



REPUBLIC OF KENYA



KENYA LAW
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**Mbithuka v Republic (Criminal Appeal E019 of 2023)
[2025] KEHC 5443 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5443 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E019 OF 2023**

EN MAINA, J

APRIL 24, 2025

BETWEEN

ZACHARIAH MBONDO MBITHUKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Conviction and sentence delivered on the
5th day of June 2023 in the Machakos Chief Magistrate's Court Sexual
Offence No. E057 of 2022 by Hon. Andayi W.F, Chief Magistrate.)*

JUDGMENT

1. The appellant was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*. The particulars of the charge were that on an unknown date in August, 2022 at Mitamboni Location, Kathiani Sub County within Machakos County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of LM, a child aged fourteen years.
2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* the particulars of which were that on the same date and place he intentionally touched the vagina of LM with his penis.
3. At the trial four (4) witnesses testified against the accused who was found to have a case to answer on 03/04/2023 however the accused told the court that he will not offer any testimony. After evaluating the evidence, the trial Magistrate found the appellant guilty on the main charge, convicted him and sentenced him to a term of imprisonment for twenty (20) years.
4. Being aggrieved by the entire judgement, conviction and sentence, the Appellant has preferred this appeal on grounds that;



- a. The learned Trial Magistrate erred in both fact and law by convicting him on evidence that did not meet the minimum threshold to uphold a conviction.
 - b. The learned Trial Magistrate erred in both fact and law by not considering his sworn defense.
5. The parties to the appeal consented to canvass it by way of written submissions. On his part the Appellant relied on the submissions dated 19th February 2025 in which he stated that the key ingredients for the offence of defilement were not proved beyond reasonable doubt; that the medical evidence adduced did not prove that sexual intercourse occurred; that there was no evidence the presence of spermatozoa or broken hymen. The Appellant contended that he was also not given an opportunity to cross examine all witnesses thus violating his right to fair trial and undermining his ability to contest the evidence produced. Additionally, that the complainant's testimony was tainted by external pressure and coercion from her mother. He also took issue with the prosecution's failure to call what he referred to as crucial witnesses. As for the sentence he submitted that the same was harsh, excessive and unjustified.
6. For the Respondent it was contended that the prosecution proved its case beyond reasonable doubt; that evidence was led that the victim was 14 years old, that there was penetration and that the victim positively identified the Appellant as her attacker. Learned prosecution counsel urged this court to dismiss the appeal and instead uphold the judgment and sentence of the trial court.

Analysis and determination.

7. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses – (see the case of *Okeno v Republic* [1972] EA 32). I have also taken into consideration the rival submissions, the cases cited and the law.
8. Section 8 (1) and (3) of the *Sexual Offences Act* state as follows:
1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement'
 2.
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
9. The elements of the offence of defilement are: -
- a. That the complainant/victim is a child.
 - b. Penetration of the genital organ of the child with the genital organ of the perpetrator whether complete or partial.
 - c. Identification of the perpetrator.
- (see the case of *Manyeso v Republic* (Criminal Appeal 12 of 2012) [2023] KECA 827 (KLR) (7 July 2023) (Judgment)
10. The victim testified that she was born on 5th April 2008 and an immunization card tendered in evidence confirmed that to be her date of birth. The victim's testimony and the information given in the card were not rebutted and I am therefore satisfied that as at the date of the offence in August 2022, the complainant was a child of 14 years.



11. On the issue of penetration, the complainant testified that the Appellant accosted her early in the morning as she was going to school and covered her mouth and led her to his residence. Once there he locked the door using a latch as she leaned on a wall crying. She described what he then did to her as follows-

“..... he pulled down my panties one leg. He removed his trousers then- short trouser that he had inside. This one he pulled down halfway. He then took his penis and inserted in my private- pointing at her private parts. He put in my vagina. He did it once then gave me a piece of cloth to wipe myself. When I did, a thick whitish liquid like mucus was coming out. He then gave me Kshs 50/-. I took it.”
12. It was her evidence that the Appellant did the same thing to her on a subsequent date still on her way to school. The court heard that although the complainant was taken to a medical facility for examination, due to passage of time, no evidence as would prove penetration was found. The court heard that whereas the incident occurred in August 2022 the examination was done in October of the same year. I am therefore not surprised that the examination did not yield any results. The lack of medical evidence is however immaterial as for a sexual offence there is no requirement for corroboration. Provided the court believes the complainant and gives its reasons for so doing it can convict on her evidence alone.
13. In this case I am satisfied that the complainant was a truthful and reliable witness. Her very detailed description of what was done to her and the evidence of her mother (PW2) which to a great extent was confirmed by the officer who investigated the case leaves no doubt that she was speaking the truth. Her evidence also proves the fact of penetration beyond reasonable doubt. That the Appellant did not cross examine the clinical officer (PW3) is immaterial given that her evidence was not of any probative value. He clearly did not suffer any prejudice and his right to fair trial was not compromised.
14. On the identification of the Appellant, the complainant testified that she knew the Appellant as he used to sell mutura (beef sausage). Her evidence was corroborated by PW2 even though no corroboration is required. Both the complainant and PW2 stated that they knew the appellant and as the Appellant did not adduce any evidence their evidence was not rebutted. I am therefore satisfied that the complainant knew the accused well and that as the occurrence took place in the morning hours hence in broad daylight, she positively identified him as her assailant. The element of identification was therefore also proved beyond reasonable doubt.
15. It is trite that the prosecution is not obligated to call any number of witnesses to prove its case. Its failure to call the alleged crucial witnesses does not, in my considered opinion, discredit its case and neither is it fatal. As earlier stated, the evidence of the victim of a sexual offence is in itself enough to convict the perpetrator.
16. On the alleged admission by the Appellant which he disputes to have made, did not influence the trial court's judgment and neither has it influenced that of this court as it does not amount to a confession. It was but hearsay and it is therefore immaterial that the witness he purportedly made the admission to was not called to testify.
17. The issue of legal representation was not raised in the Petition of Appeal but in the submissions. Looking at the record as a whole I find that the Appellant clearly understood the nature and gravity of the offence. He also extensively cross examined the witnesses and clearly the lack of an advocate did not occasion him prejudice and it is obvious that this issue was raised only as an afterthought.
18. As regards the sentence, the trial court sentenced the Appellant to serve imprisonment for twenty years which is the punishment provided for the offence he was charged with. The sentence is therefore not



excessive or harsh as alleged. It is a lawful sentence and I find no merit in the Appeal on sentence. It is worth noting that the sentences under the *Sexual Offences Act* are minimum sentences and are premised on the age of the child victim but not that of the perpetrator. The Appellant's age was not therefore a relevant factor.

19. The upshot is that the case against the Appellant was proved beyond reasonable doubt and as the sentence is also lawful this court finds no reason to interfere.
20. The appeal is dismissed in its entirety and the conviction and sentence are upheld save that in order to take into account the period the Appellant spent in remand custody the sentence of imprisonment for twenty years shall be computed to commence from the date of his arrest which as per the charge sheet is 22nd October 2022.
21. In the end, the Appeal is found to be without merit and the same is dismissed.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF APRIL, 2025.

E. N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

Appellant online from Kamiti Maximum Prison

C/A: Geoffrey

