



REPUBLIC OF KENYA



KENYA LAW
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**Kiragu v Republic (Criminal Appeal E069 of 2022)
[2024] KEHC 1943 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E069 OF 2022
A. ONG'INJO, J
FEBRUARY 22, 2024**

BETWEEN

RICHARD KIRAGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Hon. D. Odhiambo (SRM) delivered on 31st August 2022 in Shanzu S. O. Case No. E088 of 2021, Republic v Richard Kiragu)

JUDGMENT

Background

1. The Appellant, Richard Kiragu was charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
2. Particulars were that Richard Kiragu on the 17th day of June 2021 within Kilifi County of Coast Region intentionally and unlawfully touched the buttocks of YM a child aged 9 years.
3. Based on the evidence by the prosecution and defence evidence, the trial magistrate found the appellant guilty and he was convicted and sentenced to 10 years imprisonment.
4. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds: -
 1. The trial court erred in law and fact by failing to see that the voire dire examination which was conducted on the complainant was not unequivocal.
 2. The trial court erred in law and fact by failing to see that the identification evidence was insufficient.



3. The trial court failed to see that the complainant's testimony did not conclusively link me to the offence.
4. That the learned trial court magistrate erred in law and facts by giving me a harsh and excessive sentence in light of Section 216 and 329 of the Criminal Procedure Code.

Prosecution case

5. PW1, the complainant's father said that he is a chef at a school and works from 1.00 am to 4.00 am, and that his wife also works with him. He said that on 17.6.2021, he left home for work and passed by Kandara. That he has a daughter and a son aged 9 and 13 years respectively and that they normally leave the kids at home after closing the door. He said that they have neighbours and they use the same gate. He said that while at Kandara, he called for a cigarette and then saw Kirago whom he knows very well as a friend. That PW1 asked him what he was doing there at night and that Kirago then asked him whether he goes to work with his wife and that Kirago had a screw driver.
6. PW1 said that he went back and found the gate open and his door was also open. That PW1 had the keys and the door had been broken. That his wife went inside and found the gas cylinder missing. That PW1 went back to Kandara and asked how Kirago had gone after they passed and he was told Kirago had looked at them then went towards their house. That when PW1 got back, his son told them that he saw someone entering the house. That there was security light outside and that their daughter said she heard someone touching her bikers. That the person then told her that she had urinated on the bed. That PW1's son then said that he saw someone entering the house. That there was security light outside and the complainant said she heard someone touching her bikers. That the person then told her that she had urinated on the bed. That PW1's son then saw Kirago looking at the shelf and that he had dreadlocks and a blue jacket. That PW1 had also seen him with the navy blue jacket. That PW1 then went to the police station and that he also went to his cousins but they were not around. He identified Kirago as the accused in court.
7. PW2, the complainant underwent voire dire examination and gave sworn statement that she stayed with her parents and her older brother, and that they had many neighbours. She testified that on 17.06.2021, she was asleep in her bed at home at night and that she was with her brother in their bedroom when Kirago went to their room. The complainant said that she knew him as he always went to keep his board at their home and that he was her father's friend. She said that she did not see his face properly but she knew it was him. That he removed her clothes and started touching her. That she had a tight, a top and a panty, and that he inserted his hands on her buttocks. That the complainant thought it was her father and that she called him out and he said mmmh and went behind the curtain. That her brother was asleep and that he woke up and told her to go back to sleep. That the complainant did not see his face but said he was tall and that her brother also saw him. That they then waited for the return of their parents and that they normally woke them up after coming back. The complainant identified Kirago as the accused in court.
8. PW3, the brother of the complainant underwent voire dire examination and gave sworn statement that they stay in a plot with neighbours and that he sleeps in the bedroom with his sister. He said that on 17.6.2021 at 3.00 am, they were sleeping when he woke up and found someone looking for something in a drawer. PW3 informed court that he saw him very well and that it was Kiragu. That he had a board for advertising house for sale. He said that there was light from the sitting room and from security lights. That he then left and that the complainant had also woken up. That the complainant was talking to him and asking him if he was their father. PW3 said that their parents had gone to school to prepare mahamri and that they always left the door locked. He said that they then went back to sleep and when



their parents returned, they informed them that Kiragu was in the house. PW3 identified Kiragu as the accused in court.

9. PW4, No. 91816, PC Abdi Mohamed from Mtwapa Police Station said that on 17.6.2021, the complainant in the matter aged 8 years old and her brother aged 13 years old were left by their parents sleeping in the house. That it was at 1.00 am when they left for work and that when they got back at 4.00 am, they found the door open. That they woke up the kids and the complainant informed them that she was touched by somebody. That the person told her that she had wet herself which was not true. That the brother confirmed the person was Kiragu and that he saw him as the lights were on. That he said he had a black jacket and that they knew him as a neighbour and he had a board that he kept at their gate. That the complainant said the person touched her private parts and the matter was reported at Mtwapa Police Station.
10. PW4 said that the complainant's father went to Kiragu and confronted him. That both were arrested and it was established the father had gone to confront him for entering the house while they were not around. On cross examination, PW4 said that he was not involved in the investigation. That he just read the file and saw what happened. That he also read the investigation diary but did not record statements.

Defence Case

11. The accused, Richard Kiragu Ndungu gave sworn statement that on 16.6.2021, in the evening, he returned from the beach and passed by a shop in Kandara. That he sat down waiting for money to be sent and that he got the money and paid for 4 cigarettes. He said that before he left, the father of the complainant found him at the shop, greeted him and asked what he was doing there at night. That he also asked why he had a screwdriver tester. That thereafter, each one went their separate ways and that the accused went home to his wife but he could not say the name of his wife, and that he said Catherine then changed to Susan. The accused said that he got home at 11.00 pm and that he slept after eating and bathing. That in the morning, they woke up as someone was knocking on their door violently. That he checked the time and found it was 6.00 am and the person at the door was the complainant's father who threatened to kill him because he had raped his children, and left.
12. The accused said that the crowd was gathering and that he left and went to hide in a shop. That he then went to the police station and when the complainant's father went to the station too, they were both locked in the cells. That the complainant's father was locked in the cells because the accused reported him for breaking his door but he was then released. The accused said that when he met him at Kandara, he had a screw driver tester which was small and could not break a door or padlock. The accused said that he did not leave his house when he went home.
13. On cross examination, the accused said that he was a friend of the family and he used to put his sign board in their house. He said that the kids knew him and that he had shaggy hair. The accused stated that he had a tester screwdriver because he is an electrician. He said that he had been married for 9 months but he could not tell the name of his wife when asked.
14. DW2, Ruth Matano Pirs testified that the accused was her husband and they had been together for 9 months until he was arrested. That she was in the house on the day the accused was arrested and that the accused had returned home at 11.00 pm and never left. That at 6.00 am, his friend GG went knocking and that he did it normally, and there was no incident. That his friend went back the second time and broke the gate using a hammer and said he would kill them. That DW2 to go and stay in the shop. That he called his sister and they went to the police station. That he reported being threatened and that Kiragu and his friend were arrested.
15. This appeal herein was canvassed by way of written submissions.



Appellant's Submissions

16. The appellant submitted that the learned trial magistrate omitted to undertake a crucial examination of the complainant to establish whether she was knowledgeable of the nature of oath. That however, what the trial court did was to establish that the minor victim knew her age which test is independent of the knowledge of the nature of oath. The appellant cited Section 19 of the *Oaths and Statutory Declarations Act* as well as the cases of *Johnson Muiruri v Republic* (1983) KLR 445 and *Peter Kariga Kiume v Republic*.
17. The appellant argues that the complainant in her evidence stated twice that she did not see the face of her attacker and that if her testimony is anything to go by, then there was absolutely no evidence from her that she identified the person who allegedly attacked her on the said day of the incident and at that particular time of the night. The appellant stated that the trial court misdirected itself by arriving at a conviction on the basis of the testimonies of the two minor witnesses who told court that there was no light in the bedroom that they were sleeping in that night. Also, that it would appear the trial court partially based its findings on the evidence of the complainant's father PW1, who allegedly met him prior to the alleged incident and who then suspected that he was the one who committed the offence because he had seen him with a screw driver.
18. The appellant cited the case of *Cleophas Otieno Wamunga v Rep. Cr. App No. 20 of 1989* where the Court of Appeal held: -

Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or 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.
19. The appellant submitted that the trial court based its findings on the hypothetical evidence of the complainant's father contrary to the basic principles of criminal justice which demand that the prosecution must adduce evidence that is beyond reasonable doubt. The appellant cited the case of *Teper v Rep* (1952) where the Court of Appeal held that: -

Circumstantial evidence must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. It was also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.
20. The appellant pointed out that courts have grappled with the issue of mandatory minimum penal provisions, for instance, in the case of *Philip Mueke Maingi & 5 Others v Rep. Const. Pet. No. E017 of 2021* where the superior court in the case held that all accused persons deserve to have their mitigation taken into account, and equally any court is bestowed with the legitimate discretion to impose sentences that befit the offences committed. The appellant argued that the sentence of 10 years imprisonment imposed upon him deprived the court of its legitimate discretion in sentencing him. The appellant therefore prayed that the conviction is quashed and sentence set aside.



Analysis and Determination

21. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

22. After considering the grounds of appeal, records of the trial court and submissions, the issues for determination are as follows: -
- i. Whether voire dire examination conducted on the complainant was unequivocal
 - ii. Whether the appellant was properly identified as the perpetrator considering the circumstances
 - iii. Whether the sentence was harsh and excessive

Whether voire dire examination conducted on the complainant was unequivocal

23. Voire dire examination was done and it was up to the trial magistrate to draw the conclusion whether the witness of tender years had the capacity to testifying on oath. That was done before PW2 and PW3 testified and the trial magistrate concluded that they were possessed of sufficient knowledge warranting them to testify on oath. During voire dire examination of PW2 and PW3, the appellant did not question the competence of the said examination. He went ahead to cross examine PW2 and PW3 exhaustively and that cross examination went further to prove that the 2 witnesses though of tender age understood the importance of telling the truth.

Whether the appellant was properly identified as the perpetrator considering the circumstances

24. PW2 said she did not see the face of the person who removed her clothes and started touching her but she knew it was Kiragu, the friend of her father. She said that she thought it was her father and when she called him he said “mmmh” and went behind the curtain. PW3 said he heard the sister talking to the intruder and asking if he was their father but by then their parents had gone to prepare mahamri. PW3 said he saw that it was Kiragu because he had a board for advertising houses for sale. He also said that there was light from the sitting room and from security light. PW3 said that he saw the intruder had a jacket with a hoodie and he also had small dreadlocks. PW3 said he did not see the accused touch his sister.
25. In the case of *Francis Kariuki Njiru & 7 others v Republic* (2001) eKLR, it was held as follow: -

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (See *R. vs. Turnbull* (1976) 63 Civil Appeal R.132). Among the factors the Court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police



at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuy & Another vs. Republic Criminal Appeal No. 22 of 1996 (unreported) held that: -

“If (sic) is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone particularly to the police at the first opportunity. Both the investigation officer and the prosecutor have to ensure that such information is recorded during investigation and elicited in court during evidence. Omissions of evidence of this nature at investigation stage or at the time of prosecution in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.”

26. The offence was allegedly committed at night and PW3 who was with the complainant in the same bedroom did not see the appellant touching the complainant because he was asleep and he was woken up when PW2 asked the intruder if he was their father. PW2 said she did not see the face of the person properly but she said she knew him. She said when she called thinking that it was her father, the person went behind the curtain. She also said the person was tall. That evidence goes to show that PW2 was not sure who the person who had accessed the house after their parents left was.
27. PW3 on the other hand said that he saw the intruder who entered the house at 2.00 am was was Kiragu and that there was light in the sitting. PW3 did not say how the light went through the curtains on the door to the bedroom to enable him properly identify the intruder. He did not properly identify the intruder who was wearing a jacket with a hoodie. PW3 did not say how he was able to see small dreadlocks on the appellant’s head if he was wearing a hoodie.
28. None of the items that were stolen from the house namely, money, gas cylinder and phone were recovered from the appellant to corroborate the allegation that he committed the offence herein. This court finds that the circumstances surrounding the identification were not conducive for proper identification.
29. In consideration that the perpetrator was not properly identified and in consideration that the investigating officer did not testify, this court finds that it was unsafe for the trial magistrate to convict the appellant on the insufficient evidence of the prosecution. The appeal herein is merited, the conviction is quashed and sentence set aside.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 22TH DAY OF FEBRUARY 2024**

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG’INJO

JUDGE

