



**Kariuki v Republic (Criminal Appeal E044 of 2022)
[2023] KEHC 27440 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E044 OF 2022
GL NZIOKA, J
JULY 24, 2023**

BETWEEN

GEORGE MUGAMBI KARIUKI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against decision of Hon. D. N. Sure, Senior Resident Magistrate (SRM) delivered on 20th September 2022 in Criminal Sexual Offence Case No. E054 of 2022 at the Principal Magistrate's Court at Engineer)

JUDGMENT

1. The appellant was arraigned before the Senior Principal Magistrate's Court at Engineer charged vide criminal case sexual offences case No. E054 of 2022, with the offence of defilement contrary to section 8(1) as read with section 8(4) of *Sexual Offences Act* (herein "the Act") and an alternative count of committing an indecent act with a child contrary to section 11(1) of the Act. The particulars of each charge are as per the charge sheet.
2. He pleaded not guilty and the case was fully heard with the prosecution calling a total of six (6) witnesses. The prosecution case in brief was that on 28th May 2022, PW1 "R.W. K" (herein "the complainant") aged seven and half years old was in the company of PW2 TW and M watching over grazing cattle in a field near the appellant's house.
3. That the appellant called the complainant and offered her ugali. That, she went near the house and noted that the door was locked but the appellant pulled her into the house through a wooden window. The appellant's house was a single room with a metallic bed which had blankets on it.
4. That, the appellant placed her on the bed while facing up and pulled her dress towards the stomach and then removed her trouser and panty. That the appellant then lay on top of her and insert his "kasusu" in her "kasusu" and she felt pain and cried.



5. That she tried to resist but the appellant hurt her on the nose and mouth and proceeded to defile her and in the process, she was injured on her back by a wire that was on the bed.
6. That when the appellant was done, he gave her Kshs. 20 and removed her from the house through the window. The complainant went back to where PW2, Tabitha and Maina were but did not inform them what happened.
7. However, when her mother went back home, the complainant told her what had happened and she was taken to Miharati Police Station and later taken to hospital where she where the doctor examined her. The appellant was later arrested and charged after investigation.
8. At the close of the prosecution case, the court ruled that the appellant had a case to answer and placed him on his defence. The appellant gave a sworn statement and denied committing the offence stating he was framed. That he had an issue with the complainants as they had stolen his maize and killed his chicken and he reported them to the police station.
9. At the conclusion of the hearing of the case, the trial court delivered its judgment dated, 20th September 202 wherein it held that the prosecution had proved the case on the main count beyond reasonable doubt, convicted the appellant thereon and sentenced him to life imprisonment.
10. However, the appellant being aggrieved by the conviction and sentence has appealed against it on the grounds as here below reproduced:
 - a. That, the appellant pleaded not guilty in the instant case.
 - b. That, the learned trial magistrate erred in law and facts when she convicted the appellant in a prosecution case where age was not proved.
 - c. That, the learned trial magistrate erred in law and facts to when she convicted the appellant in the prosecution case where penetration was not proved.
 - d. That, the learned trial magistrate erred in law and facts by applying wrong standards of proof in criminal case where penetration was not proved.
 - e. That, the learned trial magistrate erred in law and facts by convicting the appellant but did not consider the appellant's defence.
 - f. That, I pray to be present during the hearing of this appeal.
11. The respondent did not file any formal response to the appeal but relied on submission filed. The appeal was disposed of by filing of submissions. The appellant filed submission on 14th February 2023 and argued that the mandatory sentence of life imprisonment was, excessive unconstitutional and prejudiced him.
12. That the court failed to consider his mitigation as provided under Article 50 (2) (a) of *the Constitution* of Kenya, 2010, and section 216 and 329 of the Criminal Procedure Code (Cap 75) Laws of Kenya. He relied on the case of Shadrack Kipchige kogo vs Republic, Sammy Wanderi kugotha vs R, and PKW vs Republic.
13. Further, the charge sheet was defective as he was charged and convicted for an offence under section 8 (1) as read with section 8 (4) of the Act which was in variance with the evidence and thus violated Article 50 (2) (b) and (j) of *the Constitution*. He placed reliance on the case of; Albanus Mwanzia vs Republic.



14. He submitted that the prosecution had the burden to prove its case beyond reasonable doubt as held in the case of *Woolmington vs DPP (1935) EA 462*. That, it is essential the age of the victim is proved by credible evidence as the sentence to be imposed depends on the same as was held in the case of *Alfayo Gombe Okello vs Republic (2010) eKLR*.
15. That the age of the minor herein was not proved to the required standard as no birth certificate or baptism cards were produced.
16. Further, penetration was not proved by the medical evidence and even if it was proved, the evidence did not link him to the act as he was never examined as required under section 122A (j) and (2) of the Penal Code (Cap 63) Laws of Kenya and section 36 (1) of the *Sexual Offences Act*. Further, a medical opinion must flow from the examination findings as held by the Court of Appeal in the case of *Arthur Mshila Manga vs Rep (2016) eKLR*.
17. However, the respondent in submissions dated 28th March 2023 argued that the prosecution had proved its case beyond reasonable doubt. That, penetration was proved through the oral evidence of PW5 Dr Newton Karanja who produced the P3 form and PRC form that indicated there were signs of penetration. Further, the complainant testified how the appellant raped while threatening her with a knife.
18. Further, the trial court found that the complainant was forthright and her evidence was not shaken in cross-examination and believed that she was truthful as required under section 124 of the *Evidence Act*.
19. Furthermore, the appellant was properly identified as he was well known to the complainant and that they interacted for a long period of time before commission of the offence which happened during the day.
20. Lastly, the sentence meted out is the minimum sentence prescribed under the law. That it was lenient in the circumstances of the case and that the appellant was not remorseful and took advantage of the complainant who was desperate. That rape is a heinous and demeaning offence that leaves the victims traumatized for the rest of their lives.
21. At the conclusion of the arguments by the respective parties and in considering the submissions of the respective parties, I note that, as held by the Court of Appeal in the case of; *Okeno vs. Republic (1972) EA 32*, the role of the first appellate court, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
22. In that matter, the court stated as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R 1975*) E.A. 336 and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R [1957] E.A. 570*). 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; it must make its own findings and draw its own 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.”
23. Be that, as it were, a case of defilement is proved if three elements are established. These ingredients were considered in the case of; *Agaya Roberts vs. Uganda, Criminal no. 18 of 2002*, and *Bassita Hussein vs. Uganda Criminal Appeal No. 35 of 1995*, the Supreme Court of Uganda where court stated that, in



order to constitute the offence of defilement the following must be proved: (i) the facts of the sexual intercourse (ii) the age of the victim being under 18 years (iii) participation by the accused in the alleged sexual intercourse.

24. A regard age, it is settled law that, primary evidence in proof of the age of a person is the birth certificate or a medical report and/or a document prepared by a competent medical practitioner. However secondary evidence can be deduced from the evidence of a parent or guardian, or physical observation of the child and/or common sense as held in; Hilary Nyongesa vs Republic HCCRA No. 123 Of 2009.
25. The charge sheet states that RWK was aged 7 years. PW1 RWK testified that she was 7 ½ years and in grade 3. PW4 JNK, the complainant's mother testified and produced a birth certificate in proof thereof and in support of the fact that PW1 was 7 ½ years.
26. A closer analysis of the birth certificate reveals that PW1 was born on 6th August 2014. The offence in question allegedly occurred on 28th May 2022. Therefore, the complainant was slightly older than 7 ½ years which places her in the category of 11 years as prescribed under section 8 (2) of the Act. To that extent the age of the complainant was properly proved.
27. On penetration, the charge sheet states that the appellant caused his penis to penetrate the vagina of the complainant. Penetration is defined under section 2 of the Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person.
28. PW1 the complainant testified that, the appellant defiled her. She states as follows: -

“ the accused lay on me while on the bed. He is the one who placed me on the bed. He removed my trouser. I had a panty which he removed. I had a dress which he plucked towards my stomach. He removed his trousers. When he removed his trouser he lay on me. I was lying facing upwards, while he lay on me facing me. He did bad manners here (points to her genitals)”
29. In addition, PW2 TW testified that she saw the complainant coming out of the appellant's house through the window. She was not happy. That the complainant was walking with her legs apart and demonstrated to the court.
30. PW3 Eunice Nunga states as follows in her testimony: -

“ I went and knocked the door. I called out names, but there was no response. I heard a metallic bed making noise. I shouted and told him leave the child. I kept knocking, George responded that he would come. I went behind the house and saw him removing R from his house through the window. I saw Rosie running with her legs apart. I feared the accused so I waited for the night time and entered R mother's...”
31. PW4 Jane Njeri on her part stated that, the complainant told her: -

“ The accused placed her on the metallic bed. It had no mattress. He removed her trouser and his trouser. He assaulted her and did bad manners.”
32. In addition, PW5. Dr. Newton Karanja a medical officer at Engineer Hospital produced a P3 form filled by Dr. Agnes a medical officer. The results of examination of the complainant, as per the P3 form revealed that, she had bruises on the upper and lower lip, multiple scratches on her upper back.
33. That on the genital examination, the hymen was found to have been broken with inflammation on vagina opening. The history of the complainant to the doctor was that, the suspect (whom she



- identified as the appellant herein) hit her on the face when she screamed and that's how she sustained the facial scratches.
34. Based on all the aforesaid evidence and taking into account the injuries sustained were three (3) days old; there is no doubt that, the complainant was defiled.
35. The question is who was the perpetrator. Was the appellant properly identified as the culprit and/or the one who defiled the complainant. The particulars of the charge states as much. He has denied committing the offence.
36. The evidence to prove the same was led by PW1 the complainant who, indicated that, she knew the appellant well before the incident herein. In her evidence she stated as follows:
- “ George Kariuki (looks at the accused) wronged me we were playing. I was with W and M. We live behind George's house where there is a field.”
37. She went on to states: -
- “ George called me and offered me ugali. I could not see him but I heard him call me. I went to his house. He was inside his house.”
38. When asked to identify the person who defiled her, she said “George is that person.” The appellant is indeed called George. It is also noteworthy that; the complainant clearly stated the clothes the appellant was wearing on the particular date as a jacket, gumboots and trouser. That he had rastas which by the time she was testifying he had cut. Further that she used to see him burn charcoal; and she used to graze cows near his house, a fact the other witnesses alluded to.
39. Finally, the complainant stated that, the appellant is her neighbour. It is therefore clear that, the complainant knew the appellant very well and the issue of mistaken identity does not arise; neither is the appellant alleging the same.
40. To corroborate the evidence of the complainant PW2 testified that she was playing with the complainant when the appellant she referred to a George, who lives in a plot tried to catch her but she ran away. That he got hold of the complainant and saw the appellant and the complainant enter the house through the window. PW2 T went and informed PW3 Eunice Nunga and continued to play.
41. That later she saw the complainant coming out through the window and was walking with her legs apart and looked unhappy but did not tell them what had happened. That the complainant bought them sweets with money she was given by the appellant.
42. Similarly, PW3 testified that, she knows the appellant as a neighbour. That, she saw the complainant, PW2 T, and M playing behind the appellant's house. She heard the appellant calling out the children. She was washing clothes. Shortly PW2 T approached her and told her the complainant was in the appellant's house. That, the appellant had pulled the complainant to his house through the window. That she tried to call out the appellant, he did not respond and she heard the metallic bed make noise.
43. It suffices to note this evidence corroborates the complainant's evidence that the appellant placed her on a metal bed, without a mattress and that is how she was partly injured.
44. PW3 continued to testify that, she eventually saw the appellant remove the complainant from his house through the window. She saw the complainant running with her legs apart. That, in the evening she informed the complainant's mother.



45. PW4 Jane Kamau the complainant's mother and PW6 Corporal Prisca Ngunnu the investigating officer testified that, the complainant told them that, it was the appellant who defiled her.
46. It is against the aforesaid evidence that the appellant defended himself by stating that he has been framed. However, he does not clearly testify to the exact alleged issue he had with the complainant, and one wonders what issue will he have with a 7 ½ year old child. Does the fact that the children stole his maize and/or killed his chicken (if at all), be adequate to frame him with such an undignified offence of defilement.
47. Even then throughout cross-examination he never alluded to the issue of the complainant stealing his maize or chicken. To the contrary it is in evidence that, he lured the complainant by offering to give her "ugali" and after defiling her, gave her Kshs. 20. It suffices to note that, he has admitted that, the complainant was in his house, which places him at the centre as a prime and main suspect in the offence.
48. I therefore find that at the time the offence was committed the only person who was with the complainant is the appellant. He committed the offence and both PW2 T and PW3 Eunice saw him pull the complainant to his house and released her walking with her legs apart, which confirmed he committed the offence. Therefore, I find the conviction safe and decline to quash it.
49. As regards sentence meted out, the appellant was sentenced to serve life imprisonment. The interpretation of what life imprisonment is was discussed in the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR where the Supreme Court stated thus: -
- “(88) Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.”
50. Be that, as it were, that is the sentence provided for under section 8 (2) of the Act, which states: -
- “(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”
51. The court is aware of the decision of the Court of Appeal of Malindi Court of Appeal No. 12 of 2021 Julius Munyao vs Republic which declared the life imprisonment sentence as unconstitutional. However, as in the case of Francis Karioko Muruatetu & another v Republic (supra), I hold the view that, life imprisonment, just like death sentence is only unconstitutional as it relates to its mandatory nature but does not mean the court cannot mete out the sentence of life imprisonment. It is the mandatory nature but not the sentence.
52. Secondly it is still provided for under the Penal Code. It is a statutory sentence and I hold the view that unless and until it is repealed, it is available as the statutory provision supersedes case law under the *Judicature Act*.
53. Be that as it were I note the objectives of sentencing as provided for under clause 4.1 of the Judiciary Sentencing Policy which states: -
- a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 - b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.



- c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
 - d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 - e. Community protection: To protect the community by incapacitating the offender.
 - f. Denunciation: To communicate the community's condemnation of the criminal conduct.
54. However, the circumstances of the case and the victim's interest too must be considered during sentencing. In this matter, the victim is a child of extremely tender age of 7 ½ years. She will live with the trauma of the ordeal the appellant inflicted upon her for the rest of her life. The social stigma, psychological impact cannot be overlooked.
55. To aggravate the situation, the appellant assaulted her as she tried to scream, leaving her with bruises, in addition he sexually assaulted her on a metal bed without a mattress causing her injuries on her back. That is brutal. It is ruthless and beastly. It needs to be condemned wholly.
56. It is my considered opinion that, the appellant is a dangerous person that should be kept off the society. He deserves the life imprisonment and I decline to set it aside. The upshot of the aforesaid is that, the appeal is dismissed in its entirety.
57. Right of appeal with 14 days.
58. It is so ordered

DATED, DELIVERED AND SIGNED THIS 24TH DAY OF JULY, 2023.

GRACE. L. NZIOKA

JUDGE

In the presence of:

The appellant present, virtually

Mr. Atika for the respondent

Ms. Ogutu court assistant

