



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutuli v Republic (Criminal Appeal E017 of 2023)
[2025] KEHC 1938 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1938 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E017 OF 2023
DR KAVEDZA, J
FEBRUARY 13, 2025**

BETWEEN

JASON AMBALE MUTULI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 9th November 2023 by Hon. Kabuya I.M (SPM) at Kibera Chief Magistrate's Court Sexual Offences Case no. 103 of 2020 Republic vs Jason Ambale Mutuli)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 21st March 2020 in Embakasi South Sub-County within Nairobi county, he intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 16 years. He was sentenced to serve fifteen (15) years' imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the trial court erred in relying on the medical evidence adduced in court since this evidence was prepared by an expert who is neither licensed nor accredited by the Kenya Medical Laboratory Technicians and Technologists Board.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. The prosecution case was as follows: The complainant MM (PW1) provided a sworn testimony after voir dire examination, stating that she was 16 years old and was born on 6th April 2004. She produced her birth certificate to that effect. She averred that on 21st March 2020 at 5p.m, the appellant who she referred to as Baba Carol met her, and gave her Kshs. 50 and told her to go buy him some charcoal. She did so, and when she did not find him where she had left him, she went to his house. She handed her the charcoal and the balance of Kshs. 20, after which he offered her milk. After drinking the milk, she felt dizzy and became unconscious.
5. When she woke up at 6 p.m., she found him lighting his jiko, and then she left for her in-law's house in which she resided. Later on, she felt pain in her vagina and started noticing physical changes in her body, which she was afraid to tell her in-law because he was harsh. In August, her sister took her for a check-up where she found out that she was three months pregnant. That is when she told her sister what had occurred in March.
6. Her sister confronted the appellant who admitted that he had had sex with the complainant but did not know that she would become pregnant. When he failed to believe that she was pregnant, she underwent a second pregnancy test using a kit obtained from a chemist which turned out positive. He encouraged her to seek an abortion to which she refused. From his house, the complainant and her sister proceeded to the police station where they reported the matter. Afterward, she returned to Mukuru Health Clinic where she was issued a PRC Form. Additionally, after she gave birth, her child underwent a DNA test. Her pregnancy caused her to drop out of school. She identified the appellant in court.
7. PW2, IN, the complainant's older sister, gave a testimony that corroborated the testimony of PW2. Additionally, she identified the appellant in court, stating that they had been neighbours since they were young. Having taken samples from the child and the appellant, a DNA test was conducted and the results were positive.
8. PW3, Agnes Nassir, a biomedical scientist, testified that on 2nd March 2021, she conducted a DNA test after obtaining consent from the complainant's family. The results, dated 10th March 2021, confirmed that the appellant was the father of the complainant's child. She produced the DNA report in court, along with identification and chain of custody documents, ensuring the samples were handled per legal requirements. Her testimony was corroborated by PW6, Arigas Nassir, who assisted in the test.
9. PW4, Mercy Chepkurui, a nurse at Mukuru Health Centre, testified on behalf of Mary Anne Muhammed, who examined the complainant. The examination revealed old hymenal tears and a positive pregnancy test. PW1 was treated and issued with a PRC Form, a medical certificate, and a P3 form, which PW4 produced in court.
10. PW5, Sergeant Agnes Mwanja, stated that on 6th August 2020 at 2 p.m., PW1 and PW2 reported the incident at Embakasi Police Station. She recorded their statements and received the PRC Form and medical notes. A DNA test confirmed the appellant's paternity, leading to his arrest, after PW1 identified him.
11. DW1, the appellant, stated in his defence that on the material day at 7 p.m., he was at home when he heard a knock on his door. Upon opening, he found PW1 and PW2, who accused him of having sexual relations with the complainant, an allegation he denied. They left but returned two hours later with a mob claiming to be 'Nyumba Kumi' officials, who took him to Mukuru kwa Njenga Police Post, where he was held for three weeks before being taken to Makadara Law Courts for plea.



12. The court granted an order for a DNA test, but he alleged that the prosecution took him to a private facility instead of Kenyatta National Hospital, as directed by the court. He refused to undergo the test. He vehemently denied any involvement with the complainant, asserting that her family had maliciously fabricated the allegations because he had refused to assist them financially after the complainant's parents passed away.
13. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
14. Further, sections 8(1) and (4) of the *Sexual Offences Act*, No. 3 of 2006 provides thus:
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
 - (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 complainant underwent two pregnancy tests, one conducted at a hospital and another at a chemist in the presence of the appellant. Following the birth of her child, a DNA test conducted by PW3 and PW6 conclusively established that the appellant was the biological father. The results of both the pregnancy tests and DNA analysis provided irrefutable proof that the appellant had engaged in sexual intercourse with the complainant, thereby satisfying the legal requirement of penetration.
16. The trial court evaluated the appellant's defence and found it to be incredible and unconvincing. The court determined that the appellant's explanations did not displace the prosecution's strong and cogent evidence. In my view, the appellant's defence was correctly dismissed by the trial court as an afterthought, designed solely to absolve him from liability.
17. Regarding the complainant's age, the trial court carefully reviewed the birth certificate produced in evidence. The document confirmed that the complainant was born on 6th April 2004, establishing that she was 16 years old at the time of the offence. Consequently, there is no doubt that she was legally a child, and the appellant's actions amounted to an offence.
18. In his submissions, the appellant contended that the biomedical scientists who conducted the DNA tests were neither licensed nor accredited by the Kenya Medical Laboratory Technicians and Technologists Board. However, this court dismisses this argument as it was not raised during the trial and, therefore, lacks merit. The appellant had ample opportunity to challenge the credentials of the forensic experts but failed to do so, making this submission an afterthought.
19. Accordingly, the evidence presented overwhelmingly supports the trial court's findings and justifies its conviction of the appellant. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
20. On sentence, the appellant was sentenced to serve fifteen years' imprisonment. During sentencing, the court considered the pre-sentence report and exercised discretion. Subsequently, I see no reason to interfere with the sentence.
21. 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 13TH DAY OF FEBRUARY 2025.

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent.

Mr. Okiri for the appellant

Appellant – present

Achode – court assistant

