



**Kuira v Republic (Criminal Appeal E022 of 2023)  
[2023] KEHC 22938 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22938 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E022 OF 2023  
LM NJUGUNA, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**KENNEDY MBICHO KUIRA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. A. Lorot (CM) in Chief Magistrate's Court at Wang'uru Sexual Offence No. 16 of 2022 delivered on 27<sup>th</sup> April 2023)*

**JUDGMENT**

1. By memorandum of appeal dated 10<sup>th</sup> April 2023, the appellant being dissatisfied with the decision of the trial court in Chief Magistrate's Court at Wang'uru Sexual Offence No. 16 of 2022, now seeks the following orders:
  - a. That the appeal be allowed;
  - b. That the appellant be released on reasonable bail and bond pending hearing and determination of the appeal; and
  - c. The conviction be quashed and the sentence be set aside.

The 14 grounds of appeal are set out on the face of the memorandum.

2. According to the charge sheet on record, the appellant was faced with the charge of defilement contrary to Section 8(1) as read together with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence are that, on diverse dates between 26<sup>th</sup> June 2022 and 20<sup>th</sup> August 2022 in Mwea East sub-county within Kirinyaga County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of BWM a child aged 11 years.



3. The alternative charge was indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars for this charge were that on diverse dates between 26<sup>th</sup> June 2022 and 20<sup>th</sup> August 2022 in Mwea East sub-county within Kirinyaga County, the appellant intentionally and unlawfully touched the vagina of BWM a child aged 11 years with his penis.
4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called 5 witnesses in support of its case.
5. Following voire dire, PW1 gave sworn testimony and stated that on 25<sup>th</sup> June 2022 she was admitted in a private ward at Comrade Nursing Home where she had been taken by her father for treatment. That the accused person was the night nurse attending to her at the facility. That on 26<sup>th</sup> June 2022, the accused person, after administering medicine to her, took off his trouser and removed her hospital gown and panty, and then inserted his penis into her vagina. That afterwards, the accused person gave her Kshs. 500/= and warned her that if she told anyone, he would send people to kill her and her body would never be found.
6. That the accused repeated the act on 28<sup>th</sup> June 2022 and still threatened her. That she was discharged on the 29/6/2022 and on that day the accused gave her his number and Kshs.1000/= and asked her to be calling him. PW1 stated that she called the accused person using her mother's phone on several occasions and they met on Saturdays when the accused person could defile her and gave her money. That the last day they met was 20<sup>th</sup> August 2022 when he gave her Kshs. 1,000/=. That she had a lot of money in school and when one of her teachers noticed, she reported to her mother, and PW1 was forced to tell the truth. She identified the appellant as the perpetrator.
7. On cross-examination, PW1 stated that it was not the first time that she had been treated at the medical facility. That when she was admitted, she was alone in the ward. That whenever she could call the accused person using her mother's phone, she would delete the number. That she only made voice calls but not text messages. That she never told anyone else that the accused person gave her money.
8. PW2, CWN, is a teacher at the school where PW1 attends. She stated that on 06<sup>th</sup> September 2022 a pupil went to her to buy a pencil. That she found it unusual because the transacting hours for pupils had ended. That the pupil said that she had been given Kshs. 100/= by PW1. That PW2 took it upon herself to interrogate the matter and she found that PW1 indeed had a lot of money as one of the classmates said and she has been giving it to other pupils. That PW2 collected Kshs. 1,770/= from the other pupils, money they had received from PW1. She stated that PW1 had said that she had been stealing the money from her mother but when her mother was called by PW2, PW1 confessed that she has been given the money by the accused person, who was defiling her and giving her tablets to prevent her from getting pregnant. That PW1 also told them that the accused person had threatened to kill her and make her body disappear if she reported the defilement. On cross-examination, PW2 recounted her testimony. On re-examination, PW2 stated that inquiries are usually made when a student suddenly has a lot of money because the school must protect other students in the event that money might be used as bait to pull them into wrong habits.
9. PW3, George Kariuki, is the clinical officer who examined PW1 at Kimbimbi Sub-County Hospital. He stated that PW1 was brought for examination by her mother and a police officer who reported that she had been having sexual relations with the accused person for a period of time. He stated that PW1's hymen had an old tear indicating that it could not have been torn within the past 72 hours. He stated that the test results done did not show any infections or pregnancy. He produced P3 and PRC forms. On cross-examination he stated that the injuries looked like they were 3 months old and there were no



spermatozoa. He further stated that boys below the age of 9 years could not have spermatozoa if they had engaged in sexual intercourse with the victim.

10. PW4, MWM is the mother of PW1. She stated that on 07<sup>th</sup> September 2022 she received a call from PW2 asking her to go to school regarding a concern about PW1. That when she reached the school, the teacher told her about the money which her daughter has been giving the other pupils. That upon a beating from her mother, PW1 confessed and asked PW4 not to report to the police because the accused person had threatened to kill her. That PW4 then reported the issue to police and took PW1 to Kimbimbi Sub-county Hospital. On cross-examination she stated that all the information she had regarding the accused person was given to her by PW1. That when PW1 was admitted in hospital PW4 did not think she was unsafe. She also noted that PW1 was still afraid that the accused person would kill her. That PW1 singled out the accused from all the male staff at the medical facility and PW4 believes that PW1 was not wrong in doing this.
11. PW5, P.C. Rose Sambu of Wang'uru Police station stated that on 08<sup>th</sup> September 2022 PW4 took PW1 to the police station and reported that the latter had been defiled by the accused person. She recounted the testimonies of PW1, PW2 and PW4 and also visited Comrade Nursing Home where the accused person was arrested by P.C. Njue and Iftin. That PW1 also led PW5 to the place where she used to meet with the accused person, that is "silent lodge" where they found the rooms were closed and the owner had moved to Kerugoya. On cross-examination, she said that upon visiting the medical facility, she found out that the accused person was on night duty on the days when the complainant was first defiled and that she saw no reason to doubt. That all the money given to the complainant by the accused person were in form of cash.
12. This marked the end of the prosecution's case and the court ruled that the accused person had a case to answer and he was put on his defense.
13. When the accused person was placed on his defence, he stated that he has been working as a nurse at Comrade Nursing Home since the year 2016 until when he was arrested. That on 25<sup>th</sup> to 29<sup>th</sup> June 2022, he was on day shift which runs between 7:30am and 6PM and he had the nurse's duty roster to confirm this. That he was not working on the days when the alleged incidents took place at the hospital as he had taken a day off on 26<sup>th</sup> June 2022 and then he was on day shift for the remainder of the days when the complainant was in hospital. That when he took the day off, he remained indoors and only went out to buy food and have a drink with a friend. That he had no receipts to show that he has been in any lodging. On cross-examination, he stated that there were 23-24 beds in the hospital and there were no restrictions on how the nurses attended to the patients. He stated that he is not the one who prescribed medications to the complainant but the patient's chart had 2 handwritings and signatures none of which were his. That he is the oldest staff member in the hospital and was familiar with the handwritings and signatures of all the other members of staff.
14. DW2, Daniel Mubari Wanyama is the administrator at Comrade Nursing Home who stated that as the Hospital policy, there is a male and a female nurse at all times whenever medicine is administered to a patient. That the complainant was a patient in the hospital between 21<sup>st</sup> and 29<sup>th</sup> June 2022. He produced the care index for the complainant showing that on 25<sup>th</sup> June 2022 someone else attended to the complainant and the accused person was on day shift between 25<sup>th</sup> to 29<sup>th</sup> June 2022. That it was not possible for a nurse to be on both day and night shifts at the same time. That during the accused person's shift he was never assigned to the female ward. On cross-examination, he stated that the hospital had 3 nurses against a capacity of 36 patients and so the requirement for nurses to attend to a patient in pairs is difficult to achieve. He also stated that he may not be able to account for the



- whereabouts of the accused person but it was unusual that he took a day off sooner than the usual period of 7 days after start of the duty roster.
15. DW3, Boniface Kamau Muhia, a friend of the accused person stated that on 26<sup>th</sup> June 2022, he visited the accused person at home and they spent the afternoon and evening together watching movies and later on they went out for supper and a drink at a club. That they parted ways at around 10PM. DW3 also stated that the accused person usually did not leave his house after 10PM and that he has never known the accused for using guest houses or lodgings. On cross-examination, he stated that the accused person would have told him if he was in a relationship with anyone, or if he had messed up in the way alleged in this case. He also stated that the accused person was on day shift between 24<sup>th</sup> June 2022 and 29<sup>th</sup> June 2022.
  16. The parties on appeal were directed to file their written submissions which directions, they both complied.
  17. The appellant in his submissions, stated that the burden of proof was shifted to the accused person and he cited the cases of *Bukenya Vs. Uganda* (1972) EA 549, *Said Awadh Vs. R.* (2014) eKLR and *Earnest Ashindu Vs. R* (2019) eKLR. That the prosecution failed to prove the elements of the offence of defilement under section 8(1) and (2) of the *Sexual Offences Act*. He supported his argument by citing the case of *F.O. Vs. Republic* (2020) eKLR and stated that the trial court erred in basing its finding heavily on the testimony of the minor even though PW3 stated that it is possible that carnal knowledge was not the only cause of a ruptured hymen. The appellant relied on the case of *Bassita Vs. Uganda S.C. Criminal Appeal No. 35 of 1995* in making his case that the court relied on hearsay evidence given by PW2, PW4 and PW5 who only repeated what PW1 had told them. That the court ignored the cracks in the prosecution's case and convicted him based on hearsay even after DW2 stated that appellant was on day shift for the whole period when the complainant was admitted at the hospital.
  18. The appellant submitted that PW1 was not a credible witness as she kept on lying when asked about the money she had. That PW1 did not seem scared of the accused person when she returned to the hospital in the company of her mother just a few days before arrest of the accused person. That in court, PW1 seemed suddenly afraid of the accused person yet she was comfortable around him at the hospital visit only 3 weeks before. That at the time PW1 was admitted in hospital, she was in a ward where other patients were also admitted. That the hospital did not have any private rooms. That the trial court ought to have sought corroboration of PW1's evidence and on this he cited the case of *Paul Ndogo Mwangi Vs. R* (2016) eKLR.
  19. It was also the appellant's submission that he had suffered judicial prejudice when the court alluded to the fact that the accused person tried severally before he managed to penetrate and gently so. He even argued that if penetration did not happen the first time, it shows that penetration did not happen at all and that the evidence of PW1 was scanty or non-existent for the other occasions as claimed. That the court rushed to deny the appellant bail and to convict him. The appellant also submitted that the *voire dire* was defective and relied on the cases of *R. Vs. Khan* (1981) 73 Criminal Appeal R 190 and *Gabriel Maholi Vs. R.* (1960) EA 86. That the evidence by PW1 should be disregarded and the conviction set aside.
  20. The appellant further relied on the cases of *Adedeji Vs. The State* (1971) All NLR and *Ricky Ganda Vs. The State* (2012) ZAFSHC 59 to challenge the prosecution's failure to challenge his defence of alibi. He also decried the sentence and termed the same as unconscionable and unproportionate to the crime. On this he relied on the cases of *Daniel Kipkosgei Letting Vs. Republic* (2021) eKLR and *Republic Vs. SSM* (2020) eKLR where the court cited the case of *Hamisi Bakari & Another Vs. Republic* (1987) eKLR.



21. The respondent's submissions rehashed the issues arising from the grounds of appeal and stated that the appellant was positively identified as the assailant. That it has sufficiently proved that the complainant was a minor and that penial penetration occurred as a matter of fact. The respondent also stated that the sentence imposed on the accused person was appropriate and the appellate court was urged to uphold it.
22. From the memorandum of appeal, submissions and the record of the trial court, I deduce the issues for determination to be as follows:
- a. Whether the defense of alibi by the accused person should have been considered by the trial court to acquit;
  - b. Whether the evidence by PW1 was credible or should be impeached under section 163 of the [Evidence Act](#);
  - c. Whether the offence was proven beyond reasonable doubt;
  - d. Whether the trial court was biased in denying the accused person bail.
23. This court is not oblivious of its role in this appeal as stated in the case of *Okeno Vs. Republic* [1972] EA 32 where it was held that:-
- “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 must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”
24. On the issue of the defense of alibi, the accused person stated that he had taken a day off on 25<sup>th</sup> June 2022, 2 days into his 7-day long schedule according to the roster. According to DW2, this was unusual because the accused was supposed to take the off day after the end of the 7 days. That although he was scheduled to be in the day-shift, DW2 still said that he could not account for the whereabouts of the accused person. That even on normal days, though the hospital policy states that one patient should be attended by a male and a female nurse at the same time, the facility is short-staffed and this policy is relaxed sometimes. DW3 who is a friend of the accused stated that they spent the day of 25<sup>th</sup> June 2022 together at least from the afternoon until evening, something they did often. That they would part ways around 10PM and the accused usually did not leave his house past 10PM.
25. With regard to this alibi, the court is left with questions like; if the accused does not live with DW3, would he know if the accused left his house on the night of 25<sup>th</sup> June 2022 after returning home? When a nurse is off duty and outside his shift, is there anything stopping him from accessing the wards? On these two questions, I see no evidence refuting that the accused person might have gone to the hospital on the night of 25<sup>th</sup> June 2022. Additionally, I note that the accused person did not sign on any treatment notes on the complainant's treatment chart and the medics who signed after administering medication can be identified. However, the evidence available is that when two nurses attend to a patient, only one of them records the case index and not both of them.



26. On the credibility of the evidence by PW1 and whether it ought to have been impeached under section 163 of the Evidence Act which provides:

- “(1) The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the court, by the party who calls him—
- a. by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
  - b. by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;
  - c. by proof of former statements, whether written or oral, inconsistent with any part of his evidence which is liable to be contradicted;
  - d. when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the prosecutrix was of generally immoral character.
- (2) A person who, called as a witness pursuant to paragraph (a) of subsection (1) of this section, declares another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.”

27. This ground of appeal is too general and the appellant did not clarify which party should have called for such impeachment. The prosecution may, with consent of the court, seek to impeach its own hostile witness. At the same time the adverse party may, without consent of the court, seek to impeach a prosecution witness. It is my understanding that proceedings to impeach a witness arises during the hearing and an application under this section should have been made then and during the prosecution’s case. Assuming that the appellant was the one intending to seek for impeachment of the prosecution witness(es), he should have notified the court at the hearing, of his intention and he would have allowed the court a chance to make a ruling on the matter. In the case of Augustine Wanyoike Kamau alias James Kariuki Kamau Vs Republic [2016] eKLR, the court was faced with a similarly vague request and the learned judge could not determine the issue either.

28. I should add, that it is appalling that the appellant submitted that when he attended to the complainant at the hospital 3 weeks before he got arrested, the complainant who was in the company of her mother did not seem shaken and afraid of her alleged assailant. Considering the threat on her life, placed by the appellant, it is not unusual that the complainant would behave as if nothing had happened in order to not ruffle any feathers just yet. Further, the threats to her life led the complainant to tell a series of lies so that the accused person is not implicated, lest he sends strangers to kill her and make her body disappear just like he had threatened going by evidence of PW1. This series of lies by PW1 do not discredit her testimony in the case and I do not think that she is a serial liar capable of altering the course of justice. In my view the lies are as a result of the threats made to her life by the appellant.

29. The elements of the offence of defilement are set out under section 8(1) and (2) of the Sexual Offences Act, the prosecution has the task of proving them beyond reasonable doubt:



- a. The age of the complainant- that the complainant was a child;
  - b. Penetration as defined under section 2(1) of the *Sexual Offences Act* happened to the child; and
  - c. The perpetrator was positively identified.
30. The complainant is definitely a child as evidenced in a copy of the birth certificate produced as PExh1. Therefore, this fits the definition of a child under the Children’s Act no. 8 of 2001 as she was 11 years old as at the time of the incidents.
  31. On the issue of penetration and identification of the perpetrator, PW3 testified that following his examination of the victim, there was an old tear of the hymen, outside the window of 72 hours which would have been categorized as a fresh tear. The P3 and PRC forms show that the alleged assailant is a medic at a hospital where the victim had been admitted. The only way to confirm that it is the accused person who committed the offence is by positive identification of the accused person at the hospital where she was admitted. As stated earlier, there are doubts as to the whereabouts of the accused person on the night of the first incident of defilement. It was the appellant’s argument that the statements by PW1 should have been corroborated. From the foregoing, nobody else could have been able to account for the actions of the appellant on the night of 25<sup>th</sup> June 2022, besides himself and DW3. However, even assuming that he was not on duty on the material night, the evidence of PW1 was that even after she left the Hospital the accused person continued to defile her. She led PW5 to the guest house where the accused could take her and defile her after which he could entice her with money. The evidence of PW1 was well coordinated.
  32. In addition, the complainant herein identified him in the dock as the man who assailed her on the night of 25<sup>th</sup> June 2022 and thereafter. The trial court noted that it relied mostly on the evidence by PW1 whose testimony was given under oath following *voire dire*. I find no error in this finding by the trial court because all the important facets of the case are built on the testimony of PW1. Therefore, in my view, the prosecution proved the case beyond reasonable doubt.
  33. On the issue of whether the appellant suffered judicial prejudice when he was denied bail by the trial court, the court expressed itself that the pre-bail report was unfavorable to the accused person. The trial court relied on Article 49(1)(h) of *the Constitution* of Kenya 2010 and the cases of Republic Vs. Munguti (2020) eKLR and Republic Vs. Joktan Mayenda & 3 Others (2013) eKLR in making its well-reasoned finding that there were compelling reasons to deny bail. Further, the complainant expressed apprehension that the accused person would kill her like he had threatened. It is possible that the trial magistrate, in writing the judgment made a few extraneous statements when summarizing the evidence collated, but this does not change the wholistic outcome of the case or the course of evidence adduced.
  34. On sentence, I have considered the submissions in that regard and the jurisprudence surrounding the minimum mandatory death sentence as espoused by the Supreme Court in the Muruatetu Case and in my considered view, the life sentence imposed by the trial court is excessive and harsh. The same is hereby reduced to 30 years imprisonment.
  35. It is so ordered.

**DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant



.....for the Respondent

