



**Kariuki & another v Republic (Criminal Appeal E029 & E031 of 2022  
(Consolidated)) [2023] KEHC 2941 (KLR) (4 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 2941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL E029 & E031 OF 2022 (CONSOLIDATED)**

**AC MRIMA, J**

**APRIL 4, 2023**

**BETWEEN**

**JACKSON MUGO KARIUKI ..... 1<sup>ST</sup> APPELLANT**

**PAUL FWAMBA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeals arising out of the convictions and sentences of Hon. M.I.G.  
Moranga (Senior Principal Magistrate) in Kitale Chief Magistrate's  
Court Criminal Case (S.O) No. 93 of 2019 delivered on 14th April 2022)*

**JUDGMENT**

**Introduction and Background:**

1. Jackson Mugo Kariuki and Paul Fwamba, the Appellants in Criminal Appeal No E029 of 2022 and Criminal Appeal No E031 of 2022 respectively, were jointly charged in the Chief Magistrates Court at Kitale in Criminal Case (SO) No 93 of 2019 with the offence of Defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 7<sup>th</sup> April 2019 at (Particulars Withheld] village within Trans Nzoia County, the Appellants intentionally caused their penis to penetrate into the vagina of D.N.J., a child aged 6 years.
2. In the alternative, the Appellants faced the charge offence of Committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in the same place, the Appellants caused the contact of their genital organs namely penis with the genital organ namely the vagina of D.N.J, a child aged 6 years.
3. Paul Fwamba was separately charged with a second count of Benefitting from Child Prostitution contrary to Section 15(f) of the *Sexual Offences Act*. The particulars of the offence were that on 7<sup>th</sup>



- April, 2019 at (Particulars withheld] village within Trans Nzoia County, knowingly leased a house that was used for the purpose of defilement against D.N.J. a child aged 6 years by Jackson Mugo Kariuki.
4. When arraigned before the trial Court, the Appellants pleaded not guilty to the charges. After a full trial, the Appellants were acquitted on all the charges they faced, but were found guilty of separate offences. Jackson Mugo Kariuki was found guilty and convicted of the offence of sexual assault contrary to Section 5(1)(a)(ii) as read with Section 5(2) of the [Sexual Offences Act](#). He was sentenced to serve 15 years in prison.
  5. Paul Fwamba was found guilty and convicted of the offence of aiding and abetting the offence of sexual assault contrary to Section 5(1)(a)(iii) as read with Section 5(2) of the [Sexual Offences Act](#). He was sentenced to serve 10 years in prison.
  6. The Appellants were aggrieved by the convictions and sentences. They preferred separate appeals which were heard separately. Given the commonality of the trial before the subordinate Court, this Court opted to render this consolidated judgment.

### **The Appeals:**

7. Jackson Mugo Kariuki (hereinafter referred to as 'Jackson') in his Grounds of Appeal averred that the prosecution failed to discharge its burden of proof to the required standard. He cited that the evidence was too scanty to sustain a conviction. He complained that the trial Court failed to consider his defence.
8. In the premises, Jackson prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.
9. Paul Fwamba (hereinafter referred to as 'Paul') also vehemently challenged the conviction and sentence. His Grounds of Appeal were that the prosecution failed to discharge its burden of proof to the required standard. He accused the trial Court of convicting him on hearsay evidence. He faulted the trial Court for entering a conviction based on unrecorded evidence contrary to Section 200(4) of the [Criminal Procedure Code](#).
10. Paul lamented that he was not given a chance to cross-examine witnesses to validate identification by dint of Section 144 and 150 of the [Criminal Procedure Code](#). This, in his view, was in flagrant breach of Section 208 of the [Criminal Procedure Code](#).
11. He also cited that his defence was credible but was not considered. Finally, he faulted the trial Magistrate for failing to exercise discretion during sentencing in line with the [Sentencing Policy Guidelines 2016](#).
12. In the premises, Paul prayed that the appeal be allowed, the conviction be quashed and the sentence be set aside and that he be set forthwith at liberty.
13. The appeals were heard on the basis of parties' rival written submissions. In his undated submissions, Jackson argued primarily on the offence of defilement urging that its elements were not proved to the required standard. He accused the Complainant of furnishing incredible evidence that was untruthful and unreliable.
14. In his view, crucial witnesses who would have given a watertight narrative were not called to testify by the prosecution.
15. Finally, Jackson submitted that the evidence was marred with contradictions and inconsistencies that could not sustain a conviction.
16. Paul also filed undated submissions. He pointed out that during her testimony, the Complainant constantly glared at her mother before proffering answers. On this ground alone, Paul submitted that a



- conviction could not be sustained. He argued that the Complainant's evidence was incredible, marred with falsities, contradictory and thus doubtful. Furthermore, based on her evidence, more prosecution witnesses ought to have been called to testify.
17. Scrutinizing the evidence of the prosecution further, Paul observed that none of the witnesses testified that he was the Caretaker of the said homes where the alleged offence occurred. He contended that as a matter of fact, the Complainant did not see him when she was whisked away.
  18. Paul contended that no witness was called to identify him as the Waiter of the bar or Caretaker of the rentals. He particularly implied that one Emily Nelima Barasa ought to have been called to shed light on this since she was the Landlady.
  19. Finally, Paul submitted that on sentencing, the trial Court failed to adopt recent jurisprudential pronouncements thus imposed a harsh sentence.
  20. On the part of the Respondent, the State only filed submissions in respect of Criminal Appeal No E029 of 2022. The submissions are dated 1<sup>st</sup> November, 2022.
  21. The State observed that though not stated, Jackson was convicted by virtue of Section 186 of the Criminal Procedure Code. It was argued that the conviction was lawful based on the evidence of the witnesses.
  22. On identification, the prosecution was adamant that it was proper bereft of mistaken identity. Finally, on sentencing, it was argued that the sentence was lawful.
  23. As a consequence, the State urged this Court to dismiss the appeal as it lacked merit.

**Analysis:**

24. Being first appeals, the role of this appellate Court of first instance is well settled. It was held in the case of *Okemo v R* (1977) EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
25. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the ingredients of the offences of sexual assault contrary to Section 5(1)(a)(ii) as read with Section 5(2) of the Sexual Offences Act and Aiding and abetting the offence of sexual assault contrary to Section 5(1)(a)(iii) as read with Section 5(2) of the Sexual Offences Act, were proved and as so required in law; beyond any reasonable doubt.
26. Needless to say, this Court has carefully read and understood the proceedings and the judgment of the trial Court as well as the record before this Court and also the submissions.
27. Before considering the appeals further, it is prudent to look at the facts of the matter.
28. In a brief summary, it was the prosecution's case through 4 witnesses that the complainant (who testified as PW1) was a child aged 6 years old. She was a student at Mary Immaculate Primary School.
29. On 7<sup>th</sup> April, 2019, as PW1 was playing at her friend's place, Jackson approached her. It was during the after-lunch hours. Jackson carried her sideways to a room behind the Bentos bar. PW1 used to see Jackson around, but had not closely known him.



30. Upon reaching the room, Paul emerged from Bentos bar and handed a key to Jackson which key was used to open and access the room which PW1 identified as their neighbor's. The room was among 4 in a house which PW1 testified that the Bar and house were close to each other.
31. The doors to the rooms in the house were erected in close proximity to each other. Jackson and PW1 entered the room and Jackson closed the door. PW1 described the room as a dwelling place. It had a blue mattress placed on the mabati. According to PW1, Jackson then undressed her, removed his clothes, pushed her to the wall and sexually assaulted her with a black butter knife. The Complainant felt pain.
32. After the ordeal, the Complainant rushed home, but could not inform her mother what had transpired as she was afraid. When initially probed, the Complainant lied that she was hurt by a stool. Eventually, the mother found out after observing that the Complainant was bleeding. She found bloodstains on her clothes when they were being washed.
33. PW1 was then taken to Kitale District Hospital where she received treatment.
34. On the very day, at around 5 p.m., the Complainant's father one SJ, (who testified as PW2) stated that he was walking towards (Particulars withheld) Market Center where he met by a crowd of people. He saw the Complainant crying.
35. He was informed what had transpired by his wife and the mother to PW1. After taking PW1 to Hospital, PW2 accompanied the Complainant to the crime scene. They found Paul and on enquiry on who the occupant of the subject room was, Paul informed them that the person who used to occupy the dwelling had moved out.
36. PW2 identified Paul as a member of the workforce employed by one Edward at the Bentos bar.
37. The matter was reported at Kitale Police Station. It was investigated by No.101038 PC Purity Nabwire who testified as PW4. Two weeks later, the Complainant recognized Jackson wearing a cap at a shop. PW2 testified that Jackson was later seen at the market where he was arrested by police officers stationed at Bidii Police Station.
38. Upon reporting the matter to the police, the Complainant was referred to Kitale County Referral Hospital where she was seen by PW3 one Francis Barchelso, a Clinician. PW3 examined PW1's private parts. There was valval smelling and the vagina was inflamed. PW1 also had slight bruises due to penetration. The examination was after approximately 36 hours post the incident.
39. PW3 produced the P3 Form and initial treatment notes as exhibits.
40. On 17<sup>th</sup> April, 2019, PW4 visited the scene together with Jackson and Paul. The Landlady, one Emily Nelima Barasa, was present and she opened the room which was the crime scene. There was a blue mattress and a bed. Emily stated that on 9<sup>th</sup> April, 2019, the room had been booked by one Hamilton Njuguna. He had occupied the house for 3 months before he was kicked out on account of rent arrears. Emily further stated that Paul was the Caretaker of the houses.
41. Paul was arrested on 17<sup>th</sup> April, 2019 by PW4 while Jackson and Hamilton Njuguna were arrested a day earlier by National Police Reservists.
42. PW4 recorded statements, compiled evidence and charged the Jackson and Paul accordingly. In explaining why she did not prefer charges against the said Hamilton Njuguna, PW4 stated that investigations revealed that Hamilton had, on the material day, handed over the keys to the room to Paul who was the Caretaker.



43. PW4 further produced the Complainant's Birth Certificate as an exhibit.
44. After close of the prosecution's case, the trial Court found that the Appellants herein had a case each to answer and they were placed on their respective defenses.
45. Jackson gave sworn testimony. He stated that on 7<sup>th</sup> April, 2019, he was a learner training at Full Gospel Church to play the keyboard when the incident allegedly occurred. In support of these allegations, he produced a pamphlet disclosing keyboard training exercise that took place between 3:30 p.m. and 5:30 p.m. He added that after the practice he went to watch a football match where his favorite team, Chelsea played. He denied committing the offence.
46. Paul also gave a sworn testimony. He stated that as at 7<sup>th</sup> April, 2019, he was employed by one Edward Lediwan, the owner of Bentos bar and the houses adjacent thereto. He recalled that after watching the Arsenal v Everton match, and whilst serving customers at around 5 p.m., a lady came to the bar with a small girl who was looking to identify the perpetrator. The girl did not identify anyone. He learnt of the incident the following day. He denied being a Caretaker of the rentals.
47. Paul further stated that when he went to the police station to record his statement on 8<sup>th</sup> April, 2019, he found Hamilton Njuguna who was the tenant in the room in issue. He also saw Jackson in police custody.
48. He denied that the crime scene was his dwelling place and further denied committing the offence.
49. In the impugned judgment, the trial Court acquitted the Appellants in all the charges they faced under Section 215 of the *Criminal Procedure Code*. The trial Court, however, found Jackson guilty of the offence of Sexual Assault contrary to Section 5(1)(a)(ii) as read with Section 5(2) of the *Sexual Offences Act*. It also found Paul guilty of the offence of aiding and abetting the offence of Sexual Assault contrary to Section 51 (a) (iii) as read with Section 5(2) of the *Sexual Offences Act*.
50. The trial Court in its analysis found that the Complainant was honest and truthful. It was satisfied to hold that Jackson came out of the bar, scooped PW1 and took her to a house behind the bar where Paul worked. The Court noted that the Complainant laid a vivid description of the crime scene and the transpirations of the offence.
51. The trial Magistrate considered the defenses which were dismissed for lacking credibility. It concluded that the Appellants were positively placed at the scene thus convicting them in line with Section 179 of the *Criminal Procedure Code*.
52. On a careful analysis and review of the evidence, this Court finds that the trial Court was correct in finding that the offences of Defilement, committing an indecent act with a child and Benefiting from a Child Prostitution were not proved.
53. The trial Court thereafter proceeded to consider whether any other and lesser offences had been committed. The Court then found that the offences of sexual assault and aiding and abetting the offence of sexual assault had been respectively committed by the Appellants.
54. The question for determination thus is whether the convictions were proper.
55. As a forerunner, Section 179 of the *Criminal Procedure Code* gives a Court discretion to convict on a minor offence where the main offence has not been proved. Those are the cognate offences.



56. In addition, Section 186 of the Criminal Procedure Code provides as follows: -

When a person is charged with the defilement of a girl under the age of fourteen years and the Court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under the Sexual Offences Act, he may be convicted of that offence although he was not charged with it.

57. Having said so, I will begin with a consideration of whether the offence of sexual assault was proved.

58. Section 5(1) of the Sexual Offences Act states as under: -

5. Sexual assault:

(1) Any person who unlawfully-

(a) penetrates the genital organs of another person with-

i. any part of the body of another or that person; or

ii. an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

59. The 'penetration' in Section 5 of the Sexual Offences Act must be distinguished from that in Section 2. 'Penetration' in Section 2 is defined as follows: -

"penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

60. It, therefore, follows that the meaning of the 'penetration' to be ascribed to in Section 5 cannot be the same as that in Section 2 since if that were the case then the offence of sexual assault would be transformed into either defilement (under Section 8) or committing indecent acts with children (under Section 11).

61. The 'penetration' into the genital organ of the victim referred to in Section 5 must, therefore, be occasioned by any other means but not by the genital organ of the perpetrator. Such penetration may be by any other part of the body of the perpetrator or of any other person or even by objects manipulated for that purpose.

62. In this case, the Court was satisfied that Jackson inserted a butter knife into PW1's vagina.

63. The trial Court had the opportunity to observe the demeanor of the witnesses as they testified. The description of the room given by PW1 was the same as what PW4 found when she visited the scene. There was, as well, ample evidence on the identity of Jackson as the one who took PW1 into the room. Further the penetration was proved by PW1 and PW3.

64. The defence by Jackson did not outweigh the prosecution's evidence. Put side by side, it remains a fact that Jackson took PW1 into a room and penetrated her vagina using a butter knife.



65. This Court, therefore, finds that the offence of sexual assault was proved. Jackson was rightly convicted on the basis of Section 186 of the *Criminal Procedure Code*. The appeal on conviction is, hence, unsuccessful and is hereby dismissed.
66. On sentence, I have considered the sentencing proceedings. The Court stated that it had no discretion in sentencing. However, given the recent jurisprudential developments, the position is that Courts must exercise discretion in sentencing. (See High Court at Kitale Criminal Appeal No E091 of 2021 *Jonny Opicho Wanjala v Republic*).
67. The appeal on sentencing is hence, successful.
68. Turning back to whether the offence of aiding and abetting the offence of sexual assault was proved, the starting point is a look at the provision creating the offence. The reason is in Article 50(2)(n) of the *Constitution* which states as follows: -
- (2) Every accused person has the right to a fair trial, which includes the right-
    - (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
      - (i) an offence in Kenya; or
      - (ii) a crime under international law;
69. The basis of the trial Court's finding that Paul aided and abetted the offence of sexual assault was Section 20 of the *Penal Code*. The provision states as follows: -
20. Principal offenders
    - (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
      - (a) every person who actually does the act or makes the omission which constitutes the offence;
      - (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
      - (c) every person who aids or abets another person in committing the offence;
      - (d) any person who counsels or procures any other person to commit the offence, and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
    - (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
    - (3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.



70. It is a fact that in this matter Paul was not charged with the offence of aiding and abetting the offence of sexual assault. It was the Court which found Paul guilty of the said offence on the strength of Section 20 of the Penal Code.
71. On close scrutiny of the Sexual Offences Act and the Penal Code, this Court did not come across the offence known as ‘aiding and abetting the offence of sexual assault’.
72. It is only Section 20 of the Penal Code which provides for those who aid and abet in the commissioning of offences. However, such persons ought to be charged with the actual offences.
73. From the above discussion, it is, therefore, apparent that the offence of ‘aiding and abetting the offence of sexual assault’ is unknown in law.
74. Respectfully, the trial Court erred in finding Paul guilty of a non-existent offence of ‘aiding and abetting the offence of sexual assault’. As such, the conviction cannot stand and the sentence as well.
75. The appeal by Paul is successful.

**Disposition:**

76. Deriving from the foregoing, the following final orders hereby issue:
  - a. Criminal Appeal No E029 of 2022 is hereby partly allowed. The appeal against the conviction is dismissed. The appeal against the sentence is allowed. The sentence of 15 years imprisonment is hereby set-aside.
  - b. Going by the mitigations on record, the nature of the offence and the injuries sustained by the victim, the Appellant, Jackson Mugo Kariuki, is hereby sentenced to 5 years’ imprisonment. The sentence shall run from 14/04/2022 when he was sentenced.
  - c. Criminal Appeal No E031 of 2022 is hereby allowed. The conviction is quashed and the sentence of 10 years imprisonment set-aside.
  - d. Paul Fwamba shall be forthwith set at liberty unless otherwise lawfully held.Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 4<sup>TH</sup> DAY OF APRIL, 2023.**

**A. C. MRIMA**

**JUDGE**

Judgment delivered in open Court and in the presence of:

Jackson Mugo Kariuki and Paul Fwamba, the Appellants in person.

Miss. Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Regina/Chemutai – Court Assistants

