



**Kirui v Republic (Criminal Appeal 92 of 2017)
[2024] KECA 959 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 959 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 92 OF 2017
FA OCHIENG, GWN MACHARIA & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

RODGERS KIPNGENO KIRUI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nakuru
(M.A. Odero, J.) dated 6th July 2017 in HC.CRA. No. 296 of 2014)*

JUDGMENT

1. The appellant, Rodgers Kipngeno Kirui, was charged, tried and convicted for defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that on 20th June 2013 within Nakuru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CC, a child aged 7 years. The appellant also faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. Upon conviction on the main count, the appellant was handed a life sentence. He challenged the decision of the trial court before the High Court but his appeal was dismissed in its entirety.
2. The appellant is now before us on a second appeal raising the following grounds: that the prosecution failed to call a critical witness; that his defence was not considered; that a crucial document was not produced; and that he was not subjected to medical examination.
3. CC testified as PW1 stating that on the material night while she was sleeping with the appellant's sister on the floor, the appellant who was sleeping on the bed joined them on the floor and proceeded to defile her as well as his own sister. The next day, she informed her mother, JR (PW2), of the ordeal.
4. PW2, on her part testified that PW1 was indeed her daughter and was 7 years old and in nursery school. It was her evidence that on 20th June 2013, she allowed PW1 to go for a sleepover at her friend's home.



The child came back the following day at 2.00 pm. Two days later, she realized that her daughter was walking with an awkward gait. As she washed her, she saw blood on her private parts. Upon interrogating the child, she told her that the appellant had done “tabia mbaya” to her when she had gone to sleep at her friend’s place. She reported the matter to the police. The appellant who had denied the allegation was later arrested while fleeing from the village.

5. Police Constable Emma Moraa (PW3) testified that the case was referred to her for investigations on 6th June 2013. She escorted the complainant to hospital where a P3 form was filled. She also recorded witness statements before charging the appellant who had been arrested by the villagers.
6. CC (PW4) testified that she filled the complainant’s P3 form while working as a nursing officer at Kiptagich Dispensary. While examining PW1, she observed blood stains on her inner clothes, swelling on her labia minora and the hymen was missing. The laboratory results showed high count of white blood cells indicating that she had an infection. She concluded that the complainant was penetrated.
7. In his defence, the appellant denied committing the offence stating that he was in Eldama Ravine for their manager’s funeral between 19th and 26th May 2013. Upon his return, PW2 informed him that she was taking PW1 to the hospital. He told her that he did not have any money and he was surprised when he was arrested and accused of committing an offence he knew nothing of. His request to the police to take him to hospital for medical examination was declined.
8. When the appeal came up for hearing, the appellant appeared virtually from Nakuru Main Prison while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. The parties had filed their respective written submissions which they opted to fully rely on.
9. In his submissions, the appellant reiterated his grounds of appeal and submitted that the learned Judge erred in not appreciating that the appellant’s sister, who was a witness to the crime was never called as a witness. He also submitted that there was no conclusive medical investigation as the results of the alleged infection of PW1 were not produced at the trial. Further, that the laboratory tests were inconclusive. Additionally, the appellant asserted that he was not subjected to medical examination and there was therefore no evidence to link him to the offence. It was his contention that his alibi defence was not properly considered. On the severity of the sentence, the appellant referred to the case of *Francis Opondo v. Republic* [2017] eKLR to urge that he should be subjected to the least severe sentence.
10. In opposing the appeal through the submissions dated 7th March 2024, Mr. Omutelema started by rehashing the evidence on record before asserting that the offence was proved beyond reasonable doubt. Turning to the ingredients of the charge of defilement, counsel referred to the definition of “penetration” in section 2 of the *Sexual Offences Act* and submitted that the evidence of PW1, PW2 and PW4 adequately established the element of penetration. As regards the identification of the appellant, counsel pointed out that the appellant was known to the complainant and PW2, hence his identity as the perpetrator was never in doubt. It was counsel’s submission that the evidence of PW1 was received in accordance to section 124 of the *Evidence Act* and in line with section 19 of the *Oaths and Statutory Declarations Act*. Counsel argued that the appellant’s defence was considered and correctly discarded. He maintained that the two courts properly appraised and analysed the evidence on record. Finally, on sentence, counsel appreciated the holding in *Kennedy Okinyi Owino v. Republic* [2024] eKLR on the unconstitutionality of life sentence for being indeterminate and urged that the appellant should be handed a definite prison sentence equivalent to life imprisonment as the circumstances of the case called for a severe sentence.



11. This being a second appeal, our mandate under section 361(1)(a) of the Criminal Procedure Code is as was explained in Adan Muraguri Mungara v. Republic [2010] eKLR as follows:

“Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

12. We have duly considered the record of appeal, the memorandum of appeal, the submissions and authorities referred to by the parties herein. In our view, the following issues will determine the appeal: whether the failure to call the appellant’s sister was detrimental to the prosecution’s case; whether the appellant’s defence was considered; whether there was failure to produce a critical document; and whether the appellant ought to have been subjected to medical examination.

13. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. For a conviction to ensue, the prosecution was tasked with proving penetration, the identity of the perpetrator and that the victim was under 18 years at the time of the commission of the offence. For purposes of sentencing, which is graduated according to the age of the victim, the prosecution is required to prove the exact age of the victim. The onus of proving each of the elements of the charge belonged to the prosecution.

14. In considering the appellant’s claim that the prosecution failed to call a critical witness, we start by referring to section 143 of the Evidence Act which states that no particular number of witnesses shall be required for the proof of any fact. It therefore follows that what is expected of the prosecution is to call sufficient witnesses to establish the case it has set out to prove against an accused person. In that regard, the prosecution retains the discretion to decide which witnesses to call in order to prove the charge. This position of the law was expressed in Julius Kalewa Mutunga v. Republic [2006] eKLR thus:

“As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive”

15. Similarly, in Joseph Kiptum Keter v. Republic [2007] eKLR, the Court held that:

“Bukonya v. Uganda [1972] EA 549 clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.”

16. However, if the evidence of the summoned witnesses renders the prosecution’s evidence insufficient to prove their case, and there were other witnesses who could have been called to testify but were not called, the court is entitled to draw an adverse inference. Thus, in John Waweru Njoka v. Republic [2001] eKLR it was stated that:

“It is settled law, that where the prosecution fails to call material witnesses, the Court may draw an adverse inference against the prosecution. That however, only applies where prosecution evidence tendered is weak and inadequate to support conviction.”



17. In determining whether there was a shortfall in the prosecution's case because of the failure to call the appellant's sister, we will need to assess the evidence on record vis a vis the assumed evidence of the missing witness. This question must be considered in the context of the elements of the offence as already highlighted. The age of the complainant was never in doubt. PW2 testified that the complainant who was her daughter was aged 7 years and in nursery school. The trial court also observed that the complainant was of tender age. The evidence proving penetration is found in the testimonies of PW1, PW2 and PW4. PW1 vividly recalled the events of the night of 20th June 2013. PW2 testified as to having observed the injuries on the complainant's private parts. This evidence was corroborated by the medical expert (PW4), who, upon examination of the complainant noted that the labia minora was swollen and the hymen was missing, thus confirming that the complainant had indeed been defiled. The identity of the appellant as the perpetrator was never in doubt. He was known to both PW1 and PW2. On the fateful night, PW1 had gone for a sleepover at the home of her friend, a sister of the appellant.
18. On the alleged failure by the prosecution to call a crucial witness, the appellant's contention is that since his sister was at the scene of the incident, she ought to have been called to testify. In light of the evidence we have restated above, we find no loophole which the evidence of the appellant's sister would have sealed. The evidence on record was sufficient to establish the offence against the appellant and the prosecution was not under an obligation to bring forth each and every witness but to only call adequate witnesses to establish their case. We also approve the High Court's determination on this issue noting that there was no guarantee that the appellant's sister or members of the appellant's family would have been willing to testify against their kin. Our conclusion is that there is no merit on this ground of appeal.
19. Another ground of appeal raised by the appellant is that his defence was not considered. This allegation is far from the truth. At page 9 of the High Court's judgment, the learned Judge considered the appellant's testimony noting that the alibi defence was not only raised late in the day but was also vague. We agree that the defence statement could not discharge the concrete evidence adduced by the prosecution. The two courts below were therefore right in dismissing the appellant's defence.
20. The other issue raised by the appellant which we set to consider is whether it was compulsory to subject the appellant to medical examination as part of the investigations. What we hear the appellant to be saying is that he was not linked to the offence because of the failure to subject him to medical examination. The appellant hinges this argument on the provisions of section 36(1) of the *Sexual Offences Act* which states that:
- “Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.”
21. Our understanding of the provision, and as has been interpreted by the Court on several occasions, is that it is not mandatory for an accused person to be subjected to medical examination in order to prove the offence of defilement. The evidence of an accused person's medical examination, if available, would be an added advantage to the court in determining the accused person's guilt. However, the absence of such evidence does not vitiate the finding of guilt of an accused person if the evidence available



establishes all the elements of the offence. In that regard, it was stated in W.K.K v. Republic [2016] eKLR that:

“As such, it is evident that subjecting an accused to DNA test is not a mandatory requirement of law, to prove that he committed the offence, and it is not the only evidence upon which a conviction can be based.” The upshot of the foregoing is that the appeal against conviction lacks merit and is hereby dismissed.

22. The appellant has also challenged the sentence of life imprisonment imposed upon him. In principle, and as provided under section 361(1)(a) of the Criminal Procedure Code, our jurisdiction on a second appeal does not traverse the question of severity of sentence which is deemed to be a matter of fact. Under section 361(1)(b) of the Criminal Procedure Code, we can only step into the arena of sentencing when a question about the legality of a sentence has been raised. Further, a perusal of the record shows that the appellant is raising the issue of sentence for the first time before us. The issue having not been raised before the first appellate court, it follows that it cannot fall for determination in this appeal. Consequently, the appellant’s appeal against sentence also fails.
23. In conclusion, we find no merit in the appellant’s appeal in its entirety. His appeal is dismissed.
24. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY 2024

F. OCHIENG

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

