



REPUBLIC OF KENYA



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**Kamau v Republic (Criminal Appeal 37 of 2023)
[2025] KEHC 11926 (KLR) (14 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL APPEAL 37 OF 2023
BK NJOROGE, J
AUGUST 14, 2025**

BETWEEN

FRANCIS NJOROGE KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the judgment and decree delivered on 28th April 2022 by Hon. O. Wanyaga, Senior Resident Magistrate, in Thika Chief Magistrate's Court Sexual Offences Case No. 116 of 2019 – Republic v. Francis Njoroge Kamau)

JUDGMENT

1. This judgment pertains to the Appeal filed by the Appellant on 16th May 2022, arising from the judgment and decree delivered on 28th April 2022 by Hon. O. Wanyaga, Senior Resident Magistrate, in Thika Chief Magistrate's Court Sexual Offences Case No. 116 of 2019 – *Republic v Francis Njoroge Kamau*.
2. In his Petition of Appeal, the Appellant challenges the judgment of the Trial Court on several grounds. He contends that the Trial Court erred in finding that his identification was properly established, arguing that the same was not proved beyond reasonable doubt. He further submits that the prosecution failed to establish the essential ingredients of the offence, thereby rendering the conviction unsafe. The Appellant additionally asserts that the trial was procedurally flawed. That the Learned Magistrate failed to conduct a proper and independent evaluation of the evidence on record. He avers that the Trial Court relied on weak, uncorroborated, and incredible testimony from prosecution witnesses. Lastly, the Appellant impugns the sentence of thirty (30) years' imprisonment as being manifestly harsh and unconstitutional.
3. Pursuant to the directions of this Court, the Appeal was to be canvassed by way of written submissions. The Court has accordingly perused and considered the Appellant's written submissions filed on



18th September 2024, alongside those of the Respondent dated 18th September 2024. The Court commends both parties for the diligence and industry exhibited in the preparation and presentation of their respective cases. Due to pressure of work, exigencies of time and personal issues that befell the Court, there has been delay in delivery of this Judgement. The Court apologises to the parties herein for any unintended consequences.

Background Facts

4. The Appellant was charged on the 12th November, 2019 at the Chief Magistrate’s Court Thika with the offence of Sexual Assault contrary to Section 5 (1) (a) (i) as read with Section 5 (2) of the [Sexual Offences Act](#), Cap 63A. Particulars are that on the 10th day of November 2019, at [Particulars Withheld] within Thika West Sub-County within Kiambu County unlawfully used his finger to penetrate the vagina of E.W, a child aged 9 years old.
5. The Appellant also faced the alternative count of committing an indecent act with a child. The Particulars are that on the 10th day of November 2019, at [Particulars Withheld] within Thika West Sub-County within Kiambu County intentionally touched the vagina of E.W., a child aged 9 years.
6. The Appellant pleaded not guilty to the charge. The Prosecution called four (4) witnesses, all of whom testified under oath. In his defence, the Appellant also gave sworn testimony but did not call any witnesses.
7. Upon conclusion of the trial, the Learned Trial Magistrate, on 28th April 2022, found the Appellant guilty and proceeded to convict him. The Appellant was thereafter sentenced to serve thirty (30) years’ imprisonment for the offence of sexual assault. Aggrieved by both the conviction and sentence as set out in the judgment and decree of Hon. O. Wanyaga, Senior Resident Magistrate, in Thika Chief Magistrate’s Court Sexual Offences Case No. 116 of 2019 – *Republic v Francis Njoroge Kamau*, the Appellant lodged the present appeal before this Court.

The Respondent’s case before the Trial Court

8. PW1, the complainant, one E.W., testified under oath that on the material day, she was on her way to purchase sweets after attending church. The Appellant—whom she identified as Njoroge and stated she knew prior to the incident—took into an unfinished building. Once inside, he lifted her dress, removed her undergarment, and touched her private parts using his fingers. She further stated that someone else was took a video as the events unfolded. She was, however, rescued shortly thereafter by a Good Samaritan, whereupon she returned to church and informed the Bishop. A crowd subsequently gathered at the scene.
9. PW2, the complainant’s mother, testified and confirmed the complainant’s date of birth as 18th December 2009. She stated that on 10th November 2019, she heard screams emanating from a nearby unfinished structure. On rushing to the scene, she was informed that someone had attempted to rape her daughter. Though the complainant was initially reluctant to disclose the details, she later explained what had transpired. The matter was reported to Makongeni Police Station, and the complainant was taken to hospital for medical assessment. The witness added that members of the public had attempted to apprehend and assault the Appellant, but he managed to flee. While she recognized the Appellant, she testified that she did not know his place of residence.
10. PW3, Dr. Emily Wangeci Njuno, a medical officer at Thika Level 5 Hospital, testified on behalf of her colleague, Dr. Maina, who had examined the complainant and completed the P3 Form but was then away on study leave. She stated that the P3 Form reflected injuries in the complainant’s vaginal area, consistent with the allegation of sexual assault.



11. PW4, Police Constable Sarah Oraro, No. 101227, based at Makongeni Police Station, testified that on 11th November 2019, the Appellant was brought to the police station at night by members of the public. She recorded the complainant's statement, in which the minor recounted the incident. PW4 escorted the complainant to hospital for further examination. She further testified that, based on information obtained from the public, it was believed the Appellant was a pastor, although she did not undertake independent verification of this assertion. As the complainant knew the Appellant prior to the incident, no identification parade was conducted.

The Appellant's Case before the Trial Court.

12. In his sworn defence, the Appellant denied the allegations. He stated that he worked as a mason and that on the material day, he had participated in a football match between his team and NYS Yatta, which took place from 2:00 p.m. to 6:00 p.m. He further testified that he was summoned later that evening by Nyumba Kumi elders and taken to the police station. He stated that he only became aware of the charges against him upon being arraigned in court. He denied committing the offence, adding that no eyewitness had testified to the alleged acts, and that not all witnesses had been called.

Issues For Determination

13. Upon a comprehensive re-evaluation of the Record of Appeal, the judgment of the Trial Court, the Appellant's petition, and the respective written submissions filed by both parties, the Court finds that the following issues arise for determination:
 - a. Whether the minor complainant was properly sworn prior to giving her testimony.
 - b. Whether the prosecution proved all the elements constituting the offence of sexual assault beyond reasonable doubt.
 - c. Whether the sentence imposed was manifestly excessive and/or unconstitutional.

Analysis

14. The duty of the first Appellate Court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”



15. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first Appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”

Whether the minor complainant was properly sworn prior to giving her testimony.

16. “Voir dire” literally means, “to speak the truth.” In court, it refers to a process of determining whether a minor can and does comprehend the concept of truth. It is a preliminary inquiry conducted by a Trial Court to assess whether a child of tender years is competent to testify and whether the child comprehends the duty to speak the truth. This procedure serves as a safeguard, ensuring that the evidence of young children—often persuasive in nature—is subjected to a reliability threshold before admission. The Trial Court must be satisfied that the child possesses sufficient intelligence and understands either the nature of an oath or, where unsworn testimony is permitted, the duty to tell the truth. This inquiry is essential to the admissibility and credibility of the child's testimony.
17. The Court of Appeal in *Mark Oiruri Mose v Republic* [2013] KECA 67 (KLR) reaffirmed this principle, stating as follows:

“The record before us, shows clearly that complainant was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth and directed her to give unsworn statement.”

18. Similarly, in *Erick Onyango Ondeng' v Republic* [2014] KECA 523 (KLR), the Court observed:

“We note that the trial court, before accepting the evidence of PW2 on oath, conducted a voire dire examination and specifically noted that it was satisfied that PW2 understood the nature of the oath. PW2 was subjected to cross-examination after she gave her evidence. We may add that the proviso to section 124 of the *Evidence Act* as amended Act No. 5 of 2003 and Act No. 3 of 2006 allowed the trial court to convict the appellant on the evidence of PW2 alone, as the victim of a sexual offence, if for reasons to be recorded, the court was satisfied that she was telling the truth. (See *Mohamed v Republic* (2006) 2 KLR 138 and *Geoffrey Kioji v Republic*, Crim. App. No. 270 of 2010 (Nyeri). The trial court specifically noted in the judgement that it was impressed by PW2 as a witness of truth, who spoke nothing but the truth.”

19. In the present Appeal, the Appellant contended that the Trial Court failed to inquire into whether the complainant understood the nature of an oath. However, upon review of the Trial Court record, this Court is satisfied that a sufficient voire dire inquiry was conducted. The Learned Trial Magistrate recorded that the minor understood she was in Court, and she was able to answer basic questions, including her name, age, school, and class. The Trial Court was satisfied that the minor appreciated



the duty to speak the truth. Accordingly, the failure to use the specific term “nature of an oath” does not vitiate the process, particularly where the Court’s assessment demonstrates that the child was of sufficient intelligence and understood the obligation to tell the truth. This ground of appeal, therefore, fails.

Whether the prosecution proved all the elements constituting the offence of sexual assault beyond reasonable doubt.

20. It is trite law that for the offence of sexual assault to be established, two ingredients being the penetration and positive identification or recognition of the offender must be proved.
21. This Court reiterates and adopts with approval the sentiments expressed by the Honourable Court in *Machira v Republic* (Criminal Appeal E018 of 2023) [2024] KEHC 2712 (KLR) (14 March 2024), wherein the Court cited with approval the decision in *John Irungu v Republic* [2016] eKLR, and stated as follows:

“Sexual Assault on the other hand is provided for in section 5 of the Act. Unlike defilement, which can be committed only against a child, sexual assault can be committed against “any person.” That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which cause penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim’s genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose. We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault.”

Penetration

22. This Court is satisfied with the complainant’s (PW1’s) testimony that the Appellant touched her private parts using his fingers, and specifically that he touched her vagina—a fact she also disclosed to her mother (PW2). This account is corroborated by the medical evidence tendered by PW3. Upon perusal of the Post-Rape Care (PRC) form filled by Dr. Awuor, the findings reveal a laceration approximately 0.5 cm in length on the external vaginal orifice, and further indicate that the hymen was not intact. In the Court’s considered view, the presence of such injuries, including the tearing of the hymen, constitutes medical evidence consistent with sexual assault.

Positive identification

23. With regard to the issue of identification, the Court of Appeal in the case of *Cleophas Wamunga v Republic* [1989] eKLR expressed itself as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.



24. The English case of *R v Turnbull* [1977] QB 224 is useful in this regard:

“If the quality (of identification evidence) is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.

25. PW1 testified that she knew the Appellant by the name Njoroge prior to the incident. PW2 also confirmed that she used to see the Appellant within the area, although she did not know his place of residence. PW2 further testified that upon rushing to the scene, she found the Appellant being assaulted by members of the public, and that he was hurling insults as he was being taken to the police. It was also her evidence that PW1 identified the Appellant as the person who attempted to rape her. The Appellant, in his submissions, contended that he was not properly identified and faulted the prosecution for failing to call the Good Samaritan, the Bishop, and members of the public who were allegedly present at the scene to testify.

26. This Court aligns itself with the reasoning of the Court of Appeal in *Erick Onyango Ondeng’v Republic* [2014] KECA 523 (KLR), where the Court, in addressing the issue of failure to call certain witnesses, stated:

“The appellant took issue with the fact that one Violet, who PW2 mentioned in her evidence as having happened by when the appellant was with PW2 was not called as a witness. In *Bukenya & Others v Uganda* (supra), the former East Africa Court of Appeal held that the prosecution has a duty to call all the witnesses necessary to establish the truth even though their evidence may be inconsistent; that the court itself had the duty to call any person whose evidence appears essential to the just decision of the case; and that where essential witnesses are available but are not called, the court is entitled to draw the inference that if their evidence had been called, it would have been adverse to the prosecution case. While fully in agreement with the above statement, it should be remembered that the context in which it was made is that of a case in which the evidence called is barely adequate. In the present case, the proviso to section 124 of the *Evidence Act* and the medical evidence must be borne in mind as well Section 143 of the *Evidence Act* (Cap 80) which provides that, in the absence of any requirement by provision of law, no particular number of witnesses shall be required for the proof of any fact. In this appeal, it is not clear to us what value the evidence of Violet would have added to the evidence of PW2, which the court found trustworthy, as well as the medical evidence. In our opinion, Violet would have been a peripheral witness as she was said to merely have happened by when the appellant was with PW2 on a different occasion.”

27. In the present case, this Court is satisfied that the evidence of recognition by PW1 and PW2 was credible, consistent, and of high probative value. The fact that the prosecution did not call the Bishop, the Good Samaritan, or other members of the public does not render the evidence unreliable or inadequate. The law is clear that a fact may be proved by the testimony of a single witness, where that witness is credible, especially in light of the proviso to section 124 of the *Evidence Act*. In this case, the Appellant was not a stranger to the complainant and her mother, and the identification was



by recognition, which is generally considered more reliable. Accordingly, this Court finds that the Appellant was positively and reliably identified as the perpetrator.

28. The Appellant raised an alibi defence by stating that he was at a football match on the material date. Alibi is defined in the *Black's Law Dictionary*, 10th Edition as:

“A Defence based on the physical impossibility of a defendant’s guilt by placing the defendant in a location other than the scene of the crime at the relevant time”.

29. The principle has long been accepted that an Accused person who wishes to rely on a defence of alibi must raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. In *Republic v Sukha Singh S/O Wazir Singh & Others* [1939] 6 EACA 145, the former Court of Appeal for Eastern Africa held that:

“If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing in the interval, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.

30. It is trite that once a Respondent raises an alibi defence, the onus is on the prosecution to displace the defence of alibi after the defence raises it at the trial. This was held in the Court of Appeal case of *Victor Mwendwa Mulinge v Republic* [2014] KECA 710 (KLR) as:

“It is trite law that the burden of proving falsity, if at all, of an accused’s defence of alibi lies on the prosecution”.

31. The Court of Appeal in the case of *Wang’ombe v Republic* [1980] KLR 149 held as follows:

“..... In *Ssentale v Uganda* [1968] EA 365, 368 (Sir Udo Udoma CJ).... said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion. . . .The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible”.

32. In this case the Court notes that this defence of alibi was raised at the defence hearing and not at the beginning of the trial. Besides, it did not shake the prosecution evidence which clearly placed the Appellant at the scene. It is the Court’s finding that the defence of alibi fails as the Court considers it an afterthought. Indeed, the entire defence did not cast doubt on the prosecution case.

Whether the sentence imposed was manifestly excessive and/or unconstitutional

33. The applicable principles in considering sentence on appeal were restated by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR, in the following terms: -

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must



depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist”.

34. Section 5 of the *Sexual Offences Act* states as follows regarding the sentence;

5. Sexual assault

(1) Any person who unlawfully—

(a) penetrates the genital organs of another person with—

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

35. In the present case, although the offence of sexual assault is grave and carries a minimum sentence of ten (10) years under Section 5(2) of the *Sexual Offences Act*, the Appellant was sentenced to serve thirty (30) years' imprisonment. Upon careful re-evaluation of the record, this Court finds that while a custodial sentence was warranted given the traumatic nature of the offence and the age of the victim, the trial court did not provide sufficient justification for enhancing the sentence to triple the statutory minimum. There is no indication on record that the Trial Court considered any aggravating circumstances beyond those already inherent in the offence charged. Had there been such aggravating circumstances, the Trial Court did not state so prior to sentencing.

36. Further, the Appellant was a first offender and there is no evidence on record of any prior criminal conduct. The Trial Court also failed to consider the principle of proportionality, as well as the mitigating circumstances advanced during sentencing. While the Court does not trivialize the offence or its impact on the victim, it is bound to ensure that punishment remains proportionate to the culpability of the offender and the gravity of the offence.

37. In the premises, this Court finds that the sentence of thirty (30) years' imprisonment was manifestly excessive in the circumstances, and that the Trial Court erred in failing to take into account relevant mitigating factors. The Court has also taken into consideration the 21/2 years already served in remand. Accordingly, the sentence is hereby reduced to Seven years and Six Months (7 and a 1/2) years' imprisonment, which remains sufficient to serve both punitive and deterrent purposes in the context of this case.



Determination

38. The Appeal succeeds in part, specifically on the ground that the sentence imposed by the Trial Court was manifestly excessive in the circumstances.
39. Accordingly, the sentence of thirty (30) years' imprisonment is hereby set aside and substituted with a sentence of Seven years and Six Months (7 and a 1/2) years' imprisonment, which shall take effect from the date of conviction by the Trial Court.
40. It is so ordered.

JUDGEMENT DELIVERED, DATED AND SIGNED AT THIKA THIS 14TH DAY OF AUGUST 2025

NJOROGE BENJAMIN K.

JUDGE

Judgement delivered in the presence of

Appellant present at Kamiti Prison.

Miss Torosi for the State.

Ms, Susan Nzioka - Court Assistant

