Kamau v Republic (Criminal Appeal E021 of 2023)
[2025] KEHC 5627 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5627 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E021 OF 2023

JN NJAGI, J

APRIL 30, 2025

BETWEEN

AYUB NYAGA KAMAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. T. A. Sitati, SPM, in Lamu Senior Principal Magistrate's Court Criminal Case No. 27 of 2020 delivered on 27/6/2023)

JUDGMENT

1. The Appellant was convicted in count 1 for the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between the months of July 2020 and 6th October 2020 within Lamu County, he intentionally and unlawfully caused his penis to penetrate the vagina of IMDA (herein referred to as the complainant), a child aged 15 years.

2. He was further convicted in count 2 for the offence of abuse of position of authority contrary to Section 24 (2) (a) of the *Sexual Offences Act*. The particulars being that on diverse dates between the months of July 2020 and 6th October 2020 within Lamu County, he took advantage of his position as a Kenya Wildlife Service Ranger to have sexual intercourse with the above said complainant.

3. The appellant was sentenced to serve 15 years imprisonment in respect to count 1 and 10 years in regard to count 2. He was aggrieved by the conviction and the sentence and filed the instant appeal wherein he raised the following grounds:

    1. That the learned trial magistrate erred in law and fact in convicting him on evidence which did not meet the required standard;

2. That the learned trial magistrate erred in law and fact by depending on evidence which was based on theory and conspiracy between the Appellant and the prosecution witnesses and that the said offence was not proved beyond reasonable doubt by the prosecution witnesses;

3. That the learned trial Magistrate erred in law by failing to consider his strong defence.

4. That the learned trial magistrate erred in law and fact by convicting him on charges that were not tallying and were unfavourable to him.

4. The prosecution called 12 witnesses in the case at the close of which the trial court found the appellant to have a case to answer and placed him to his defence. The Appellant defended himself and did not call any witness. By a judgment delivered on 27th June, 2023, the Appellant was convicted on both charges and sentenced accordingly.

Case for prosecution

5. The case for the prosecution is that the complainant was at the material time a standard 4 pupil at [Particulars withheld] primary school. She was living with her parents at [Particulars withheld] town in Lamu County. Her father was PW11 in the case. The appellant was a Kenya Wildlife ranger stationed at Particulars withheld] KWS camp.

6. The complainant who was PW1 in the case testified before the trial court that she had a sexual relationship with the appellant. That she had had sex with him on three different occasions. That the first occasion he wore a condom. That on the following day she had sex with him at his house at the KWS camp at 7 pm. She had sex again with him for a third time at a place she did not disclose after which the appellant escorted her towards her home. She arrived home late and her father threatened to beat her. She escaped from home.

7. It was the testimony of the complainant that she was later taken to Lamu where her samples were taken. She was found to be pregnant.

8. The complainant later in her evidence told the court that it was not true that the appellant had impregnated her. That the truth was that the appellant had helped her when he found her on the way after she had escaped from home after the threat of being killed by her father.

9. It was the evidence of the complainant's father PW11 that on the 5/10/2020, he arrived home from grazing his cattle and he was informed that the complainant had vanished from home at 11 am of that day. That she resurfaced at home in the evening at 11 pm. He scolded her and she stormed out of the home. He and his family members searched for her but they did not find her. On the following morning he went to the KWS camp in search of her. While at the chief's camp, he saw the appellant and a lady called Ajavo boarding a police vehicle. They went and came back with his daughter. He went with the police, the appellant and his daughter to hospital.

10. PC Fredrick Kipchoge PW7 and PC John Musyoka Mwanthi then based at Kiunga Police Station told the court that on 6th October, 2020 they received a call from the appellant who informed them that he had seen a girl hiding in the bush near the KWS Camp. That they went towards the KWS camp and met with the appellant on the way. He led them about 300 metres from the KWS camp and showed them a girl in the thickets. They picked the girl, the complainant, and took her to the police station.

11. It was the evidence of a clinical officer at King Fahad Hospital, Madi Sheyumbe PW2, that he examined the complainant on the 6/10/2020 and found her with a normal genitalia with a missing hymen. That an ultra sound examination was done that revealed that she was 5 weeks pregnant. The clinical officer

filled a P3 form to that end. During the hearing he produced the treatment notes, the ultra sound reports and the P3 form as exhibits, P.Exh. 1 – 3 respectively.

12. It was further evidence of the clinical officer that the laboratory technician took blood sample of the appellant for DNA testing.

13. An aunt to the complainant FNK PW3 testified that on the 6th day of October 2020 at 7am she was informed by the complainant`s father that the complainant had vanished from home. She joined in the search. They went to the KWS camp and lodged a complaint with one Corporal Hussein of KWS. That at 3pm she received a report that the complainant had been found. She went to the police station where she found the appellant and the complainant. The complainant was taken to Kiunga hospital where she was examined and found to be pregnant. That the doctor who attended to her told them that both the complainant and the appellant had visited the hospital twice to test their HIV status.

14. The government analyst Irene Furaha Mwaringa PW5, of Mombasa Government Chemist testified that she received the following exhibits from Sgt Saumu Juma - high vaginal swab (HVS) of the complainant, blue inner wear of the complainant, maroon checked inner wear trouser with black waist band of the complainant and blood sample of the appellant. That she examined them and found that the stains on the blue inner wear and trouser tested positive for spermatozoa by way of S.P.A test. She then extracted DNA profiles from the samples and came to the conclusion that the HVS of the victim generated a female DNA profile. That the stains on the blue inner wear trouser generated a mixed DNA profile from two different persons. That the stains on the maroon checked inner wear trouser with black waist band generated a male DNA profile which matched the refenced extracted blood sample of the appellant with a probability random match of 1 in several billions of persons. She explained that the DNA in the maroon inner wear matched the DNA of the appellant's blood.

15. The investigating officer Sergent Saumu Juma of DCI Lamu East Station told the court that she was assigned the case to investigate on the 6th day of October, 2020. She met the complainant who informed her that she was in a sexual relationship with a KWS officer. That the officer had instructed her not to say anything on the case. That during interrogation, she noted that the complainant did not recall the date when she had intercourse with the appellant. That she pointed out specific locations where they had sexual intercourse with the appellant - at the beach near Kwa Mutua and at the appellant's house at the KWS camp. That the complainant disclosed to her that the appellant led her to his house and when she returned to her parent's house, the father threatened to severely punish her for returning home late.

16. It was the evidence of the Investigating officer that she took the complainant to Kiunga Health center for medical test and upon arrival at the center, she met a clinical officer called Kipngetich who informed them that the complainant had been going to their clinic in the company of the appellant for regular HIV testing. That she confirmed this information from the HIV testing and counselling register and more particularly from an entry made on 19th September, 2020 that showed that both the appellant and the complainant had attended the said clinic. She then alerted Inspector Ondiek to interview the appellant who initially ignored the summons but later after being called by his superiors went to the police station in full combat uniform and armed with a G3 rifle. That he refused to be interviewed and caused a stand-off between the police and KWS personnel. That it is not until after a senior KWS officer intervened that the appellant surrendered the rifle and agreed to be interviewed. He was later charged with the offence.

17. She told the court that the complainant went missing on 10th October, 2020 and was rescued on the following day. That the appellant eloped with her on the 27th day of October, 2020. That after investigations, they concluded that the appellant was responsible for her disappearance.

18. On cross examination she told the court that according to the register, it was not clear whether the appellant and the victim went to the HIV clinic as a couple or separately. It was her evidence that the maroon trousers, P.Exh.4, belonged to the complainant and that she was wearing them at the time of the interview and she retrieved them from her. That the blue trousers were sent to her from the complainant`s house and she, PW12, could not confirm if they belonged to the complainant`s sister. It was her evidence that the DNA on the pants matched the appellant's DNA.

Defence Case

19. When placed to his defence the appellant stated in a sworn statement that on the 6th day of October, 2020 at around 1:30 pm he was headed to Kiunga shopping center when he heard the cry of a woman. Thereafter, he saw a woman coming out of the thickets and he recognized her as he had seen her before. The woman (the complainant) begged him for help her. She informed him that her father wanted to kill her. He then called the police on his mobile phone and informed them that there was a child in need of care and protection. That in response, two police officers came over and took her to the police station.

20. That on the following day Sergent Saumu called him to explain how he had found the girl. He went and recorded a statement. He was then detained at the police station and accused of preying on the female minor. He was later moved to Lamu Police Station then escorted to King Fahad Hospital where his blood was taken for DNA sampling. That after his blood samples were taken, he went to the KWS Camp, That the complainant disappeared from police custody around that time. That he was arrested and charged with kidnapping her but he was acquitted of the charges.

21. It was the contention of the appellant that the trial court ought to have rejected the DNA evidence since the court did not issue an order to have the same extracted.

22. It was the evidence of the appellant that he was in a sexual relationship with Hawa, the complainant's elder sister and not the complainant.

Analysis and determination

23. As this is a first appeal, this court is required to re-evaluate the evidence tendered in the trial court and come up with its own independent conclusion as to whether or not to uphold the conviction and sentence. This duty was stated by the Court of Appeal in the case of Okeno Vs. Republic (1977) eKLR 32 that it is the duty of a first appellate court to revisit the evidence tendered before the trial Court afresh, evaluate it, analyze and come to its own independent conclusion on the matter. This task must have regard to the fact that the appellate court never saw or heard the witnesses testify thus the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

24. The ingredients of an offence of defilement are: proof of the age of the victim, proof of penetration and proof of the perpetrator of the offence, see Dominic Kibet Mwareng v Republic (2013) eKLR. The prosecution was required to prove these elements beyond reasonable doubt.

25. The appellant and the complainant were known to each other. The issue of identity of the appellant therefore does not arise. The issues are on proof of the age of the complainant and penetration.

Whether the age was proved

26. The appellant was charged with defiling a girl of the 15 years. The prosecution in proof of the age of the complainant herein produced a birth certificate that indicated that she was born on 21st September, 2005 making her age at 15 years at the time of the alleged defilement. A birth certificate is one of the documents that can offer conclusive proof of the age of a person. The trial court found the age of the

complainant at the material time to have been 15 years. I therefore find that the age of the complainant was conclusively proved.

Whether the element of penetration was proved

27. The complainant testified that she engaged in sex with the appellant on three different occasions. That when she was examined at King Fahad hospital she was found to be pregnant and samples were taken from her and the appellant for DNA sampling.

28. In convicting the appellant of the offence of defilement, the trial magistrate heavily relied on the evidence that the appellant's DNA was found on the complainant's clothes.

29. The appellant contended that the DNA sampling was unlawful as there was no court order authorizing the extraction of DNA.

30. A DNA sampling may be ordered under section 122A of the *Penal Code* which provides that:

122A

(1) A police officer of or above the rank of inspector may by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

(2) "DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—

(a) the taking of a sample of saliva or a sample by buccal swab;

(b) the taking of a sample of blood;

(c) the taking of a sample of hair from the head or underarm; or

(d) the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

"serious offence" means an offence punishable by imprisonment for a term of twelve months or more.

31. The trial court dealt with the issue and cited the case of Paul Ng'ang'a Wanjiru v Republic (2020) eKLR where the Court of Appeal dealt with a similar issue and held that:

> By dint of Section 122A, whenever it is suspected on reasonable grounds that DNA sampling of a person suspected to have committed a serious offence may confirm or disprove commission of the offence by that person, a police officer of or above the rank of inspector of Police is required, in writing, to order that person undergo DNA sampling.

32. Section 122B of the *Penal Code* empowers the police, led by an officer of or above the rank of an inspector, to use reasonable force to effect the procedure if a suspect resists to comply with an order made under section 122A.

33. The trial court in this case held that the DNA sampling process was under the express written authority of Inspector Ondiek who initiated it by police summons and he ordered Sgt Saumu to commence the

inquiry. It is however clear from the evidence that there was no order in writing by IP Ondiek requiring the appellant to provide samples for DNA sampling. IP Ondiek did not testify in the case. The only thing that Sgt Saumu said about IP Ondiek is that she asked him to interrogate the appellant and that he accompanied them to Kiunga hospital when they escorted the complainant and the appellant for medical examination.

34. Though there was no order in writing by IP Ondiek for the appellant to provide samples for DNA sampling, a suspect may voluntarily give his/her consent as stated by section 122C that provides that:

> 122C. Suspect may volunteer
>
> (1) Nothing in section 122A shall be construed as preventing a suspect from undergoing a procedure by consent, without any order having been made:
>
> Provided that every such consent shall be recorded in writing signed by the person giving the consent.
>
> (2) Such consent may, where the suspect is a child or an incapable person, be given by the suspect's parent or guardian.

35. It is however a requirement of the law that an order or consent must first be proven before a DNA test can be admitted as evidence in court. Section 122D provides that:

> 122D. Order or consent to be proven
>
> The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given.

36. In this case there was no order in writing for the appellant to provide samples for DNA sampling and neither did he give consent in writing for the same to be taken from him. It is clear from the provisions of Section 122D that the prosecution was first required to prove either of the two conditions stated in section 122D. None was proved in this case before the trial court admitted the DNA results. The trial court erred in holding that the sampling was authorized by IP Ondiek when there was no written order produced in court to that end. The fact of IP Ondiek summoning the appellant to the police station for interrogation cannot be construed to be an order to provide samples for DNA testing. In my view, the evidence on DNA sampling was improperly admitted in court. The trial court erred in using evidence that was improperly admitted to convict the appellant.

37. The question is whether there was any other evidence other than the DNA result that supported the conviction of the appellant.

38. The trial magistrate held that the complainant was examined shortly after she was found and laboratory examination showed that she had spermatozoa deposits in her vaginal canal. It was the opinion of the court that this supported the complainant`s evidence that she had been penetrated.

39. However, the clinical officer who testified in the case PW2 was based at King Fahad Hospital in Lamu whereas the lab examination that showed that the complainant had spermatozoa deposits was done at Kiunga health centre on the 6/10/2020. PW2 examined the complainant on 8/10/2020. He did not mention spermatozoa deposits having been found in the complainant's vaginal canal at that time. The clinical officer who examined the complainant at Kiunga did not testify in the case. Though PW2 produced the treatment notes from Kiunga health centre as exhibit, he did not say that he knew the person who conducted the laboratory examination at Kiunga. Without the evidence of the person who

conducted the laboratory examination at Kiunga, the evidence that the complainant was found with spermatozoa deposits shortly after she was found was hearsay.

40. The trial magistrate in her judgment put a lot of weight on the evidence that the HIV clinic visitors register, PExh.9, indicated that the appellant and the complainant visited the HIV Testing and Counselling center on 16/9/2020. The magistrate wondered why someone who is neither a spouse nor the parent or caretaker of a female person wound accompany such a female to a HIV clinic The court was of the view that the only reason the appellant would have done so is because he had had sexual intercourse with the complainant.

41. Though the HIV register record indicated that persons with similar names to those of the appellant and the complainant visited the said clinic on the said day, the register does not indicate that the two went to the clinic together or separately. Sgt Saumu admitted to that fact. Sgt Saumu further said that the complainant was identified by a clinical officer of having visited the clinic for HIV testing. However, the said clinical officer who is also purported to have made the entry in the register was not called to testify in the case. There was in the premises no evidence identifying the two as the persons who visited the clinic on the said day. The evidence that the appellant and the complainant visited the HIV clinic together at Kiunga health Centre was hearsay evidence.

42. The above notwithstanding, the fact of pregnancy of the complainant was corroborated by the evidence of the clinical officer, PW2 who testified that ultra sound tests were conducted at King Fahad hospital that revealed that the complainant was 5 weeks pregnant. The ultra sound results were produced in court. There is thereby no doubt that the complainant was at the time pregnant. There was however no medical evidence to prove that the appellant is the one who impregnated the complainant. Consequently, the only available evidence against the appellant was oral and circumstantial that he defiled the complainant. The question is whether there was such sufficient evidence proving that the appellant defiled the complainant.

43. The law in respect to sexual offences involving children is that the court may convict on the basis of the evidence of the child victim if the court is satisfied that the child is telling the truth. This is the requirement of section 124 of the *Evidence Act* that provides that:

> " 124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, the court shall receive the evidence of the alleged victim and proceed to convict the accused person, if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

44. The trial court found that the complainant was telling the truth despite the fact that her evidence had been interfered with. However, the complainant after leading evidence that the appellant defiled her, she later in her evidence told the trial court that:

> " I made a call to Kamau. He asked me if my blood had been sampled. I told him that it was because my family thought that he had made me pregnant yet the truth is that Kamau only

had helped me. Kamau helped me when he found me on the way after I had escaped from the threat of being killed by my father when I had vanished earlier."

45. The evidence adduced before the court was that the complainant vanished from her home on 5/10/2020. She was found on the following day. She however did not tell the court where she spent the night. The evidence that the appellant led the police to where the complainant was found did not prove anything against him when the complainant did not disclose to the court where she had spent the night. There was thereby no evidence that she had spent the night in the house of the appellant as contended by the investigating officer. According to the complainant the truth was that the appellant had helped her when he found her on the way after being threatened by her father. In my view, this statement means that the witness was repudiating her evidence that the appellant had defiled her and impregnated her. Was she then a reliable witness whose evidence could be relied upon to convict the appellant?

46. The complainant in her evidence in court stated that she had had sex with the appellant on three separate occasions. She however never told the court where the first sexual encounter took place. She said that the second one took place at the appellant`s staff quarters at KWS camp. She did not tell the court where the third encounter took place. Why did the complainant leave out such important details if it is true that the appellant defiled her? It is clear to me, something also observed by the trial court, that the complainant was economical with the truth. Why then did the trial court believe such a witness?

47. The trial magistrate said in her judgment that the interference with she the complainant's evidence did not change the contents of her first report to Sgt Saumu in which she named the appellant as the person who had sexual intercourse with her. It appears to me that the trial magistrate convicted the appellant on the evidence of what the complainant told Sgt Saumu when she interrogated her rather than on what the witness told the court herself. The witness did not tell the court most of the things she told Sgt Saumu during interrogation. In the absence of corroboration of the evidence of Sgt Saumu by the complainant, the trial court erred in relying on the repudiated evidence of the complainant as the basis of a conviction on the appellant. A witness who changes his/her evidence and states something contrary to the evidence given in the case cannot be a trustworthy witness. In the case of Ndung'u Kimanyi – vs- Republic, (1979) KLR 282, the Court of Appeal said the following on credibility of a witness:

> " The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence."

48. On my independent evaluation of the evidence, I do not find sufficient reason why the trial court believed the evidence of the complainant that she was telling the truth that the appellant defiled her. The complainant cannot, in my view and for the reasons given above, be described as credible or reliable witness. That being the case, it was not safe to rely on her evidence to convict the appellant. In fact, the complainant should have been declared a hostile witness to the prosecution case.

48. It is the duty of the prosecution to proof the case against an accused person beyond reasonable doubt. Lord Denning in the case of Miller vs. Minister of Pensions (1942) A.C. stated as follows:

> It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which

can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

48. The upshot is that I find this appeal to be merited. I find that the prosecution had not proved the charges against the appellant beyond reasonable doubt. The appellant was in the circumstances of this case entitled to the benefit of doubt. Consequently, the conviction entered by the trial court against the appellant is quashed and the sentences imposed on him set aside. I order the appellant be set at liberty forthwith unless lawfully held.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 30TH DAY OF APRIL 2025.

J.N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person at G. K. Prison Malindi

Court Assistant - Ndonye