



**Gitau v Republic (Criminal Appeal 34 of 2021)
[2023] KECA 749 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 749 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 34 OF 2021
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA
JUNE 22, 2023**

BETWEEN

REUBEN MWANGI GITAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi
(Warsame, J.) dated 11th January, 2010 in HC. CR.A. No. 139 OF 2007)*

JUDGMENT

1. This is a second appeal from the judgment of the High Court (Warsame, J., as he then was), where the appellant’s first appeal was dismissed. The appellant, Reuben Mwangi Gitau, had been charged in Gatundu Magistrates Court with the offence of defilement of a girl contrary to Section 145 of the [Penal Code](#) particulars being that on April 8, 2006 he had carnal knowledge of “MWM”, a girl under the age of sixteen years. There was an alternative charge of committing an indecent act with a child. He was convicted and sentenced to imprisonment for life. The appellant appealed to the High Court, and as we have seen, the first appeal failed. Being a second appeal, our jurisdiction is limited by Section 361 (1) (a) [Criminal Procedure Code](#) to a consideration of issues of law only and we must resist the temptation to consider matters of fact which have been considered by the trial court and re- evaluated on first appeal. That mandate has received various judicial pronouncements of this Court in cases such as [John Kariuki Gikonyo v Republic](#) [2019] eKLR stated:

“(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the [Criminal Procedure Code](#):

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such



findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213.”

2. We shall visit the facts of the case to satisfy ourselves that the two courts below carried out their mandate as required by law and to see whether there are any points of law raised in this appeal meriting our consideration.

3. The minor, PW1, told the court that she knew the appellant as a neighbor and constant visitor to their home, and on the material day, she was playing with her friend “MWN” (PW2) when the appellant lured her to his house to help him remove jiggers and then removed her clothes and defiled her. She felt a lot of pain. The appellant instructed her and her friend not to reveal what happened threatening them that he would kill them if they did. He gave her 10 shillings. She immediately revealed to her said friend what had happened and that she had been given the money and they bought mandazis. She went home but did not tell her mother for fear of consequences. However, her mother was told by another person, who was also a neighbour.

PW2, her said friend told the court that indeed the appellant called PW1 into his house to help him remove jiggers, but PW1 later told her that the appellant did bad things to her.

PW3 was the area Chief who received the report of defilement from PW1’s mother. The appellant was arrested by the public on April 14, 2006.

PW4 was the child’s mother who reported what her daughter had told her regarding the incident. She said that they had lived peacefully with the appellant and had no grudges. She reported the incident to Gatundu police station and thereafter took the child to hospital.

PW5 was PC Leah Wangechi of Gatundu Police Station, who received the child and her mother and booked the report. She escorted the child to Gatundu hospital where she was treated.

PW6 Dr Marion Muhia produced a medical report on behalf of her colleague, which confirmed that the child had been defiled. This was discerned from her broken hymen, a foul discharge and the presence of a sexually transmitted disease.

4. The appellant was placed on his defence and he gave an unsworn statement. He stated that he had no knowledge of the offence and stated that he was arrested due to a disagreement to do with a portrait he did of President Mwai Kibaki and that PW1’s father wanted some of the money that the appellant was to be paid. He said he had also been framed due to land disputes.

5. The trial court considered the case by the prosecution and the defence offered by the appellant and found that the case had been proved to the required standard, and hence, convicted the appellant.

6. The appellant has filed this second appeal premised on homemade “Grounds of Appeal” where 6 grounds are set out. He says that the court was in breach of Section 151 *Criminal Procedure Code*; that the case was not proved to the required standard and he would not have been convicted; that conviction was wrongly based on evidence of a child without medical evidence; that his constitutional rights were violated contrary to Section 72

(3) of the retired Constitution. He prays that he would be availed the Judgment of the High Court “... since I did not hear all what was read by the Hon. Judge ...”, and finally that he should have availed all court proceedings and Judgment to enable him raise more grounds of appeal.

7. When the appeal came up for a virtual hearing on January 25, 2023, the appellant was unrepresented and appeared from Kamiti Maximum Prison while Mr Okachi, learned State Counsel, appeared for



the Office of the Director of Public Prosecutions. The appellant had filed written submissions and supplementary ones which he fully relied on.

8. In opposing the appeal, Mr Okachi also relied on written submissions and in a highlight of the same he submitted that the prosecution had proved its case beyond reasonable doubt. He recounted events where the appellant had asked PW2 to send PW1 to his house; PW1, aged 7 years entered the appellant's house as witnessed by PW2 and the appellant defiled PW1 as PW2 waited outside. On emerging from the house PW1 who had some money informed PW2 that she had been defiled. Counsel also referred to medical evidence confirming that PW1 had been defiled.
9. In response the appellant told us that he is 77 years old and suffers from blood pressure and diabetes.
10. We have considered the record and the submissions made. The only issue of law we identify is whether the case was proved to the required standard.
11. The High Court on first appeal found that the prosecution evidence placed the appellant at the scene of crime and that there was sufficient evidence to sustain the conviction. We have considered the record and have reached the same conclusion as that reached by the Judge on first appeal. There was straight-forward evidence that the appellant who lived in the same neighborhood as PW1 and PW2 instructed PW2 to send PW1 to his house to assist him to remove jiggers from his feet. On entry into his house, he defiled her and she immediately informed her friend PW2 (who had been left playing outside the appellant's house). The doctor confirmed that the child had been defiled. In the face of positive identification of the appellant by the two children and defilement having been confirmed, the two courts below reached the correct conclusion that it was the appellant who had defiled the child, that is PW1. We note that Section 124 of the *Evidence Act* requires corroboration in criminal cases but in sexual offences if the only evidence is that of the victim, the court can still convict if it is satisfied that the victim is telling the truth. In this appeal we note that the trial court was not only satisfied by the evidence of the victim but there was corroboration by PW2 that indeed that she was present when the appellant called PW1 into his house.
12. There is no merit in this appeal which we hereby dismiss in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

