



**Kimani v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 27096 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E002 OF 2023
DK KEMEL, J
DECEMBER 20, 2023**

BETWEEN

MIKE KIBOI KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and Sentence of Hon V. Masivo (SRM)
in Nanyuki CM S.O No E036 of 2022 delivered on 16th January, 2023)*

JUDGMENT

1. The appellant faced a charge of defilement contrary to section 8(1) as read with 8(2) of the [Sexual Offences Act](#), 2006. It was alleged that the appellant on 5th June, 2022 at around 2000 hrs in Kieni East Sub County within Nyeri County intentionally caused his penis to penetrate the vagina of ENS a child aged 10 years. He also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the [Act](#).
2. Upon arraignment, the appellant denied the charges and the matter thus proceeded to hearing.
3. The minor testified as PW-1. Her evidence was that the appellant, her father, came home early that day. He then called her to the house telling her; atanifanyia tabia mbaya. That at 8.00 pm, he picked her from her bed to his bed and defiled her therein. When she tried to report, the appellant pulled her back saying he would kill someone and she promised not to reveal. That the appellant hid the blood-soaked bedsheets under the bed. When her mother arrived, she reported to her mother and father fought.
4. She stated that she was then taken to hospital and the appellant to the police station. On cross-examination, she stated that it was the appellant who is her father who defiled her.
5. PW-2 SS, the minor's mother stated that she arrived home on that day at about 9.00 pm and that PW-1 opened the door for her. She noticed the minor was unsettled and that she inquired from her as to what



- the problem was. The minor informed her that she had been injured while climbing on the bed. She thought the minor had started menstruating. When she discovered the blood-stained bedsheet under the bed, the minor informed her to ask the appellant. She called neighbours and the appellant was arrested. That the appellant said that he was drunk. She took the minor to Naromoru Hospital.
6. PW-3 Yustus Murigo, a clinical officer from Naromoru Health Centre testified that the minor was availed in their facility with blood stained trouser and panty. That he found the vagina inflamed and freshly broken hymen. His conclusion was that there was forceful penetration. He produced into evidence a PRC form and P3 form.
 7. PW-4 PC Gedion Mutua stated that members of the public escorted the appellant, the minor and PW-2 to Equator Police Station carrying a blood-stained bedsheet. He then arrested the appellant and called police from Naromoru Police Station to pick the appellant.
 8. PW-5 PC Nancy Ndegwa, the investigating officer took the minor to hospital for examination. She then charged the appellant with the offence.
 9. The appellant was put on his defence and he elected to tender unsworn evidence. His testimony was that he woke up on 5/6/2023 and his wife then in the company of a male friend demanded for money. He left for work and came back at 11.00 pm. The wife opened the gate demanding the money while armed with a knife. He was suddenly hit with a club by men armed with pangas and rungas and took his Kshs 10,000/- and ID card. They demanded the log book for his motor cycle and the agreement.
 10. That he the escaped to police station but found no one. After about 10 minutes, 2 police officers came and arrested him and later transferred to Naromoru Police Station until the following day when he was charged.
 11. The court subsequently convicted him and sentenced him to life imprisonment. Aggrieved, he moved this court by a memorandum of appeal dated 17th January, 2023 raising the following grounds;
 - a. The prosecution did not prove its case beyond reasonable doubt.
 - b. The learned trial magistrate erred by not appreciating that the complainant gave conflicting evidence.
 - c. The learned trial magistrate erred by failing to note that there was no proper medical evidence linking the appellant to the offence.
 - d. The learned trial magistrate erred by not appreciating that the medical report showed the external genitalia was normal.
 - e. The trial magistrate erred by failing to note that the accused's right to fair trial under article 50 of the Constitution was infringed.
 - f. The trial magistrate erred by failing to note that the complainant stated that she was defiled on 5/6/2022 thus contradicting the first report date.
 12. The appeal was disposed of by way of written submissions. The parties duly complied. Both submissions have been considered.



Analysis and determination.

13. In *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated the duty of the Court on a first appeal thus:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see *Peters v. Sunday Post*, [1958] EA 424.”

14. This being a charge of defilement, the respondent should establish beyond reasonable doubt the victim's age, the act of penetration and the perpetrator's identity.
15. On the question of age, PW-2 stated that the minor was born on 3/5/2012. On her part, PW-6 produced a birth certificate showing the minor was born on 3/5/2012. In the circumstances, I find the minor's age was sufficiently proved.
16. On the fact of penetration, the minor testified that the appellant defiled her on their bed. Her testimony was that the appellant did 'tabia mbaya' to her. She stated that the appellant first switched off the lights. Her evidence was that the blood-soaked bedsheet was thrown under the bed by the appellant and who threatened her that he would kill someone.
17. When PW-2 came, the minor was unsettled and had blood from her private parts making her believe that the minor had started menstruating. When she came across the bed sheet, she inquired further when the minor disclosed to her about the incident. The bedsheet was produced as Pexh 5.
18. The medical evidence further showed the minor had blood stains from her private parts and that he noted the urine blood-stained urine as well as the freshly broken hymen. The clinical officer concluded that the minor had been forcefully penetrated.
19. Proof of penetration is by way of the victim's evidence and medical evidence. This was the holding in *Mobamud Omar Mohamed v Republic* [2020] eKLR where it was held;

The key evidence relied by the courts in rape cases and defilement in order to prove penetration is the complainant's own testimony which is usually corroborated by the medical report presented by the medical officer. In this case since the complainant was a minor, the evidence of the Clinical Officer is key so as to corroborate such testimonies.

20. Given the evidence in this case, I am satisfied that the medical evidence corroborated the minor's own testimony. I have no doubt that the minor was defiled and find that the ingredient was established beyond reasonable doubt.
21. On the perpetrator's identity, the minor stated that the appellant is his father. That they were together in the evening the incident took place. PW-2 indeed confirmed that the appellant is her husband. The minor was then aged ten years and was a child capable of recognizing her own father. It is highly unlikely that the mother of the complainant could use her as a victim of sexual assault so as to settle perceived



differences with her husband. Nothing came out that the parents of the complainant had been on a frosty relationship. I find the appellant's identity was proved.

22. I have perused the record and find no contradiction in the witness testimony as presented by the prosecution. I do not find instances of inconsistent evidence. The allegation on the date of the offence was cured by the amendment of the charge sheet to which the appellant was advised to exercise his right of recall. He explained that he had adequately cross-examined the minor. I find the conviction arrived at by the trial court was sound and I see no reason to interfere with it.
23. As regards sentence, it is noted that the appellant was sentenced to life imprisonment. Indeed, sentencing is at the discretion of the trial court. The trial court vide a comprehensive ruling on sentence dated 16/1/2022 duly considered the appellant's mitigation and the fact that he is a first offender and a father/step-father of the complainant. It is instructive that the complainant looked up to the appellant for protection. It was therefore out of the blues for the appellant to sexually molest his hapless complainant and vulnerable daughter. The complainant obviously has been psychologically scarred by the incident and has ruined her life. In any event, the appellant has not raised any grounds challenging the sentence imposed and hence I will not interfere with the same.
24. The end result is that I find no merit in the appeal and proceed to dismiss it.

Orders accordingly.

DELIVERED AT BUNGOMA (VIRTUALLY) THIS DECEMBER DAY OF 20TH 2023

D. KEMEI

JUDGE

In the presence of :

Mike K Kimani Appellant

Kimaru for Respondent

Savuni Court Assistant

