



**Kenga v Republic (Criminal Appeal E029 of 2022)
[2024] KEHC 7461 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 7461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E029 OF 2022
M THANDE, J
MARCH 20, 2024**

BETWEEN

HARIRI KENGA APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal arising out of the judgment of Hon. S. D. Sitati, RM
delivered on 12.1.22 in Kilifi Hola Criminal Case No. E032 of 2021)*

JUDGMENT

1. Hariri Kenga, the Appellant herein, was convicted of the offence of defilement contrary to Section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* – (SOA). The particulars of the offence are that on diverse dates between the 26.12.2020 at Jila location in Ganze sub-county within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of Rebecca Kadii (the Complainant), a child aged 16 years. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *SOA*. The particulars of this offence were that on the same date in the same place, the Appellant intentionally touched the vagina of the Complainant with his penis. Following trial, the Appellant was convicted of the main charge and sentenced to serve the minimum mandatory sentence of 15 years’ imprisonment.
2. Being aggrieved, the Appellant filed this appeal against both conviction and sentence. The summarized amended grounds of appeal are that the learned magistrate erred in law and fact by failing:
 - i. to give reasons why it believed the evidence of the Complainant which was devoid of corroboration.
 - ii. to resolve the inconsistency and contradiction in favour of the Appellant.



- iii. to see that the Appellant was not satisfactorily placed at the scene of the alleged incident on the material date.
 - iv. to find that some crucial witnesses were not called to testify.
 - v. to appreciate that the sentence of 15 years was harsh in the circumstances.
 - vi. to put into consideration his defence.
 - vii. to consider the time spent in remand custody prior to conviction.
3. The submissions of the Respondent principally relate to relate to the Appellant's grounds of appeal before amendment. The Respondent however addressed the ground of failure to consider the Appellant's defence and the harshness of the sentence which were cross cutting.
 4. As a first appellate Court, I have subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial Court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
 5. The Appellant contends that the charge against him was not proved beyond reasonable doubt. He submitted that the trial court failed to properly and adequately analyze the evidence and in particular did not evaluate the possibility that another person may have defiled and broken the Complainant's hymen. The Respondent however submitted that the prosecution proved all the ingredients of the offence of defilement beyond reasonable doubt.
 6. To sustain a conviction for the offence of defilement, the prosecution has to prove 3 ingredients. For an accused person to be convicted of the offence of defilement, 3 ingredients must be established. This is was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 must be established. The Court in that case stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.
 7. It must first be demonstrated that there was penetration of the complainant's genitalia. Second, it the evidence must show that the accused is the perpetrator; and third, the complainant must be below eighteen years.
 8. The Complainant testified that she was 16 years old at the time of the incident and that the Appellant was her boyfriend. On 26.12.2020, they met at a wedding at elder Wade Shadrack Kahindi. At night, he asked her for sex and took her to a bush and they had sex. Thereafter, they returned to the wedding. They had sex at a later date. Her teacher discovered and summoned her parents who took no action. Aster completing her KCPE, she met the Appellant on her way from the shop and as they were walking together, her parents appeared and took them to village elder and sub-chief. The following day they went to Bamba Police Station and then to Bamba Hospital where she was examined.
 9. PW2, testified that the Complainant the Complainant is his daughter and was born in 2004. The Appellant is their neighbor and his wife's sister's son. He found the Appellant with the Complainant in 2021. The issue was raised with the school which promised to look into the matter. On the night of 30.3.21 at 1 am, he and his wife went out to tie the goats and found the door open. They were informed by their daughter Zawadi that the Complainant had gone out. They pursued footprints and voices in the bush. They found the Appellant and the Complainant in the bush but they were not having sex. They took them to the village elder, sub-chief and the following day to Bamba Police Station.



10. PW2's evidence is corroborated by his wife PW3. She stated that she knew the Appellant had sex with her daughter. The village elder told her so and that he had heard this from members of the public. She stated that the 2 were asleep in the bush and were just conversing when they arrived.
11. PW4 Bernard Oduor told the Court that he was from Kilifi County Hospital. He produced the PRC and P3 forms which indicated that the Complainant's hymen was broken. He stated that the Complainant informed them that she had had sex with a boyfriend. The report was made on 11.4.21
12. From the evidence, it is clear that the Complainant was a minor. Her birth certificate which was produced in evidence indicated that she was born on 2.12.04 and was 16 years old in 2020 and was still in school. As regards penetration, the PRC and P3 forms clearly showed that the Complainant's hymen was broken. These 2 facts are not in disputed. What is disputed however is whether the penetration of the Complainant was by the Appellant.
13. In her testimony, the Complainant stated that the Appellant was her boyfriend and that they had sex on 26.12.2020 when they met at a wedding. They had sex at a later date which she could not remember. PW2 and PW3 stated that they found the Appellant and the Complainant together in the bush on the night of 30.3.21. Both however stated that they did not find them having sex.
14. The Respondent submitted that the defence evidence did not controvert or dislodge the watertight evidence placing the Appellant at the scene of incident. A careful look at the record does not support this contention. The trial Magistrate appeared to have been persuaded of the guilt of the Appellant by the evidence of PW2 and PW3 who found the Appellant and Complainant in the bush at night lying on a piece of cloth chatting. It is noted that the PRC Form is dated 3.4.21, while the P3 form is dated 6.4 21. This is a period of over 3 months from the date the offence is said to have been committed. It is not clear why the Complainant did not report the alleged incident on 26.12.2020 the day it happened, or soon thereafter.
15. The conclusion that can be drawn from the available evidence, is that the Complainant is a minor and that she was defiled. The ingredients of age and penetration are thus met and satisfied. When and by whom the defilement took place, cannot be ascertained from the evidence on record. The ingredient of identification thus fails.
16. In light of the foregoing, I find that the prosecution did not discharge its burden of proof against the Appellant, beyond reasonable doubt. The evidence adduced was not sufficient to sustain the conviction. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 20TH DAY OF MARCH 2024

M. THANDE

JUDGE

