



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutwiri v Republic (Criminal Appeal 24 of 2020)  
[2022] KEHC 10042 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10042 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL 24 OF 2020  
EM MURIITHI, J  
APRIL 28, 2022**

**BETWEEN**

**ALEX MUTWIRI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Isiolo Chief Magistrate's Court Criminal Case No. 22 of 2017 delivered on 19/2/2020 by Hon. E. Ngigi, PM.)*

**JUDGMENT**

1. The appellant was charged with Defilement Contrary to Section8(1) as Read With Section8(2) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were set out as follows –  
  
“Alex Mutwiri: On 21<sup>st</sup> day of December 2017 at [Particulars Withheld] area, in Isiolo township in Isiolo county within Eastern region intentionally and unlawfully caused his penis to penetrate into the vagina of EK a child aged 11 years.”
2. The appellant faced an alternative charge of indecent act with a child c/s 11(1) of the *Sexual Offences Act* with particulars that  
  
“Alex Mutwiri: On the 21<sup>st</sup> day of December 2017 at [Particulars Withheld] area in Isiolo township, in Isiolo county within Eastern region, intentionally and unlawfully touched the private parts namely breast and vagina of EK a child aged 11 years”
3. The appellant challenges the conviction and sentence of the trial court principally on sufficiency of evidence to prove the charge which the DPP considered to have been proved beyond reasonable doubt. The Court has considered the written submissions for the appellant and the DPP, and identifies the questions for determination to be whether the offence of defilement as charged in the main charge



or the alternative count of indecent act have been proved on the evidence to the required standard of proof. The court is mindful of its duty as a first appellate court to reconsider the evidence before the trial court and come to its own conclusion before considering whether the trial court arrived at the correct conclusion. See *Okeno v R* [1972] EA 32.

4. When hearing commenced on 18/3/2019, the court conducted a *voire dire* on the child and found that “the minor understands the significance of an oath and further the duty of telling the truth [and she will] give evidence on oath.” PW1’s testimony in full is as follows:

“I am EK I live in [Particulars Withheld]. I am now 13 years old. I attend [Particulars Withheld] primary school and in Standard 6. On 20/12/2017 at 10.00pm I was at home when I was called by Alex Mutwiri. He came and called me out and I went and opened the gate. He told me that I am like his daughter. I went with him to his house and I lit the lantern. He then told me he wanted to hold me as I was like his daughter. The accused was our neighbor. He then led me to his bed. He then removed my underpant.

He also removed his clothes. He inserted his “private part three times” into mine. I did not scream. He then gave me his phone to take to my mother for charging. He told me I should not tell anyone. I went home and I did not tell anyone.

However, I felt a lot of pain on my private parts and my mother asked me what was wrong and I told her what had happened.

My mother said we go that night to Karimi who had sold us that plot. We went to Karimi and she assembled people who came and arrested the accused person. The accused was then taken to the police station and I also accompanied them. I was then taken to hospital and was told to come on the following day. We had given an O/B number. We were given a blue letter. On the following day I was examined at the Prison and later at the General Hospital.

This document was issued to my mother. (P3 MFI-1).

I know Alex as he is our neighbour. He is the one sitted over there.

(Points at the accused).

Cross examined by the accused in Swahili

I have never had sex with a man before.

The doctors saw the underpant. It is the doctor who knows this. You do not have a dispute with my mother over a plot.

I do not know how a person feels when she has sex. I am not telling what my mother told me but I am telling the court what happened to me. My mother did not tell me to say I had slept with you for three times. I am the one who came to your house. My mother did not send me. My mother saw me coming to your place.

Re-examined by Prosecuting Counsel in Kiswahili

Alex is the one who did the act on me.

The plot was given away by yourself.

I did not scream and I did not know what you were doing at me. I felt pain. Your house is close to ours.”



5. PW2 PK, the mother of the complainant PW1 testified as follows:

“On 20/12/2017 at around 10.00pm I was in my house when I heard Mutwiri calling my daughter E. Mutwiri is my neighbor. E went and opened the gate for him. I was so tired and I heard the, accused giving my daughter keys to go and open the door for him.

E came back at 10.00pm. I asked E where she had gone. She then went out severally to urinate and I questioned her on what was wrong and she told me Mutwiri had taken her to bed.

I woke up and went to my neighbor and her husband called other people. The people went and called Mutwiri and Mutwiri was brought to that homestead and he denied the act. We then came to the police station together with the child. We then took the child to hospital. We were then taken back home. The child was not admitted. In the morning we went back to hospital and the child was examined and drugs given to her.

On that day the complainant had come back with the accused phone. The complainant did not have the accused phone when she went to open the gate.

The child has told me she was also feeling a lot of pain on her private parts. Mutwiri is a neighbor as he had just moved there about two months prior. I was issued with a P3 that was filled at the hospital. This is the P3 (refers to MFI-1). Mutwiri is the one in court (points at the accused in court).

Cross examined by accused in Swahili

I had known you since you came to this place about two months ago. Previously you used to come and inspect your plot. I have never removed your fence. You should have lodged a case with the police if I had demolished your fence.

I did not tell the child what to say.

The person who sold you the plot had allowed me to cultivate the land before you bought it.

The child not sleep at your house but stayed there for one hour. I did not bring the underpant. The child was not bleeding I allowed the child to go out but it was not at 10.00pm. The child went out at 8.00pm and came back at 10.00pm. the child left at 8.00pm and came back at 10.00pm.

I did not see the need to scream but went and informed neighbours who came and arrested you.

What relationship can I have with you.

I did not tell the child what to say. At 8.00pm it was dark and no one else could have seen the two of you other than me. I did not follow you. You were drunk on that day. Your wife is the one who was sending for your phone after your arrest.

Nobody else saw the two of you. I did not refuse to come and fill the P3 as the complainant's father was ill. Initially, I was taken to hospital by an officer and we went on our own the following day. I do not know how you did it.

The child did not scream as she told me she did not know what you were doing to her.

Re-examination by PC in Kiswahili



The child left at 8.00pm and came back at 10.00pm”

6. PW3 David Kairi Laikuta testified that on 21/12/2017 he had been called in his capacity as the sub-Area manager and informed of the incident as follows:

“On 21/12/2012, I was at my home in [Particulars Withheld]. At 10.30am I was called over by phone as I am the area Sub-area and informed that the complainant’s mother was alleging her daughter was in the accused house. That was at 10.30am. I went to the place and found a lot of people at PK’s house and they told me that EK had been dragged into the accused house.”

7. When put on his defence the appellant read his written defence, which was principally an alibi and allegation of a grudge arising from a land dispute with the complainant’s mother, as follows:

“I remember on 20/12/2017 I woke up to travel to Meru and spent the night there. On 21/12/2017, I travelled back to Isiolo and arrived t 8.00am. There were workers at my plot and we worked until 5.00pm. I then went to my rental plot in town where I live. I took a rest and food until 9.00pm. I then went to town to watch football and came back at 10.48pm using a motor cycle. There were cement and timber at the plot which needed to be guarded. arrived and everything was fine. I then slept. After about 5 minutes somebody knocked and I opened the door. A man was standing there and he told me there was a complain and we go to Karimi’s house. I cooperated and, on the way, we met 3 men and a child. They began to ask me questions and I told them I do not know. They began to harass and beat me. I ran to the AP Police and they followed me. The AP took us-to the police. On the way to the police the mother was telling the child to say I slept with her three times. On arrival the child told the police what the mother had told her. They did not take us both to hospital. They charged me and put me in cells. After 3 days I was interrogated by a police lady and I denied. -On 29th I was brought to court. The case was framed by Karimi who sold -my plot and who never came to testify and the sub area who used to sell other property in [Particulars Withheld]. The plots have no title deed and some people took advantage to sell.”

8. On cross-examination, the appellant the sub-area manager and Karimi had a plot dispute with him but that he had not reported the dispute anywhere. The appellant put in evidence copies of statements by PW2 and PW3 with the object to show that the first report did not indicate that he was drunk or that he had given his phone to the complainant for charging as she testified in court.

## Determination

9. The accused faced a charge of defilement under section 8(2) of the *Sexual Offences Act* with an alternative charge of indecent act with a child under section 11(A) of the Act. The ingredients of defilement under section 8(1) as read with 8 (2) of the *Sexual Offences Act* which is charged in the main count require the evidence of penetration. Indecent act does not include penetration but only the touching of the victim’s sexual organ by the sexual organ of the accused, and or exposure to ponographic materials, as defined in section 2 of the Act, as follows:

“indecent act” means any unlawful intentional act which causes-

- (a) any contact between the genital organs of a person, his or her breasts and buttocks with that of another person;



(b) exposure or display of any pornographic material to any person against his or her will, but does not include an act which causes penetration;”

10. The Prosecution did not produce medial evidence of penetration because the Medical Examination (P3) report, although marked for identification, was not put in exhibit as the prosecution’s case was closed by the court on refusal of adjournment to call other witnesses. On the evidence, this court finds the offence of Indecent Act charged as alternative charge to the main count of defilement was proved.
11. The appellant was known to the complainant who identified him as the assailant who after asking her to help unlocking the door lured her into his bed and defiled her all the time telling her that she occupied the same position as his daughter. There was ample opportunity for the child to recognize the appellant whom she knew as their neighbour across the fence as indicated by PW2 and the accused himself.
12. That the appellant had a dispute over a plot with the mother of the complainant, which PW2 readily accepted, does not detract from the cogency of the evidence of the victim PW1 as to the defilement. The evidence of a child given on oath need not be corroborated as discussed in the Kenya Judiciary Criminal Procedure Benchbook 2018 at paragraphs 94-96 as follows:

“ 94. No corroboration is required if the evidence of the child is sworn (Kibangeny arap Kolil v R [1959] EA 92). Unsworn evidence of a victim who is a child of tender years must be corroborated by other material evidence implicating the accused person for a conviction to be secured (Oloo v R [2009] KLR).

95. However, in cases involving sexual offences, if the victim's evidence is the only evidence available, the court can convict on the basis of that evidence provided that the court is satisfied that the victim is truthful (s. 124, *Evidence Act*). The reasons for the court's satisfaction must be recorded in the proceedings (Isaac Nyoro Kimita v R Court of Appeal at Nairobi Criminal Appeal No. 187 of 2009; Julius Kiunga M'birithia v R High Court at Meru Criminal Appeal No. 111 of 2011).

96. The evidence of a child, sworn or unsworn, received under section 19 of the *Oaths and Statutory Declarations Act* is subject to cross-examination pursuant to the right to fair trial, which encompasses the right to adduce and challenge the evidence produced against the accused (art. 50(2)(k), CoK”

13. In any event under section 124 of the *Evidence Act*, the Court is entitled to convict on the sole evidence of a victim of the sexual assault if for reasons to be recorded the court believes the victim to be telling the truth. In this case the Court will defer to the observation of the trial court which saw and heard the victim in terms, as held in Okeno v R [1972] EA 32, of the allowance to be made by an appellate court “for the fact that the trial court has had the advantage of hearing and seeing the witnesses.” The trial court recorded as regards the victim in this case that –

“ [T]he court had the opportunity to observe the demeanour of the complainant while she was giving evidence. Her evidence was firm even upon being subjected to cross-examination. Her evidence before the court impressed me as being a truthful account of the events of the 21<sup>st</sup> of December 2017.”

14. The victim PW1 is the only witness to the sexual assault and her evidence is covered by section 124 of the *Evidence Act*. There is nothing in the defence that raises a reasonable doubt as even the alibi defence was not taken up in the cross-examination of the witnesses PW1, PW2 and PW3. Only the land matter



was raised in the cross-examination. The appellant had admitted in cross-examination that he had not reported the dispute anywhere. The alleged land dispute with the mother PW2 does not explain why a 13-year old PW1 would steadfastly testify that she had been defiled by the appellant when she was 11 years old.

15. In addition, I have had opportunity to read the handwritten statements of the PW1 and OB report put in evidence by the appellant and confirmed that the testimony of PW1 and PW2 in court mirrored what they recorded in the statements and OB, and I do not find any material inconsistencies. That they did not state that he had been drunk is not material to the charges. Both the defilement report and the PW1 statement indicate, respectively, that the “accused pulled her in the bed and removed her clothes and later defiled her repeatedly” and “shortly he pushed me towards him and put me on his bed, since he had already closed the door. He removed all my clothes and he also removed his trouser, while halfly naked he lie on top of me , He put his male genital organ into my female genital organ and started to defile me several times.” (Sic)
16. This court finds the alternative charge of indecent act with a child proved in terms of section 179 (2) of the Criminal Procedure Code because the Prosecution were only able to prove such facts as prove the lesser offence of indecent act, the act described by the PW1 indication the contact necessary for indecent act, but not defilement, as penetration was not proved by medical evidence. The Court would have convicted for indecent act even if the accused had not been charged therewith.
17. Section 179 (1) of the Criminal Procedure Code (CPC) provides as follows:

“ (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.”
18. The evidence of the child that the appellant “inserted his "private part three times" into mine” is not to be interpreted as evidence of penetration when she says herself that she did not know what the appellant was doing. Corroboration of penetration by medical evidence is necessary on the facts. In this case, however, the appellant had been charged with an alternative count, and there is, consequently, no need to invoke section 179(1) of the CPC.

### **Judgment of the trial court**

19. The trial court elaborately considered the issues for determination and held as follows:

“The issues that arose for determination are as follows:

- a. The age of the complainant
- b. If there was an act of penetration on the complainant
- c. If the answer to (b) above is not in the affirmative, whether an indecent act was committed to the complainant.
- d. If (b) or (c) above are in the affirmative whether there is evidence to link the accused person.

As regards the issue of the complainant's age the particular sin the charge states that the complainant was 11 years as at the time the incident is alleged to have occurred. The age assessment done on the 25<sup>th</sup> of June 2018 had estimated the



complainant's age to be 12 years. It is noted that the same was carried out in the year 2018 whereas the incident occurred in the year 2017.

Accordingly, the court finds the complainant was 11 years old when the incident occurred.

Turning now to the issue of penetration it is noted that the prosecution case was called without the P3 being produced.

As such an expert opinion as to whether there was penetration of the complainant's genitalia is missing. The court therefore finds that the prosecution did not prove there was an act of penetration on the complainant's genitalia and thus the charge of defilement cannot stand without this crucial piece of evidence.

The court has however noted from the testimonies of the complainant that she says that the accused had inserted his private parts onto hers three times.

From the complainant's testimony it is clear that the accused private parts had come into contact with the vagina of the complainant.

As such the court finds that an indecent act was committed against the complainant on the 21st of October 2017.

As to who had committed the said act, the complainant and the accused person were neighbours and had interacted with each other prior to the incident. The complainant was therefore familiar with the accused person.

Further though the incident occurred at night the complainant had stated in examination in chief that the accused person upon entering his house had lit the lantern. Moreover, the two had a conversation at the complainant's gate when the accused is said to have told the complainant that she was like his daughter. They would also extend their conversation to the house.

From the foregoing the court finds that the accused was not only identified by the complainant but also recognized as the person who had committed the indecent act on the complainant.

The accused in his defence had alleged that the complainant mother was framing him up owing to a land dispute. When this issue was put across to the PW2 she had indeed confirmed that prior to the accused purchasing the plot, the previous owner used to allow her to do some cultivation on the plot.

However, the witness had denied ever causing any destruction on the said plot since the accused took up the ownership of the plot. Infact, it is noted that though the accused had implied there was a land tussle between her and the complainant mother there is no material placed before the court to show any incident reported to the police by either the accused or PW2 regarding the use or ownership of the subject plot. Accordingly, the accused defence of being framed up owing to a land case is a shame and must fail.

The above notwithstanding the court had the opportunity to observe the demeanour of the complainant while she was giving evidence. Her evidence was firm even upon being subjected to cross-examination. Her evidence before



the court impressed me as being a truthful account of the events of the 21st of December 2017.

The upshot is that court finds the alternative charge as having been proved and the accused is convicted under Section 215 of the CPC for the offence of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offence Act.

Hon. E. Ngigi-PM

19/2/2020”

I respectfully agree with the conclusion of the trial Magistrate.

20. The directions of the Supreme Court in *Muruatetu & another v R* [2021] eKLR are binding on this court that the decision as to the mandatory nature of the death sentence in cases of murder does not apply to sexual offences and the minimum sentences therefor are unaffected by the decision in *Muruatetu*.
21. As this court held in KBT HCCRA 63 of 2017, *Kamama Kole v R* on minimum sentences:
  5. Paragraph 7.17 of the Kenya Judiciary sentencing policy Guidelines on mandatory minimum sentences provides that:-

“Where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose lower than what is prescribed [see *Kennedy Munga v R* [2011] eKLR]. A fine shall not substitute a term of imprisonment where a minimum sentence is provided.”
  6. The provision in the Policy Guidelines is supported by case law such as *Kibirgen v R* [1975] EA 250; *Kipsaina v R* [1975] EA 252; *Mfundo v R* [1975] EA 63; *Desai v R* [1971] EA 416; *Njuguna v R* [1972] EA 494; *Kimanzia v R* [1972] EA 495.
  7. The Court has no discretion whether to award minimum sentence or reduce it. It is duty bound to pass the minimum or greater sentence according to the circumstances of the case in accordance with the procedure of assessment of sentence set out in *Njuguna* and *Kimanzia supra*, and followed in *Kibirgen and Kipsaina, supra*.”
22. This Court does not, therefore, have any discretion in the matter, and the minimum sentence of imprisonment for ten (10) years must be imposed on conviction for indecent act with a child under section 11(1) of the *Sexual Offences Act*.

### Orders

23. Consequently, this court does not find merit in the appeal by the appellant against the conviction and sentence of the trial court, and the same is dismissed.
24. The court will only give direction in terms of section 333(2) of the Criminal Procedure Code that the sentence of imprisonment for ten years shall commence from the 23<sup>rd</sup> December 2017 when he was arrested and detained to await his trial.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**EDWARD M. MURIITHI**

**JUDGE**



**Appearances:**

Appellant in person.

Ms. Nandwa, Prosecution Counsel for the DPP. for Respondent.

