Kamenwa v Republic (Criminal Appeal E058 of 2022)
[2025] KEHC 10829 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E058 OF 2022

AK NDUNG'U, J

JULY 23, 2025

BETWEEN

PAUL NG'ANG'A KAMENWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E080 of 2021– B. Mararo, SPM)

JUDGMENT

1. The Appellant, Paul Ng'ang'a Kamenwa was convicted after trial of sexual assault contrary to Section 5(1)(a)(i) as read with Section 5 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 03/10/2021 at Laikipia Central Sub county within Laikipia County, unlawfully used his fingers to penetrate the vagina of WMK a child aged 7 years old. On 07/07/2022, he was sentenced to twenty five (25) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, the Appellant lodged this appeal vide a petition filed on 16/9/22 and subsequently filed amended grounds of appeal together with his submissions. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by failing to note that he was not given an opportunity to cross examine the complainant which was against his right to fair trial.

    ii. The learned magistrate erred by failing to analyse evidence of identification at night contrary to the tenets of the law.

    iii. The learned magistrate erred by failing to note that the sentence was harsh and excessive in the circumstances.

iv. The learned magistrate failed to note that the medical evidence presented before court did not prove beyond reasonable doubt that the complainant was defiled.

v. The learned magistrate failed to take into consideration the time spent in custody c/sec 333(2) of the *Criminal Procedure Code*.

vi. The learned magistrate erred by failing to note that there was no tangible evidence linking him to the charges.

vii. That the learned magistrate rejected his defence without giving cogent reasons.

3. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the trial court failed to give him an opportunity to cross examine the complainant contrary to Article 50 of the *Constitution*. He urged the court to consider whether his case is a suitable case for the court to order for a retrial so that he can be accorded a full and fair trial. Reliance was placed on the case of *Paul Kinyanjui Kimauku v Republic* (2016) eKLR and *James Ngiru v Republic* Criminal Appeal No. 26 of 2018. As to identification, he submitted that the trial court failed to analyse the light used by the complainant to identify him. Further, PW1 testified that there was another person at the scene by the name Peter and she told the court that she was defiled by Njenga.

4. He submits further that PW2 testified that the complainant informed her that someone had inserted her fingers in her private parts and the person was Guku. That Njenga and Guku were not his names. Therefore, the prosecution ought to have investigated if he was the only man that lived in the house where the complainant was defiled since there were three people mentioned by the complainant. That the trial magistrate failed to address the issue of identification.

5. He submitted that the prosecution failed to prove that the complainant was defiled as there was no blood that was observed or severe bruises in her genetalia noting her tender age. There was no evidence that she had difficulty in walking and PW2 testified that the complainant was attending school without fail.

6. He added that the trial court failed to impartially analyse the evidence tendered as a whole to determine his culpability. He submitted that the sentence was harsh and excessive in the circumstances of the case.

7. In rejoinder, the Respondent's counsel urged the court to disregard the Appellant's amended grounds of appeal filed alongside his submissions for they were filed without leave of the court contrary to Section 350(2) of the *Criminal Procedure Code*. He submitted that complainant's age was proved through her birth certificate.

8. As to matter of proving sexual assault, he submitted that PW1's evidence was corroborated by PW2 and PW4 as PW2 testified that she observed a rush when she was washing her. She cried saying she had a wound and PW4 testified that upon examination, the complainant had a septic rash and hymen was proffered(sic) hence, penetration was proved to the required standard. As to identity, he submitted that it was proved as PW1 and the Appellant were close neighbours and the Appellant was PW2's tenant. They knew each other well. Further, PW1 testified that the Appellant, Ng'ang'a invited her to his house where he sexually assaulted her. PW2 confirmed that the Appellant was her tenant and the Appellant testified that he knew PW2 and he confirmed that he was at the scene on the material day.

9. It is submitted that the court complied with Article 50 of the *Constitution* as the Appellant participated in the trial and was accorded an opportunity to cross examine all other witnesses. That for reasons not known, he did not cross examine PW1 and this cannot be visited on the victim and the prosecution. That he must demonstrate that there was a miscarriage of justice and this court must balance the right of the Appellant with that of the victim who went through a gruesome ordeal from his actions.

10. Further, that the trial court considered his defence which was a mere denial and found that it did not dislodged the watertight testimony by the prosecution's witnesses.

11. In regard to sentence, it is submitted that the trial court considered his mitigation and aggravating factor. That he did not demonstrate that the sentence was harsh, excessive, that the sentencing court took into account an irrelevant factor or that a wrong principle was applied and reliance was placed on the decision in Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No. 253 of 2003. That the sentence was not only lawful but lenient in the circumstances.

12. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.

13. First, a recap of the evidence at the trial court.

14. The evidence before the trial court was as follows. PW1 the complainant in her unsworn testimony testified that she was 7 years old and she was living with Shosh. She knew the Appellant, Njenga (handwritten record says Nganga) and he lived in Ngobit. That he sucked her and inserted his penis and he told her not to tell her shosh or mom. He took her to the bathroom/water toilet and he sucked and inserted his fingers (pointed to her private parts). That she used that part to 'sush'. It was at night and he called her to his place before she slept and told her to remove her clothes. They were with Peter but he left. He used to live with the Appellant. The Appellant told her that she will feel nice. That she told Shosh when she saw a bruise while washing her and she was taken to hospital.

15. PW2, the complainant's grandmother testified that she was washing the complainant when she started crying and said that she had a wound and she showed her her private parts. She took her to a dispensary and she was given medicine and she was told to persuade her to tell her what had happened. She said that someone had inserted his fingers in her private parts. That she said it was Guku, the Appellant who inserted his finger and sucked her. she was referred to police station. She testified that the Appellant was her tenant.

16. On cross examination, she testified that the complainant said that he did it after school and that he took her to the bathroom and he threatened her. That he did it four times. He was in the plot which he vacated later. That he used to be there daily and no one saw him leave the bathroom. That they have never disagreed.

17. PW3, the investigating officer testified that he directed PW2 to take the child to hospital after issuing her with a P3 form. He later arrested the Appellant. He testified that the Appellant had inserted his fingers into the child's vagina. He produced the complainant's birth certificate as Pexhibit1 and investigation diary as Pexhibit3.

18. He testified on cross examination that he visited the scene but the Appellant was not there as he had vacated. There were no other people within the plot. The child informed him about the act.

19. PW4, the clinical officer produced the P3 and PRC forms on behalf of another doctor who was on leave. She testified that she knew her handwriting and signature as they had worked together for 1 year. She testified that the victim had a history of PV rash in the vagina and smelling discharge. It was itchy and painful during urination. That the victim said the perpetrator was licking her private parts and used to insert his fingers into her vagina. That he used to caress her after removing her clothes and inner wear and he did it four times. There were no bruises on the body. She testified that the hymen was observed, there was a vaginal discharge, she had a septic rash, spread labia majora and minora which

were tender on touch and all else was normal. That she concluded that the hymen was perforated by light object/finger. She produced the P3 and PRC forms as Pexhibit2(a) and (b) respectively.

20. She testified on cross examination that she did not have any disease and that the Appellant inserted her vagina (sic) at least four times. That she must have bled and she said that he had threatened her.

21. The Appellant in his unsworn testimony testified that he was arrested on 08/10/2021 while at work and he was charged and he did not understand. That the complainant was his landlady and that he used to share a house with another. That the landlady told them to move and he went to stay in the shamba and she was not happy. That he got surprised when he was arrested as he did not do it. That he was not there on 03/10/2021.

22. That was the totality of the evidence before the trial court.

23. The Appellant raised a preliminary point to wit, that he was not given a chance to cross examine the complainant. The lower court record shows that the complainant testimony was unsworn after the trial court conducted voir dire examination. The record does not show whether the Appellant was given an opportunity to cross examine the complainant or not.

24. Article 50 (2) (k) of the *Constitution* provides as follows;

> " 2) Every accused person has the right to a fair trial, which includes the right—
>
> (k) to adduce and challenge evidence."

25. The right of an accused person to cross examine witnesses is further provided for under section 150 of the *Criminal Procedure Code* which provides;

> " ...Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

26. In addition, section 302 of the *Criminal Procedure Code* provides;

> " The witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate, and to be re-examination by the advocate for the prosecution."

27. This right extends to minors as was held by the Court of Appeal in the case of *Nicholas Mutula Wambua v Republic*, MSA CRA No. 373 of 2006, where the Court cited with approval the decision of the Supreme Court of Uganda in *Sula v Uganda* [2001] 2 EA 556 thus;

> " The second point we wish to discuss is whether or not a child witness, who gives evidence not on oath is liable to cross-examination. There appears to be a widespread misconception that a child witness who is allowed to give evidence without taking oath because of immature age, should not or cannot be cross-examined.... It would appear that misconception arises from a view that because accused persons are not cross-examined whenever they make unsworn statements in the defence, child witnesses who did not take the oath should be treated in the same way. Such a view is oblivious of the peculiar protection given to an accused person in the form of a right to make an unsworn statement with no liability to be cross-examined".

28. The Court of Appeal in *Paul Kinyanjui Kimauku v Republic* [2016] eKLR while addressing a similar issue further observed thus;

> " ...the record reveals that following the evidence of G that was unsworn, the appellant was not given the opportunity to cross-examine the witness. This was a clear violation of the appellant's right to a fair trial. Under Article 50(2) of the *Constitution*, every accused person has a right to a fair trial. This includes the right of an accused person to challenge the prosecution evidence through cross-examination. Therefore, an accused person is entitled to cross-examine any person who testifies as a prosecution witness. This is so even in the case of a minor witness giving unsworn evidence. A witness including a minor witness, unlike an accused person has no right to refuse to answer questions or not to be subjected to cross-examination. Thus, there is a clear distinction between an accused person who opts under Section 211 of the *Criminal Procedure Code* to give unsworn evidence in his defence, and a minor witness who gives unsworn evidence as the latter must be cross-examined."

29. Clearly, there was a misstep or omission on the part of the trial court. It was the Appellant's right to test the child's evidence through cross examination. The election on whether to cross-examine or not is the prerogative of the accused and not of the witnesses or of the court. The record does not show he was afforded the opportunity and elected not to cross examine the child. In view of this apparent lapse in the trial process, it is my view he was not afforded a fair hearing.

30. The Appellant in his submissions urged this court to consider whether this case is suitable for a retrial. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In *Muiruri -v-Republic* [2003] KLR 552 the court of appeal held as follows;

> " It, (retrial), will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See Zedikiah Ojuondo Manyala -v- Republic (Criminal Appeal No. 57 of 1980); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the courts".

31. And in *Mwangi -v- Republic* [1983] KLR 522, the court held that;

> " ... a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result".

32. No doubt for reasons stated above the Appellant was not accorded a fair trial. This was a lapse on the part of the court and which cannot be visited on the prosecution or the victim. The lapse vitiated the trial. So which way this appeal?

33. On the material before court, and balancing the scales of justice, this is in my view a proper case for a retrial.

34. With the result that the appeal succeeds to the extent aforesaid. The conviction by the trial court is quashed and sentence set aside and substituted thereof with an order that a retrial be held before another court of competent jurisdiction other than Mararo B SPM.

35. The Appellant be presented before the Chief Magistrate Nanyuki on 29th July 2025 or on any near date as logistics may allow for a fresh plea and allocation.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JULY 2025.

A.K. NDUNG'U

JUDGE