



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutembei v Republic (Criminal Appeal E047 of 2024)  
[2025] KEHC 2663 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2663 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E047 OF 2024  
CJ KENDAGOR, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ERICK MUTEMBEI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgment delivered by Hon. C.K Obara,  
Senior Principal Magistrate on 2nd November, 2023 in Maua  
Magistrates Court S. O. No. 59 of 2019, Republic v Erick Mutembei)*

**JUDGMENT**

1. Erick Mutembei was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. The particulars are that on the 24<sup>th</sup> day of July, 2019 within Meru county, the appellant intentionally caused his penis to penetrate the vagina of F.N. a child aged 16 years.
2. In the alternative count, the Appellant was also charged with the offence of indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.
3. The trial magistrate convicted the Appellant after the trial, during which the prosecution called six and the Appellant gave his defence. The Appellant was sentenced to 15 years' imprisonment.
4. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on the following amended grounds:
  - I. That the learned trial magistrate erred in both law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubts
  - II. That the learned trial magistrate erred in fact by failing to note that key witness were not called



- III. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witness
  - IV. That the learned trial magistrate erred in matters of law by and fact by failing to consider my defense
  - V. That the trial magistrate erred in both matters of law and also facts by failing to note that the medical evidence was not conducive to a safe decision.
5. This appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

6. The Appellant, in his submissions, focused solely on the sentence and argued that, since the DNA confirmed he was the father of the Complainant's child born as a result of the incident complained of, his continued incarceration would affect and infringe upon the rights of the Complainant's child under Article 53 (1) (e) of the Constitution and Sections 4(1) and 6(1) of the Children's Act.
7. The Appellant urges this Court to exercise discretionary powers to impose a lesser sentence than awarded by the trial Court so that he may be able to fulfill his parental responsibilities.

### **Respondent's Submissions**

12. The Respondent addressed specific elements of the offence of defilement, namely, the age of the Complainant, proof of penetration in accordance with Section 2(1) of the Sexual Offences Act, and positive identification of the assailant. The Respondent relied on several case laws to demonstrate that the elements of defilement were proven beyond reasonable doubt.
13. In regard to sentencing, the Respondents state that the accused was sentenced in accordance with the law, and there are no justiciable grounds for interfering with this. The Respondents urge this Court to dismiss this appeal in its entirety

### **Prosecution's Case**

12. PW1, F.K., the Complainant, stated that she was 17 years old, having been born in March, 2003. She testified that on 24<sup>th</sup> July, 2019, while on her way to school, she encountered the Appellant, who began speaking to her and promised to provide her with whatever she needed and promised to pay her a visit. She testified that the Appellant visited at night while she was sleeping, called her by name, and she responded by opening the door out of fear. She stated that the Appellant entered the house, and while she was sleeping with him, her mother discovered them and informed the father, who arrived with a police officer; subsequently, they were arrested and taken to the police station. She testified that she sleeps alone in a separate house from her parent's house, and narrated that they had sexual intercourse with the Appellant on that date and that they had had sexual intercourse with the Appellant on two other occasions. The Complainant was subsequently taken to the hospital for examination and found to be pregnant and the child P.M was born.
13. PW2, LM stated that the complainant is her daughter, born on 3<sup>rd</sup> March, 2003. On 24<sup>th</sup> July. 2019, at around 12:00 am, while asleep, she heard a hen making noise, prompting her to step outside to investigate. She stated that she walked around the compound and saw that her daughter had switched off the security lights while the other lights were on. She testified that she peeped through the lower part of the door and noticed a pair of slippers, after which she locked the door from the outside and



informed the Complainant's father, who was at Kawira. He arrived with three people and escorted the Appellant to the police station after they found him in her daughter's room.

14. PW3, JM, stated that his wife, PW2, called to inform him that something troubling was occurring at their home. He mentioned that he went there and found the Appellant in his daughter's room. He testified that he reported the matter and that the accused was subsequently charged.
15. PW4 EKM, clinical officer, testified that the Complainant was seen on 24<sup>th</sup> July, 2019 regarding the allegation that she had been defiled by someone known to her. The accused had no physical injuries, discharge, or visible wounds. The hymen was torn but not fresh. From the analysis, it was established that the complainant was pregnant due to previous sexual intercourse.
16. PW5 R.W., government analyst, testified that they received three sample exhibits from PC(W) Jemima Wanjiku. The samples were analyzed, and a DNA profile was generated. There were 99.99 plus 41 chances that EM is the biological father of the child P.M.
17. PW6, Investigation Officer, stated that on 24<sup>th</sup> July, 2019, at 4:00 a.m., the Appellant and F.N. were brought in by three individuals who reported that they found the Appellant in their daughter's room. She stated that they detained them for defilement and for being a child in need of care and protection. He mentioned that she and another officer accompanied them to the hospital, where it was established that the Complainant was pregnant. She testified that she subsequently took the DNA samples to Maua General for transmission to the government chemist.

#### **Defence Case**

12. The Appellant gave an unsworn statement in his defence. He acknowledged knowing the Complainant, stating that she was his landlord's daughter, and expressed his readiness to care for the child born from their relationship.

#### **Analysis and Determination**

12. This being the first appellate Court, this Court 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.”

15. The Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are:
  - i. Proof of age of the victim
  - ii. Proof Penetration
  - iii. Positive identification of the perpetrator



16. The investigating officer produced the birth certificate which showed that the Complainant was born on 26<sup>th</sup> March, 2003. She was aged 16 years at the time of the incident complained of. Age was therefore established.
17. The Complainant testified that the Appellant had sexual intercourse with her on the night that they were found at her room. She described that the Appellant inserted his penis into her vagina. The medical examination indicated that her vagina appeared normal, and no discharge or injuries were observed.
18. The Complainant testified that they had engaged in sexual intercourse previously, and the medical officer noted that the pregnancy and the child subsequently born were a result of earlier sexual activity.
19. From her testimony, the Complainant clearly understood what she referred to in her testimony as bad manners as sexual activity and that it was the insertion of the penis into her vagina. She was 17 years old at the time of her testimony, which was very detailed and convincing.
20. The arrest of the Appellant at the location of the incident (PW1, 2 and 3's home) serves as compelling circumstantial evidence. The investigating officer's testimony indicated that both the Appellant and the Complainant were taken to the police station together on the same night. Notably, there were no other individuals present at the scene during the incident. Furthermore, the evidence by PW2 and PW3 corroborated the identity of the assailant who was found at the room. The DNA report for the child P.M. supports the testimony that the Appellant and the Complainant had previously engaged in sexual activity leaving no doubt regarding the authenticity of the complainant's claims.
21. The issue of circumstantial evidence was addressed by Njuguna J. in *Njue & another v Republic (Criminal Appeal E020 of 2022)* [2023] KEHC 256 (KLR);  

“It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests, namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”
15. The trial Court examined the sequence of events surrounding the case. After thoroughly reviewing the evidence presented during the proceedings, I am firmly convinced of the Appellant's guilt. His defence did not challenge the evidence presented; the elements of the offence of defilement, contrary to Section 8(1), as read with Section 8(3) of the *Sexual Offences Act*, were established to the required standard beyond reasonable doubt, and the conviction was safe. His status as the biological father of the child does not absolve him from the fact that his action was unlawful; it cannot be overlooked or justified merely by virtue of this paternity.
16. Accordingly, the appeal against conviction is dismissed.

### **Whether the sentence meted against the appellant was excessive**

15. Section 8(1) and (4) of the Act provides as follows:
  - 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- 8 (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
15. The Appellant contended that the trial Court considered the aggravating factors to the complete exclusion of the mitigating factors, notably that he is the child's father and willing to support the child.
16. In the case R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:
- “There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed...”
15. The trial Court requested a presentence report, and the sentencing indicates that she properly considered the report, the presented mitigation, and the fact that the appellant was a first-time offender. I find that the sentence of 15 years is inherently sound in itself.
16. Having considered the issues raised in this appeal, I find that the appeal is not merited. Accordingly, I uphold the conviction and sentence and the appeal is hereby dismissed in its entirety. The sentence shall commence on the date it was passed by the trial Court.

It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS  
ONLINE PLATFORM ON THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Appellant present

Mr. Omondi, ODPP for Respondent

