



Simba v Republic (Appeal E087 of 2022) [2025] KEHC 4013 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4013 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
APPEAL E087 OF 2022
SM GITHINJI, J
MARCH 27, 2025**

BETWEEN

ROY MICHENI SIMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Ruling of Hon. E. M. Ayuka (P.M) in
Nkubu S.O No. E036 of 2022 delivered on 15th June, 2023)*

JUDGMENT

1. Roy Micheni Simba was charge in the main count with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the *sexual offences Act* No. 3 of 2006.
2. The particulars of this offence are that on the 9th day of October, 2022 at around 22:00 hours at (particulars Withheld) Village in (particulars Withheld) Sub-location, (particulars Withheld) Location, Imenti South Sub-County within Meru County, the appellant herein intentionally and unlawfully caused his penis to penetrate the vagina of B.G, a juvenile aged 11 years old.
3. In the alternative, the appellant faced a charge of committing an indecent act with a child Contrary to Section 11 (1) of the *sexual offences Act* No. 3 of 2006.
4. The particulars being that on the 9th day of October, 2022 at 22:00 hours at (particulars Withheld) Village in (particulars Withheld) Sub-Location, (particulars Withheld) Location. Imenti South Sub-County within Meru County, the appellant intentionally and unlawfully touched the vagina of B.G a girl aged 11 years with his penis, against her will.
5. The evidence of PW-1 who is the victim in this case, and that of her mother the PW-2 in this case, shows that the victim was born on 21/10/2011. The said evidence is buttressed by the victim's Birth Certificate No. 3428732, which indicates the date of birth as disclosed by the two witnesses.



6. On 13/12/2022 when the victim gave evidence, she was aged 12 years and was a pupil at (particulars Withheld) day and boarding Primary School, in class 5.
7. On 9/10/2022 when the offence allegedly took place, the victim had gone to church for a crusade at (particulars Withheld) Youth Members. At 12pm she noted other members had left. The victim called Brian to keep her company as they looked for them. They did not succeed in tracing them and went back to (particulars Withheld) junction. They met Victor at the place, who had his motorbike. Victor spoke to them and offered to carry them on his motorcycle to go and see whether the other youths had arrived at the scene of crusade. He took them to Ntharene where Brian was called. He went leaving behind the victim with Victor. Victor took the victim back to school where they noted the youths had not arrived. They then went to his cousin's home. The cousin is namely Kelvin. They found Kelvin with his girlfriend. Kelvin and Victor left, leaving behind the victim with Kelvin's girlfriend. After about an hour the duo returned. Kelvin then left with his girlfriend, leaving behind Victor with the victim. Victor enticed her to go sleep at his cousin's bed. In the bed they had sexual intercourse, where he inserted his penis into her vagina. She did not go home that night as she spent it with Victor at the place.
8. The following day she felt pain and took some capsules. She then met Victor and was with him at the cattle dip.
9. When PW-2 noted that the victim had not returned home from crusade, she started looking for her. She met a Motorcyclist who told her that he saw the victim carried on a motorcycle. That day she did not succeed in finding her.
10. The following day she went to KK in search for her but in vain. At about 4pm to 5pm, Mama Jackie informed her that she had seen the victim with a boy. PW-2 went towards the cattle dip. At the place she found the victim in company of the appellant, when the appellant saw her he fled. She, together with the victim went to Igoji Police Station where they reported the case.
11. According to the evidence of PW-4, the case was reported at the police station on 16/10/2022. Through the evidence of PW-3 does not show when the victim was examined and treated at Kanyakine Sub-County Hospital, her patient Card No. 925 shows she was treated on 10/10/2022. Her P.3 form and PRCC form were filled at the place by PW-3, a Clinical Officer at the said Hospital. He noted that the victim's hymen was broken and she had a whitish Vaginal discharge. HVS test revealed presence of pus cells. He was of the opinion that the broken hymen was suggestive of penetrative sexual intercourse.
12. The police mobilized Motor cycle riders on 27/10/2022. The same day at 12pm the victim and her mother went to the police station to follow up on the case. The appellant was there having been arrested on a different case. The victim saw him and pointed to him as the perpetrator in this case.
13. On 30/10/2022, PW-4 called the victim and her mother. The appellant was present, and the victim led them to the scene where the incident took place. There were two beds at the place, one for the appellant and the other for his cousin, Kelvin. Kelvin was present and confirmed the house was for the appellant. The appellant was then charged with the offences carried in the charge sheet.
14. The Appellant in his defence stated that his name is Roy Micheni. He is a Bodaboda rider. On 27th October, 2022 he was arrested by his uncle who took him to the police station. He had sold his uncle's Motorcycle. The uncle wanted them to do an agreement at the police station. He met Madam Leah who had a grudge with him. The uncle forgave him but the police declined to release him. He was held at the police station for 3 days. Later on it was claimed that he had defiled the complainant (victim). He had not know the victim as she was a total stranger to him. It's Leah who investigated the case. The complainant mother stated that she does not know him.



15. The trial court evaluated the evidence and found that the main court was established by the prosecution beyond reasonable doubt. The appellant was consequently convicted of the offence and sentenced to serve life imprisonment.
16. Dissatisfied with the said conviction and sentence, he appealed to this court on the grounds that: -
 1. The sentence meted is harsh and excessive given the circumstances of the case.
 2. The appellant was not positively recognized as the real culprit.
 3. Vital and Crucial witnesses were not availed by the prosecution to testify.
 4. The evidence of broken hymen was relied on wrongly as proof of penetration.
 5. The defence case was unfairly rejected.
17. The appeal was canvassed by way of Written Submissions and both sides did file their respective submissions.
18. As the first appellate Court, I have re-evaluated the charges, evidence adduced by both sides, the judgment of the lower court, sentence meted, considered the grounds of the appeal and submissions by both side. The prosecution case when weighed casually, on the face of it and generally, poses the impression that it's credible and reliable. However, as well said the devil is in details.
19. The Charge sheet carries the name of the accused as Roy Micheni Simba. There is no alias or aka name given. The victim in this case throughout her evidence described him as Victor. She did not explain how she knew of the said name given that she had not known him before she met him on 9th October, 2022. PW-2 did not describe him or give his name. She only said she met the accused and the complainant at the cattle dip and on seeing her, he fled. How she knew it was the accused is not disclosed. PW-4 the Investigating Officer is not clear on whether the suspect's name was given when the matter was first reported by the complainant and her mother. Though she disclosed the name of the first motorcycle rider as Brian, for the appellant herein she referred to him as the accused. She referred to him that way throughout her evidence, without disclosing his name at all. Its noticeable that the offence was allegedly committed on 9/10/2022. Though the Investigating Officer stated it was reported on 16/10/2022, the date could be wrong given that the victim was examined on 10/10/2022, the date the PRC and P3 forms were issued. The matter could therefore have been reported on 10/10/2022. The appellant was however arrested on 27/10/2022. The Investigating Officer discloses that the appellant was arrested then on a different matter and when the victim herein and her mother went to follow up on this case, they saw him and identified him. The question which arises is; if the suspect was known and disclosed when the case was reported, and his residence known, why had he not been arrested till 27/10/2022 when he was arrested in another case and not this particular one? The victim further explained that after spending the night with Victor the following day she felt pain and took some capsules. She then met Victor and was with him at the cattle dip.
20. The evidence fails to disclose how she parted with Victor for her to meet him later at the Cattle dip. She does not also give details of where and who might have offered her the capsules and directed her on how to take them.
21. The disclosed foregoing lacunas and unbridged gaps in the prosecution case, raises a reasonable doubt as to whether the appellant is one and the same person as Victor who allegedly defiled the victim. PW-2 does not disclose that the appellant is a person she had known or knew before then. The circumstances under which she recognized or identified him at the Cattle dip are not disclosed. Similarly the circumstances under which he was pointed to at the police station on 27/10/2022 by



- PW-1 and PW-2 as the culprit are not disclosed. It can't go unnoticed that PW-1 and PW-2 do not disclose in their evidence of the identification of the culprit on 27/10/2022 at the Police Station. It's only the Investigating Officer who disclosed of it.
22. The issue about the scene visit in presence of the appellant, victim, her mother and the Investigating Officer, was only disclosed by the Investigating Officer herself and not by the other two witnesses.
23. The trial court in finding that there was reliable Identification stated a follows:-
- "The identity of the accused herein, is in my considered view, not in dispute. Evidence on record shows that upon spotting him, the complainant positively identified him as the perpetrator. That she was able to lead the police to the house in which she was defiled, where even Kevin, a cousin to the accused confirmed the accused used to live there. He identified his bed. Before court, the complainant pointed out to the accused in dock as the person who had defiled her.
- From the record, the complainant stated that she spent quite some time with the accused. They spent part of the material day together until the next day when her mother bumped into them prompting the accused to flee.
- The complainant was very coherent and eloquent in her testimony, both in chief, and on cross-examination. She was very specific that the accused is the person with whom she had sexual intercourse. I believe in her evidence.
- The complainant's mother too stated that it is the accused that she found with the complainant at the cattle dip. That on seeing her, the accused fled. She identified the accused before court.
27. In these circumstances, I am satisfied that there was no room for mistaken identification whatsoever. The accused has been positively identified and directly linked to the offence, as the culprit"
24. It's crucial in criminal proceedings to ascertain proper identification of a suspect to prevent wrongful convictions.
25. In the case of Anjoni and Others –vs- Republic [1980] KLR, Madan J.A observed:-
- ".....recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."
26. In the case of Republic –vs- Turnbull & Other [1976] 3 ALLER 549 it was made explicit that:-
- "the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under Observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?..... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."



27. The victim in this case said,

"I did not know the accused prior to that date". This means the appellant was a stranger and her evidence is of identification rather than recognition. There is no evidence that she described the assailant in anyway in her report to the police. The name she gave of the assailant is not the name in the charge sheet. There is no evidence whatsoever that the appellant is known or regarded anywhere by the name of Victor. The evidence about the scene and what Kevin allegedly told the Investigating Officer, is hearsay, as Kevin was not called as a witness.

The said evidence is at discrepancy with what the victim said that the house belonged to Kevin and had sexual intercourse in Kevin's bed. It's not clear as to whether PW-2 was able to identify the assailant at the cattle dip. She does not claim to had done so. The circumstances under which he was pointed to as the suspect at the Police Station are not clear. In Gabriel Kamau Njoroge -vs- Republic [1982-1988] I KAR 1134, the court observed that, "dock identification is generally worthless".

28 From the foregoing it's vivid that the evidence of identification was not properly weighed by the trial court and so ended up with a wrong conclusion. The evidence when weighed properly cast doubts as to whether the appellant is the real culprit. The said doubt should have been resolved in his favour leading to his acquittal.

29. Having observed so, I need not weigh the evidence on age of the victim which in anyway is not doubted, and the other ingredient of penetration.

30. The bottom line is that the appeal is merited and the conviction is therefore quashed as well as the sentence. The appellant is accordingly set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 27th DAY OF MARCH, 2025.

S. M. GITHINJI

JUDGE

APPEARANCES:

Ms. Adhi for the Prosecution.

Appellant present in person.

