



REPUBLIC OF KENYA



**Kamua v Republic (Criminal Appeal 37 of 2018)  
[2023] KEHC 18763 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 37 OF 2018**

**J WAKIAGA, J  
JUNE 21, 2023**

**BETWEEN**

**JOHN MUCHUKI KAMUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from original conviction and Sentence by Hon. P.M. Kiama –  
SPM in Sexual Offence Case No 21 of 2017 of the PM'S Court at Kangema)*

**JUDGMENT**

1. The Appellant was convicted of the on the charge of Defilement Contrary to Section 8(3) of the [Sexual Offences Act](#) and sentenced to twenty (20) years imprisonment.
2. Being aggrieved by the said sentence and conviction, he filed this Appeal and raised the following Supplementary grounds of Appeal;
  - a. There was no proper identification.
  - b. Crucial prosecution witnesses were not called to testify.
  - c. Voir dire was not conducted
  - d. The Appellant's defence was not considered
  - e. Section 169 of the [Criminal Procedure Code](#) was not complied with as there was no reason given for the finding of the Court.
  - f. The minimum sentence given was unconstitutional.



## Submissions

3. Directions were given that the Appeal be heard by way of Written Submissions and on behalf of the Appellant, it was submitted that the Appellant was not positively identified as the house wherein the complainant was defiled at belonged to the son of the Chief and that the wife of the said Sub chief was not called to testify and that the Appellant was not known to PW4 before the said date and therefore his identification may have been mistaken when weighed against the Appellant defence that he was implicated.
4. It was submitted that essential prosecution witnesses were not called to testify and that the Court should have held that had they been called then their evidence would have been adverse to the prosecution as was stated in *Juma Ngiodia v Republic* (1982-88) KAR 454. Among those witnesses were the Sub Chief on why the Appellant was found on his farm, the chief's son, the student who knew where the complainant was at when she went missing, the village elder who arrested the Appellant and the Medical Officer who examined the complainant and neither were the blood stained collages of the complainant produced.
5. It was contended that no Voir dire was conducted before the evidenced of PW4 was taken in line which *Johnson Muiriri v Republic* [1983] eKLR 447 and *Meripett Loonkomok V Republic* [ 2016] eKLR where the Court set the age of 14 years as correct threshold for Voir dire examination and since the complainants was 13 years, the evidence could not be used to secure a conviction having been sworn without Voir dire.
6. It was contended that the prosecution case was full of contradictions, inconsistencies and falsehood which cast a doubt on the Appellant's culpability and should have been resolved in favour of the Appellant was stated in the case of *John Mutua Munyoki v Republic* [2017] eKLR. It was the Appellants case that his unsworn defence should have been analysed by the Court and reasons for disbelieving the same given as required under section 169 of the *CPC*.
7. It was finally submitted that the sentence imposed was harsh and excessive and that the minimum sentence imposed had been declared unconstitutional by the high Court in Philip Mueke v Republic and Edwin Wachira & another v Republic.
8. On behalf of the Respondent it was submitted that the condition prevailing was ideal for the identification of the Appellants there was adequate electricity in the room and the Appellant and the complainant was found in the room by her father thus corroborating her evidence. It was contended that there no requirement on the number of witnesses and that whereas Voir dire was not conducted the same was not fatal to the prosecution case as the complainant was 14 years at the time when she testified and was not a child of tender age in support of which reference was made to the case of *Maripett Lookomok* (supra).
9. It was submitted that there was no inconsistency in the prosecution case and that those stated by the Appellant did not affect the case as was stated in *Richard Munene v Republic* [2018] eKLR. On sentence it was submitted that the same was at the discretion of the trial Court as was stated in the case of *Bernard Kimani Gacheru v Republic* which the Appellant Court can only interfere with if it was manifestly excessive. It contended that the sentence was lawful.
10. This being a first Appeal, the Court is under an obligation to re-evaluate the record of the trial and to come to its own conclusion there on while giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses which I say do as I analyse the issues identified for determination.



## Determination

11. The first issue for determination is whether the Appellant was positively identified? PW1 JMM stated that he was called and told that his daughter the complainant had not reached home from church, the next day they reported to the police and when they went to her school one of her friends told the Principal that she knew where she was and who had given the name of the Appellant as the one who was with her and when they opened the door where he led them to they found the complainant who informed them that the Appellant had defiled her, which was confirmed by her blood stained clothes.
12. This evidence was corroborated by that of PW2 Harrison Macharia who confirmed that the complainant had told them that she was going to see a sick person and did not return back home, they went to the home of the Appellant who opened the door to the house where the complainant had been locked inside. PW5 PC Nicholas Kirui confirmed that the complainant had been locked in a room in the compound of the Assistant chief where he was employed.
13. When put on his defence, the Appellant corroborated the evidence of the prosecution witnesses that he knew PW2 and that he met them on the date of his arrest. PW4 MWM stated that she had gone to visit her friend who advised her to sleep in their home and took her to another house where the Appellant later came into and demanded for payment to be allowed to sleep thereat and defiled her.
14. I am therefore satisfied that the Appellant was positively identified and put together with the Appellant and that penetration having been proved through the evidence of PW3 a clinical officer and taking into account the evidence on how the complainant was traced and the Appellant arrested am satisfied that his conviction was free from error.
15. I agree with the Submissions by the prosecution that the complainant having attained the age of 14 years as at the time of her testimony was no longer a child of tender age and failure to conduct Voir dire was not fatal to the prosecution case and that the Appellant was not prejudiced by the said act. Further it is trite law that the prosecution has the discretion to all the number of the witnesses they deem necessary to prove its case and that failure to call the witnesses stated by the Appellant was not fatal taking into account how he was identified and placed together with the complainant leading to a conclusion that the prosecution case was proved beyond any reasonable doubt.
16. The second issues is the defence by Appellant: He stated that he was implicated and that he was at his place of work till 1.00pm together with his friends before going to watch football and later went to sleep on the 7<sup>th</sup> and that on the 9<sup>th</sup> the material day he went to work until 2.00pm when he was informed by a friend of some work at Kangema and proceeded there at 3 pm and while assisting an old woman carry her nippier grass to the gate he was approached by two men one whom he knew as Harrison whom he had worked with before and was asked to enter into a motor vehicle where he found a girl seated inside and they took them to the chiefs office where he was asked whether he had slept with her and he denied the same.
17. In considering this defence, the Court found that it was a mere denial which he dismissed. I therefore find that the defence was analysed by the Court and dismissed. This defence did not account for where the Appellant slept on the material night and did not displace that prosecution case that the complainant slept in the house which the Appellant considered his as confirmed by the circumstantial evidence on how and where the complainant was found. There is no set standard of analysing the evidence produced before the trail Court and therefore find no merit on this ground of Appeal.
18. It follows that the prosecution case against the Appellant was proved to the required standard and therefore Appeal against conviction has no merit and is accordingly dismissed.



19. On sentence, as submitted by the prosecution, the same remains at the trial Court discretion join this matter the Appellant was sentenced to the minimum sentence provided for under the law. I have noted that the Appellant was a first offender and that the Court did not take into account the provision of Section 333(2) of CPC and the fact that the Appellant in mitigation stated that he was still studying.
20. The trial Court failed to comply with the Judiciary Sentencing Policy Guidelines and therefore find his sentencing in error which I hereby set aside. I am of the considered view that the best approach since there was no pre-sentencing report produced in Court, is to send the Appellant back to the trial Court for proper sentencing.
21. I would therefore direct the probation officer to prepare and submit to the trial Court a presentencing report on the Appellant for consideration and further action.
22. The trial Court's determination on conviction is hereby affirmed and the Appeal thereon dismissed whereas the Appeal against the sentence is allowed and remitted back to the trial Court for reconsideration. And it is ordered.
23. Before penning off, the trial Courts are hereby advised to follow the Judiciary Sentencing Policy Guidelines whose purpose is while maintaining the individual officers' discretion, is to bring into uniformity the sentencing process and procedures.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 21<sup>ST</sup> DAY OF JUNE, 2023**

**J. WAKIAGA**

**JUDGE**

**In the presence of:**

Ms. Murimi for Mr. Mbugua for Appellant

Ms Nzuki for Prosecution

Jackline – Court Assistant

