



**Kirinya v Republic (Criminal Appeal 128 of 2018)  
[2024] KECA 1125 (KLR) (6 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1125 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CRIMINAL APPEAL 128 OF 2018  
W KARANJA, LK KIMARU & AO MUCHELULE, JJA  
SEPTEMBER 6, 2024**

**BETWEEN**

**AMOS KIRINYA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Meru  
(D.S. Majanja, J.) dated 17th October 2018 in HCCRA No. 25 OF 2018)*

**JUDGMENT**

1. The appellant, Amos Kirinya, was on 5<sup>th</sup> March 2018 convicted by the Principal Magistrate at Meru of defilement contrary to section 8(1) and (2) of the Sexual Offence Act, whose particulars were that on 14<sup>th</sup> and 16<sup>th</sup> July 2016 in Buuri District within Meru County, he intentionally caused his penis to penetrate the vagina of JK (PW 1), a girl aged 7 years. He was sentenced to life imprisonment. His appeal against conviction and sentence was on 17<sup>th</sup> October 2018 dismissed by D.S. Majanja, J. of the High Court at Meru.
2. This is a second appeal. Under section 361(1) of the [Criminal Procedure Code](#) our jurisdiction is confined to matters of law only. We will only interfere with the concurrent findings of fact by the two courts below if they were based on no evidence, or on a misapprehension of the evidence, or if it is demonstrated that the two courts below acted on wrong principles in making the findings. (See [Samwel Warui Karimi - v- Republic](#) [2016]2eKLR).
3. The prosecution evidence on which the appellant was convicted was that he was living in the same house with his child, PW1. PW 1 was aged 7 and was school-going. On 15<sup>th</sup> July 2016 at night, she was in bed when the appellant said he was going to fetch water. When he returned, he removed his and her clothes and slept on top of her. He removed his penis which he inserted in her vagina. He did this on two consecutive days. He was warning her not to tell anyone and she was promised that she would be



bought a big loaf of bread. The next day in the evening at about 7.50pm, PW 2 JKK met the child on the way. She had been chased from home by the appellant. PW 2 interrogated her and took her to his home. He contacted her mother, CM (PW 3), who was staying at (Particulars withheld) market. She came. This is when PW 1 narrated to them that she had been defiled by the appellant. PW 3 contacted both the child's headteacher and the OCS of Subuiga Police Station. The appellant was arrested. It took a week for PW 1 to be taken to Meru General Hospital. When examined, it was found that her vagina was "okay". It had no bruises. However, her hymen was broken. There were numerous blood and puss cells, but no spermatozoa detected. The appellant was charged.

4. The appellant denied the charge in sworn defence. He testified that he had been framed. He stated that when he married PW 3, she already had PW 1. While they were living together, he discovered that she had another child. As if this was not enough, one day he found her in his house with another man. This is when he chased her. There was a dispute that escalated up to the Children's Office over PW 1 and where she should stay. Ultimately, she was staying with one Kathomi but he was responsible for her feeding. PW 3 stole the child from Kathomi. He looked for the child for two weeks. The matter ended up at the Children's Office. The next thing was that he was arrested and charged.
5. This is the evidence on which he was convicted. In confirming the conviction, the learned Judge observed as follows:-

“ 11. The evidence of corroboration was twofold. First, PW 2 found her in state of distress on the material night after she was chased away from home. Second, the medical evidence tended to confirm the fact of penetration.

12. The appellant attacked the medical evidence as insufficient. This is explained by the fact that the child was seen one week after the incident and the only evidence of penetration was numerous pus and blood calls. Likewise, the failure to seek medical treatment on time does not weaken the prosecution case. PW 2 explained in cross- examination that she did not have money and it only after intervention from officers from the school that the child was taken to the police station and then referred to the hospital.”

6. The appellant's complaint before us was contained in the grounds of appeal as follows:-

“ 1) That the learned trial magistrate erred in both law and facts by failing to note that the prosecution witnesses gave hearsay, contradictory and conflicting testimonies;

2. That the learned trial magistrate erred in both law and facts by failing to note that the prosecution case was not proved beyond reasonable doubts.

3. That the learned trial magistrate erred in both law and facts by failing to note that there was vendetta between the mother of the complainant and the appellant.

4. That the learned trial magistrate erred in both law and facts by failing to note that the expert report did not support the allegations as the expert recited that no spermatozoa seen.

5. That the learned trial magistrate erred in both law and facts by failing to note that the prosecution failed to summon vital witnesses ie the area manager to support the allegations.



6. That the learned trial magistrate erred in both law and facts by failing to note that the child was taken to hospital after 7 days.
7. That the learned trial magistrate erred in both law and fact by failing to give the appellant enough time to prepare his defence, as the defence witnesses were not called.
8. That since I cannot recall all the transpired during the trial, I now beg the honourable court to furnish me with the court proceedings and judgment to draft more cogent grounds during the hearing of this appeal.
9. That I pray to be present during the hearing of this appeal.”

7. We have to determine whether, on the proper re-examination of the evidence before the trial court, the learned Judge’s finding that the charge had been proved beyond reasonable doubt was sustainable. We shall also consider the appellant’s complaint that there was bad blood between him and PW 3, and whether it was possible that he had been framed. We shall deal with these issues together.

8. We have been concerned that, in dismissing the appellant’s defence, the trial court observed that he had not called the persons he had mentioned to come to support his testimony. They included “Kathomi” and “Nyamu”. The court then went on to say the following:-

“I do find the accused persons defence not merited at all. In grievances case like this of defilement where the sentence is severe the accused person was if any supposed to exonerate himself if indeed, he was innocent as claimed by himself (sic).”

9. This was complete misdirection on the part of the trial court. It was clear that the appellant’s defence was discounted because he had not called witnesses to support it. It is also clear that the trial court expected the appellant to call evidence to exonerate himself. This is why he had been convicted. Unfortunately, the learned Judge did not pick these misdirections and deal with them, to be able to satisfy himself that, despite them, the appellant had been convicted on safe evidence.

10. An accused in a criminal case is convicted on the strength of the prosecution case, and not on the weakness of the defence case. The burden is always on the prosecution to prove the guilt of the accused person beyond reasonable doubt, and that burden never shifts to the accused. Where the accused person raises a defence, it must be weighed against the prosecution case and can only be dismissed if found to be incredible.

11. In this case, the appellant told the trial court that he had been framed. Was this claim investigated by the trial court? Did the learned Judge deal with it? Why were PW 3 and the appellant staying apart if they were a couple? If PW 1 was living alone with the appellant, where was PW 3, the mother? According to PW 2:-

“The accused had abducted her and we had a case of the lost child from school.....”

According to the recorded evidence of the appellant, there was an outstanding case between him and PW 3 over PW 1, and that the Children’s Office was dealing with the matter. Both the courts did not interrogate this. It is evident from the record that the appellant intended to call the Chief and the Children’s Officer as witnesses in his defence. He requested for summons to issue for them to attend. After he testified, the defence case was adjourned severally but the witnesses did not attend. He was apparently not on bond and was relying on the prosecution to help bring the witnesses. The summons had been issued through the police. So, even as the trial court was blaming the appellant for not calling



witnesses to exonerate himself, the record showed otherwise. He had tried to get the witnesses but the police did not serve the summons on them.

12. It was in the face of the foregoing evidence that the appellant's claim that he had been framed should have been considered by the two courts below. There was certainly bad blood, a strained relationship, between him and PW 3. There was reason to frame him. The fact that the victim was medically examined a week after the alleged incidents of defilement, in our view, raises suspicion and supports the appellant's contention that he may have been framed. The claim by the appellant that there was insufficient evidence to prove defilement should have been considered bearing in mind this strained relationship. Yes, the child's hymen was broken. But a sexual assault of penetrative nature, given her age and the appellant's age, would have left the child with obvious injuries to her genitalia. Even if the examination was after a week, there would have been found scars or healing wound to the genitalia.
13. In conclusion, we find that the appellant was not convicted on safe evidence. We allow the appeal, quash the conviction and sentence and order the appellant be set at liberty unless he is otherwise lawfully held.

**DATED AND DELIVERED AT NYERI THIS 6<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the Original.

Signed

**DEPUTY REGISTRAR**

