



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Republic (Criminal Appeal E084 of 2022)  
[2023] KEHC 18958 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18958 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E084 OF 2022  
PM MULWA, J  
JUNE 22, 2023**

**BETWEEN**

**JOB MWANGI KIMANI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. H. M. Ngángá in  
Gatundu Criminal Case No. 10 of 2020 delivered on 6th May 2021)*

**JUDGMENT**

1. The Appellant Job Mwangi Kimani was tried and convicted of the offence of Sexual Assault contrary to Section 5(1) (a) (ii) (2) of the *Sexual Offences Act* No 3 of 2006.
2. The particulars of the charge were that on diverse dates between 8<sup>th</sup> January and January 22, 2020 at [Particulars Withheld] Village, Gatundu South Sub-County, Kiambu County unlawfully used his fingers to penetrate the vagina of EWK a child aged 10 years.
3. On April 23, 2020, the appellant was arraigned and upon the charges being read to him he pleaded not guilty. The prosecution called a total of 7 witnesses. Upon conviction, the appellant was sentenced to serve 10 years imprisonment. Aggrieved by the conviction and sentence, he filed the current appeal, citing the following grounds of appeal;
  - a. That the learned trial magistrate erred in matters of law and facts by failing to hold that the penile penetration of the complainant's genitalia by the use of fingers was not proved.
  - b. That the learned trial magistrate erred in matters of law and fact by failing to hold that the accused person was not properly identified as the penetrator of the offence charged.



- c. That the learned trial magistrate erred in matters of law and fact by failing to hold the complainant (PW1) was coached to implicate the appellant herein.
  - d. That the learned trial magistrate erred in the matter of law and facts by failing to find that the delay between the alleged date of commission of the offence charged and the reporting was not explained.
  - e. That the learned trial magistrate erred in matters of law and fact by failing to hold that the appellant's mode and circumstances of the arrest are unjustifiable.
4. On March 2, 2023 the court directed that the appeal be canvassed by way of written submissions. Only the appellant filed written submissions.

### **Appellant's submissions**

5. In the submissions filed on January 30, 2022 the appellant submits the respondent failed to prove its case beyond reasonable doubt and that the trial court's evidence is full of suspicion. He cited the case of *Mary Wanjiku Gichia vs Rep Cr Appeal no 17 of 1998* where it was stated that suspicion however strong cannot provide a basis for inferring guilt and must be proved in evidence.
6. The appellant submits the prosecution failed to prove that he used his body parts to penetrate the victim as per the doctor's report which showed that Pw1 was in fair condition. That the prosecution failed to take the appellant's nail clipping for testing to prove the appellant's connection with the incident.
7. The appellant submits he was not positively identified by Pw1 who failed to determine the place and the time when the commission occurred. The prosecution failed to prove a lack of consent. He submits the hymen was not broken, indicating there was no sexual assault. He urged the court to find the respondent failed to prove its case against the him beyond a reasonable doubt.

### **Analysis and determination**

8. This is the first appeal and this court is called upon to re-evaluate, re-analyze the evidence of the trial court and come up with its own conclusion having in mind it did not have the chance to hear the witnesses and observe their demeanour. In the Court of Appeal case of *Kiilu & Another v Republic, [2005] 1 KLR 174*, the court stated thus:

' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.'

### **Trial court's evidence.**

9. Before dealing with the appeal on merit, this court will re-evaluate and re-analyze the trial court's evidence.



10. testified and told the court the victim was her cousin. That the victim had informed her she was scared as a man had forced to kiss her and she refused when she had gone to her mother That the man threatened to kill her if she disclosed to anyone. She informed her mother who sent for the victim.
11. After conducting a voir dire, the court established that Pw2 understood the consequences of lying on oath. She gave sworn evidence. She told the court she schooled in [Particulars Withheld] Primary School in class 5. She stated she was with her other aunty when a 'mbaba' told her to go and get some sugarcane, she went with her 5-year old sister and when they got to the man's house she was given sugarcane and when she was done eating the man called her to his bedroom where he removed her clothes and put his fingers in her private part which she uses to susu (urinate). Her sister caused an interruption as she started crying and the man gave her 20 shillings and warned her from telling people. She told the court she was living with her aunt S after the arrest of her mother.
12. Pw2 told the court the 'mbaba' asked her to kiss him and she refused and rushed home and told M what had happened and in turn, M told her aunty. She stated that the man had informed her that when she gets to class eight 'atanitoboa' (interpreted to mean break her virginity). She took her aunty to the appellant's house, but on the first day they did not find him but he was arrested later by the police. She positively identified the appellant who was in the dock as the man who inserted fingers in her private parts.
13. She told the court she was taken to Gatundu Hospital for examination.
14. In cross-examination she denied she was coached to lie in court by her mother and aunty. She told the court she couldn't remember visiting the accused with her mother before the incident.
15. Pw3 testified on August 17, 2020 and stated that she had been informed there was a serious case when Pw1 was sent to her and she bought her drugs. The following day she received a call to the effect that there was a man who wanted to see Pw2. Pw2 took her to the home of the man, and she later pointed the man to her when they met on the way. She told the court that the man was familiar as she knew the brother. She sought help from the police and the appellant was arrested. Pw2 was taken to Gatundu Hospital for treatment. She identified the appellant as the man who was talking to Pw2. She denied the charges are a set-up.
16. Pw4 the doctor at Gatundu Hospital produced the P3 form of Pw2 filled on April 30, 2020. Pw2 was reported at the hospital on April 21, 2020 with a history of inappropriate kissing and penetration using fingers and on examination there were no bruises or lacerations. The incident had allegedly happened 3 days ago. He told the court he did not examine the victim when filling the P3 form. The initial examination was done by a different doctor.
17. He told the court that penetration using fingers will not necessarily cause injury and would have healed at the time the victim was presented for examination 4 months later.
18. Pw5 the police officer from Gatundu told the court he received a call from Pw3 on April 20, 2020 and informed that Pw2 had been defiled. In the company of a colleague he went to the place directed and found the appellant Job Mwangi with the child standing. They introduced themselves and proceeded to arrest the appellant.
19. Pw6 a doctor from Gatundu Hospital produced the medical forms of Pw2. The PRC form indicates Pw2 was defiled by someone she did not know. The assailant kissed her and inserted fingers in her genitalia. The victim was disturbed, no injury was seen and neither was there blood, the hymen was not seen but on touching her vagina it was painful. The urinalysis did not reveal any infection, HV's revealed infection but no spermatozoa were present.



20. After the close of the prosecution case the accused was placed on his defence. He gave sworn evidence and stated that on April 20, 2020 when he was arrested he had left to look for pig and poultry feed. That later at 5.30 pm he was informed someone was looking for land to purchase. He testified that he went to their plot near Gatundu Level 4 hospital and a tenant sent him vegetables. Immediately he left the plot he saw a personal car and three police officers alighted and was arrested, he told the court he saw a young girl running and the aunty hid herself in a corridor.
21. He testified he was taken to the police station and could not understand the reason for the arrest, but the young girl and aunty came to the police station.

### Determination

22. I have considered the appeal, the appellant's submissions and the trial court evidence. The issues for determination are:
  - i. Whether the evidence adduced by the prosecution was sufficient to prove the charge of sexual assault preferred against the appellant beyond any reasonable doubt.
  - ii. Whether the sentence was proper.
23. Section 5 of the *Sexual Offences Act* provides that:
  - ' (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 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.'
24. From the above provision, the prosecution ought to prove there was the penetration of the victim's genitalia using any body part of the appellant's or by use of an object.
25. The Court of Appeal in the case of *John Irungu v Republic, [2016] eKLR* pronounced itself on the essential ingredients of the offence of sexual assault as follows:
  - ' Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.'
26. Pw2 testified that the appellant inserted fingers in her vagina after she had visited him when she went to get some sugarcane. After she finished eating the sugarcane, the man called her to his bedroom, he removed his clothes and took his clothes and put his fingers in her private parts which she uses to 'susu' but his actions were interrupted by the cry her 5-year-old sister. He gave her Kshs 20/= and warned her from telling anyone. This evidence was corroborated by Pw6 - Dr Wangui Kamau from Gatundu



Hospital and Pw4 - Dr Omondi who testified the complainant was brought to the hospital with a history of assault where an unknown person tried to kiss her and insert fingers in her private parts. On examination, the minor's hymen was not intact and in touch it was painful. The minor looked disturbed. She was put on drugs after pregnancy and HIV tests turned negative.

27. On the issue of identification, it was the victim's testimony that she visited the appellant's house with her sibling when the appellant invited her to go and get some sugarcane. She told the trial court they went with the appellant to his house. Pw3 also testified the complainant took her to the appellant's house but they did not meet him on that particular, the victim pointed out the appellant to Pw3 when they met on the road as the man who had been forced to kiss her and sexually assaulted her.
28. On the other hand, the accused did not deny knowing the victim, he informed the trial court he is not aware of the reason for his arrest. According to him on April 20, 2020, he went to look for poultry and pig feed. That he was called and informed of someone interested in buying some land. But while at their plot a tenant sent him to buy kale and that is when he saw a white personal car, people alighted and introduced themselves as police officers and arrested him. That the victim and her mother had colluded to frame him.
29. The appellant did not deny knowing the complainant, and neither did he deny ever meeting the complainant before his arrest. This court finds the appellant failed to controvert the evidence of the complainant. The trial court had reason to believe that the evidence of the minor was truthful. It went ahead to rely on the evidence of the minor which was corroborated and found the prosecution had proved its case beyond reasonable doubt.
30. This court therefore finds that the trial court did not err in convicting the appellant.
31. The trial court sentenced the appellant to 10 years' imprisonment. In his mitigation he asked the court to consider the period of time he spent in custody and pleaded for a non-custodial sentence. The prosecution urged the trial court to consider the complainant has been traumatized by the actions of the accused and consider imposing the maximum sentence.
32. The trial court considered the provisions of Section 5(2) of the *Sexual Offences Act* No 3 of 2006 and taking into account the accused was remorseful adopted the minimum sentence.
33. Section 5(2) of the *Sexual Offences Act* provides 'A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.
34. This court thus finds the trial court did not err in sentencing the appellant, for an imprisonment term of 10 years. The sentence meted was within the law. The appellant has not advanced any sufficient reason for this court to interfere with the trial court's decision.
35. I uphold the trial court's decision on conviction and sentence.
36. Consequently, the appeal against conviction and sentence herein lacks merit and is dismissed.

Orders accordingly

**JUDGMENT delivered virtually, dated and signed at Kiambu This 22nd day of June, 2023.**

.....

**P.M. MULWA**

**JUDGE**

**In the Presence of:**



**Kinyua – court assistant**

Appellant – present virtually

Mr. Muriuki for Respondent

