



REPUBLIC OF KENYA



**Mwenda v Republic (Criminal Appeal 157 of 2017)
[2025] KECA 140 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 140 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 157 OF 2017
W KARANJA, LK KIMARU & J MOHAMMED, JJA
FEBRUARY 7, 2025**

BETWEEN

NICHOLAS MWENDA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Meru
(Kiarie W. Kiarie, J.) dated 11th May, 2016 in HCCR.A. 49 of 2014)*

JUDGMENT

Background

1. Nicholas Mwenda was charged before the Senior Resident Magistrates Court at Githongo for the offence of defilement contrary to Section 8(1)(3) (sic) of the *Sexual Offences Act*.
2. The particulars of the offence were that on 16th December, 2014 at [particulars withheld] village at Imenti Central District of Meru County he intentionally caused his penis to penetrate the vagina of JK, a child aged 12 years.
3. During the trial the prosecution called eight (8) witnesses in support of its case. At the conclusion of the trial the appellant was found guilty of the offence of defilement, convicted and sentenced to twenty (20) years' imprisonment.
4. Aggrieved, the appellant appealed against conviction and sentence before the High Court at Meru (Kiarie W. Kiarie, J.). His first appeal was unsuccessful prompting this second appeal against conviction and sentence.
5. The jurisdiction of this Court on a second appeal is well settled.



In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows:-

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”

6. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.
7. JK (PW1) was the complainant and gave sworn evidence. It was her testimony that she was born on 15th June 2006 and was 13 years old. She testified that on 16th December, 2014 at around 9pm she was in a church at Kathiranga central attending a youth seminar. It was her evidence that the appellant sent one Karimi to call her to meet outside the church. That she thought that the person calling her outside was her brother, Mwenda who shared the same name as the appellant herein.
That upon going outside the church she found the appellant who insisted that he had something to tell her.
8. It was her further evidence that she declined his request and threatened to report him to the Bishop (PW3) who was conducting the youth seminar. It was her evidence that the appellant requested her to escort him to his house to take his jacket and thereafter return to the church. PW1 testified that it was then about 9pm and she obliged. That upon reaching the appellant’s house, he locked her in and left her in his house while he went back to the church. It was her testimony that he returned at about 10pm when he removed her clothes and defiled her.
9. It was her further evidence that subsequently the Bishop knocked at the appellant’s door and that the appellant hid her in a toilet outside his house. It was her further evidence that MK (PW4) found her in the toilet and informed the Bishop whereupon she was taken to the office. It was her further evidence that her mother (PW2) was summoned and AP officers arrested the appellant. It was her further evidence that she was taken to Githongo District Hospital for examination and treatment.
10. EK (PW2) who is PW1’s mother testified that on 17th December, 2014 at around 5am she was asleep and was woken up by one Franco who summoned her outside the house where she found many people outside. It was her evidence that she saw PW1 together with the Bishop who informed her that PW1 had earlier gone missing from the youth seminar, which had been organized by the Bishop. That PW1 had been seen in the company of the appellant and was later found in his house. It was her further evidence that she and others took the appellant and PW1 to the Police Post and PW1 was subsequently taken to the hospital. It was PW2’s further testimony that PW1 was born in 2001 and relied on PW1’s registration of birth certificate, a copy of which was in her possession.
11. HK (Bishop) (PW3) testified that she was a resident of Katheri and was a Bishop. It was her evidence that on 16th December, 2014 she was in the church hosting a 2-day youth seminar for boys and girls. It was her evidence that MK (PW4) was in charge of the security of the girls while CM (PW5) was in charge of the security for the whole event. It was her further evidence that at around 4 am when conducting prayers she noticed that some participants were missing, prompting a roll call. That the roll call revealed that the appellant and PW1 were both missing from the seminar. It was PW3’s further evidence that a search ensued and that she suspected the appellant as he had rented a house near the



- church. That upon knocking at the door of the appellant's house, he reluctantly opened. It was PW3's further evidence that the appellant denied that he was with PW1. It was PW3's further evidence that MK (PW4) found PW1 inside the toilet outside the appellant's house whereupon she took PW1 with her. That the appellant was arrested and PW1's mother (PW2) was summoned to accompany them to the Police Post.
12. MK (PW4) testified that on 16th December, 2014 she was in church and had been tasked to care of the girls who were attending the youth seminar, which had been organized by Bishop (PW3). It was her evidence that at about 4am, PW3 suspected that some children were missing whereupon a roll call was conducted which revealed that PW1 and the appellant were missing. It was her further evidence that PW3 led them to the appellant's house and that upon knocking the door; the appellant initially refused to open the door but subsequently opened it. It was her evidence that she found PW1 in a toilet outside the appellant's house and that the appellant was subsequently arrested.
 13. CM (PW5) testified that on the material day he was in church where a youth seminar was taking place. That at about 4 am PW1 and the appellant were found to be missing from the seminar. That he and the Bishop and others went to the appellant's house, which was near the church. That the appellant opened the door and PW4 found PW1 inside a toilet. That the appellant was subsequently arrested and escorted to the Police Post at Githongo.
 14. Sophia Muthoni Kinoti (PW6) was the Clinical Officer at Githongo Hospital. It was her testimony that on 17th December, 2014 she examined PW1. That on examination, she found that PW1 was in fair general condition and there was no bloodstain or discharge. PW6 further testified that she observed that PW1 had normal genitalia and her hymen was not intact and that no lacerations were noted. Further, that a high vaginal swab revealed numerous spermatozoa, pus cells noted and several epithelial cells. It was her finding that PW1 had been defiled. She produced the P3 form, treatment notes and Post Rape Care Form.
 15. APC JK, No. 20XXXXXX551 (PW7) testified that on 17th December, 2014 while at Kathiranga AP Post members of the Public went to report a case that a school girl had been found in the appellant's house. It was his testimony that he and others proceeded to arrest the appellant and escorted him to the Githongo Police Post.
 16. PC JK, No. 7XXX5 (PW8) who was the Investigating Officer testified that on 17th December, 2014 while at the Githongo Police Post he received a report of a defilement. That he commenced investigations and escorted PW1 to the hospital where it was revealed that PW1 was 12 years old and had been defiled. PW8 produced PW1's birth certificate in evidence.
 17. When placed onto his defence, the appellang gave sworn evidence and did not call any witness. He denied committing the offence and testified that on 16th December, 2014 he was in the church attending a youth seminar. That he was in church the whole day and was given the duty of preparing tea and drawing water for the guests. It was his further testimony that he stayed at the church until 9 pm and attended the "kesha" (overnight service). That he left the church at 10pm and went to his house to sleep. It was his further evidence that at around 5am the next morning he was woken up by Bishop and asked to open the door to his house. That he was informed that some girls who had attended the seminar had gone missing. It was his further evidence that his house was searched but nobody was found inside. That PW1 was found in the toilet outside his house whereupon he was arrested.
 18. In cross-examination the appellant stated that the Bishop was fabricating his case. Further, that PW1 did not know where he lived and that he did not talk to her while they were attending the seminar. It was his further evidence that he had no grudge against PW1 who he had known for over 2 months, as



she was new in the neighborhood. It was his testimony that he and PW1 used to communicate while in church.

19. The trial court dismissed the defence and found in part as follows:

“Accused has raised a defence that at the time of his arrest he was found alone in the house. I have analyzed the evidence and quite clearly he was misleading this court. At the time PW3 knocked the window he took time to open and later took time to open the door, and after a short while the complainant was found in the toilet. The circumstantial evidence herein pointed at accused trying to conceal the complainant knowing very well that the search party would “not have moved into the toilet”. The inference of guilt in this scenario pointed at him without any capable explanation, as this was his house and the compound where he lived. There was no doubt in my mind that he knew of the presence of the accused in that house...In a nutshell this court after considering the entire evidence presented before it, is convinced that indeed accused (sic) is the one who had carnal knowledge of the minor.”

20. Aggrieved by the conviction and sentence, the appellant appealed to the High Court which after re-evaluating and analyzing the evidence on record, found as follows:

“There is overwhelming evidence that the appellant had sexual intercourse with the complainant. It is also abundantly clear that it was consensual. However, since the complainant is a minor she lacked capacity to give consent. The conviction by the learned trial magistrate cannot be faulted. The appellant was sentenced to serve 20 years imprisonment...The appellant was sentenced to the minimum sentence. I cannot interfere with it for doing so will amount to an illegality. From the foregoing analysis of the evidence on record I find that the appeal cannot stand the same is dismissed. The appellant shall serve the sentence meted out by the trial court.”

Submissions

21. At the hearing of the appeal, the appellant who was acting in person submitted that the prosecution failed to conclusively prove that he defiled PW1. The appellant further submitted that PW1 was not the only participant who was found to be missing from the youth seminar when the roll call was called out at 4am on the material day. The appellant further submitted that the fact that he delayed in opening the door when Bishop knocked was not conclusive evidence that he hid PW1 in the toilet. The appellant asserted that being late at night, it was unsafe for him to open before ascertaining who was at the door.
22. The appellant further submitted that the two courts below did not bear in mind these important questions to test the veracity of the witnesses whose testimonies could not form a complete chain of events to arrive at a safe conviction. The appellant asserted that the failure to enquire on these matters cast doubt on the whole trial thereby occasioning injustice.
23. The appellant further submitted that the prosecution did not call Karimi who was a vital witness. That Karimi could have shed light of what transpired on the material night but was left out deliberately. Further, that had Karimi’s evidence been adduced, the trial court’s verdict would have changed and the court would have set the appellant at liberty.
24. There are no submissions by the respondent on record.

Determination

25. We have considered the record of appeal, the appellant’s submissions, the authorities cited and the law.



26. The appellant filed amended grounds of appeal raising three (3) grounds of appeal to wit that the 1st appellate court erred by admitting unsatisfactory, doubtful evidence, which was not safe to base a conviction on. That the prosecution failed to prove its case beyond reasonable doubt by entirely basing a conviction on a balance of probabilities without testing the veracity of all the testimonies tendered in order to serve justice and for justice to be realized. Further, that the prosecution failed to evaluate matters of fact and law and that a vital witness, one Karimi, was not called to testify.
27. We discern 3 issues for determination in this appeal: whether the prosecution proved its case beyond all reasonable doubt; whether the failure by the prosecution to call one Karimi as a witness was fatal to the prosecution case; and whether the sentence imposed by the trial court and upheld by the 1st appellate court was harsh and excessive.
28. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three (3) key ingredients: the age of the victim; that there was penetration; and the positive identification of the perpetrator. See: Charles Karani vs. Republic, Criminal Appeal No. 72 of 2013.
29. In the instant appeal, PW1 testified that she was 13 years old in 2015 when she testified. Her mother (PW2) testified that PW1 was born in 2001 and was therefore 12 years old at the time of the commission of the offence. The P3 form also indicated that PW1 was 12 years old. The Birth Certificate produced in evidence indicated that PW1 was born on 15th June, 2001. The trial court found that PW1 was, therefore, 13 years and 6 months at the time the offence of defilement was committed. We, therefore, find that the prosecution proved that PW1 was a minor when the offence of defilement was committed.
30. On penetration, PW1 testified that the appellant defiled her on the material day. Medical evidence produced by PW6 proved that upon examination of PW1 her findings were that her hymen was not intact and that PW1 had been defiled. On the identity of the perpetrator, PW1 testified that the appellant defiled her in his house after luring her from the church where they were both attending a youth seminar. The appellant conceded that he was known to PW1 as they had lived in the same neighbourhood for a period of over two months. PW1's identification of the appellant was therefore by recognition. PW3 and PW4 corroborated PW1's evidence as they found PW1 in a toilet outside the appellant's house.
31. In the circumstances, we find that the prosecution proved the three (3) ingredients of the offence of defilement beyond all reasonable doubt.
32. On the failure by the prosecution to call one Karimi as a witness, from the record, PW1 testified that Karimi received a text message through her cell phone informing her that the appellant wished to see PW1 outside the church. The appellant assailed the failure by the prosecution to call Karimi as a witness as she would have shed light on what transpired on the material night. The appellant asserted that the prosecution deliberately failed to call Karimi as a witness.
33. It is notable that this issue was not raised in the two courts below. This Court in [*John Kariuki Gikonyo v Republic*](#) [2019] eKLR pronounced itself as follows regarding completely new issues raised in a second appeal:

“The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her?”



34. This Court when faced with a similar issue in *Alfayo Gombe Okello v Republic* [2010] eKLR; held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”

The issue of failure by the prosecution to call a particular witness, therefore, ought not to be entertained at this stage.

35. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We, therefore, find that the appellant’s conviction was safe.

36. On the issue of sentence, this Court in the recent decision of *Octavious Waweru Kibugi V Republic* Criminal Appeal No. 41 of 2018 stated as follows:

“On the issue of sentence, we defer to the recent decision of the Supreme Court in *Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA} & 3 others {Amicus Curiae}* (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the *Sexual Offences Act* remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361(2) of the *Criminal Procedure Code*, outside our remit.”

37. By parity of reasoning, we find that this appeal is devoid of merit and we dismiss it in its entirety.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

