



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kariuki v Republic (Criminal Appeal 28 of 2018)
[2023] KEHC 19076 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 28 OF 2018**

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

BETWEEN

JACKSON MWANGI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the original conviction and sentence in Criminal case
No S.O. NO 16 of 2016 Kangema PM COURT before Hon. D.M KIVUTI (SRM))*

JUDGMENT

1. The Appellant was convicted and sentenced to a thirty (30) years imprisonment on the charge of Defilement Contrary to Section 8(1) as read with 8(2) of the [Sexual Offences Act](#) the particulars of which were that on the January 6, 2015 at Kahuti Sub Location intentionally caused his penis to penetrate the vagina of LWM a child aged 14 years.
2. Being aggrieved by the aid conviction and sentence, he lodged this appeal and raised the following grounds of appeal;
 - a. The prosecution case was not proved to the required standard.
 - b. The case was not properly investigated.
3. Directions were issued on the hearing of the appeal by way of Written Submissions and on behalf of the Appellant who was unrepresented. It was submitted that the conviction was based on the testimony of the Assistant Chief and the complainant which evidence was contradictory as the evidence shows that the act was consensual as there was no resistance from the victim which the assistant chief interrupted. It was submitted that the witness was stood down and was never recalled to complete her testimony and to be cross examined thereby denying the Appellant right to fair hearing.



4. It was submitted that the mother of the victim testified that she had forgiven the Appellant who was a family member which the Court did not take into account. It was submitted that the Investigating Officer did not visit the scene and that the complainant's underwear was not recovered and that the issue of his taking poison was not believable as there was no way a prisoner would have gone with poison into a police cell.
5. The Court passed the burden of proof on the Appellant on his evidence that he was framed by the Area Chief.
6. On behalf of the Respondent, it was submitted that the Appellant was granted right to fair hearing with an opportunity to cross examine all the prosecution witnesses. It was contended that the appellate Court has powers to sustain increase or reduce the sentence under Section 354(3) (b) of the CPC but the Court will not do so unless the trial Court acted upon wrong principles or the sentence is illegal or excessively low or high as was stated in the case of Shadrack Kipkoech Kogo v Republic and that the Supreme Court in Muruatetu 2 clarified that it did not outlaw minimum sentences in respect to *Sexual Offences Act*.
7. It was submitted that the prosecution case against the Appellant was proved beyond reasonable doubt as the age of the complainant was proved by the production of the birth certificate and that the complainant and the Appellant were caught red handed by the assist chief having sex in the toilet as corroborated through the production of P3 form and the Appellant was identified through recognition as a cousin of the complainant. His defence was considered and dismissed.
8. On retrial it was submitted that the trial was neither illegal nor defective and that the Appellant did not meet the threshold set by the Court of Appeal in *Ahmed Sumar v R [1964] EALR 483*.
9. This being a first appeal the Court is under a duty to re-evaluate the evidence tendered before the lower Court to come to its own determination thereon while giving an allowance that unlike the lower Court it did not have the privilege of seeing and hearing witnesses as was stated in the case of *Okeno v Republic [1972] EA 32*.
10. By way of introduction, the Appellant was initially tried and convicted by Hon JO Magori in Criminal Case No 19 of 2015 and sentenced to 20 years' imprisonment and two years respectively for attempted suicide. He lodged an appeal to this Court being Criminal Appeal No 9 of 2015 and by a Judgement dated August 19, 2016 Kiarie Waweru Kiarie, J quashed the conviction and set aside the sentence and ordered for a retrial.
11. From the record of the proceedings on November 14, 2016, EM appeared in Court after the Appellant had informed the Court that he had negotiated with her and on oath stated that she had forgiven the Appellant to which the Court stated that it had rejected the same as it was done without the participation of the prosecution.
12. PW1 LWM stated that she was sent to the shop by her father when she met the Appellant whom she identified as Jackson who took her to the toilet within the market and held her by the mouth and took some bottle which he opened and threatened that it was the last day she would live. He then removed her inner wear and started to put his penis in her vagina before the Assistant Chief came and found him in the act and the Appellant arrested. The compliant was then stood down.
13. PW2 Lucy Muthoni Kimani stated that on her way to the toilet, she found the Appellant having sex with the complainant and pulled him away from the complainant who did not have an inner wear. She called the police who arrested the Appellant while she went to trace the parents of the complainant who was identified to her by a lady called Mama Shiru. She stated that the Appellant had a paper bag



which contained a pesticide, which he said he had taken. At that stage the witness was stood down to enable the prosecution obtain the exhibit.

14. PW3 EWM stated that she was informed by PW2 that the Appellant had pulled the Complainant towards the market toilet and defiled her. She produced her birth certificate confirming that she was sixteen years at the time of the trial having been born on March 7, 2000 and that the Appellant was a relative and a neighbour.

15. PW4 PC Chris Wasike was called by PW2 and rearrested the Appellant. He interrogated the complainant who told him that the Appellant had removed her pants which he threw in the toilet and that the Appellant had threatened to burn her with chemical should she scream.

He produced P3 form filed at Kagema Sub District Hospital and that when he interrogated the Appellant he admitted having committed the act. It was his evidence that while in the police cells the Appellate drank the said pesticide. In cross examination he stated that the act took place during day time.

16. When put on his defence the Appellant testified on oath and stated that he was sent to the shop to buy pesticide and he met the complainant whom he sent to the shop to buy it on his behalf. Later a police officer and the Assistant Chief came and accused him of having defiled the complainant and that the police told him to admit the offence which he did and was jailed for twenty-two years before a retrial was ordered. It was his evidence that PW2 implicated him with the offence. In cross examination, he stated that he was beaten at the police station and that he did not have any grudge with the complainant's family.

17. DW2 Susan Kabera Kariuki stated that the Appellant had left home to go to the shop when she was later on called by the mother of the complainant who informed her of the arrest of the Appellant at the Chief's office.

Determination

18. Based the above evidence the Appellant was found guilty and sentenced to thirty years and in this Appeal I have identified the following issues for determination: -

- a. Whether the Appellant's right to fair trial was violated.
- b. Whether the prosecution case was proved.
- c. What order should the Court make.

19. The right to a free and fair hearing is constitutionally provided for under Article 50 of the Constitution which includes a right to adduce and challenge evidence which right according to Article 25(c) cannot be limited.

20. In this matter it is clear that the Appellant was not accorded his constitutional right to challenge the prosecution evidence against him since two vital witnesses were stood down and were never called to enable the Appellant cross examine them. The Medical Officer who examined the complainant was never called to testify and the P3 herein was produced by the investigating officer without any legal basis for its production being laid.

21. I would therefore agree with the submissions by the Appellant that this trial herein was in violation of his constitutional right to fair trial and therefore the conviction was a nullity which cannot be allowed to stand notwithstanding the nature of the evidence produced and would therefore on that basis alone allow the Appeal set aside the conviction and quash the sentence herein.



22. This is a clear case which should have been sent for retrial having found as a fact that the trial was a nullity. I have however taken in into account the history of this case wherein the Appellant was first convicted on his own plea of guilty which was later set aside and a retrial ordered and note that to order a retrial again will not be in the best interest of the justice of this case as having noted the evidence of the complainant's mother before the trial Court, securing witnesses at a second retrial might be a tall order. I have further noted that the complainant is now aged 23 years and there is a possibility of the same having moved on with her life and to drag her back to relive what happened to her on the fateful day might not be in the best interest of her dignity.
23. I consequently set the Appellant free forthwith unless otherwise lawfully held. This case should act as a warning to the prosecution and the trial Courts that there are no short cuts in the establishment of guilt or innocence of any accused person and all the Courts must safe guard the constitutional rights of all accused persons and this Court shall not shy from quashing any trial conducted in violation of the constitutional rights.

SIGNED, DATED AND DELIVERED AT MURANGA THIS 21ST DAY OF JUNE 2023

J. WAKIAGA

JUDGE

In the presence of:

Jackline - Court Assistant

Ms Nzuki - Prosecution

