



**Kirima v Republic (Criminal Appeal E019 of 2022)  
[2023] KEHC 17846 (KLR) (Crim) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17846 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E019 OF 2022**

**DR KAVEDZA, J**

**MAY 23, 2023**

**BETWEEN**

**DAVID KIRIMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the conviction and sentence on 31/12/2021  
in Kibera SO case No. 11 of 2014 before Hon E. Boke, SPM)*

**JUDGMENT**

1. The appellant was charged and convicted of the offence of defilement contrary to Section 8(1)(3) of the *Sexual Offence Act* No 3 of 2016. It was alleged that on 3<sup>rd</sup> day of February 2014 at Kibera within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of KM a child aged 14years. He was sentenced to serve 20years imprisonment Being dissatisfied with his conviction and sentence, he filed a petition of appeal in which he raised four grounds.
2. The main grounds were raised as follows; in ground 1 the appellant contended that the trial court erred in law and in fact by failing to adhere to the dictates set out under article 50 of *the Constitution* on the right to a fair and impartial trial process of an accused person. In ground 2 and 3 the appellant challenged the totality of the prosecution's evidence as insufficient to warrant a conviction which he claimed was riddled with inconsistencies. In ground 4 the appellant stated that his defence was disregarded and therefore the court arrived at a wrong conclusion.
3. As this is the first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanor thereof (See *Okeno v Republic* [1972] EA 32, and further in the Court of Appeal case *Mark Oruri Mose v R* [2013] eKLR) that this court is duty-



bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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.

4. Purity Kawira Kubai (PW1) the children's officer at Kibera testified that she received a call from a lady who informed her that there was a child who was screaming inside some house in the plot. She rushed to the scene only to find the door locked and the members of the public surrounding the house. Upon gaining entry she found the appellant and the complainant who was kneeling and screaming that he had been infected with HIV. The minor had a cut on the right side of the hip. With the help of members of the public PW1 managed to rescue the complainant who was apparently screaming and throwing stones at the time.
5. KM (Name withheld) (PW2) testified that he is 14years old and stays at home with her mother. He told the court that on February 2, 2014 his mother sent him to go and buy githeri in the shops. While on the way he met the appellant who sent him to go and buy for him cigarette. Upon delivery of the cigarette, the appellant gave him 5shillings and he left only to meet him again. The appellant told him that he should go with him and help him do some work in his house. The complainant indeed accompanied him and when they arrived in the house the appellant locked the door from inside then fetched a knife. The appellant removed the complainant's trousers and while holding a knife he started strangling the complainant, he then inserted his penis in the complainant's anus. PW2 then started screaming while throwing stones in anger and members of the public came to his rescue. The complainant positively identified the appellant after his arrest. He was then taken to the police station then to the hospital.
6. Dr Kizzie Shako (PW3) from the police surgery Nairobi area Kenyatta Hospital examined the complainant and noted that there was a tear at 6 o'clock on the anus and a widened anal orifix. He produced the P3 form and P Exhibit. He concluded that the widening of the anus is suggestive of defilement or trauma to the region.
7. Dr Esiromo Marian (PW4) a consultant at Kenyatta Hospital noted that the complainant suffers from frequent convulsions. He was diagnosed to be suffering from epilepsy and has been under medication.
8. No 75769 CPL Philemon Rotich (PW5) the investigating officer from Capitol Hill Station testified that he was informed that the appellant was caught sodomizing the complainant. He effected the arrest on February 3, 2014 and referred the complainant to Kenyatta National Hospital. He produced the birth certificate of the complainant which indicated that he was born on June 7, 2000.
9. After the close of the prosecution's case, the trial court found that the appellant had a case to answer and was put on his defence. In his unsworn evidence he did not call any witnesses. In his defence, he denied ever defiling the complainant. He testified that the complainant's mother had a dispute with him that has never been resolved. He maintained that he was framed.

#### **Analysis and determination.**

10. In his appeal, the appellant challenged the weight of the prosecutions evidence. He contended that the elements of defilement were not proved and his conviction was improper. The appellant submitted that the offence of defilement were not proved.
11. From the record, the complainant narrated to court how the appellant lured him to his house and defiled him. The clinical officer in her findings of the anal area of the complainant concluded that there was evidence of anal penetration due to a tear and its enlargement. The age of the victim was also proven and the appellant was identified as the perpetrator of the offence. I therefore find that the elements of defilement were proved beyond reasonable doubt.



12. In ground 3 the appellant contended that there were inconsistencies in the testimonies adduced by the prosecution witnesses. I have considered the contradictions but I do not find the same to materially affect the credibility of the evidence of the witnesses. In deed the evidence on record clearly demonstrates that the appellant took the complainant to his house and threatened him with a knife before defiling him. All this took place in broad daylight and the complainant screamed for help that is when members of public came to his rescue. I therefore reject this line of defence and find that the appellant is the person who subjected the complainant to acts of penetration. (see [\*James Waita Keli v Republic\* \[2021\]eKLR.](#))
13. In ground four (4) the appellant contended that his defence was disregarded and therefore the court arrived at a wrong conclusion. He submitted that the complainant's mother framed him. This did not however occasion a failure of justice in view of the abundant evidence in support of the conviction. The same was considered and found to be unbelievable. The ground therefore fails and is hereby dismissed for lacking merit.
14. It is important to note that a vulnerable child (who was epileptic) had to be threatened by the appellant who was armed with a knife an indication that he was meant to inflict harm to the child, which he did by cutting the child on the hip .
15. The appellant should have also been charged for an offence of assault. There were aggravating circumstances hence the sentence of 20years imprisonment.
16. In my view, due to the aggravating circumstances the magistrate ought to have imposed a higher sentence. However, I do not find it necessary to interfere with the discretion of the trial court and hold that the sentence meted out was proper and proportionate to the offence.
17. Accordingly, uphold the conviction and sentence and dismiss the appeal in its entirety.

**JUDGMENT DATED AND DELIVERED ON 23<sup>TH</sup> DAY OF MAY 2023**

.....

**D. KAVEDZA**

**JUDGE**

**In the Presence of:**

Mr. Mutuma for the State

The Appellant present in person

**Joy Kamuyu (C/A**

