



REPUBLIC OF KENYA



**Kamau alias (Nyoike) v Republic (Criminal Appeal E045 of 2023)
[2024] KEHC 8909 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E045 OF 2023
JK NG'ARNG'AR, J
JULY 25, 2024**

BETWEEN

**AUGUSTINE WANYOIKE KAMAU ALIAS JAMES KARIUKI KAMAU
(NYOIKE) APPELLANT**

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment delivered by Hon. C. Kithinji, Resident Magistrate on 23rd June 2015 in Kandara Senior Principal Magistrate's Court Criminal Case No. 241 of 2014, Republic v Augustine Wanyoike Kamau alias James Kariuki Kamau (Nyoike))

JUDGMENT

Background

1. Augustine Wanyoike Kamau alias James Kariuki Kamau (Nyoike) was charged with the offence of defilement contrary to Section 8(1)(2) of the [Sexual Offences Act](#) No. 3 of 2006.
2. The particulars are that Augustine Wanyoike Kamau alias James Kariuki Kamau (Nyoike) on the 17th day of February 2014 within Murang'a County intentionally and unlawfully caused his penis to penetrate the vagina of JNW a child aged 5 years.
3. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The trial magistrate considered the evidence of the 6 prosecution witnesses and the sworn evidence of the Appellant and convicted the Appellant who was sentenced to serve life imprisonment.
5. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds: -



1. That the learned trial court magistrate erred in matters of law and fact by failing to consider that the evidence adduced by the victim was hearsay evidence coached by her grandmother.
 2. That the learned trial court magistrate erred in matters of law and facts for failing to find that the medical evidence did not conclusively prove that the Appellant had committed the alleged offence.
 3. That the learned trial court magistrate erred in matters of law and fact by failing to caution himself that suspicion however strong, cannot provide basis for inferring guilt as there was a grudge between the Complainant's mother and the Accused person herein.
 4. That the learned trial court magistrate erred in matters of law and fact by failing to note that no or shallow investigations were carried out and there is no nexus between the arrest of the Accused and the offence charged.
 5. That the learned trial court magistrate erred in matters of law and fact by failing to uphold my sworn defence statement which was plausible and unshakeable without giving the points of determination.
 6. That the learned trial court magistrate erred in matters of law and fact by failing to conclude that the prosecution's case was not proved beyond all reasonable doubt.
 7. That the learned trial court magistrate erred in matters of law and fact in failing to find the sentence awarded is harsh and excessive whereas Section 216 and 329 of the CPC unfetters the magistrates from giving minimum mandatory sentences.
6. The appellant prayed that the appeal succeeds in its entirety, conviction quashed, sentence set aside and he be set at liberty.

Prosecution's Case

7. The Complainant (PW1) said that on 17.2.2014 on her way home from school, she met Nyoike who took her to a shamba and defiled her. The following day, she told mother (PW2) that she had abdominal pain. When her grandmother (PW3) heard what the Complainant was telling her mother, she threatened her with a panga and she said that Nyoike had defiled her and said he would kill her if she told anyone about it. They went and reported at Miruka and they were referred to Kandara Police Station then to Thika Level 5 Hospital.
8. PC Gladys Cherotich (PW6) from Kandara Police Station escorted the Complainant to hospital where Dr. June Muthiora (PW5) examined the Complainant and found she had foul smelling discharge and her hymen was broken. PW5 filled the P3 Form which was produced as ExP1. The Accused was then arrested in June 2014 after being identified by the victim. PW6 produced the pants and tights that the Complainant was wearing as ExP2 and ExP3 respectively and the Birth Certificate as ExP4.

Defence Case

9. The Appellant when placed on his defence gave sworn evidence that he was a driver in Nairobi. That on 5.6.2014, 2 government officers went to his home and told him their boss wanted to see him. That he followed them and they went to Kandara Police Station where he slept up to the following morning and that his fingerprints were taken. That he was escorted to court where he was charged with being in possession of bhang. He said he was convicted and jailed. He said he was not able to defend himself because it was his first time in court and he did not know of the charges. That he was also arraigned in court and charged with the offence herein. He said that on the day the alleged offence herein occurred,



he was nowhere near the village. That he went home the following Sunday and returned back to Nairobi the same day. That when he returned on 5.6.2014, he was arrested.

10. This appeal was canvassed by way of written submissions.

Appellant's Submissions

11. The Appellant argued that the minor testified through intimidation and coercion by her mother and grandmother. That they insinuated that the reason they knew that the complainant had been defiled was the abdominal pain which never came from the Complainant both in her testimony and cross examination. The Appellant stated that the testimony of the minor was contradictory which created doubt as to her credibility as a witness.
12. The Appellant submitted that the prosecution did not prove beyond reasonable doubt that there was penetration of PW1's genitalia. That the foul smelling discharge and broken hymen cannot be an inference of penetration. That whereas there can be many causes of foul smelling vagina, hymen can also be broken by various activities. The Appellant further stated that there are children born without hymen and that a lab test was not conducted to establish the cause of the foul smell. That the smelly discharge discovered by the clinical officer was neither described as dirty or bloody as had been described by the grandmother who checked the victim.
13. The Appellant contended that there was animosity between him and the family of PW1, according to the testimony of PW2 and PW3. That this is the reason why he was implicated in this case and he prayed that the court finds that his acquittal was legitimately deserved.
14. On shallow investigation and no nexus between the arrest and the offence charged, the Appellant submitted that PW2, the Complainant's grandmother directed the police to arrest him, that there were no investigations to establish the unhidden rivalry between the Appellant and PW2, that the investigating officer failed to visit the alleged scene of crime to establish that it was disturbed, and it was not explained why the clothes alleged to have been worn by the victim did not have any blood or marks noted by the court.
15. The Appellant argued that his defence that he was framed up by the Complainant's mother to take revenge for forsaken love was not considered. The Appellant cited the case of *Michael M'Maranya v Republic, Crim. App. No. 126 of 2004* (Nyeri) where it was held that "where the first appellate court does not adequately consider the defence, an appellant is entitled to an acquittal." The Appellant also relied on the case of *Uganda v Sebyala & Others* (1969) EA 204 where the court held "The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."
16. The Appellant submitted that evidence of the prosecution was full of contradictions, inconsistencies and discrepancies. That PW2 said the Complainant did not go to school for the whole week yet the Complainant said she did not go to school the following day after she was taken to hospital. That PW2 claimed she was told by the Complainant that she was defiled near a macadamia tree while PW3 said the Complainant was defiled near a mango tree in sweet potatoes plantation. That PW2 on cross examination said that the scene was on a public road just 15 meters from homes and according to the Appellant, it is not clear why no single person either saw the crime or the victim entering or coming out of the alleged scene, also considering the time of the day when it happened.
17. Further to the above, the Appellant stated that there were inconsistencies and contradictions where the Complainant said she did not find her granny at home on the material day and that she later contradicts



herself and says she found both her mother and grandmother at home. That it is contradictory for the Complainant to say she was in pain yet she was not crying and could not tell anyone even after arriving home. That the Complainant alleged PW3 threatened her using a panga which is inconsistent with the statement of PW3 at the station that she threatened her with fire. The Appellant submitted that the said inconsistencies were incurable under Article 159 of *the Constitution* and that the witnesses should be declared unreliable.

18. The Appellant submitted that the sentence was harsh and excessive and prayed that the appeal succeeds in its entirety, conviction quashed, sentence set aside and he be set at liberty.

Respondent's Submissions

19. The Respondent submitted that PW1 in her testimony narrated what transpired on that day and upon being cross examined by the Appellant, she reiterated what she had testified and that it was Nyoike who defiled her. That the Complainant gave direct evidence which is not hearsay as alleged.
20. The Respondent argued that PW4, a clinician testified to the effect that on examination of the Complainant's genitals, there was foul smelling discharge, that hymen was broken and he produced treatment cards as exhibits. That PW6 who was a doctor upon cross examination stated that "in a child of that age there is only one way that hymen can be broken and that is sexual activity. It was penetration through a penis." That the P3 Form was produced as exhibits. The Respondent stated that the above testimonies have been corroborated with the testimony of PW1 who stated that the Appellant removed his kinyunyuyu and did bad things to her when she was lying down. Therefore, medical evidence was conclusive.
21. On the ground of suspicion and grudge between the Complainant's mother and the Appellant, the Respondent contended that PW1 testified that she did not know if the Appellant had problems with her mother and grandmother. That PW6 also stated she was not aware of the relationship between him and the victim's mother. That the testimony of PW1 was corroborated by medical evidence which clearly prove it was not a matter of mere suspicion but the alleged act took place.
22. On whether there were shallow or no investigations conducted and if the case was proved beyond reasonable doubt, the Respondent submitted that PW6 went to the report office and found that she had been allocated the matter, she interrogated them and sent them to the hospital and when they came back she questioned the minor again. That she investigated the matter and the doctor confirmed the injuries hence she had no reason not to believe the victim.
23. The Respondent submitted that the birth certificate was produced as ExP4 hence age was proved. That to prove penetration, the victim stated that the Appellant made her lie on the sweet potato plants, removed his kinyunyuyu and placed it where she uses to urinate and did tabia mbaya to her. That the P3 Form and treatment notes produced corroborated her testimony. On identification of the assailant, the Respondent stated that victim testified that the person who did tabia mbaya to her was Nyoike who resided at the shopping center and that this was an indication that the victim knew the Appellant.
24. The Respondent argued that the Appellant in his defence concentrated on narrating how he was arrested instead of giving factual evidence. That the said defence did not therefore shake the prosecution's case. Additionally, that none of the testimony by prosecution witnesses was shaken or controverted in cross examination. The Respondent submitted that the ingredients of the offence were proved beyond reasonable doubt and that the sentence of life imprisonment was proper considering the age of the victim. The Respondent therefore urged the court to dismiss the appeal and uphold the conviction and sentence.



Analysis and Determination

25. This being the first appellate court, this court 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 appellant 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.”

26. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

- i. Whether the evidence adduced was sufficient to prove the prosecution’s case to the required standard
- ii. Whether the Prosecution’s evidence was full of discrepancies, contradictions and inconsistencies
- iii. Whether the Appellant’s defence was considered
- iv. Whether the sentence was harsh and excessive

Whether the evidence adduced was sufficient to prove the prosecution’s case to the required standard

27. The Appellant submitted that the Complainant’s evidence was hearsay as her grandmother told her what she should say. That her grandmother promised to buy her gumboots and also threatened her with a panga. That it was through coercion and intimidation that the minor testified.

28. The Appellant argued that That the foul smelling discharge and broken hymen cannot be an inference of penetration. That whereas there can be many causes of foul smelling vagina, hymen can also be broken by various activities. The Appellant further stated that there are children born without hymen and that a lab test was not conducted to establish the cause of the foul smell. That the smelly discharge discovered by the clinical officer was neither described as dirty or bloody as had been described by the grandmother who checked the victim.

29. The Appellant stated that there was animosity between him and the Complainant’s family. That he was fabricated for the offence herein because of allegations of wooing the Complainant’s mother and business rivalry of the cabbage vending base. That comprehensive investigations would have established the existing grudge.

30. The Appellant further alluded to shoddy or no investigations as retrieval of the clothes alleged to have been worn by the Complainant during the alleged incident was not safe, that there were no marks which showed a nexus with the alleged offence, and that the investigating officer did not go to the crime scene.



31. Section 8(1) of the *Sexual Offences Act* provides that: -

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

32. In the case of in *George Opondo Olunga v Republic* (2016) eKLR it was held that the ingredients of an offence of defilement are identification or recognition of the offender, penetration and the age of the victim.

33. On the age of the minor, PW6 produced the birth certificate as ExP4 which showed that she was born on 30.7.2008. On penetration, PW4, the Clinical Officer from Kandara Health Center observed the Complainant and established that she had foul smelling discharge and the hymen was broken. He produced the treatment notes as ExP5. PW5, Dr. June Muthiora who also examined the Complainant confirmed that hymen was broken and foul smelling discharge was noted. PW5 formed the opinion that the weapon used was penile.

34. On identification or recognition of the offender, PW1, the Complainant said that it was Nyoike, the Appellant who defiled her. The Complainant confirmed in cross examination that she knew the Appellant before the incident and she used to call him Nyoike. That she went and told her grandmother what Nyoike had done to her and PW2 in her testimony said Nyoike lived across the road and PW3, the Complainant's grandmother, said she knew Nyoike since he was a child. There was therefore no mistake on the identity of the Appellant as it was a case of recognition rather than identification. This court finds that the prosecution's case was proved to the required standard.

Whether the Prosecution's evidence was full of discrepancies, contradictions and inconsistencies

35. The contradictions pointed out by Appellant were that the Complainant did not go to school for the whole week yet the Complainant said she did not go to school the following day after she was taken to hospital, that PW2 claimed she was told by the Complainant that she was defiled near a macadamia tree while PW3 said the Complainant was defiled near a mango tree in sweet potatoes plantation, that the Complainant said she did not find her granny at home on the material day and that she later contradicts herself and says she found both her mother and grandmother at home, and that the Complainant alleged PW3 threatened her using a panga which is inconsistent with the statement of PW3 at the station that she threatened her with fire.

36. This court finds that the discrepancies, contradictions and inconsistencies submitted by the Appellant are minor to affect the cogent evidence of the prosecution as was held in the case of *Jumaa Malunga Lugo vs Republic* (2019) eKLR where it was held that "We do not agree that there were material contradictions that would have occasioned any miscarriage of justice. Not every contradiction is prejudicial to the accused's case." The ground herein has no basis and therefore falls.

Whether the Appellant's defence was considered

37. The Appellant submitted that he was framed up by the Complainant's mother to revenge for the forsaken love and that the prosecution did not cross examine on the same. That the Appellant also had defense of alibi which were not considered by court.

38. The Appellant gave a sworn defence that he never saw the statements and did not know of the case. That the incident was not reported to anyone on the material date hence she was not defiled. The Appellant also said that he was nowhere near the area and sought for an acquittal. This court notes that the said defence was considered by the trial court on page 47 of the typed proceedings.



Whether the sentence was harsh and excessive

39. The Appellant was sentenced to life imprisonment pursuant to Section 8(2) of the [Sexual Offences Act](#) which provides as follows: -

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

40. However, in consideration of the holding in *Julius Kitsao Manyeso v Republic* (2020) eKLR that an indeterminate life sentence without any prospect of release or a possibility of review is a degrading punishment, this court substitutes the life imprisonment sentence with 30 years imprisonment.

41. In conclusion, this court finds that the appeal succeeds partially. The appeal on conviction is dismissed, the appeal on sentence is allowed. The sentence of 30 years imprisonment is to run from 6th June 2014 when the Appellant was first arraigned in court pursuant to Section 333(2) of the Criminal Procedure Code. 14 days right of appeal explained.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Peter Og'indi - Court Assistant

Muriu for Respondent

Appellant present

