Karanja v Republic (Criminal Appeal E021 of 2024)
[2025] KEHC 4820 (KLR) (Crim) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4820 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E021 OF 2024

KW KIARIE, J

APRIL 24, 2025

BETWEEN

DAVID NJENGA KARANJA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E005 of 2022 of the Principal Magistrate's Court at Ol Kalou by Hon. J.N. Nthuku, Principal Magistrate)

JUDGMENT

1. David Njenga Karanja, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on the 13th day of December 2022, at Nyandarua Central Sub-County within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of JWK, a child aged sixteen years.

3. The appellant was sentenced to ten years' imprisonment and has appealed against both his conviction and sentence. He was represented by Martin Gathumbi & Company Advocates. He raised the following grounds of appeal:

    a. The learned magistrate erred in law and, in fact, in convicting the appellant when the evidence in the record was manifestly insufficient and inconsistent and had glaring gaps, hence incapable of sustaining a conviction.

    b. The learned magistrate erred in law and fact in convicting the appellant against the weight of evidence on record.

c. The learned magistrate erred in law and convicted the appellant to a severe sentence, yet there was no adequate evidence of penetration or partial penetration by the appellant.

d. The learned magistrate erred in law and fact in convicting the appellant on a sentence that was not proved beyond a reasonable doubt, as required by law.

e. The learned magistrate erred in fact and law, sentencing the appellant to an excessive and harsh sentence.

4. The state opposed the appeal through M/s Odera Vena, prosecution counsel, who contended that the conviction and the sentence were proper.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno v the Republic [1972] EA 32.

6. To establish an offence of defilement against an accused person, the prosecution has to prove the following ingredients:

a. That there was penetration of the complainant's genitalia;

b. That the accused was the perpetrator and

c. The victim must be below eighteen years old.

This position was echoed in the case of Fappyton Mutuku Ngui v Republic [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

7. The complainant, JWK (PW1), testified that she was sixteen. No document to prove her age was produced. In the case of Francis Omuroni v Uganda, the Court of Appeal Criminal Appeal No. 2 of 2000 held:

In defilement cases, medical evidence is paramount in determining the age of the victim, and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ...

The clinical officer who examined her stated that she was sixteen. Although no copy of the Certificate of Birth was produced, I find that her age, for Section 8(4) of the *Sexual Offences Act*, was proved.

8. According to the complainant (PW1), she left her home out of fear. Her father had discovered she had a cell phone, and she did not want to disclose its origin. She did not tell the trial court its origin either. But her friend (PW3) informed the court that she had bought it in her presence.

9. She (PW1) informed the trial court that she went to PW3's home for refuge. However, since they suspected that her father could go for her there, they decided to go to the house of the appellant. He agreed to accommodate them. The three of them shared a bed. This was when the appellant took advantage of her and defiled her. This was the first time she was having sex.

10. RW. (PW3) testified that they indeed slept on the same bed and denied that any sexual intercourse took place. Her evidence was that when they arrived at the appellant's house, the latter called PW1's boyfriend, Thomas. Thomas slept on a seat in the sitting room.

11. The complainant testified that this was her first sexual intercourse encounter. Her evidence, therefore, that she was defiled required corroboration. The unanswered question was why her friend, sharing a bed with her, did not notice this, yet she claimed the appellant defiled her for two hours. It is well known that the first instance of sexual intercourse is often painful.

12. Evidently, the complainant was not truthful. She denied the presence of Thomas Maina in the appellant's house during cross-examination. She also denied that he, Thomas Maina, was her boyfriend. This was despite PW3's evidence.

13. Joseph Ndungu Gatheca (PW2) examined the complainant on 15 December 2022. His findings contradicted the complainant's evidence. The genitalia had sore lacerations, a swollen vulva and old remnants of the hymen. This was two days after the alleged defilement. Since she contended that this was her first time to have sex, she did not explain under what circumstances her hymen was breached.

14. The Court of Appeal in the case of Ndungu Kimanyi v Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

    The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

15. It was unsafe to depend on the complainant's evidence to establish penetration by the appellant.

16. The proviso to section 124 of the *Evidence Act* states:

    Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

    I find the complainant's evidence to be unconvincing. By implicating the appellant, she must have covered for the actual perpetrator.

17. The upshot of the preceding analysis of the evidence is that the conviction was unsafe. I quash the conviction, set aside the sentence, and set the appellant at liberty unless lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 24TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE

JUDGE