



REPUBLIC OF KENYA



KENYA LAW
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**Katana v Republic (Criminal Appeal E055 of 2022)
[2023] KEHC 23329 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E055 OF 2022
A. ONG'INJO, J
SEPTEMBER 28, 2023**

BETWEEN

GARAMA KATANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Hon. D. Odhiambo (SRM) delivered on 29th July 2022 in Shanzu S. O. Case No. 73 of 2018, Republic v Garama Katana)

JUDGMENT

Background

1. The Appellant, Garama Katana was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. Particulars were that Garama Katana on the 1st day of July 2018 in Kisauni Sub-County within Mombasa County intentionally and unlawfully caused his penis to penetrate the vagina of SO a child aged 3 years old.

Prosecution case

3. PW1, NM testified that the complainant was her child and that she was 5 years old although on 01.07.2018, she was about to turn 3 years old. PW1 said that she knew Garama Katana and positively identified him in court. That Garama was her mother's farm boy and that she was staying next to her mother's home. She said that on that day at around 7 pm, the complainant went home and told her that Garama had taken her upstairs, removed her panty, touched her private parts and inserted his penis into her vagina. That the incident happened at the house of PW1's mother where Garama was sleeping. That PW1 went and called Garama and asked him what he had done. That at first he refused



to say what he had done but later admitted that he had taken her upstairs and asked for forgiveness. That they then took him to Bamburi Police Station and the complainant to Coast General Hospital.

4. PW2, SO the complainant after *voire dire* examination was found not to possess sufficient knowledge and was allowed to testify freely. She said she did not know someone called Garama Katana. She said there was someone who touched her nunu. She said she did not have a panty and that the person she identified in court carried her to his home up and touched her. Then she said she was not taken to hospital. In cross examination, she said she saw her father hitting Garama.
5. PW3, Dr. Deepkuna Nakeshur testified on behalf of Dr. Nasir Varywai who examined the complainant and filled the P3 Form and found that the complainant had vaginal abrasion. He produced the P3 Form as well as the PCR Form which was filled by a clinical nurse known as Saida Mwinyi on 2.7.2018 when the complainant was first taken to hospital.
6. PW4, PC. Irene Kanga who from Bamburi Police Station who investigated the offence that when the matter was allocated to her, the appellant had been placed in the cells having been brought in by the complainants. She said she interrogated the complainant who said that uncle Rama took her upstairs and removed her pant after which he started inserting his finger in her vagina and later removed his penis and forcefully penetrated her. That when the appellant was removed from the cells and the child saw him, the child hid behind her mother and could not talk again. That after some time when the complainant was interrogated, she was able to point at the accused person as the perpetrator. PW4 produced the birth certificate for the complainant

Defence Case

7. The accused, Garama Katana after being sworn in stated that it was not him who defiled the child and pleaded to be released and the case to end.
8. Based on the evidence by the prosecution and the appellant's sworn statement, the trial magistrate found the appellant guilty and he was convicted and sentenced to serve life imprisonment.
9. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds of appeal filed on 12th August 2022 by the appellant in person namely: -
 1. That the learned trial magistrate erred in law and fact by finding my conviction and sentence without considering that the expert's report did not prove the case of defilement beyond reasonable doubt.
 2. That the learned trial magistrate erred in law and fact by finding my conviction and sentence without humbly considering that the prosecution case was governed by massive contradictions and discrepancies.
 3. That the learned trial magistrate erred in law and fact by failing to comply with Section 329 of the CPC as mitigation is part of the trial process.
 4. That the learned trial magistrate erred in law and fact by finding my conviction and sentence without humbly considering my defence evidence.
 5. That the learned trial magistrate erred in law and fact by finding my conviction and sentence without humbly considering the life sentence meted on me the appellant was harsh, excessive, unjust, unconstitutional, inhumane and degrading.



10. M/s Odhiambo S. E. & Co. Advocates had earlier filed another Petition of Appeal on 8th August 2022 on behalf of the Appellant on the following grounds: -
1. That the learned honourable magistrate erred both in law and fact in that he did not properly consider the evidence of the prosecution witnesses and the appellant's evidence.
 2. That the learned honourable magistrate erred both in law and fact in that he shifted the burden of proof of innocence on the appellant.
 3. That the learned honourable magistrate erred both in law and fact in that he relied on evidence which was not strong enough to prove the appellant's guilt.
 4. That the learned honourable magistrate erred both in law and fact in that he convicted the appellant on insufficient grounds which did not meet the threshold of proof beyond any reasonable doubt.
 5. That the sentence given to the appellant was too severe in the circumstances.
11. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

12. The appellant's submissions were that the trial magistrate based his findings on insufficient, contradictory and inconsistent evidence and did not therefore prove the charge of defilement beyond all reasonable doubt. It was argued that the evidence as to who the appellant was to the family of the complainant was contradictory.
13. It was also argued that the place and time when the complainant was defiled was uncorroborated and that the grandmother and the sister of the complainant as well as her father who ought to have recorded statements of the prosecution did not testify and failure to call those witnesses should be resolved in favour of the appellant.
14. The appellant's advocate also submitted that the complainant's panty which was said to have been stained was not produced and no forensic examination was done on it to connect the appellant to the offence. That it was not explained what type of stain was on the panty whether blood or semen.
15. It was further stated that the complainant did not know the appellant as Garama Katana. That although the trial magistrate indicated in the judgment that the appellant carried her to the house upstairs and inserted his penis in her vagina, there is no such evidence from the complainant.
16. On identification of the appellant, it has been submitted that the offence occurred between 1900 hrs and 2100 hrs when there was darkness and the complainant did not tell court how she was able to identify the appellant.
17. In respect to the sentence, it was argued that the appellant was a first offender and the sentence was therefore harsh and excessive and the trial court ought to have exercised discretion to mete out a more lenient sentence.
18. The appellant's counsel argued that the appellant's constitutional right to representation was violated when he was asked to proceed for defence in the absence of his advocate.
19. The issue of the appellant's mental capacity was also brought to question when the trial magistrate sentenced the appellant without for a psychiatrist report to confirm his mental status.



Respondent's Submissions

20. The respondent's submissions filed on 5th July 2023 were to the effect that the three ingredients to the offence of defilement namely age, penetration and identity of the perpetrator were properly proved by the prosecution and that the appeal should be dismissed.
21. On sentencing, the respondent argued that Section 8(2) of the *Sexual Offences Act* provides for a mandatory minimum sentence of life imprisonment for a child below 11 years. That the trial court considered the appellant's mitigation and that the sentence should not be unsettled.

Analysis and Determination

22. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

23. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -
 - i. Whether evidence adduced by the prosecution made the threshold of beyond reasonable doubt
 - ii. Whether the appellant's defence were considered
 - iii. Whether the appellant's mitigation was considered under Section 329 of the CPC
 - iv. Whether the sentence was severe in the circumstances

Whether evidence adduced by the prosecution met the threshold of beyond reasonable doubt

24. The ingredients of the offence of defilement under Section 8(1) of the *Sexual Offences Act* are the age of the victim, penetration and proper identification of the perpetrator. Refer to *George Opondo Olunga v Republic* (2016) eKLR.
25. From the evidence on record, the age of the complainant was proved by production of a certificate of birth showing she was born on 2.7.2015 and was therefore 3 years at the time of the incident.
26. On the issue of penetration, the complainant in unsworn statement said there was someone who touched her nunu when she had her panty. That the person took her to his house and said the person was Garama. That she went and told her mother but she was not taken to hospital. On the other hand, the complainant was taken to hospital and examined and it was found to have abrasions on the vagina but her hymen was intact. This court finds that evidence adduced does not prove penetration but rather attempted defilement by the appellant.



27. Identification of the appellant is not in doubt. He was an employee of the complainant's grandmother and he has not disputed that fact. On that account, there could not have been a mistake on his identity.

Whether the appellant's defence were considered

28. The same was considered at paragraph 20 of the judgment of the trial court in which it is indicated that the defence did not dislodge the prosecution's case to the extent that there was an attempt to defile the complainant herein.
29. The appellant was placed on his defence on 14.9.2021 and after several adjournments at the instance of the defence counsel, the trial court made the appellant to defend himself in the absence of his counsel on 30.6.2022. Judgment was reserved for 29.7.2022 during which period the appellant and his counsel could have applied for reopening of their case so that he could defend himself but that was not done. There is no explanation why the defence counsel was not in court to conduct defence of his client and there was no application for reopening of the appellant's case so that he could defend himself in the presence of his lawyer. Claim of violation of the right to fair trial after so much time had been granted for defence cannot therefore stand.

Whether the appellant's mitigation was considered and whether the sentence was severe in the circumstances

30. Having found that the charge of defilement was not proved beyond reasonable doubt, this court sets aside the conviction and sentence of defilement and substitutes thereof a conviction for the offence of attempted defilement under Section 9(1) of the Sexual Offences Act and sentences him to imprisonment for a term of 10 years imprisonment in consideration of the age of the child involved. Right of appeal within 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 28TH DAY OF SEPTEMBER 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Mr. Odhiambo Advocate for the Appellant – No appearance

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Court: Notice of judgment to be given to appellant's counsel.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

