Mutum v Prosecution & another (Criminal Appeal E049 of 2023)
[2025] KEHC 1186 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1186 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E049 OF 2023

LW GITARI, J

FEBRUARY 7, 2025

BETWEEN

PETER MUTUM ..... APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTION ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT

(Appeal from the proceedings in the Senior Principal Magistrate's Court at Nkubu Sexual Offences Case No.E017/2022)

JUDGMENT

1. The appeal arises from the proceedings in the Senior Principal Magistrate's Court at Nkubu Sexual Offences Case No.E017/2022 where the appellant was charged with defilement Contrary to Section 8(1) of the *Sexual Offences Act* No.3 of 2006. The particulars of the charge were that on 14/5/2022 at Imenti South Sub-County within Meru County the appellant unlawfully caused his penis to penetrate the vagina of VK a girl aged years at the time of defilement.

2. The appellant was also charged with an alternative count of committing an indecent act with a child Contrary to Section 11(1) of the *Sexual Offences Act* in that on 14/5/2022 intentionally and willing fully touched the vagina of VK a child aged 13 years using his penis against her will.

3. The appellant denied the charge and a full trial was conducted and at the conclusion he was found guilty on the charge of defilement Contrary to Section 8(1) and he was convicted and sentenced to serve Twenty years imprisonment. He was dissatisfied both conviction and sentence and filed this appeal based on six grounds which are listed in his submissions. These are as follows:

    1. That the learned trial magistrate erred in both matters of law and fact by relying on evidence that was not corroborated, contradicting and marred with falsehood.

2. That the learned trial magistrate erred in both matters of law and fact where he failed to make findings that crucial and vital witnesses were not summoned before court to rove the allegations thus provokes Section 150 of the *Criminal Procedure Code*.

3. That , the learned trial magistrate erred in both and matters of law and fact when he failed to note that the prosecution case herein was not proved beyond reasonable standard required by law.

4. That , the learned trial magistrate erred in both matters of law and fact where he failed to make findings that crucial and vital witnesses were not summoned before court to prove the allegations thus provokes Section 150 of the *Criminal Procedure Code*.

5. That , the learned trial magistrate erred in both matters of law and fact by rejecting the appellant defence without giving any cogent reason.

6. That , I the appellant has rights to a fair trial have been violated by the fact that the time I spent in remand while undergoing trial was not taken into account in my sentence of 20 years awarded by sentencing court as required under Section 333(2) of the *Criminal Procedure Code* hence violating the provisions of Article 27(1)(4) and (5) of *the Constitution* on the right to equal protection and equal benefit of the freedom from discrimination.

4. The appellant prays that the appeal be allowed. The conviction be quashed and the sentence be set aside.

5. The respondent opposed the appeal and prays that it be dismissed.

The Prosecution Case

6. PW1 – VK was the complainant who told the court that she was 13 years old at the time. She gave unsworn statement after voire dire examination following the magistrate's ruling that she was of sufficient intelligence and understood the duty to tell the truth. She testified that she was born on 26/7/2008. That on 14/5/2022 she was at Kagendo's house washing clothes when the appellant who she knew as Mutuma went there and bought her two cups of 'Mugacha' which was being sold at a nearby club. That it was at about 7.00pm and she took the drink and went with the appellant to Ntiira's house which is a bar. He bought for her one cup of Keg and told her to pay and yet he is the one who had ordered it. She drunk it then left for home alone.

7. On the way she met the appellant near a mango tree. He undressed her ad told her he was not sick. He then inserted his organ for urinating into her vagina. They had sex. One Ngetich a police officer shone a torch on them and ordered them to dress up. He then took them to Kieni Kia Ndege. He then took them to the police station. PW7 was taken to Kanyakine Hospital where she was treated and a P3 form was filled. She identified her birth certificate, treatment notes and the P3 form. The complainant maintained her testimony in cross-examination.

8. PW2 – EMM testified that she is a business lady and operates a club. On 14/5/2022 she was at the club with a police officer called Hilary Ngetich (PW3) standing outside when she heard noises inside where there was some nippier grass. PW3 shone his torch at direction and he saw a girl who was naked. The girl is named K. and the appellant alias "Soft" lying down. The appellant was lying on top of 'K' and they were having sex. Mutuma had pulled his trousers down to the knees and the complainant was holding her pant in her hand. They went close and PW3 brought the two outside the club where there was some light. PW3 called Inspector Kianga and the two were taken to the police station. She testified that there was a mango tree where they found the two.

9. In cross-examination, PW2 denied that she had a grudge with the appellant or that she demanded Kshs.50,000/- from him.

10. PW3 – P.C Hillary Ngetich who was then attached at Miruriiri police post. He testified that on the material night at around 9.00p.m EMM (PW2) who owns a bar at (Particulars withheld) market called him and reported that there was one suspect who had been reported of rape and was on the run.

11 He took a torch and proceeded to that bar and called PW2 to meet her outside the bar. They then moved ten metres away to a place where there was an abandoned house and next to it, there was nappier grass. He then heard some movement from the place where there was nappier grass and he shone a torch in that direction. He saw a man who was lying on top of a woman playing sex.

12. The two stood up suddenly. PW2 recognized the complainant and called out her name K. She was a young girl so he went near and ordered them not to move. By then K was trying to wear her pant. The man had pulled his trousers below the knees. He arrested the two and took them near the bar where there was light then called Inspector Kianga to assist him. He learnt that the man was called Mutuma alias Soft and the girl was VK. He interviewed her and she said the appellant had paid her Kshs.150/-. He took them to the police station and the next day he took them to Kanyakine hospital where they were examined and a P3 form was filled.

13. PW5 – No.23xxxx Inspector John Kinage of Igoji Police Station testified that on 14/5/2022 at 9.00pm he received a call from PC Ngetich from Miruriiri police station requesting him for assistance as he had arrested a man defiling a minor girl. He proceeded to (Particulars withheld) market with P.C Njenga and PC Sitinei where he met PC Ngetich (PW3) and a man and a woman had been ordered to sit down. PC Ngetich narrated to him that he found the man defiling the girl inside a place where there was nappier grass. He viewed the same then took the two to Igoji police station. He then had the girl escorted to the hospital for examination and the doctor confirmed that she had been defiled. He then obtained the girls' birth certificate showing that V.K was born on 26/7/2008 and as at that time she was 13 years old. He produced the birth certificate as Exhibit – 1. He then charged the appellant.

14. PW5 – was Timothy Mberia a Clinical Officer from Kanyakine hospital who examined the complainant on allegation of defilement. VK was taken to the hospital on 15/5/2022 on allegation of defilement by a person who was well known to her. She was examined by his colleague Georgina Kajuju. There was a bruise on Labia Minora and the hymen was broken. On high vaginal swab there were Epithelia cells, no spermatozoa was seen, pregnancy test was negative, H.I.V test and VDRC tests were negative.

15. The clinical officer concluded that the broken hymen and bruises on labia minora was suggestive of penetrative sexual inter-course. He produced the treatment notes, and the P3 form as exhibits 2 and 3.

16. The appellant was also examined but nothing positive was observed. He produced the treatment notes for appellant as Exhibit – 4.

17. The appellant was put on his defence and opted to give a sworn statement. He told the court that he was named by PW2 & 3 and that PW3 demanded Kshs.50,000/- from him to finalize the matter. He was then escorted to the police station and they were escorted to hospital. Nothing positive was found on him. He was then charged.

18. In cross-examination, the appellant admitted that he was in the club on the material day and left at 9.00pm and saw the complainant and PW2 who were the prosecution witnesses.

19 The appeal was canvassed by way of written submissions.

Appellant's Submissions

20. He submits that the learned magistrate erred in relying on the testimony of PW5 when nothing positive was noted on him by the clinical officer. That the evidence was not corroborated, was contradicting and marred with falsehoods. He relies on Dickson Elia Nsamba Shapwata & Another –vs- The Republic Cr. Appeal No.92/2001 court of Tanzania. Albanas Muasya Mutua –vs- Republic.

22. He further submits that vital witnesses were not called and relies on Bukenya –vs- Uganda (1972) E.A 549. He further submits that the learned magistrate erred by rejecting his defence without giving any cogent reason.

Respondents Submissions

23. The respondent submits that all ingredients of the charge were proved beyond any reasonable doubts. She relies on Charles Wamkoya –vs- Republic Criminal Appeal No.72/2013, Movalengo Chichoro Mwanyembe –vs- Republic Cr. Appeal No.24/2015 UR.

24. On the issue of penetration it is submitted that in Alex Chemwote -vs- Republic (2018) eKLR the court went at length to express what penetration entails in sexual offences.

25. She submits that there were no contradictions or inconsistencies with proving the issue of penetration. It is further submitted that the issue of penetration and identity of the perpetrator were proved. On the issue of failure to call key witnesses she relies on Section 143 of the *Evidence Act* and submits that no particular number of witnesses was required to prove age, identity of perpetrator and penetration.

26. She submits that sufficient witnesses were called and there was no need to call more witnesses.

26. On sentence, she submits that the learned magistrate considered relevant matters as the appellant had helped to intoxicate the minor before defiling her. She was a vulnerable child and he took advantage of that fact. That the learned magistrate was not bound by the mandatory sentence.

Analysis And Determination:

26. I have considered the grounds of appeal, the record of the learned magistrate and the submissions. The issue which arises for determination is whether the charge was proved beyond any reasonable doubts.

26. This is a first appeal and this court has a duty to analyze the evidence, evaluate it and come up with its own independent finding. The court is however supposed to bear in mind that it has not had the advantage to see the witnesses when they testified and leave room for that. See Okeno –vs- Republic (1972) E.A 32.

27. The appellant was charged under Section 8(1) & (2) of the *Sexual Offences Act* which provides as follows:

> "(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

28. The ingredients which the respondent is supposed to prove in order to secure a conviction are:

1. Age of the complainant

2. Penetration

3. Positive identification of the perpetrator

Proof Of Age

29. In the case cited by the respondent, Mwambingo Chichoro Magombe –vs- Republic the court of Appeal stated as follows:

> " ...the question of proof of age has finally been settled by a recent decision of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or any oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of prof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. (See *Denis Kinywa –vs- Republic Criminal Appeal No.19 of 2014*) and (Omar Ucher –vs- *Republic Criminal Appeal No.11 of 2015*). We doubt if the courts are possessed of requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decisions of the court of Appeal of Uganda in Francis Omuroni vs. Uganda Criminal Appeal No.2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable..."

30. The learned magistrate after doing voire dire examination stated she was of sufficient intelligence and understands the duty to tell the truth. Her testimony is therefore reliable. She told the court that she was thirteen years and produced her birth certificate in court which shows that she was born on 26/7/2008. The offence was committed on 14/5/2022. At the time the offence was committed, she was 13 years old. I find that a birth certificate is a credible and reliable evidence to prove the age of the complainant. The age of the complainant was proved to the required standard of beyond any reasonable doubts.

Proof Of Penetration

31. Section 2 of the *Sexual Offences Act* defines Penetration as "the partial or complete insertion of a person genital organs into the genital organs of another."

32. It is trite law that penetration is proved by the testimony of the victim corroborated by medical evidence.

33. The testimony of the complainant was corroborated by medical evidence adduced by PW5 who observed a bruise on the Labia Minora and a broken Hymen upon examination of the complainant. The observation made him to come to the conclusion that the minor complainant was engaged in penetrative sexual intercourse. The P3 form exhibit – 3 is clear on the subject. The evidence on penetration is corroborated by PW2 & PW3 who caught the appellant in the act of penetrating the complainant in the nappier grass.

34. The appellant has submitted that crucial witness were not called. Section 143 of the *Evidence Act* provides that no particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact". As such, no particular number is required to proof fact, it is the duty of the prosecution to call sufficient witnesses it deems necessary to proof a fact but not a superfluity of witnesses simply because they were mentioned or are presumed to have witnessed the crime. If the prosecution calls witnesses and their testimony is corroborated and proves the fact to the required standard, it need not call a holder of witnesses.

35. In Keter –vs- Republic (2007) E.A 135 the court held that the prosecution is not obliged to call a superfluity witnesses but only witnesses as are sufficient to establish the charge beyond reasonable doubts."

36. On the other hand, in sexual offences, the court is free to rely on the testimony of the victim if it is satisfied that the witness is truthful. In this regard Section 124 of the *Evidence Act* Cap 80 Laws of Kenya provides as follows:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

37 In this case, the learned magistrate held that the complainant understands the duty of talking the truth. The testimony was reliable and well corroborated. The witnesses who were called caught the appellant in the act of defilement.

38. The fact of penetration was corroborated by medical evidence. The appellant submits that the learned magistrate erred in failing to note that nothing positive was found on him. In Mark Qiruri –vs- Republic Criminal Appeal No.295/2012 (2013) eKLR the court of Appeal held that "in any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim, many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require the evidence of spermatozoa to be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girls' organ."

39. There was sufficient evidence to prove penetration in the vagina of the complainant by the prosecution. The appellant was caught in the act with pants down and no amount of allegations can change this fact.

Identity Of The Perpetrator

40. The appellant was identified by the complainant and her testimony was corroborated by PW2 & 3. He was with the complainant in the pub. He was known to the complainant. He led her to the farm where there was nappier and forced her to have sex telling her he was not sick. The circumstances lead me to find that there can be no doubt that he is the one who defiled the complainant. He was caught in the act, taken to the police station the same night and examined at the hospital. This happened because he was the perpetrator and no other person. The appellant submits that there were contradictions and inconsistences. In the case of Twehangane Alfred –vs- Uganda, Court of Appeal Uganda Appeal No.139/2001, (2003) UGCA 6 which was quoted with approval by the court of Appeal in Erick Onyango Odeng –vs- Republic (2014) eKLR it was held that:

> "With regard to contradictions in the prosecution case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor

contradictions unless the court thinks that they point to deliberate untruthfulness or if they do affect the main subject of the prosecution case"

41. The question of how to treat contradictions and inconsistencies in a case was address in Philip Nzaka Watu –vs- Republic (2016) eKLR where the court held that

> "evidence that is self-contradictory in material particulars or where it is amalgam of inconsistent versions of the same even differing fundamentally from one purported witness to another cannot give the assurance that a court needs to be satisfied beyond reasonable doubts ----------
>
> Ultimately whether discrepancies in evidence render it believable or otherwise must turn on the circumstance of each case and the nature and extent of the discrepancies and inconsistencies in question"

42. In this case, the appellant submits that PW3 stated that he had information on subject who had been reported for rape, that offence reported was rape. PW4 talked of defilement of a young girl. He also points at contradictions on time. I find that the contradictions and inconsistencies are minor. It is not unusual for members of the public to use the term rape and defilement inter-changeably. The witness who said the appellant was on the run may have been referring to a different incident as the term on the run means the person was avoiding being captured and in this case, the appellant was not running away, he was caught in the act. On the issue of time, PW1 talked of 7.00pm as the time the appellant bought her a drink.

43. The time of 9.00pm on the other hand is when he was caught. The fact is that the events happened the same evening from 7.00 – 9.00pm and the witnesses gave the time the different events took place. There are no contradictions on material particulars.

44. The contradictions, discrepancies and inconsistencies are not grave, they are at best ignored. In any case, the appellant in his defence said he was in the pub up to 9.00pm when he left.

45. The appellant submits that his defence was rejected without giving cogent evidence. The learned magistrate considered the defence at length in her judgment and stated that he found the prosecution's evidence was water tight as the appellant was found in the act of committing the offence. She further found that she could not see the reason why PW1, 2 and 3 would frame a case against the appellant. The learned magistrate had the chance to see the witnesses and assess their demeanor. The defence of the appellant was rejected on sound and cogent reasons.

46. Finally, on the ground that Section 333(2) of the *Criminal Procedure Code* was not complied with, I note from the record that indeed the time spent in remand awaiting trial was not considered. Section 333(2) of the *Criminal Procedure Code* provides that:

> "Subject to the provisions of section 38 of the *Penal Code* every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

47. The section is couched in mandatory terms. The court of Appeal in the case of Abolathi Ahamed and Another –vs- Republic (2018) eKLR the court of Appeal stated that time spent in custody awaiting trial must be taken into account which means that the sentence imposed must be reduced

by that period the appellant spent in custody awaiting trial. In this case, the appellant was in custody throughout the trial and that period should have been taken into account to reduce the sentence but it did not happen. This ground has merits.

48. For the reason stated above, I find that the conviction of the appellant was sound. The charge was proved beyond reasonable doubts.

Conclusion

1. The appeal lacks merits and is dismissed.
2. The sentence imposed to run from 16/5/2022 to take into account the time spent in custody awaiting trial.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF FEBRUARY 2025.

L.W. GITARI

JUDGE