



REPUBLIC OF KENYA



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

**Kamwa v Republic (Criminal Appeal 49 of 2020)  
[2023] KECA 212 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KECA 212 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 49 OF 2020  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
MARCH 3, 2023**

**BETWEEN**

**MICHAEL MWANGI KAMWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya (D S Majanja, J) dated on 6th January, 2020 in Kiambu HCCR Appeal No 52 of 2019)*

**JUDGMENT**

1. In this appeal, the appellant, Michael Mwangi Kamwa, is challenging his conviction for the offence of defilement, in respect of which he is serving a jail term of 30 years. He was charged, convicted and sentenced as aforesaid after being found guilty of the offence of defilement contrary to section 8(1) as read with sub-section (2) of the *Sexual Offences Act* (“the act”). The particulars of the offence were that on August 21, 2013 within Kiambu County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of RN, a child aged 8 years.
2. As already stated, the trial court upon finding him guilty, sentenced him to life imprisonment. However, on appeal, the High Court confirmed the conviction but substituted the life sentence with 30 years’ imprisonment. The appellant was not satisfied by the judgment of the High Court and thus preferred this second and perhaps last appeal before this court.
3. The facts as brought out by the five prosecution witnesses who testified before the trial court were that the appellant was a well known person to the family of RN. She testified that on August 21, 2013, the appellant whom she referred to as “mwalimu”, went to their house and asked her father to go and look for a battery for his lorry. When her father left, the appellant took her inside the lorry removed her clothes, and sexually violated her. Thereafter the appellant warned her not to tell anyone and gave her



- Kshs 10.00 to buy mandazi. RN however informed her big brother, GK of the incident who in turn told their mother and consequently her father, JM and together they took her to the hospital.
4. PW2, GK went home and found a lorry parked outside their home and noticed some activity therein. He saw his sister with mwalimu. He went into the house then peeped through the window and saw mwalimu caressing RN. The next day, when he talked to her about the incident, RN informed him that mwalimu asked her to touch his private parts, he then called his mother and PW1 was taken to the hospital.
  5. PW3, JM, the father to RN was at home on the material day when the appellant who is a family friend and a mechanic came to his house to repair his lorry and asked him to go fetch a battery. He left the appellant in his house and when he came back, did not find the appellant. Later, PW2 informed him that he had noted suspicious behaviour between the appellant and RN. He then took PW1 to the hospital where PW 1 was examined and put on treatment, and they were then referred to the police station.
  6. PW4, Joan Munene a Clinical Officer based at Ruiru Sub-County Hospital produced the P3 form, treatments notes and Post Rape Care (“PRC”) forms for PW1 as exhibits. She stated that on examination, her hymen was torn, but there were no lacerations or vaginal discharge. She concluded that there was clinical evidence to show that RN was defiled and there was a history of previous sexual encounters.
  7. PW5, PC Mohammed Rono, the investigating officer of the case produced the clinic card of RN as exhibit to prove her age.
  8. Placed on his defence, the appellant elected to give sworn evidence without calling any witness. He stated that he knew RN and her father as they lived in the same area and he would repair his lorry. That on the material day, he did not go to RN's home and did not therefore defile her; that the case was a fabrication because PW3 did not want to pay him for the repair works amounting to Kshs 2,000.00 he carried out on his lorry.
  9. The trial magistrate was satisfied that the prosecution had established its case to the required standard and convicted the appellant and sentenced him as already stated, to life imprisonment.
  10. Having considered the appeal filed by the appellant, the learned judge dismissed the appeal on conviction but allowed and set aside the appeal on sentence by substituting the sentence of life imprisonment imposed by the trial court with a sentence of 30 years imprisonment on the basis of the Supreme Court decision in *Francis Karioko Muruatetu and Others v Republic [2017] eKLR*, “the Muruatetu case”.
  11. The appeal before us is on the grounds that the two courts below, both erred in holding that the prosecution had proved the case against the appellant, in not holding that the prosecution evidence was inconsistent and contradictory; that the doubts created in the prosecution case ought to have been resolved in his favour; that medical evidence was unreliable; that crucial witnesses were never called to testify; and finally, the sentence imposed was manifestly harsh and excessive.
  12. The matter proceeded by way of both oral and written submissions. The appellant was present in person while Mr Omondi, learned counsel from the Office of the Director of Public Prosecutions appeared for the respondent.
  13. In his submissions, the appellant stated that the two courts below based their judgments on the prosecution evidence that was weak, doubtful and unreliable and which did not meet the threshold. The appellant cited the case of *Cosmas Mwaniki Mwaura v Republic HCCR Case No 11 of 2005 (UR)*



for the proposition that in a criminal trial, any doubt in the prosecution case should be resolved in favour of the accused.

14. On penetration, he submitted that it was paramount for the medical evidence to show and prove that there was partial or full penetration, which was not the case here. That PW4's evidence was that his examination was external limited to the extent that the hymen was torn and nothing more. Accordingly, there was doubt as to whether there was penetration of whatever kind.
15. It was submitted that the most important witnesses in cases of defilement are the victim and the doctor and their evidence should corroborate each other in a manner that will not raise doubts or suspicion. That hymen can be broken as a result of excessive bike riding and or any other trauma. The appellant submitted that if this court was to carefully consider the evidence of PW1, PW2, PW4, it will automatically come up with a different conclusion contrary to that arrived at by the two courts below. That the prosecution was hinged on mere suspicion going by the evidence of PW3. The appellant cited the case of *Burunyi v Uganda [1968] EA 228*, for the proposition that suspicion upon suspicion must remain suspicion and cannot be the basis of a conviction. That, as regards contradictions and inconsistencies, what was evidenced from the PRC was that the hymen was missing, there were no lacerations and bleeding. The appellant submitted further the age of an offender or convicted person is an important factor in sentencing. The appellant's age was not factored in his sentencing by the High Court resulting in a sentence that was still harsh and excessive.
16. The respondent on the other hand submitted that the case against the appellant was proved beyond reasonable doubt and this court ought not to interfere with the same save to enhance it. That it was proved that RN. was defiled, that the appellant was at the scene and defiled RN. who was 8 years old. That the High Court properly evaluated the evidence in the trial court and concluded and rightly so that RN was defiled.
17. That the hymen was torn according to the medical evidence tendered by PW4. That of importance was the fact that PW1 and PW2 knew the appellant very well as he was commonly known as mwalimu and that PW2 had seen the appellant in action. Lastly, that the High Court erred in interfering with the sentence and it was in the interest of justice that the earlier sentence be reverted to even though the respondents had not filed a cross appeal.
18. As this is a second appeal, under section 361(1)(a) of the Criminal Procedure Code only matters of law may be raised and considered. See *Njoroge v Republic [1982] KLR 388*.
19. We have considered the record of appeal, respective submissions and the law. The appellant's grievance is that the offence for which he was convicted and sentenced was not proved to the required standard. There was no proof of the age of RN, or penetration, or that the appellant was the perpetrator of the crime.
20. As regards age, the appellant's grievance appears to be the mix up of his own age. He does not appear to appreciate that it is the age of the victim, as opposed to his age that is paramount for the prosecution to establish, given that it was never suggested that the appellant was not an adult. In the case of *Hadson Ali Mwachongo v Republic [2016] eKLR*, this court stated that:

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim.” [emphasis added]



21. The age of RN was proved by the evidence of PW2, PW3 and PW4 all of whom testified as to the age of RN. In particular, PW4 tendered in evidence the P3 form, the hospital treatment notes and PRC forms which all indicated that RN was aged 8 years at the time of the incident. The appellant did not dispute this fact either in his cross-examination of the witnesses or in his defence. Finally, we note that the two courts below arrived at concurrent findings on the issue and we have no reason to interfere with the finding.
22. With regard to penetration, we have already alluded to RN's testimony which was clear that it was the appellant who was commonly known as mwalimu who defiled her in the lorry that he was repairing. That he had taken her inside the lorry, removed her clothes and sexually violated her. This evidence was corroborated by that of PW2 who found the appellant in the act on the material day.
23. The medical report produced by PW4 indicated that the victim's hymen was torn thereby concluding that she had been defiled. This evidence, coupled with the PRC forms, P3 form and hospital treatment notes indeed proved the act of penetration. The argument by the appellant regarding issues such as the extent of the torn hymen, the measurements, the instruments used in measuring the torn hymen and when the hymen was torn, were not canvassed before the trial court and 1<sup>st</sup> appellate courts. To our mind, these complaints are irrelevant as it is clear that under section 2 of the *Sexual Offences Act*, penetration is defined to mean, "the partial or complete insertion of the genital organs of a person into the genital organ of another person". As stated by this court in the case of *Erick Onyango Ondeng v Republic [2014] eKLR*:

"In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

Also in *Mark Oiruri Mose v R [2013] eKLR* where this court stated thus:

"Many times the attacker does not fully complete the sexual act during the commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ" [Emphasis added].

24. There is no doubt therefore that there was penetration of RN by the appellant. The two courts below were therefore right in reaching concurrent findings on the issue.
25. With regard to the identity of the defiler, the appellant was a person who was well known to the RN's family. RN gave a detailed account as to how the appellant defiled her in broad daylight thereby discounting the question of mistaken identity. PW2 found them in the act. Further, PW3 confirmed having left the appellant in the homestead as he went for the battery but when he came back, he was nowhere to be seen, why? He thus had opportunity to commit the crime. The appellant himself, indeed, confirmed that he knew the victim's family, though on the material day he claimed not to have been anywhere near the home of RN. Instead, he asserted that he was framed with the case because of a grudge on account of failure to be paid his dues by PW3 for repairing his lorry. We think that this defence was hogwash and was rightly rejected by the two courts below. We cannot imagine a situation where a parent would put his/her child in the harms way and in particular have her defiled so as to settle scores. Further, how would such parent influence medical evidence? We are satisfied that the prosecution evidence irresistibly pointed to the appellant as the perpetrator of the offence.



- 26. All in all, we conclude that all the ingredients of the offence for which the appellant was convicted and sentenced were proved to the required standard as concluded by the trial court. We have no basis for interfering with the same.
- 27. Taking into totality all the foregoing, we are satisfied that the first appellate Judge was very thorough in his re-analyzing of the record before him. He considered in detail each and every complaint raised by the appellant before him. He backed each conclusion with supportive evidence and gave sound reasoning as to why he either upheld or discounted any issue raised by the appellant. The reasoning was well balanced, fortified by principles of law as and when there was need to cite these, and we find no fault in the approach taken by the first appellate court. We are in agreement that both courts below arrived at the correct conclusion as to the culpability of the appellant.
- 28. As for the sentence, the first appellate court fell in error when it substituted the sentence imposed by the trial court of life imprisonment with that of 30 years on the basis of the Muruatetu case. However, since there is no cross-appeal on the issue by the State and since it did not even bother to file notice to enhance the sentence, we shall leave the matter at that.
- 29. The upshot of the above is that there is no merit in the appeal. It is dismissed in its entirety.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of March, 2023.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**A K MURGOR**

.....

**JUDGE OF APPEAL**

**S OLE KANTAI**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

