



**Muthioya v Republic (Criminal Appeal 37 of 2024)
[2024] KEHC 15992 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 37 OF 2024
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

KELVIN MBUGUA MUTHIOYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. P. Mutua (SPM) Kibera Chief Magistrate's Sexual Offense
Case no. 77 of 2024 Republic vs Kelvin Mbugua Muthioya & Another)*

JUDGMENT

1. The appellant with another not before this court was jointly charged for the offence of gang defilement contrary to section 10 of the *Sexual Offences Act*. The particulars of the offence as per the charge sheet are that on 27th July 2014 at (Particulars withheld) within Nairobi County, Kevin Mbugua Muthiora, the appellant intentionally caused his penis to penetrate the vagina of SAD, a child aged 15 years. After a full trial, the appellant was convicted while his co-accused was acquitted. The appellant was sentenced to serve fifteen (15) years imprisonment.
2. Being aggrieved, he filed the present appeal challenging the totality of the prosecution's evidence against which he was convicted. He further stated that the prosecution failed to prove their case beyond reasonable doubt.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called six (6) witnesses in support of their case.



5. PW1, SAD, testified that on 25th July 2014, she met her friend EE at Riruta Chief's Camp. EE's supposed boyfriend, the appellant, promised to take her to Loresho for scholarships from a man named JB. EE left her with the appellant, who took her to JB's house and gave her an alcoholic drink named Smirnoff, claiming it was soda. After a few drinks, she felt weak. The next day, the appellant took her to his girlfriend's house where a party was ongoing. When he was asked to leave, he took her to his single-room house, where she encountered the co-accused, whom she had never met before.
6. The appellant told her to sleep with him, but when she refused, he pulled her towards the bed, removed her clothes, and penetrated her vagina with his penis. The co-accused followed suit. She tried to scream to no avail since the appellant had switched on the radio and the music was too loud.
7. They forced her to shower, escorted her to a bus, and paid her fare. She reported the incident at Riruta Chief's Camp, where her mother was contacted. She was then examined at Nairobi Women's Hospital. Under cross-examination, she admitted leaving home for a party and noted errors in her police statement.
8. The complainant's testimony did not require corroboration under the proviso to Section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), provided there were reasons to believe the child was telling the truth. In this case, the trial magistrate noted that the complainant was truthful since she admitted evidence that was not favourable to her such as the fact that she had a boyfriend, the fact of running away from home, and the circumstances surrounding the incident were confirmed to be true by the accused persons. PW2 was consistent and steadfast in her testimony. Furthermore, her evidence, which was subjected to cross-examination, remained consistent throughout. I therefore hold that the appellant was correctly identified.
9. PW3, JAJ, the complainant's mother, confirmed that her daughter ran away from home. She searched for her with a watchman named Herman and informed the complainant's father. Together, they reported the matter to Riruta Chief's Camp and Kabete Police Station. On 27th July, she received a call from the chief's camp that her daughter was there. The complainant narrated the incident, after which she was taken to Nairobi Women's Hospital and issued a PRC form dated 27th July 2014 and a P3 form dated 29th July 2014. The complainant also underwent examination by Dr. Kizzie Shako (PW2) and received counselling at Kenyatta National Hospital. Later, the co-accused was arrested in (Particulars withheld) and taken to Kabete Police Station, followed by the appellant's arrest. Under cross-examination, PW3 noted that the police statement was amended to include all the details.
10. PW4, Senior Sergeant Isaack Masiga, testified that on July 27, 2014, PW3 and her husband reported their daughter missing at the Chief's Camp. He advised them to report to Kabete Police Station. Later, the complainant arrived at the camp, asking for help to reach her parents and recounting the incident. When her parents arrived, the complainant narrated what had happened. PW4 and his colleagues arrested the appellant and his co-accused in a house on Kikuyu Road and took them to Kabete Police Station, where the complainant identified the appellant.
11. PW5, PC Stellah Chebet, the initial investigating officer, received the missing child report on July 27, 2014. The next day, two suspects were brought in. She recorded statements from the complainant, her mother, and witnesses. The complainant was examined at Nairobi Women's Hospital and later by a police doctor. Initially charged with sexual assault, the charge was amended to gang defilement. The complainant's birth certificate showed she was born on March 8, 1999.
12. PW6, Sergeant Mercy Wandera, took over the case but conducted no further investigations. She produced the complainant's PRC form from Nairobi Women's Hospital.



13. PW2, Dr. Kizzie Shako, a Police Surgeon, testified that on 30th July 2014, she examined the complainant. The examination revealed a normal genital structure for her age but with multiple hymenal tears and tenderness at the vaginal entry. She produced the complainant's P3 form, indicating that the hymenal injuries were not fresh and resulted from penetration. Under cross-examination, Dr. Shako confirmed the hymen's normal structure and explained that she could not determine the age of the tears.
14. The evidence by the prosecution leaves no doubt that the ingredient of penetration was proved.
15. On the age of the victim, the trial court considered the birth certificate on record which indicated that the complainant was born on 8th March 1999. This was conclusive evidence of age. She was therefore 15 years old at the time of the incident and therefore a child within the law.
16. In his defence, the appellant stated that on July 26, 2024, the complainant and her friend EE visited him. They planned to attend a party in Kileleshwa, but EE left to care for her sick sister. The appellant and the complainant attended the party and left at 3:00 a.m. the next day. They walked to Kangemi, took a taxi with ten others, and went to his cousin's house in Uthiru, where seven adults and seven minors lived.
17. They woke at 7:00 a.m. and went to his house by 9:30 a.m., where the complainant slept on his bed while he slept on the couch. The co-accused arrived at 1:00 p.m., followed by EE, who later slept on the couch with the complainant. At 6:30 p.m., the complainant left with Sharon. The appellant noted that EE gave a statement but did not testify.
18. DW2, the co-accused, corroborated the appellant's testimony. DW3, PNW, DW2's mother, testified that on July 26 and 27, 2014, she was with DW2, who played piano at church. He was arrested on July 29. DW4, Joyce Nina Rere, confirmed that on July 27, 2014, DW2 was already at church when she arrived.
19. The trial court found the appellant's defence to be a mere denial. In addition, the complainant stayed with the appellant for a considerable amount of time, which was not denied, and was able to properly identify him. During the duration which the offence occurred, there was no margin of error and/or mistaken identity. This court finds that the appellant was positively identified as the perpetrator of the offence herein by the consistent and well-corroborated testimonies of the prosecution witnesses. The conviction for the offence of gang defilement is therefore affirmed.
20. On sentence, the appellant was sentenced to fifteen (15) years imprisonment. During sentencing, the court considered the appellant's mitigation and that he was a first offender. The court sentenced the appellant to the minimum sentence provided under the law.
21. As such, I find that the sentence was proper in light of the supreme court decision in Petition E018 of 2023 *Republic v Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:



Appellant Present

Mburugu for the Respondent

Achode Court Assistant

