



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenga v Republic (Criminal Appeal 4 of 2020)  
[2022] KECA 126 (KLR) (18 February 2022) (Judgment)**

Neutral citation: [2022] KECA 126 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CRIMINAL APPEAL 4 OF 2020  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
FEBRUARY 18, 2022**

**BETWEEN**

**DICKSON BIDII KENGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Malindi (Nyakundi, J.) delivered on 14th April 2020 in High Court Criminal Appeal No. 40 of 2019)*

**JUDGMENT**

1. The appellant, Dickson Bidii Kenga, was on 19<sup>th</sup> February 2019 convicted by the Senior Principal Magistrate’s Court at Kilifi for the offence of defilement contrary to Section 8(1) as read with 8(3) of the *Sexual Offences Act* and sentenced to twenty years imprisonment. The particulars of the offence were that on diverse dates between 1<sup>st</sup> February and 29<sup>th</sup> February 2014 at Mweza Sub Location, Dungicha Location in Ganze District within Kilifi County, he intentionally caused his genital organ namely penis to penetrate the genital organ namely vagina of ZMM a child 15 years.
2. ZMM testified on 24<sup>th</sup> March 2015. She stated that she was a student in class 7 at Primary school; that the appellant was her friend and had known him since she was born; that the appellant asked her to have sex with her and she agreed; that she started having sex with him in 2013 and that he did not force her to do so; that she became pregnant and the appellant suggested and assisted her to get an abortion, which she did.
3. Harrison Safari (PW3), a boda boda rider and a relative of ZMM was awakened at night and told that ZMM was bleeding. ZMM informed her that she had taken some drugs to abort. PW3 took her to hospital. ZMM was examined at Kilifi County Hospital by Dr. Busra, whose medical report was produced before the trial court by Dr. Daisy Juma (PW2). On examination, her hymen was not intact. She had vaginal bleeding and tested positive for pregnancy and was having “a septic abortion”; and



- since she had a miscarriage ongoing, the fetus was removed. A P3 form, filled on 7<sup>th</sup> August 2014, as well as a PRC form were produced as exhibits.
3. Based on a report made at Bamba Police Station by ZMM's mother that ZMM had been defiled by the appellant and admitted in hospital, Police Constable Maurine Atieno (PW4) the investigating officer recorded witness statements. She obtained the birth notification in respect of ZMM which indicated that her date of birth was 27<sup>th</sup> January 1999. She also took ZMM to Hospital for examination where the P3 form and PRC forms were filed. She charged the appellant with the offence.
  4. After the close of the prosecution case, the trial court found that a prima facie case had been established to warrant the appellant to be placed on his defence. The appellant elected, as he was entitled to do, to remain silent. Thereafter, satisfied that that all ingredients of the offence of defilement, namely penetration, the age of the victim, and identification of the perpetrator, had been established by the prosecution to the required standard, the trial court convicted the appellant. He was then sentenced to a prison term of 20 years.
  5. The appellant's first appeal before the High Court, principally on the ground that the prosecution did not discharge its burden of proof beyond reasonable doubt, was dismissed by the High Court (R. Nyakundi, J.) in a judgment delivered on 14<sup>th</sup> April 2020. The learned Judge was equally satisfied that all ingredients of the offence had been proved and the sentence meted out was legal.
  6. In his grounds of appeal before us, the appellant complains that the lower court failed to consider: that mandatory minimum sentence under Section 8(3) of the *Sexual Offences Act* conflicts with the provisions of Sections 216 and 329 of the *Criminal Procedure Code*; that the sentence under Section 8(3) of the *Sexual Offences Act* fetters the discretion of the trial court in considering the mitigation circumstances for purposes of passing an appropriate set sentence; and that the Judge failed to consider that the pregnancy of the complainant was not proved to have been caused by the appellant as no DNA test as required under Section 36 of the *Sexual Offences Act* was done.
  7. However, in his written submissions on which he entirely relied, the appellant focused on challenging the sentence. He urged that the legal provision providing for mandatory minimum sentence under Section 8(1)(3) of the *Sexual Offences Act* violates the right to fair trial as those provisions deny the judicial officer discretion; that the principle enunciated by the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR that sentencing is a judicial function should apply equally to sentences under the Sexual Offence Act as was held by this Court in *Dismas Wafula Kilwake vs. Republic* [2019] eKLR that under Section 216 and 329 of the Criminal Procedure Code, mitigation is part of the trial process and before passing sentence, the court may receive evidence in order to inform itself of the proper sentence to be passed; that considering the heavy penalty imposed in the present case, his mitigation was of no evidential value; that had the trial court considered the mitigation, a sentence of no more than 10 years would have been reasonable.
  8. Learned Principal Prosecution Counsel Ms. Keya for the respondent opposed the appeal and submitted that the offence was proved to the required standard; that all elements of the offence were approved; that PW1 stated that she had consensual sex with the appellant and got pregnant and that penetration was therefore established; that the doctor also confirmed the victim's hymen was broken.
  9. As regards age, counsel submitted that the birth notification established that the victim was 15 years old at the time the offence was committed. As for the identity of the assailant, counsel submitted that there was positive identification as there was no doubt the appellant was well known to the victim since childhood. As to the complaint that DNA test was not done, it was submitted that it was not necessary as the issue was not paternity.



10. As regards sentence, it was submitted that the same is legal and there is no basis for interfering with it.
11. We have considered the appeal and submissions. We are constrained, on a second appeal such as this, to consider matters of law only by reason of Section 361(1) of the Criminal Procedure Code. As the Court stated in *See Karani vs. R* [2010] 1 KLR 73 we cannot interfere with the decision of the lower courts unless:
 

“...it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.”
12. The first issue is whether the offence was proved to the required standard. In that regard, it is established that “this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence.” *See Karingo vs. Republic* [1982] KLR 213. There are, in this case concurrent findings by the two courts below with which we concur that all the ingredients of the offence of defilement were proved beyond reasonable doubt. As demonstrated above, there was overwhelming evidence to support the decision of the two courts below and there are no grounds on which this Court can lawfully interfere with those findings.
13. The argument that a DNA test, under Section 36 of the Sexual Offence Act, was required to prove penetration is not well founded. As this Court stated in *Robert Mutungi Mumbi vs. Republic* [2015] eKLR, Section 36(1) of the *Sexual Offences Act* empowers the court to direct a person charged with an offence under the Act to provide samples, including DNA testing to establish the linkage between the accused person and the offence. That provision is not couched in mandatory terms and DNA evidence is not the only evidence by which commission of a sexual offence may be proved. See also *Hadson Ali Mwachongo vs. Republic* [2016] eKLR. In the present case, there was the uncontroverted evidence of the victim that despite being underage, she and the appellant had a long running sexual relationship that resulted in her pregnancy and that the appellant aided her in carrying out an abortion. Under Section 124 of the *Evidence Act*, her evidence, which was in any event corroborated by the doctor’s evidence. She was undoubtedly well known to the appellant and the question of mistaken identity did not arise. As for her age, the birth notification clearly demonstrated that she was 15 years at the time the offence was committed. The upshot is that the appeal against conviction has no merit.
14. As regards sentence, the Supreme Court of Kenya in its Directions in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR has since pronounced that its earlier decision in the same case “did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute” and that its previous decision “cannot be authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*.” We have no basis therefore for interfering with the sentence passed by the trial court and affirmed by the High Court.
15. The result is that the appeal fails and is hereby dismissed.

**DATED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> DAY OF FEBRUARY 2022.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**



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**JUDGE OF APPEAL**  
**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

