



**Karisa v Republic (Criminal Appeal E004 of 2021)
[2022] KEHC 14701 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E004 OF 2021
A. ONG'INJO, J
OCTOBER 27, 2022**

BETWEEN

JULIUS MZUNGU KARISA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgement and sentence of Hon. D. Odhiambo RM in Sexual Offence Case No. 22 of 2018 delivered on 23rd December 2020 in Shanzu Principal Magistrate Court)

JUDGMENT

1. Julius Mzungu Karisa the Appellant herein was charged in Shanzu Principal Magistrates Court in Sexual Offence Case No 22 of 2018 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. The particulars were that the Appellant – Julius Mzungu Karisa on the February 21, 2018 at [Particulars Withheld] within Kilifi South Sub-county in Kilifi County, the accused intentionally and unlawfully caused his penis to penetrate the vagina of HNY a child aged 3 years.
3. The Appellant was also charged with an alternative count of committing an indescient act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.
4. The appellant was convicted upon the trial Magistrate considering the evidence of 4 prosecution witnesses as well as the Appellants shown statement in defence and the evidence of appellant three witnesses.
5. The Appellant was then sentenced to serve 20 years in prison in consideration of the Muruatetu case and the Appellants mitigation. The Appellant was aggrieved by the conviction & sentence and he filed the appeal herein on the following grounds:-



- i. That the trial court erred in law & fact in that it convicted the Appellant on the uncorroborated circumstantial evidence of a minor and yet the trial did not indicate why it felt that it was safe to convict in such circumstances.
 - ii. That the trial court found as a fact that the complainant had lacerations on her vagina which were older than the period that it is alleged that the Appellant defiled her as indicated in the P3 & PRC form.
 - iii. The trial court erred in law & fact in holding that the appellant defiled the complainant and yet the P3 & PRC forms indicated the hymen was swollen after alleged penetration by blunt object and not broken.
 - iv. That the trial court failed to hold that the failure to produce the cloth, particularly the underpants that the complainant was wearing on the material day also heightened the cogency and cohesion of the prosecutions case.
 - v. That the trial court erred in that it failed to hold as a matter of prudent, it is unsafe to convict in sexual offences especially where the complainant is a minor in the absence of corroboration as required under the rules of evidence.
 - vi. That the trial court completely erred in that the trial court failed to analyze and properly evaluate the sworn testimony of the Appellant. The said failure resulted to grave injustice.
 - vii. That the trial court erred in that it failed to analyze whether or the totality of the whole evidence any doubt arose as to the guilty of the Appellant. As such doubt ought to have turned in the acquittal of the Appellant.
 - viii. That the trial court erred in law & fact in that the conviction and sentencing imposed was totally against the weight of the circumstantial evidence that had been presented before the court of law.
6. The appellant proposed to ask the court for orders that the appeal herein be allowed and the conviction and subsequent sentence against the Appellant by the trial court dated December 23, 2020 be set aside.
7. The prosecution opposed the appeal vide grounds of opposition dated May 16, 2022 on the following grounds:-
- i. Identification of the Appellant was established.
 - ii. The Age of the minor was proved at the trial court.
 - iii. The fact of penetration was proved.
 - iv. The trial court guaranteed the Appellant's right to fair trial.
 - v. That the Appellant's defence was considered by the trial court and finding made on the same.
 - vi. The prosecution proved its case beyond reasonable doubt.
 - vii. The sentence meted by the trial Magistrate was lawful.
8. Directions were taken for the appeal to be canvassed by way of written submissions.
9. The Appellants submissions were filed by his advocate Ms Lutta & Association in May 16, 2022 but only 3 grounds were highlighted upon as follows:-



- i. That from the P3 form the offence was committed on February 21, 2018 at around 5.00pm but the same P3-Ex. P2 indicated injuries were 10 days old.
 - ii. It was also submitted that treatment notes were not produced to assist the court to seal the loophole as to the date the offence was committed.
 - iii. The court was urged to find that there was discrepancy of 2 to 3 days which creates a reasonable doubt for the court to quash the conviction.
10. The Appellant's counsel relied on the holding in *Criminal Appeal No 155 of 2011 – Dominic Kibet v Republic* where it was held that penetration is an ingredient of the offence of defilement by a particular assailant at a particular time.
11. On whether the prosecution properly framed the charge. It was argued that the evidence by prosecution was that Appellant used his finger to penetrate the vagina of the complainant and ought to have been charged with offence of sexual assault and not defilement. It was therefore contended that there was clear mistake in the manner the charge was framed. The court was urged to acquit the accused on that account as there was ambiguity in the evidence of the prosecution as to whether 'tabia mbaya' meant sexual intercourse.
12. On whether the complainant identified the Appellant it was submitted that prosecution failed to properly identify the assailant for reasons identification was done after the offence and that the Appellant was a victim of malice by the mother of the complainant who had been his neighbours for 6 years. It was alleged that it was easy for the victim's mother to falsely accused the appellant in order to settle personal score.

The prosecution's case was as follows:

13. That the complainant and her sister 8 years old YN came from school on February 21, 2018 and when passing by appellant's house the appellant asked complainant if she wanted a dolly. That appellant told the complainant to go and change first and go back for the dolly. That after PW 2 & the Complainant had changed they started watching TV but the complainant left to go and play. That when PW 2 went out to check on the complainant she didn't find her. That PW 2 went to accused persons house and found the accused persons door was closed. That PW 2 informed the mother who went and found the complainant in accused person's house.
14. PW 2 said that the mother found the complainant in accused person's house. PW 1 the complainant's mother testified that on February 21, 2018 her 3 children came back from the school and were supposed to go for Madrassa at 5.00pm. Therefore she told the children to do their homework. That she then realized that the complainant was not around and she send PW 2 to look for her. That PW 2 told her that the complainant had passed by accused person's house. That PW 2 told her she found accused had locked his house from inside. That when PW 2 called out on accused and asked if the Complainant was inside he answered in the affirmative. That when the appellant opened the complainant ran out and told her sister the appellant had done bad manners.
15. PW 2 reported the matter to the village elder who referred her to the police station. That there then proceeded to Coast General Hospital where the complainant was examined & PRC form filled – EX P1. PW 2 said an examination the complainant had swellings on her private parts. PW 2 testified that the Appellant had been a neighbour for 6 years and they had never disagreed. PW 1 said when she went to accused persons house she found the door was locked from inside and the accused/Appellant had initially refused to open.



16. PW 3 CM the village elder testified that PW 1 called him and when he went he found PW 1 in front of accused persons house together with the minor. PW 3 said the minor told him that the accused had done *tabia mbaya* to her. PW 3 said that appellant confirmed he had given the minor a dolly to play with and he asked the Appellant why he closed the door.
17. PW 4 Dr Nafisa Seif produced P3 & PRC forms – EXP 2 & P1 which P3 was duly filled by Dr Majida after examining the complainant and finding that the minor’s hymen was swollen & vaginal wall was bruised. Dr Mafida was of the opinion that the swelling and bruises were likely caused by blunt object and would take long to heal. Dr Nafisa said that the minor said she could identify the assailant.
18. When accused was placed on defence he stated that the minor complainant and her siblings had the habit of passing by his house whenever they came from school because their mother told them he was their uncle and he was used to them.
19. The Appellant stated that on the material day the minor and her siblings passed by his house and saw a dolly on top of the table and wanted to take it but he refused/declined. That the children left and he also got out to get his clothes from the line. That when he went back to the house he heard a knock on the door but he didn’t bother to open. That he found the minor in the sitting room and the mother was calling outside. That when he heard the mother of the minor calling him he got out of bed to open the door & that is when he found the minor in the sitting room.
20. That the complainant’s mother alleged the appellant had disrespected him and she swore to teach the Appellant a lesson as the child alleged appellant had done *tabia mbaya* to her. The Appellant denied having committed offence. The appellant told the village elder that the minor had gone to his house without his knowledge.
21. The appellant claimed that PW 3 – the village elder send people to beat him the following day and took his radio an allegations he had defiled the child. That the people who were send to beat and arrest him declined but few days later he was arrested and taken to Kijipwa Police station.
22. Accused in cross examination admitted he was at home on the material day but didn’t see the minor. He said the child went to his house on February 13, 2018 and the door was open. He admitted the minor was inside his house which the mother went and knocked at his door. The Appellant confirmed he had never differed with the mother of the complainant and he had not heard that the minor had been defiled before. The Appellant said the Complainant returned to his house shortly after he told them they could not take the dolly. He said when the complainants mother came knocking he got out from bed and found the child/minor was trying to open the door.
23. DW 2 SCK testified that she was called after the Appellant had been arrested and she followed to Kijipwa Police Station where police told her to follow up the case in court. That she went to PW 1 to ask what had happened and she was told to leave. DW 2 was not around when offence was allegedly committed.
24. DW 3 JK testified that the Appellant was his employee and on the material date and time of alleged offence he returned to his shop and found it was closed. That he went to accused persons houses found the complainant’s mother looking worried and she went to accused persons house and called the accused. That when the accused opened the minor walked out.
25. That PW 3 the village elder took PW 1 and the minor to his house and the accused was arrested and taken to court. DW 3 said accused was not at work. He said he didn’t witness the offence take place but the accused was with the child in the house which was closed.



26. DW 4 the mother of the accused testified that when she went to the father of the minor complainant, she was told her son did bad manners to a small child and she was chased away.
27. Having re-evaluated and re-analyzed the evidence on the trial courts record both for the prosecution and defence; having also considered the grounds of appeal, the judgment of the trial court as well as the submissions as is required by the 1st appellate court as held in the authority in *Okeno v Republic*, the issues for determination are:-
 - i. Whether Appellant was convicted on uncorroborated circumstantial evidence of a minor. Did the court indicate it was safe to rely on the evidence of a minor.
 - ii. Whether the prosecution proved the offence of defilement against the appellant.
 - iii. Whether the alleged defilement was committed on the date indicated in the charge sheet or earlier. Whether there was contradiction in evidence as to date of alleged offence and the date indicated in the P3 & PRC forms.
 - iv. Whether failure to avail cloth/under pant the complainant was wearing at the time of the alleged defilement was fatal to the prosecution case.
 - v. Whether the trial court analyzed and properly evaluated the sworn testimony of the appellant.
 - vi. Whether there was any doubt raised in prosecution case.
 - vii. Whether conviction was against the weight of evidence.
 - viii. Whether sentence imposed was lawful.

1st Issue

28. The 3 years old complainant didn't testify for obvious reasons. PW 2, 8 years old sibling of the complainant however testified that she went out to look for her sister and didn't find her.
29. The Appellant had earlier told them to go to the house change clothes before they could go to his house and play with dolly. PW 2 therefore went to find out if the complainant was at Appellants house but she found the door was locked from inside and the appellant didn't respond. PW 2 went to call the mother PW 1. On arrival PW 1 knocked at the door & called out Appellants name and when he opened the minor ran out of the house.
30. The accused confirmed when PW 1 knocked & called and he went to open he found the minor trying to open the door. Appellants own witness and employer confirmed that the Appellant had closed the shop and he found PW 1 outside accused person's house looking worried. That when PW 1 called the appellant out and the door was opened. DW 3 saw the minor run out of the house. PW 3 the village elder was also at the scene and he went away with PW 1 & the child after Appellant opened the door and the child came out.
31. The evidence against the Appellant was therefore direct and not circumstantial PW 2 merely alerted the mother – PW 1 that the minor was in the Appellants house and the door was locked from inside. PW 1, PW 3 & DW 3 were present when the Appellant open and the door and the minor came out running.
32. The Appellant admitted as much that the child was inside his house and that we found her trying to open the door when he was called from outside by the mother of the minor. Appellant didn't explain how the child got into his house and yet it was locked from inside.



33. It was therefore not necessary for the trial court to give reasons why it relied on the evidence of PW 1 as that was not the every evidence relied upon. In any case Section 124 of the Evidence Act is very clear as to admission of evidence in sexual offences.

2nd issue - Whether the offence of defilement was proved

34. For the prosecution to prove the offence of defilement the following ingredients have to be proved:-

- a. Age of complainant
- b. Penetration
- c. Identity of the assailant

35. In this case the charge sheet indicates the complainant was 3 years. The evidence as to age was given in the P3 form & PRC form & the Appellant didn't dispute that the child was found locked in his house was 3 years old.

36. When the appellant opened the door to his house & the child ran out, the village elder and used PW 1 to report and after which they were referred to hospital where the child was examined & from the diagrams in the PRC form it is indicated she had a swollen hymen & abrasions on vaginal wall. The P3 form was also filled to that effect.

37. Although the appellants counsel in his submissions alluded to offence having been committed by use of fingers, this court has not seen any such evidence in the trial courts record and the PRC form indicates that survivor alleges that July did 'tabia mbaya' to her – put his penis in her vagina. The definition of penetration as provided under section 2 of the Sexual Offences Act No 3 of 2006 is complete or partial insertion of the genital organs of a person into the genital organs of another person. The injuries observed in the genital of the child complainant is proof of partial penetration & this court finds that this ingredient was proved to the required standard.

38. The complainant was found to have been defiled. Subsequent to her coming from the appellant's house. The appellant was alone with the complainant inside the house. The Appellant locked the door to his house from inside & PW 1 in her evidence said when she went to accused/Appellants house & found the door closed from inside, she called him and he answered and confirmed the child was inside the house.

39. That she told him to open the door & she started shouting and that is when the Appellant opened the door and the child ran out. The Appellants own employer confirmed that he saw the minor come out of the appellant's house. The Appellant confirmed the child was in his house. The Appellant confirmed that the complainant & her siblings were familiar with him as he had been their neighbour for over 6 years. There was no evidence of disagreement between the Appellant and the mother of the complainant. It therefore follows that the Appellant was identified without any possibility of mistake.

40. This court finds that the trial Magistrate considered the defence by the Appellant which in actual sense didn't controvert the prosecution case. The evidence of appellants witness DW 3 corroborated the prosecution's case.

41. Whether there was contradiction as to the date the offence was committed in the charge sheet and the P3 & PRC forms. This court has perused P3 form which was filled 10 days after the date of defilement and the complainant was treated on February 22, 2018, one day after she had been defiled on February 21, 2018. This court finds no material discrepancy as the prosecution witnesses testified as to the date when the child was defiled & that she was taken to hospital the following day on February 22, 2018.



42. From the evidence on record in the trial court there was sufficient evidence to find appellant guilty and he was therefore properly convicted.
43. The penalty for the offence of defilement contrary to section 8(1) as read with Section 8(2) of the Sexual Offences Act No 3 of 2006 is life imprisonment. The Appellant was sentenced to serve 20 years imprisonment upon consideration of his mitigation and the trial Magistrate took into account the holding in Supreme Court petition on the case of Francis Karioko Mureuatetu in which it was held that mandatory death penalty in murder is unconstitutional.
44. This holding was later clarified to apply only to murder cases and not any other mandatory sentences by an advisory of the Supreme Court. There is however currently 2 authorities by Justice Mativo and Justice Odunga which have declared mandatory minimum sentences in sexual offences as unconstitutional and therefore the verdict by the trial Magistrate not to pass the life sentence would still hold.
45. This Appellant took advantage of the familiarity & confidence the 3 years old child had in him to defile him. The sentence meted out was therefore lawful and commensurate with the heinous act perpetrated by the Appellant.
46. This court therefore finds that this appeal lacks merit and is dismissed. The Appellant has 14 days to appeal.

Dated, signed and delivered in Open Court/online through MS TEAMS, this 27th day of October 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel - Court Assistant

Mr. Ngiri for Respondent

Mr. Otieno Advocate hold brief for Mr. Lutla Advocate

For Appellant

Appellant – Present in person

Hon. Lady Justice A. Ong'injo

Judge

Mr. Otieno

I pray for a copy of the judgment.

Order

Certified copy of the judgment to be supplied to appellant's counsel upon payment of copying charges.

Hon. Lady Justice A. Ong'injo

Judge

