



**Kinyua v Republic (Criminal Appeal E001 of 2023)
[2024] KEHC 1839 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E001 OF 2023**

M MUYA, J

FEBRUARY 28, 2024

BETWEEN

EPHRAIM MIANO KINYUA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Ephraim Miano Kinyua herein after referred to as the Appellant was convicted on the main count of sexual assault and was sentenced to life imprisonment.
2. The particulars were that on the 18th day of March 2022 at 1600 hours in Mathira East Sub- County of Nyeri unlawfully used his fingers to penetrate the vagina of B.W.K a child aged 1 year.
3. The prosecution in this case called (7) seven witnesses. The Appellant gave a Sworn Statement and called two witnesses.
4. This is the first Appellate Court. It has a duty to re-evaluate the evidence on record afresh so as to arrive at its own conclusions, bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses. Republic v Okeno 1972 EALR Page 32.

Brief Facts.

5. The Appellant was charged under Section 5 (1) (a) (1) (2) of the *Sexual Offences act* No. 3 of 2006.
6. The mother of the victim testified as PW1. She told the court that her daughter was at the time aged 1 year and several months having been born on 3rd may 2020. A birth certificate was identified before the court. She also testified on knowing the Appellant as he hailed from their village.
7. On 18/3/2022 at about 4:00Pm, she was at home with her husband. Her daughter was playing outside with other children. While there a child called Y reported that she found the victim crying on the road



to the appellant's house and she was alone. She breast fed the child and she slept. In the evening she washed her and she did not notice anything. At about 11:00Pm the child woke up crying and inserting her fingers inside her trouser. The grandmother called her and observed the child's private parts which appeared reddish. The following day she inquired from the other children of what they might have seen. They said that they had left the child eating sugar cane with the appellant. Her husband called for the appellant to explain what had happened. When he refused they reported the matter to the police. The child was taken to hospital.

8. YPW2 testified to have found the appellant eating sugar cane near where the child victim was. The baby was crying, she took her to her mother (PW1). PW3 Mercy Kaimuri was a tea picker at a homestead near the complainants. On 18/3/2022 she did see the appellant eating sugar cane near where she was working. She saw the appellant holding the victim while seated. She heard the child cry but thought it was not unusual. The child was taken away by Y (PW2).
9. PW5 – Dr. Nguru Maina examined the child victim and found her hymen broken, there were lacerations on the right and left minora. He was of the view that the child was sexually assaulted.
10. The investigating officer did testify to have visited the scene of assault and found the Appellant who alleged that he had been assaulted by the father of the victim. He was informed to produce witnesses but he failed. He was mentioned by the witnesses as the one seen with the child on the day of the assault.
11. In his defence the Appellant gave a Sworn Statement to the effect that on the 18th day of March 2022 he had gone in search of casual jobs returning in the evening when he met the father of the child victim with his drunk friends they beat him up. He reported the matter to the police and went for treatment. He produced two P3 forms (1) dated 19th /3/ 2022 and (2) dated 23/3/2022. He stated that the charges against him were trumped up.
12. His mother testified as DW2 and stated that the father of the victim had inquired from her where her son was. She told him that he was at the shops. He went there and persuaded him to leave with him and proceeded to beat him up at a lonely road on allegations that he had sexually assaulted a child. They went and reported the matter of the assault to the police. Two P3 forms were issued. One for 19th March 2022 and another for 23rd March 2022.

Determination

13. The appellant was convicted under section 5 (1) (a) (1) (2) of the *Sexual Offences Act* No. 3 of 2006 which provides:-
 - “i). Any person who unlawfully
 - (ii) Penetrates the genital organs of another person with,
 - (iii). Any part of the body of another or that person or
 - (iv). An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes.
 - v). Manipulates any part of his body or the body of another person 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 for a term of not less than 10 years but which may be enhanced to imprisonment for life.”

Issue

1). Whether the prosecution proved that it was the accused who caused penetration by way of inserting his fingers into the vagina of the victim.

14. The mother of the victim (PW1) testified that on the day in question her child was playing with other children at a neighbour's place, she was brought back by one Y who had found her crying. She did not notice anything about the condition of the child. It was alleged that the child was found alone while on the road to Miano's compound. The mother breast fed the child and she slept. After supper she washed the child and did not notice anything. Later the child woke up and started crying. The grandmother took the child and later reported that upon examining it she saw that the private parts were red. She applied milking jelly on the child's private parts and some blood oozed out. The following day they interrogated the children who were playing with the child and they said that they had left the child eating sugar cane with the accused. She reported to her husband who called the accused for interrogation but he was not co-operative.
15. PW2 testified to have seen the father of the victim drop the child at the gate where Miano (accused) was eating sugar cane. She later heard the child crying. She went there and found that she was not wearing a trouser. She saw the accused running towards their coffee farm. PW3 testified to have seen the accused holding the child while seated.
16. What comes out clearly in this case, is that none of the prosecution witnesses saw the accused in the act of inserting his fingers into the private parts of the victim.
17. What was before the court was circumstantial evidence.
18. In the Court of appeal case of *Sawe v Republic* 2003 KLR page 365, it was held:-
 - “ 1. In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.
 2. Circumstantial evidence can be a basis for conviction only if there is no other existing circumstances weakening the chain of circumstance relied on.
 3. The burden of proving facts which justify the drawing of this inference from the facts to the conclusion of any other reasonable hypothesis of innocence is on the prosecution. The burden always remains with the prosecution and never shifts to the accused.
 4.
 5.
 6.
 7. Suspicion however, strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt.”
18. This sexual assault on the victim is said to have taken place on the 18th day of March 2022 at 4:00Pm. As per the evidence of the investigating officer the report of the assault was made to police on 21/3/2022.



19. The accused had made a report earlier on of assault upon which he was issued with a P3 form and informed to go and provide police with witnesses. He did not and it was decided that he be charged with sexual assault.
20. The accused defence appears credible. He had alleged that he had been confronted by the father of the victim who was in the company of his colleagues and he was beaten. He went and reported the matter to police. The father of the complainant later reported that his daughter had been sexually assaulted.
21. It is evidently clear that the parents of the child victim did not know who had assaulted the complainant. They had to make inquiries from the children who were playing with the victim as to whom they had seen with the child the previous day. None of the prosecution witnesses saw the accused inserting his fingers on the private part of the complainant. The assumption was because he had been seen eating sugar cane with the child then it follows he was the one who had assaulted her. The child was not able to communicate by talking. The complainant is said to have been playing with other children. Her age was given as 1 year 10 months old. The age of the other children she was playing with was not shown. The doctor who examined the complainant did not give the age of the injuries he observed during examination.
22. The mother of the child did testify to have washed the child that evening but did not notice anything unusual on her private parts. In the instant case it is not clear when the sexual assault indeed took place. There is high possibility that another person apart from the accused could have been the attacker. In a nutshell the evidence against the accused does not point irresistibly to him as the attacker. Mere suspicion was not enough.
23. It is instructive to note that the father of the victim did assault the accused. Upon this assault the accused went and reported the matter to police with the father of the victim reporting after him the case of sexual assault of his daughter. This creates doubt in the mind of the court.
24. The upshot is that this case was not proved beyond reasonable doubt. The conviction is quashed and the sentence is set aside.
25. The accused (Appellant) is set at liberty unless otherwise lawfully held.

JUDGMENT READ AND DELIVERED IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2024.

In the presence of:-

The Applicant in person.

Mr. Kariuki for the Respondent.

Court assistant: Andrew

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JUSTICE MARTIN MUYA

