



REPUBLIC OF KENYA



**Kiarie v Republic (Criminal Appeal E081 of 2023)
[2024] KEHC 7876 (KLR) (28 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7876 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E081 OF 2023**

S MBUNGI, J

JUNE 28, 2024

**ARISING FROM ORIGINAL SEXUAL OFFENCE CASE NO. 19 OF 2016 AT
THE PRINCIPAL MAGISTRATE'S COURT AT GITHUNGURI**

BETWEEN

GABRIEL KIRIKA KIARIE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against both conviction and sentence of life imprisonment for the offence of defilement Contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006 in original Sexual Offence Case No. 19 of 2017, judgment dated and delivered on 21st October, 2021 before Honourable V. Asiyo (SRM) at the Senior Principal Magistrate's Court, Githunguri)

JUDGMENT

1. The Appellant herein, Gabriel Kirika Kiarie was arrested on 13th May 2017 and charged for the offence of defilement Contrary to Section 8(1) of the [Sexual offences Act](#) No. 3 of 2006.
2. The particulars of the main charge were that on the 8th day of April 2017 at around 1800 hours in Githunguri Sub- County within Kiambu County intentionally and unlawfully caused his penis to penetrate into the vagina of CN a girl aged 8 years old being a person with mental disability.
3. He was also charged with offence of indecent act with a child Contrary to section 11(1) of the [Sexual Offences Act](#) No. 3 of 2006.
4. The appellant herein pleaded not guilty to both charges and the matter proceeded to full trial whereby the prosecution called eight (8) witnesses to prove its case.



5. That on 11th March 2021, the court considered the evidence of the eight (8) prosecution witnesses and made a finding that the prosecution had established a *prima facie case* against the accused. The appellant (DW1), on his part, gave sworn evidence on 10th June 2021 and did not call any witnesses(es).
6. The Appellant having being dissatisfied with the decision of the Hon. V. Asoyo (PM) Of Githunguri Law Courts, delivered on 21/10/2021 on the charges of defilement Contrary to Section 8(1)(2) [Sexual Offences Act](#) No. 3 of 2006 appealed against the said judgment on the grounds that: -
 - i. The trial court convicted and sentenced the appellant of the offence charged notwithstanding, prosecution failed to prove case beyond reasonable doubt.
 - ii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the charge sheet was defective.
 - iii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the crucial prosecution witnesses were not availed.
 - iv. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.
 - v. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the plausible defence of the appellant was not given due consideration.
 - vi. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, there was no eye witness pointing at the appellant.
 - vii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the vital ingredients of the offence charged were not proved as stipulated by law.
7. The Parties agreed to dispose off the appeal by way of written submission. On 3rd of June 2024 when the matter came to court the appellant confirmed having filed his submissions Mr. Gichara for the DPP sort for seven (7) days to file his submission. At the time of writing judgment there were no written submissions filed by the DPP; therefore, the court has written the judgment without the benefit of the submissions from the DPP.

The Analysis of the appellants submissions

8. I have gone through the appellant's submissions; he seems to have no problem with the prosecution evidence on the age of the complainant and proof of penetration but maintains that the prosecution did not prove that he was the perpetrator, for the victim/complainant (PW1) did not identify him as the assailant.
9. He submitted that the complainant being a child with mental retardation, she had no ability to positively identify the person who defiled her.
10. He further submitted that the evidence on record was not clear where the incident took place, whether it was on the way to the shop, at the river or at the alleged perpetrators home, and the clothes the child was wearing were not produced as exhibits.
11. The appellant submitted that it was only PW3's evidence which linked him to the incident and not the complainant's evidence.



12. The appellant faulted trial court for inferring that the appellant failed to conclusively challenge the prosecution evidence in his defence by saying the accused failed to produce evidence that he was not Gabriel Kirika. The lower court also failed to take into account that there was another person called John Kirika Njeri whom he found at the police cells having been arrested for the same offence but he bribed his way out.
13. The Appellant further submitted that on the alleged date he was engaged in a construction work at his father's home from 8.00 a.m. to 6.30 p.m. and thereafter he went to a bar where he stayed up to 9.30 p.m. The trial court never considered this, given that the prosecution never investigated whether his assertions were true or not.
14. On sentencing the appellant faults, the trial court for imposing the mandatory life imprisonment against him without taking into considerations the emerging jurisprudence which does not encourage imposition of life imprisonment.
15. The appellant rests his submissions asking the court to quash the conviction or set aside or vary the sentence of life imprisonment and sentence the appellant to a lesser sentence and order that the sentence to run from the date of arrest which was 13th May 2017 in line with Section 333 (2) of the Criminal Procedure Code Cap 75 Laws of Kenya.
16. I have read the memorandum of appeal, the proceedings and the judgment of the trial court and submissions filed by the appellant.

The issues for determination are: -

- a. Whether the prosecution proved the ingredients required to be proved in a charge of defilement and indecent act.
- b. Whether the trial court failed to consider the appellant defence and shifted the burden of proof to the defendant.
- c. Whether the mandatory life imprisonment imposed upon the appellant was harsh, excessive and went against the emerging jurisprudence

Determination

17. This being the first appeal the court is under duty to reconsider and evaluate the evidence on record and draw its own conclusions based on: -
18. In the case of *Selle And Another v Associated Motor Boat Company Ltd And Others*[1968] 1EA 123: “this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”
19. In *Gitobu Imanyara & 2 others v attorney general* [2016] eKLR the court of appeal stated that: - “an appeal to this court from a trial by the high court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
20. I have taken into consideration the principles set herein above.



Issue No. 1

21. The legal burden of proof as provided for under Section 107 (1) of the *evidence Act*, Cap 80 Laws of Kenya provides that; “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”
22. The evidential burden of proof is captured under Sections 109 and 112 of the *evidence act* as follows: -
 - “109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”
23. In criminal cases ordinarily, the burden of proof is always on the Prosecution. See the case of High Court Malindi criminal Case No. 20 of 2020 *Republic v Safari Katana Lugo alias Rasta Mungira*.
24. The question to answer is whether the complainant identified the assailant.
25. From the lower courts records as highlighted by the appellant in his submissions; The complainant (PW1) testified “I went to Kirika’s to pick a rubber....Kirika has two other siblings. Kirika was beaten by his mother when he refused to give me the eraser. Mama Kirika got annoyed. Told Kirika to wash clothes. Kirika “alifanya tabia mbaya” to me on the day his mother beat him. He was beaten I told on Kirika. Kirika got annoyed. My father is called Kamonde. Kirika has a sister. His sister is called Kirika. His brother is called Kirika. Kirika’s sister is called Kirika. Page 62 line 15,21 to 26

After I left the hospital, I saw Kirika in Rui again. You do not look like Kirika. Kirika does not look like anyone herein in court today. He does not look like accused. page 63 line 19 and 20.

Kirika looks like accused (pointed). Kirika is the one who was beaten. Kirika looks like him (points to court clerk). Page 63 line 22 to 24.

I went to Kirika’s home on that day. I do not know why I went there. I had not gone to do anything there. It is Kirika who did tabia mbaya. I was wearing my uniform, when I went to fetch water at “Rui” Kirika did not do tabia mbaya”. Page 66 line 3, 4,12 to 14.

26. On the issue of whether the appellant was positively identified from the above testimony the trial Magistrate had this to say.....

“On the third issue PW1 testified that a person called Kirika inserted his penis into her private parts. PW3 testified that when she found PW1 bleeding from the vagina on 9/4/2017 she asked her what had transpired. PW1 told PW3 that it was Kirika who did bad manners to her and she even took PW3 to the scene of incident.

PW1 during cross-examination by Mrs. Fundi kept changing the names Kirika and Kiriga. She said Kiriga was a boy who was a friend she used to play with and that she would even beat him. She distinguished between Kiriga and Kirika. At some point she stated it was Kiriga who did bad manners at another time she said it was not Kiriga. She said the blood came from Kiriga who had been hurt on the leg.

However, during re-examination PW1 clarified that Kirika is the bad person who did bad manners to her and he is not her friend.

It has been the defence case that PW1 did not positively identify the accused. They also submitted that the accused had mental retardation.



However, PW6 stated during cross-examination stated that PW1'S behavior was for a two-year-old. However, he said that a two-year-old can recognize the parents.

PW7 testified that it was possible for PW1 to identify the assailant. Be that as it may PW3 testified that the accused stayed in her home for one month after he had been beaten by his father.

Accused confirmed the above by testifying that he worked for PW3 for some time. Thus, the accused was well known by PW1.

That aside it is the accused defence that he was being framed by pw3 because he owed her money.

He said that his name is Michael and not Gabriel Kirika. However, I note when the accused took plea he did not raise an objection to the charge sheet referring to him as Gabriel Kirika.

His own father processed his cash bail using the name Gabriel Kirika.

Further to the section 107 of the *evidence act* provides that he who alleges must prove. In this instant case it behoved the accused person to produce his national identification card to prove that he is not Gabriel Kirika Kiarie.

As such I am not convinced with the accused's contention that he is not Gabriel Kirika.

Further to that the accused person said he was being framed by PW3 because he owned her money.

However, upon- cross-examination by Mr. Kariuki counsel watching brief for the complainant the accused admitted that he did not raise the issue of the debt when he was cross-examining PW3. The above is a pointer that the accused's allegation of being framed because of a debt is an afterthought.

That aside the accused stated that the police released the real perpetrator called John Kirika after his mother had paid a bribe. I note from the court record that the defence did not raise the allegations of bribery when cross-examining the investigating officer that is PW5.

The above is a pointer that the accused's entire defence is an afterthought. Pw1 was categorical that Kirika defiled her and when PW3 was told by PW1 that is was Kirika she knew that PW1 was referring to the accused who staying in her home.

PW3 during re-examination stated that the accused used to come to her house every day and he would call PW1 and offer to buy her sweets thus she knew pw1 was referring to the accused.

From the above it is clear that the prosecution witnesses positively identified the assailant who happens to be the accused person”

27. From the above quote, it is clear the trial Magistrate carefully analyzed the evidence and found that the appellant was positively identified as the assailant, and even the scene of the incident was identified; for the complainant took PW3 to the place where the appellant defiled her. The complainant maintained that it was the appellant who defiled her even when under intense cross examination notwithstanding her mental challenges. Therefore, I find there is no reason to disturb the lower courts findings on the these.



28. The evidence of PW3 that the complainant took her to the place where the appellant defiled her dismantles the accused defence of alibi, for these places him at the scene. Thus, I agree with the lower courts his defence of alibi is an afterthought.

I therefore do uphold the lower courts finding that the appellant was the perpetrator.

29. Lastly on the issue of sentencing; The punishment prescribed by the law for the offence of defilement for a child of less than 11 years is life imprisonment which is a minimum mandatory sentence. The lower court records show that the appellant was the first offender, in this case the trial court allowed the appellant time and the opportunity to mitigate. The learned trial magistrate expressed herself "I have taken note of accused mitigation, he is a first offender however the offence attracts a mandatory custodial sentence. Consequently, the accused person is sentenced to life imprisonment".

30. Though I cannot blame the trial court for passing mandatory life imprisonment sentence; I will agree with the appellant the emerging jurisprudence guards against imposition of mandatory life imprisonment for this takes away the courts discretion to meet out sentences commensurate to the circumstances of each case- see the case of Joshua Gichuki Mwangi vrs Republic Nyeri CA, CR Appeal 84 OF 2015 and Martin Wekesa Simiyu vrs Republic -Eldoret CA Appeal No. 112 of 2019.

31. Therefore, being guided by the above cited authority and upon considering the appellants mitigation and the circumstances in which the offence was committed, I hereby resentence the appellant to 25 years imprisonment for the offence of defilement Contrary to Section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006. Pursuant to Section 333 (2) of the Criminal Procedure Cap 75 Laws of Kenya. The sentence shall be computed from the date of his arrest and placed in custody on 13th May 2017.

32. In conclusion the appellant appeal against conviction fails and the appellants appeal on sentence partially succeeds as stated herein above. Right of appeal 14 days.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY IN KAKAMEGA HIGH COURT ON 28TH DAY OF JUNE, 2024.

HON. JUSTICE S. MBUNGI

JUDGE

Signed by:-

In the presence/absence of

Appellant-

Respondent-

Court Assistant-

