Murithi v Republic (Criminal Appeal E054 of 2023) [2025] KEHC 4260 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4260 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E054 OF 2023

AK NDUNG'U, J

APRIL 3, 2025

BETWEEN

SAMUEL NJERU MURITHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E014 of 2021– Ben Mararo SPM)

JUDGMENT

1. The Appellant, Samuel Njeru Murithi was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act*, No 3 of 2006. On 03/07/2023, he was sentenced to ten (10) years imprisonment.
2. The particulars were that on 22/02/2021 at around 08:00 pm in Laikipia East Sub-county, forcefully and intentionally caused his penis to penetrate the vagina of PN a child aged 16 years.
3. Being dissatisfied with the conviction and the sentence, he appealed to this court vide a petition of appeal dated 08/08/2023. The conviction and the sentence are being challenged on the following grounds;
    i. The learned magistrate erred convicting him when the charge and its particulars were not proved beyond reasonable doubt.
    ii. The learned magistrate erred relying on contradictory and uncollaborated evidence of witnesses to convict him.
    iii. The learned magistrate erred by failing to interrogate the medical evidence which did not support the charge.

iv. The learned magistrate erred by failing to consider his defence which exonerated him from any wrongdoing.

v. The learned magistrate erred by failing to find that all the ingredients of the charge were not proved as he was not subjected to medical check up to confirm the allegations made.

vi. That the conviction was not backed by cogent evidence and therefore bad in law further considering that he was unrepresented during trial.

4. The appeal was canvassed by way of written submissions. In his written submissions, he argued that the charge sheet was defective as the statement of the charge was erroneous as regards the age of the victim which was stated to be 16 years whereas the complainant testified that she was 17 years old. The court proceeded erroneously and adopted the complainant's age as 16 years. That the medical evidence was not corroborative and not convincing to even warrant suspicion of defilement as it revealed that the complainant was an active sexual person. That it is the complainant who visited him and they engaged in consensual sex. That she had run away from home and went to his house, being her boyfriend where she proceeded to lead him into having sex with her and he was charged as a result of her parent's anger. That the trial court failed to interrogate the evidence as per the set standards of the law thus arriving at an erroneous judgment. He urged the court to quash the sentence and conviction.

5. The Respondent's counsel on the other hand argued that the age of the complainant was proved to be 17 years at the time of the incident as per her birth certificate. That the submissions that the charge was defective for indicating the complainant's age as 16 years old is farfetched and the defect is curable under Section 382 of the *Criminal Procedure Code* as the error did not change the fact that the complainant was a minor. As to penetration, she submitted that the complainant's evidence was corroborated by medical evidence produced by PW3 who concluded that from his medical observation, penetration had occurred. The Appellant did not adduce evidence challenging these findings hence the findings of the clinical officer remained unchallenged. As to identification, she submitted that the same was through recognition and the complainant referred to the Appellant as her boyfriend and they spent 3 days together. As to whether there were contradictions, she submitted that nothing on record shows any grave contradictions to warrant an acquittal and if they were any, they were very minor. As to whether there was a failure to interrogate the medical evidence, she submitted that the Appellant was given a chance to challenge the medical evidence but he had no question in cross examination. That his defence was considered which was a mere denial and an afterthought and was properly rejected. That the sentence imposed was proper, justified and lenient taking into considerations the nature of the offence and provisions of mandatory minimum sentences. That the trial court considered both the mitigating factors and aggravating factors before preferring the sentence of 10 years.

6. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

7. It is necessary therefore to have a recap of the evidence at trial to facilitate its re-evaluation. The complainant testified as PW1. It was her evidence that she was17 years old and identified her birth certificate. She stated that on Sunday evening, PW2 went home drunk, asked for food and when she informed her that there was no food, she took a whip and she was forced to hide. She then ran out to the gate and went to her grandmother and later to her aunt but they were not there. She therefore went to the Appellant's place. He was not there but she waited for him. She slept there for three days and they had sex. There was no force. He had asked that they have sex but initially she had refused but agreed later. He removed her pants. That her mother and police went for her at the Appellant's

place. They were with Samuel and the brother. They were taken to monastery then to the station. She testified that the Appellant was her boyfriend for 1 month.

8. On cross examination, she testified that she ran away from home. That the Appellant was not in the house during the arrest and they were not together. She maintained that he was her boyfriend.

9. PW2, MK testified that the complainant was 17 years old and she identified her birth certificate. She stated that she quarrelled with the complainant and chased her away and told her not to come back. She disappeared for two days and she checked with her grandmother and aunt. She was later informed that her clothes had been seen at a plot. They proceeded to the plot but they were denied entry. She was later shown the Appellant and she was informed he had the complainant. She went to the village elder and with his help, she was forced to open. That the Appellant's brother was present when they opened. They reported the matter and went to hospital. She testified that she did not know the Appellant.

10. She testified on cross examination that the complainant was found in the Appellant's house with his brother. That he said he lives with his brother and they did not enter his house. That he was arrested while on the bed. She testified that the complainant said she was at Appellant's house.

11. Upon recall, she testified that Appellant was complainant's boyfriend. She did not tell her what happened. On further cross examination, she testified that she found the complainant at his house. That he was with his brother who gave out the keys and the complainant said that he was her boyfriend. That she was detained at the station. On further re-examination, she testified that the Appellant was arrested while on the road and had locked up the complainant in the house and he lied that she was not in the house but people said she was in his house.

12. PW3 the clinical officer produced the P3 and PRC form as Pexhibit 1 and 2 respectively. On examination, there were no injuries on labia majora/minora, old broken hymen, foul smelling discharge. On lab investigations PITC negative, VDRL negative, pregnancy test negative, high vaginal swab was normal, pus cells, no spermatozoa, presence of gram. His findings were that there was penetration

13. PW4, the investigating officer testified that there was a case of defilement and the accused and the complainant were in custody. She took the victim to hospital and they returned to the station and recorded the statement. That the victim had ran away from home and went to Appellant's house where they had sex. She identified the complainant's birth certificate.

14. She testified on cross examination that she was not the initial investigating officer but investigations were done. That he was with an underage child who was a student and she was found at his place. That neighbours and her mother said that it was his house. That she did not visit his house and he was arrested while at his house. That she did not know that he had a business relationship with the victim's mother.

15. The Appellant in his sworn defence testified that he is from Kwa Mwea and he is a business man selling milk, eggs, cabbages. That on the material day, he was at work when PW2 found him and she said that he will pay her or else he would know. She was drunk. He said that he will pay but she threatened him and started causing chaos and she was removed by people. Later on, he was arrested by police who told him that he would know and they said that a girl was removed from his house in Kanyoni. He said that he did not live there but was staying at Kwa Mwea and was charged with an offence he did not know.

16. On cross examination, he testified that he did not know the complainant but knew the mother as he used to buy charcoal from her. That he did not know where she lived and she used to be drunk. PW2 claimed that he owed her Kshs.500/- for charcoal yet he had purchased it wholesale.

17. That was the totality of the evidence before the trial court. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

18. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

19. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> "Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

20. In the present appeal, the Appellant position is that the charge sheet was defective since it indicated the age of the complainant as 16 years whereas the complainant testified that she was 17 years old.

21. Indeed, the charge sheet indicated that the complainant was 16 years old. The complainant and her mother testified that she was 17 years old. PW3 testified that she was 16 years old. The birth certificate attached was not produced as evidence. It was only marked for identification after being identified by PW1, PW2 and PW4 and as was held in Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others [2015] eKLR the mere marking of a document for identification did not dispense with the formal proof thereof. It further held that the marking of a document was only for purposes of identification and was not proof of the contents of the document and that a witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case.

22. The question is therefore whether the complainant was 16 years old or 17 years old. It is trite law that where the actual age of the victim is not proved, it has been held that the apparent age of the victim shall suffice. The Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR quoted with approval its earlier decision in Evans Wamalwa Simiyu vs. R [2016] eKLR and held that:-

> "Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*."

23. Further, in Thomas Mwambu Wenyi v Republic (2017) eKLR the Court of Appeal cited with approval Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which held that:-

> "In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

24. In Evans Wamalwa Simiyu (supra) the Court of Appeal observed that –

> "As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This

leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years.

25. What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the minor's parent evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant. Following the quoted decisions above, it therefore follows that the apparent age according to the evidence adduced, and more specifically from the P3 form produced in the lower court places the complainant in the age bracket of 16 to 17 years Hence, the complainant's age was proved to fall under that age bracket and this means that she was a child for the purpose of *Sexual Offences Act*.

26. As regards proof of penetration, PW1 testified that they had sex. There was no force. That the Appellant asked her that they have sex. She initially refused but she agreed later. That he removed her pants.

27. The complainant's testimony in this regard was not specific as to the act of penetration and her evidence of having sex does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. The complainant's explanation as to what transpired between her and the Appellant was vague. I am guided by the case of Julius Kioko Kivuva v Republic [2015] eKLR where the court held as follows;

> " The complainant (PW1) testified as follows in this regard:
>
> > " The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day"
>
> PW1's testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim's testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness's testimony, and is particularly powerful when the ability to prove a charge rests with the victim's testimony and credibility as it does in this appeal."

28. See also Kemei J in P M M v Republic [2017] eKLR where he stated;

> " As noted in the case of Julius Kioko Kivuva =vs= Republic (machakos HCCRA No. 60 of 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only

the Complainant to present sufficient details as to whether penetration did occur. Hence I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act*..."

29. Also, in Furaha Ngumbau Kagenge Versus Republic, Criminal Appeal No. 141 of 2016, Mombasa (Cr); the court observed that;

> " .....it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the *Sexual Offences Act*, which is required to be proved beyond reasonable doubt....."

30. Matters are further compounded by the fact that PW1 and the Appellant were held in custody at the police station after arrest. Indeed, PW2 testified that PW1 never told her what had transpired at the material time. We therefore have evidence of a witness who was initially put in police detention and it is not farfetched to conclude that it is not possible to determine with any degree of precision whether the witness was telling the truth or her evidence was influenced by the act of incarceration and her desire to secure her freedom. The credibility of the evidence becomes shaky.

31. The question that raises is whether her statement was made up after being detained by the police or she was telling the truth. This issue was ably addressed by Mativo J, (as he then was), in Paul Ndogo Mwangi v Republic [2016] eKLR, citing the Court of Appeal decision in Gerald Muchiri Kiruma vs Republic Criminal Appeal No. 56 of 2006 where he stated;

> " At this juncture I find it necessary to address a third issue that injured the credibility of evidence of the complainant. Appellants counsel urged the court to note that the complainant was arrested and held in a police station for three days. This, in counsel's view seriously eroded the credibility of her testimony rendering it unsafe to form the basis of a conviction.
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> In my view, the credibility of a witness is his or her worthiness of belief, determined by the following considerations:- Character, acuteness of powers of observation, accuracy and retentiveness of memory, general manner in giving evidence, relation to the matter before the court, appearance, deportment, and prejudices, general reputation for truth in his or her community, a comparison of his or her testimony with other statements made by him or her out of court, and a comparison of his or her testimony with that of others and more important possibility of coercion or interference by other persons. Where circumstances suggest that a witness may have been compelled, coerced or intimidated to give evidence, then, such evidence in my view ought to be treated with caution.
>
> From her own evidence, it took the police to separate the two. She was arrested and locked in a police cell for three days. Why was it necessary to arrest and detain her at a police station for three days.? What was the motive for the detention? Under what circumstances was she released? What crime had she committed? Did her unexplained detention and unexplained release have anything to do with her evidence in court? Was her evidence voluntary and or free from coercion?. Without the arrest and detention, could she have agreed to voluntarily give evidence?
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> Counsel for the appellant cited the Court of Appeal decision in Gerald Muchiri Kiruma vs Republic[31]where the Court of Appeal strongly abhorred the practice whereby witnesses are arrested and later released and treated as prosecution witness. The crucial question that arises under such circumstances is whether the arrest and detention had any impact on

the credibility of the evidence offered by the witness. In fact the Court of appeal in the aforesaid case was categorical that for a court to find that the detention of the witness had no impact on the credibility of their evidence is, with respect, highly speculative and probably erroneous. On account of the unexplained three day detention, it would be highly speculative for this court to find that the detention had no impact on the credibility of the evidence of PW1 and on that basis alone I find that her evidence was not credible to form the basis of a conviction."

32. The burden of proof in a criminal trial lies on the prosecution. In light of the foregoing, I find that the circumstances under which the complainant recorded her statement create a fertile ground for reasonable doubts as to the guilt of the accused. The conviction was supported by evidence which called for more circumspection given that the main witness (PW1) was subjected to an arrest and one cannot rule out with any degree of certainty that her evidence may have been influenced by her predicament and the natural instinct to safe her skin.

33. It is trite that a criminal trial must be proved beyond reasonable doubt. Our system of justice lays important safeguards to protect conviction of the innocent. A guilty verdict is permitted, however, only if the evidence is truthful accurate and credible. This was not the case in this appeal.

34. In the premises, and for reasons aforesaid and on the basis of the evidence, I return a verdict of not guilty and in so doing find the appeal herein meritable. The same is allowed. The conviction by the trial court is quashed and the sentence set aside. The Appellant is to be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF APRIL 2025.

A.K. NDUNG'U

JUDGE