



REPUBLIC OF KENYA



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

**Kaniaru v Republic (Criminal Appeal 106 of 2015)  
[2023] KECA 992 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 992 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 106 OF 2015  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
JULY 28, 2023**

**BETWEEN**

**PATRICK KIRUMA KANIARU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nakuru,  
Mshila, J), dated 12th March 2015 IN HC. CRA No 28 of 2011.)*

**JUDGMENT**

1. Patrick Kiruma Kaniaru (the appellant herein), has preferred this second appeal against the judgment of Mshila, J dated March 12, 2015, in which he had initially been charged at the Chief Magistrate's Court in Nakuru with the offence of defilement contrary to Section 8 (1) as read with Sub Section 8 (2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The particulars of the offence were that on April 12, 2010, at (particulars withheld), he unlawfully and intentionally did an act which caused penetration of his male genital organ namely penis by inserting into a female genital organ namely; vagina of MW aged 7 years.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (1) of the same [Act](#). The particulars of the offence were that at the same time and place, he intentionally and unlawfully did an indecent act with a child by touching her private parts namely, the vagina of MW a child aged 7 years.
4. The appellant denied the charge after which a trial ensued. In a judgment delivered on February 2, 2011, Hon B. Kituyi (the then Resident Magistrate, Nakuru) convicted him of the main charge and sentenced him to life imprisonment.



5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on March 12, 2015, Mshila, J found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.
6. Unrelenting, the appellant has now filed this appeal and probably the last appeal vide a Notice of Appeal dated March 26, 2015 and supplementary grounds of appeal dated September 5, 2022 raising the following grounds of appeal:
  - "i. That the learned appellate judge erred in law by upholding the provided mandatory sentence of life imprisonment but failed to note that the appellant was a first offender, was a young man thus the court could have awarded a definite sentence in considerations of the provisions of Sections 216 and 329 of the *Criminal Procedure Code* and Article 50 (1) (2) (p) of the *Constitution* and the policy sentencing guidelines 2016.
  - ii. That the learned appellate judge erred in law and fact by upholding the appellant's conviction and sentence in a prosecution case where the ingredients of defilement were not proved, age, penetration and identification were not clearly proved in evidence.
  - iii. That the learned appellate judge erred in law and fact by dismissing the appellant defence of alibi which by the strength of the defence witnesses and other evidence remained unchallenged by the prosecution."
7. Briefly, the background to this appeal is as follows; PW1 was Dr Samuel Onchere a doctor at Provincial General Hospital in Nakuru. It was his evidence that on April 15, 2010, he filed a P3 Form in respect of PW2 (the complainant), who had been defiled by a person well known to her on April 12, 2010. From the genital examination conducted, PW2 had a fresh broken hymen with a whitish discharge. A lab examination further revealed that she had been infected with gonorrhoea and that she had many pus cells. He concluded that PW2 had been defiled.
8. PW2 was MW a girl aged 7 years and the complainant in this case. It was her evidence that on April 12, 2010, she had gone to visit her grandmother when "Kiruma" (the appellant), took her to his house, locked the house and removed his trousers and her trousers and did "bad manners" to her. It was her further evidence that she felt pain (witness pointed at her genital area) and that after the incident, the appellant gave her a sweet and helped her wear her trousers.
9. PW3 was Steven Gacheru. It was his evidence that on April 12, 2010, he was at home riding a bicycle when PW2 was sent to call him and that PW2 proceeded with the appellant to his house. It was his further evidence that he peeped through the window of the appellant's house and saw the appellant who had removed his trouser on top of PW2. That, when PW2 came out of the house, he asked her what she had been doing and PW2 said that the appellant had done "bad manners" to her. He later reported the incident to PW2's mother.
10. PW4 was Veronica Mwhaki Kiarie and PW2's mother. She testified that on April 12, 2010, she was at her mother's house in London estate in Nakuru when her mother sent PW2 to call PW3 but instead PW2 proceeded to the appellant's house. That, after a few minutes 3 children, that is, PW2, PW3 and one, Mary came when she heard PW3 ask if he should say. That, she then called PW3 who told her that the appellant had called PW2 and taken her to his house and that when he peeped through the window, he saw the appellant on top of bed.



11. That, she then called PW2 and asked her if the incident had happened previously and she answered in the affirmative. She later took PW2 to hospital and after a few days the appellant wrote her a text message pleading for forgiveness. He later went underground.
12. PW5 was P.C Beth Kamande, a Police Officer attached to Central Police Station. She testified that on April 13, 2010, she was at the Police Station when PW4 came and reported a case of defilement. She later recorded witness statements and charged the appellant as indicated on the charge sheet.
13. The appellant in his defence gave an unsworn statement and called 2 witnesses. He denied having committed the offence and testified that on the material day he was in Molo attending a funeral of his mother's friend, Stephen Murimi. He spent the night there as it had rained heavily after which he proceeded to Njoro where he stayed for 7 days.
14. DW2 was Isaac Njenga. It was his testimony that the appellant was his friend and that they had attended a funeral together in Molo on the material day, that is April 12, 2010, having travelled on April 11, 2010.
15. DW3 was Simon Kaniaru, the appellant's father. It was his testimony that the appellant used to work as a carpenter at a plot owned by D.W.3's Aunt and that many a time, they were quarrelling over rent and that at one point he had even asked the appellant to move out. On May 30, 2010, the appellant told him that the complainant's family wanted to buy his workshop. On May 31, 2010, he accompanied the appellant to the workshop. Shortly thereafter, the appellant was arrested.
16. When the matter came up for plenary hearing on March 15, 2023, the appellant who appeared in person sought to rely on his written submissions dated September 5, 2022. Miss Mburu, learned counsel appeared for the State and equally sought to rely on her written submissions dated September 22, 2022.
17. Turning to the first ground of appeal, it was submitted by the appellant that the sentence of life imprisonment as provided for under Section 8 (2) of the *Sexual Offences Act* fettered judicial discretion in sentencing which was inconsistent with the *Constitution*. Further, it was contended that the appellant was a young person who needed to be rehabilitated and later reintegrated in society and that in the circumstances of this case, the sentence of life imprisonment did not serve such restorative or rehabilitative purposes. Consequently, we were urged to set aside the sentence of life imprisonment imposed on the appellant and award an appropriate definite sentence in accordance with our discretion and the law.
18. The appellant further submitted that the ingredients of the offence of defilement were not conclusively proved for reasons, inter alia, that as regards the age of the victim, PW1 stated that PW2 was 7 years old yet, he did not carry out an age assessment examination to ascertain her age. As regards penetration, the evidence of the two minors (PW2 and PW3) was unsworn and required corroboration and further, that PW1 testified that he was not the one who treated PW2. Consequently, we were urged to find that the act of defilement and the age of the complainant were not proved.
19. Lastly, the learned judge was faulted for failing to consider the appellant's defence of alibi in that the appellant had testified that he was not at the scene of crime when the offence was committed as he had travelled upcountry on April 11, 2010 to attend a burial.
20. On the other hand, it was submitted for the respondent that the complainant was 7 years old at the time of the commission of the offence and that as such the sentence imposed was legal as it was the only sentence prescribed in law. Further, that the sentence was appropriate owing to the aggravating circumstances in the case namely, the tender age of the complainant, the infection of the complainant



with a sexually transmitted disease, the fact that the defilement had occurred previously and that the appellant took advantage of the complainant's trust as he was her uncle.

21. Regarding the ingredients of the offence of defilement, it was submitted that age was proved to the required standard in law as both PW2 (the complainant) and her mother (PW4) had testified orally that the complainant was 7 years old and further, that the birth certificate that was produced confirmed that the complainant's date of birth was 24<sup>th</sup> June 2002.
22. On penetration, it was submitted that PW2 had testified that the appellant had defiled her and she felt pain in her genitals, which evidence was corroborated by PW3 who was an eye witness. Additionally, the P3 Form that was produced in evidence confirmed that PW2's hymen was freshly broken.
23. Lastly on identification, it was submitted that PW2 had testified that she was defiled by a person known as "Uncle Kiruma" who was very well known to her and the incident happened during the day, thus the circumstances were favourable for identification as both PW2 and PW3 were able to see and identify the appellant. Consequently, it was submitted that the offence was proved to the required standard and that the trial court safely convicted the appellant.
24. We have considered the record, the rival written submissions, the authorities cited and the law.
25. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this court rendered itself thus on this issue:  

“ ... This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ... ”
26. In *David Njoroge Macharia v Republic* [2011] eKLR it was 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 are based on a misapprehension of the 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). ”
27. Turning to the first ground of appeal raised by the appellant, we shall revert to the same shortly as it has a bearing on sentence.
28. As regards the second ground of appeal, the appellant contended that the ingredients of the offence of defilement namely: age, penetration and identification were not conclusively proved.
29. In the instant case, PW2 who was the victim during voir dire examination stated that she was 7 years old and a standard 2 pupil at Lion Hill Primary. In examination in chief, she reiterated that she was 7 years old and a student at Lion Hill Primary School. Her mother who was PW4 corroborated her evidence when she testified that PW2 was 7 years old having been born on June 24, 2002. The evidence of these two witnesses that PW2 was 7 years old was corroborated by a birth certificate produced by PW5 which showed that PW2 was indeed 7 years at the time of the incident.

The evidence of these 3 witnesses as regards the age of PW2 remained firm and consistent throughout the trial and the appellant did not even attempt to challenge the same even in cross examination.



30. The contention by the appellant that PW2's age was not conclusively proved as there was no age assessment conducted on her is clearly without basis as from the circumstances of this case, age assessment was not necessary in light of the overwhelming evidence by PW2 (the complainant) and PW 4 (the complainant's mother) who testified that PW2 was 7 years old at the time of the incident which evidence was further corroborated by a birth certificate that was produced in evidence. Nobody can know better the age of her child other than a mother. Consequently, we are satisfied beyond any reasonable doubt that the age of the victim (PW2), was proved to the required standard and that indeed she was 7 years old at the time of the commission of the offence.
31. Turning to penetration, PW2's evidence was that on April 12, 2010, she had been sent by her grandmother to call PW3 when the appellant took her to his house, locked the house, removed his trousers and did "bad manners" to her and that she felt pain (the record shows that the witness pointed to her genital area). Her evidence was corroborated by the evidence of PW3 who testified that when he peeped through the appellant's house, he saw him on top of PW2 and when he asked PW2 what the appellant had done to her, PW2 stated that he had done
- "bad manners" to her. The evidence of these two witnesses remained unchallenged throughout the trial.
32. Additionally, the evidence of PW2 and PW3 that PW2 had been defiled was corroborated by the medical evidence of PW1 who produced the P3 form which showed that upon examination of PW2, he found that she had a freshly broken hymen with a white discharge and she had been infected with gonorrhoea.
33. In any event, medical evidence is not the only way to prove defilement. See *Robert Mutungi Muumbi v Republic* [2015] eKLR, where this Court stated:
- "Decisions of this court abound which affirm the principle that medical evidence or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."
34. From the circumstances of this case we are satisfied that penetration was proved to the required standard.
35. Turning to the issue of identification, we note that the appellant did not address us on this issue. Be that as it may, the evidence on record shows that the appellant was well known to PW2 as he was her uncle. The appellant admitted as much in his defence. PW2 testified that she was defiled by the appellant who she referred to as "uncle Kiruma". It is also on record that the incident happened in broad daylight and therefore there was no possibility of mistaken identity.
36. It is also not lost on this court that offences of these nature mostly happen in private and normally there are no eye witnesses. In the instant case however, PW3 testified that he witnessed the incident and that when he peeped through the appellant's house, he saw him on top of PW2 and when he asked PW2 what the appellant had done to her, PW2 stated that the appellant had done "bad manners to her".
37. There was therefore overwhelming evidence that the appellant was the perpetrator of this heinous crime. In our view, this was case of positive recognition as opposed to identification as the appellant was well known to PW2 and PW3.
38. Having considered and re-evaluated the evidence on record, it is our considered view that all the ingredients for the offence of defilement were proved to the required standard contrary to the appellant's contentions.



39. Finally, the High Court was faulted for dismissing the appellant's defence of alibi. The appellant in his defence denied having committed the offence and testified that on the material day he was at a friend's funeral in Molo which ended at 4:30PM and that after the funeral he went to Njoro where he remained for 7 days before returning home.

40. In her judgment, the learned Judge while considering the appellant's alibi defence stated as follows:

“It is a settled principle of law that the defence of alibi does not shift the burden of proof to an accused. The prosecution has the duty to investigate and test the evidence. Therefore, if an accused person intends to raise an alibi defence, he should raise it at the time he is pleading to the charge to allow the prosecution time sufficient time to enquire into it. However, if it is raised during the defence hearing, as in the instant case, the court should weigh it against the prosecution's evidence. See *Wang'ombe v Republic* [1980] KLR 149 and *Ganzi & 2 Others v Republic* [2005] eKLR.

This was the approach adopted by the trial court. He considered that the defence of alibi had been raised at a time when the prosecution could not properly test it and considered it against the prosecution case. She found that the prosecution's evidence was not displaced by the defence and proceeded to convict the appellant. Upon

carefully considering and weighing the evidence, I find no reason to depart from the finding of the trial court.”

41. The learned judge further continued as follows:

“The appellant presented evidence to the effect that he was not the person who defiled the complainant because on the date of the alleged offence, he was at a friend's funeral. In his sworn testimony, he testified that on the said date, he attended a friend's funeral at Muchorwe in Molo which ended at about 4:30PM. He produced as “DExb1” and “DExb2” the eulogy and a photograph of him and his friends that was taken at the funeral. He stated that they spent the night in Molo because of the heavy rains. He then went to a friend's place in Njoro where he remained for seven days before returning home.

DW1 and DW2 who allegedly attended the funeral with the appellant confirmed that they spent that night in Molo town and the following day, they left the appellant in Njoro town.

I concur with the trial magistrate's findings and note that DW2 and DW3's evidence on the whereabouts of the appellant is hearsay. Further, DW1's evidence on where they put up does not tally with that of the appellant.

The prosecution evidence was strong and credible when tested against that of the defence which had not been investigated and established by the prosecution. The minor's evidence was clear and they did not appear to have been coached. The appellant was known to both PW2 and PW3 and this court is satisfied that the identification by way of recognition was proved by the prosecution.” (Emphasis supplied).

42. From the above excerpts from the judgment of the learned Judge, it is evident that both the two courts below considered the appellant's alibi defence and in our view rightly rejected the same for the following reasons: firstly, the appellant raised the issue of him having attended a funeral on the day when the offence was committed for the first time while tendering his defence. He never raised the issue during cross examination of any of the prosecution witnesses. The evidence of PW2 and PW3,



an eye witness, remained uncontroverted and these two particular witnesses put the appellant squarely at the scene of crime.

43. In the case of *Victor Mwendwa Mulinge v R* [2014] eKLR this Court while considering an alibi defence stated:

“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution; see *Karanja v R* [1983] KLR 501 ... this Court held that in a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.” (Emphasis added).

44. The appellant ought to have raised the issue of alibi at the earliest opportunity to enable the prosecution interrogate the same. Having raised it late in the day, we are of the considered view that the appellant’s alibi defence was clearly an afterthought as this evidence did not dislodge the evidence tendered by the prosecution witnesses. Consequently, this ground of appeal is without merit and the same must accordingly fail.

45. Ultimately therefore, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of defilement against the appellant beyond any reasonable doubt. We find that there was overwhelming evidence to sustain a conviction against the appellant for a charge of defilement and that it was the appellant who defiled PW2 and no one else.

46. We therefore find and hold that the appellant’s conviction for the offence of defilement was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant’s appeal on conviction.

47. Turning to the sentence, the appellant was sentenced to life imprisonment as provided under Section 8 (2) of the *Sexual Offences Act*, a sentence he has contended is inconsistent with the *Constitution* as it fetters judicial discretion in sentencing. We are aware of the jurisprudence that has been emerging from this Court as regards the mandatory sentences provided for under the *Sexual Offences Act* where the Court has frowned on the lack of discretion in offences of this nature

48. Be that as it may, we have considered the circumstances under which this offence was committed. The appellant defiled his own blood cousin and a child of tender years aged 7 years thereby breaching the trust and expectations bestowed on him by society to protect such a child. As, if that was not enough, he infected her with a sexually transmitted disease and there was uncontroverted evidence on record that this was not the first time that he had defiled PW2.

49. We are of the considered view that the circumstances herein are aggravated and the appellant does not deserve any mercy. We are therefore not inclined to disturb the sentence.

50. Accordingly, we find that the appellant’s appeal is without merit and the same is hereby dismissed in its entirety.

It is so ordered.

**DATED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**F. SICHALE**

.....



**JUDGE OF APPEAL**

**F. OCHIENG**

.....

**JUDGE OF APPEAL**

.....

**L. ACHODE**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

