



REPUBLIC OF KENYA



**Kariuki v Republic (Criminal Appeal E070 of 2023)  
[2024] KEHC 9655 (KLR) (1 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9655 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL E070 OF 2023  
JM NANG'EA, J  
AUGUST 1, 2024**

**BETWEEN**

**DANCAN THIONG'O KARIUKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the Principal Magistrate's  
Court at Kangema (Hon. I. Gichobi ) delivered on 19/05/2023)*

**JUDGMENT**

1. The appellant is dissatisfied with the said judgement of the above stated lower court before which he was charged with a main offence of defilement contrary to section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the same *Act*.
2. The particulars of the main charge are that on diverse dates between January 2022 and 13<sup>th</sup> June 2022 in Kangema Subcounty of Murang'a County the appellant intentionally caused his penis to penetrate the vagina of PMW ( ' the complainant' ) who is a child aged 11. It is alleged in relation to the alternative charge that during the same period and at the same place the appellant intentionally and unlawfully touched the complainant's vagina using his penis.
3. The appellant refuted the charges.
4. After a full hearing, the trial court convicted the appellant of the main charge of defilement pursuant to Section 215 of the *Criminal Procedure Code* and sentenced him to life imprisonment. No order was made regarding the alternative charge.
5. The grounds of appeal as per Memorandum of Appeal filed on 07/06/2023 may be condensed as follows:



- a. That the learned trial magistrate erred in law and fact by disregarding medical evidence proffered by PW3, a Clinical Officer.
  - b. That the conviction of the appellant was against the weight of evidence.
  - c. That the learned trial magistrate erred in law and fact by failing to take into account that the appellant was a first offender.  
and;
  - d. That the learned trial magistrate erred in law and fact by failing to consider the appellant's youth in sentencing him.
6. It is trite law that a first appellate court has the duty of re-assessing or re-evaluating the evidence presented before the trial court and arrive at its own conclusions on both matters of fact and law while being mindful of the fact that unlike the lower court it did not have the advantage of watching the demeanour of witnesses {see the case of *Okeno v Republic* ( 1972) EA 32}.
  7. The complainant made an unsworn statement on 23/8/2022 upon voire dire examination. She stated that while she was at their home cooking sometime between January 2022 and June 2022 the appellant entered the kitchen. According to the complainant, the appellant regularly visited their home to see her uncle called MM who was his friend. On that visit the appellant allegedly touched her breasts and she reacted by hitting his hand with a cooking stick. He was adamant and pushed her out of the kitchen and leading her to the adjacent house of her uncle who was away. There the appellant seduced her to sexual intercourse but she refused to accede thereto. When he heard someone coming he let go of her and pretended to sleep.
  8. On 10/6/2022 the appellant again visited the complainant's home and caused her to hold his penis with her hand. He later went away and returned on 13/6/2022 and found her with her aunt known as M by their water tank. After M left for the kitchen to cook, the appellant showed to her pornographic videos in his cell phone. He then had sexual intercourse with her using his penis after removing her trousers and lowering her pant. Thereafter the appellant counselled her not to disclose the incident to anyone. The complainant further stated that she nevertheless reported the matter to her friend and teacher called Stella and Mrs. Macharia respectively. The teacher in turn related the information to the complainant's grandmother (PW2).
  9. The complainant was taken for medical examination at Kangema Sub County Hospital the following day before the matter was reported to the police. As per the evidence of a Clinical Officer (PW3) who examined her on 21/6 2022, her external genitalia was normal. No bruises or lacerations were noted. The complainant's hymen was broken but not freshly so. The witness observed numerous epithelial cells in the girl's vagina which he explained to be due to taking of testing samples or penetration.
  10. PW4 was the case Investigating Officer. She confirmed lodgment of the complaint at Kangema Police Station on 21/7/2022. PW5, a Police Officer from Nyakahura Police Post, apprehended the appellant at the request of Kangema Police Station. An Assistant Chief who knew the appellant led the arresting officer to [particulars withheld] Secondary School where he was a student. The appellant was found in school and put under arrest.
  11. The appellant gave a sworn defence and confirmed that he was a student at [particulars withheld] Secondary School. He reiterated his denial of the charges contending that on 10/6/2022, 13/6/2022 and 17/6/2022 when it is alleged that he met with the complainant and defiled her, he was at school. The appellant further told the court that as per a copy of a Register of the complainant's school [particulars withheld] Primary School) the complainant was also at her school on each of the stated



dates. In support of his evidence he tendered copies of Students Attendance Registers from the schools showing inter alia attendances for the month of June 2022. The appellant's school Register was only marked in the morning. During the month of January 2022, students were said to be at home. According to the appellant, he would arrive at his school at 6.30 am and leave for home at 6.30pm. He therefore states that in the circumstances he couldn't have committed the offences charged.

12. Learned Counsel for the appellant and the Republic filed their written submissions which I have carefully read through.

13. In his judgement the learned trial magistrate noted as follows regarding the medical evidence herein:

“I do not understand why the clinical officer stated that there were no bruises when he testified yet the P3 tabled in evidence captured that bruises were noted (*sic*).

Secondly, the only history given was that complainant victim had been defiled. It was therefore not clear why the clinical officer (PW3) stated that he couldn't tell hymen was broken via penetration by a male penis. There was no other variant histories given according to me to lead to a different conclusion other than that hymen was broken via penetration by a male penis.

Based on the foregoing, my finding is that the prosecution case was well established, testimony and evidence was well corroborated and an act causing penetration or penetrative sex was proved beyond reasonable doubt (*sic*).”

14. I have considered the record and written submissions proffered by Counsel for the parties. The appellant is faulting the trial court's appreciation of the medical evidence herein and the sentence imposed. Contrary to the trial court's observation, PW3's medical report dated 21/6/2022 tendered in evidence does not indicate presence of bruises in the complainant's genitalia. Notwithstanding, the expert witness did not rule out penetration in light of the state of the complainant's genital organs. The witness therefore gave his honest professional opinion and there is no basis upon which to fault him as the trial court did.

15. The complainant appeared to contradict herself when she stated upon cross-examination by the defence Counsel that they didn't engage in sexual intercourse in the month of June 2022. She is also recorded in the evidence as stating that the appellant "tried to penetrate" her. The complainant is further recorded to have wanted her teacher to tell her grandmother to warn the appellant against visiting their home "because he had been trying to rape" her. This should have created doubt in the mind of the learned trial magistrate as to whether there was actual penetration. Further considering the inconclusive medical evidence, the prosecution evidence on penetration and the appellant's complicity is rendered doubtful. It cannot in the circumstances be said that the complainant spoke the truth as to the appellant's complicity as provided for in the proviso to Section 124 of the *Evidence Act*.

16. Grounds a) and b) of the Memorandum of Appeal therefore succeed. Consequently, the conviction of the appellant will not stand. The other grounds of appeal relating to the sentence imposed against the appellant do not arise for consideration in light of the court's decision on his conviction.

**JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1<sup>ST</sup> DAY OF AUGUST, 2024 IN THE PRESENCE OF:**

The Prosecution Counsel, Ms Gakumu

The Appellant.

The Court Assistant ( Ruth)



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**J. M. NANG'EA**

**JUDGE**

