 32.)
45. In fulfilment of that duty, the broad issues for determination in this appeal are: -



1. Whether the Respondent discharged its burden of proof on the charge of defilement.
  2. Whether the trial court considered the defence.
  3. Whether the Court should interfere with the conviction and sentence.
46. To discharge its burden, the Respondent had to prove the age of the complainant, that there was penetration and that the Appellant was the perpetrator.
47. Regarding age of the complainant it is now settled law that age can be proved by documentary evidence such as birth certificate, baptism card, or by oral evidence of the child if possessed of enough intelligence to testify or the evidence of the child's parent or guardian or by medical evidence among other credible form of proof. The trial magistrate held on the issue: -
- “A Certificate of Birth was produced in evidence showing the complainant was born on 8/8/2000. The crime herein is said to have occurred on 30<sup>th</sup> August 2016. The complainant was therefore aged around sixteen years. The court confirm that the age of the complainant has been proved and that she was a minor when the offence was committed.”
48. This Court has looked at the P3 form and the complainant's age is indicated as 16 years. It is therefore an apparent error on the face of record that the typed record reflects PW4 's evidence as indicating the age as 10 years. The error does not go to the core of the matter and cannot be regarded as a contradiction. The complainant's age was clearly proved 16 years as at the time of the commission of the offence.
49. The Appellant's submissions that the prosecution must prove the age of the complainant and that the accused had knowledge that the complainant was below age is irrelevant. His line of defence did not at any time indicate that he was mistaken that this was a minor.
50. In regard to penetration, Section 2 of the *Sexual Offences Act* define penetration and “the partial or complete insertion of the genital organs of a person into the genital organ of another person.” The complainant testified that she was sexually assaulted on the material date. She was taken to hospital on the same day. Both the P3 Form and PRC filed by the doctors who examined the complainant confirm that she was sexually assaulted. Her hymen was freshly torn.
51. This Court is satisfied with the trial court's finding that both oral and medical evidence proved penetration. Failure to avail the victims clothing or the fact that she took a bath after the sexual assault is immaterial to this case.
52. Regarding identity of the perpetrator, the record shows that the complainant was defiled during the day. The Appellant admitted that the complainant was in the house. There were no other people in the compound except him and his cousin named N who was also a fundi. The two of them were working on PW3's house.
53. In cross- examination, the Appellant told the court that on that day, he met the complainant twice in the compound. She was drawing water at the tank opposite the house where they were working on. That she knew them as masons and they would greet her whenever they arrived in the compound. He had not differed with the complainant.
54. The Appellant's argument that this case was brought due to the money her father (PW3) owed him was disputed by PW3 during cross- examination. Indeed, the complainant's case has nothing to do with PW3's failure to pay the Appellant, whether PW3 owed any money or not.



55. It is clear that the complainant knew the Appellant physically and as a fundi and in the circumstances herein, her identifying him at home when the two fundi were paraded by PW3 was simply to clarify as to who between the two fundi working in the compound that day had defiled her.
56. She did not hesitate to point at the Appellant. There was nothing unlawful about that “parade” and there would have been no necessity for an identification parade at the police station in the circumstances herein.
57. The trial court held on the issue: -
- “The complainant testified that she saw the accused’s face when she interacted with him closely when she gave him water and saw the face at close proximity as the accused defiled her. It is therefore not in doubt that the complainant was familiar with the accused and readily identified him as the person who defiled her. The court observed the demeanour of the complainant during her testimony and there was nothing to suggest she was not telling the truth. She remained firm and consistent in her testimony even in cross examination. The evidence against the accused person was so overwhelming that even after considering his defence the court has no doubt in its mind that the accused committed the offence he is charged with.”
58. The trial court’s findings on the issue are proper and based on law and evidence. This Court is satisfied that the identification of the Appellant by the complainant as the perpetrator was free from any possibility of error.
59. There is nothing to support the Appellant’s grievance that “the learned trial magistrate erred in law and fact by relying on PW4’s evidence which was not complete according to trial court procedure as investigator.” PW4 (Dr. Stephen Onyango) produced the P3 Form and PRC form on behalf of his colleague Dr. Kanyotu and Dr. Murage respectively and with whom he worked for 3 years and 4 years respectively and was familiar with their handwriting and signatures. The Appellant who was duly represented by counsel did not object to PW4 producing the exhibits and indeed, the witness was duly cross - examined. Reception of that evidence was proper.
60. Regarding the ground that his defence was rejected by the trial court, record shows otherwise. The trial court analysed the whole case including the defence before arriving at the conclusion that the Respondent had proved its case beyond any reasonable doubt.
61. This Court has also considered the Appellant’s line of defence during cross examination of Respondent’s witnesses and finally his sworn statement in defence. Of concern is the questions that Counsel for the Appellant posed on the complainant so that the complainant responded: -
- “I don’t know how a circumcised man looks like. I do not know how a circumcised man looks like. The accused was not taken to hospital with me. “
62. Asking a minor such questions was uncalled, demeaning and offensive to the child. It was totally irrelevant and should have been stopped and rejected by the trial court. It is not a defence that has any effect on the case that was before the court. The trial court’s failure to make any reference to it in its judgment was justified.
63. In totality, the Appellant’s defence did not challenge or cast any doubt in the prosecution case at all. The trial court correctly arrived at the final verdict of guilt. The conviction herein was sound and therefore upheld.



64. On sentence, the Appellant was a first offender. In mitigation through his counsel was as follows: -
- “The accused is remorseful. He is a family man with children. He is the only breadwinner. He is a first offender. The complainant was mature at 16 years. The accused has attended court diligently. We pray for a lenient sentence.”
65. The trial court called for the probation officer’s report which recommended that court determine the matter in an appropriate manner considering the gravity of the offence
66. The record shows that in sentencing the appellant, the court did consider that the Appellant was a first offender and his mitigation together with the probation officer’s report were considered. The trial court also considered the period the Appellant had been in custody.
67. Under Section 8 (4) of the *Sexual Offences Act* provides 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.”
68. The fact that the complainant was mature as at the time the case was concluded does not erase the physical and emotional scar on the complainant and neither does it change the fact that the Appellant defiled the complainant when she was a minor. That sentence was justified and lawful. There is no reason to disturb it.
69. It is apparent that there was no compliance with the provisions of Section 333 (2) of the Criminal Procedure Code which is mandatory. The Appellant was arrested on 1<sup>st</sup> September 2016. He went out on bond on 26<sup>th</sup> September 2016. The time he was in custody awaiting trial ought to have been put into account during sentence.
70. In conclusion therefore, this Court makes the following orders: -
1. The appeal is dismissed for lack of merit.
  2. The conviction is upheld and sentence affirmed.
  3. When computing the sentence of 15 years imprisonment, the period the Appellant spent in custody from 1/9/2016 to 26<sup>th</sup> September 2016 be taken into account.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of:

JNK- Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant

