



REPUBLIC OF KENYA



**Mutari v Republic (Criminal Appeal E047 of 2024)
[2025] KEHC 6369 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E047 OF 2024**

RK LIMO, J

MAY 15, 2025

BETWEEN

PHILIP OMORI MUTARI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein Philip Omori Mutari was charged with defilement contrary to section 8(1) as read with 8(3) of *Sexual Offences Act* no.3 of 2006 vide Kitale CMC S.O. Case No.E003 of 2024. The particulars of the charge were that on 29th December 2023 at around 3pm at Trans-Nzoia County he intentionally and unlawfully caused his penis to penetrate the genital organ of B.L. a child aged 14 years.
2. The appellant denied committing the offence but after trial, he was convicted and sentenced to serve 30 years in jail. He was aggrieved and filed this appeal.
3. Before I look at petition of appeal and the grounds thereof, I will take a look at brief over-view of the evidence tendered at the trial court.
4. The complainant/victim was a girl aged 14 years and she told the trial court that on 29/12/2023 she was cutting grass in a nearby farm in the company of another minor named DW(PW2). While they were cutting the grass, she stated that the appellant confronted them and caught hold of her as DW escaped. According to the complainant, the appellant told them they had done wrong by cutting grass without permission of the owner of the farm. She testified that the appellant pretended that he was taking her to the owner of the farm but on the way changed course and led her to a bush where he forcefully defiled her after tying her with ropes.
5. In the meantime, the other minor namely, DW had ran home and informed the complainant's mother. The mother and DW went and found the complainant in the bush having been defiled.



6. DW (PW2) testified and largely corroborated the testimony. He testified that they found the complainant lying down without clothes and saw “foam like” substance on her vagina.
7. Alex Wafula Sikuli (PW4) a clinical officer at Kapsara testified and told the trial court that on 29/12/23 at around 1930 hours, the complainant was taken to the medical facility and that he examined her and concluded that she had been defiled. He stated that lab examination of vaginal swab revealed pus cells and spermatozoa. He tendered treatment notes as PExhibit1, P3 Form as PExhibit 2, PRC Form as PExhibit 3.
8. PC Cornelius Andayi (PW6) testified and tendered clothes worn by the minor at the material time which were;
 - i. Florah skirt – Pexhibit 5
 - ii. White pant – Pexhibit 6
 - iii. Blouse/T-shirt – Pexhibit 7
9. When placed on his defence, the appellant in summary denied committing the offence. He stated that he was framed but did not know the reasons why.
10. The trial court evaluated the evidence and found that all the necessary ingredients of the offence had been established, to wit age, penetration and identification of the perpetrator. The appellant was then convicted.
11. In the petition of appeal, the appellant has raised the following grounds namely;
 - i. That his constitutional rights under Article 49 were violated as he was held in custody for too long.
 - ii. That the clinical officer who testified was inconsistent and unreliable.
 - iii. That the trial court erred in evaluating the evidence tendered.
 - iv. That the medical evidence showing that the labia was inflamed might have been caused by friction.
 - v. That the evidence tendered was full of contradictions and discrepancies.
 - vi. That crucial witness was not called to shed light on the existence of a grudge and hatred due to silage that was cut to feed livestock.
12. In his written submission the appellant submits that the prosecution’s case was not proved beyond reasonable doubt. He also submits that his defence was not considered.
13. He contends that a crucial witness named Henry and who witnessed the incident was not called to testify. He faults the trial magistrate by not invoking the law to call the witness he opines was a crucial witness.
14. On sentence he submits that the sentence was harsh and that the trial court should have handed him a minimum sentence of 20 years.
15. The State has opposed this appeal vide written submissions dated 12th March 2025 done by Mark Mugun, the Principal Prosecution Counsel.
16. The respondent submits that it proved all the 3 ingredients of the offence to wit age of the minor, penetration and identification of the offender.



17. On age, the respondent contends that PW3 tendered age assessment report indicating that the minor was aged 14 years.
18. On identification, the State submits that the appellant was positively identified by PW2 who knew him as a worker who guarded a neighbour's farm.
19. On penetration, the State submits that the medical evidence tendered by PW4 proved penetration pointing out that the medical officer noted that genitalia had inflamed labia, laceration on the vaginal wall with blood stains and white mucoid substance. The State relies on the treatment notes (PExhibit 1) P3 Form (PExhibit 2) and PRC Form (PExhibit 3) tendered during trial in its submissions that penetration was beyond reasonable doubt.
20. On sentence, the State submits that section 8(3) of *Sexual Offences Act* prescribes a minimum sentence of 20 years which it contends means that the trial court may impose a sentence above 20 years. The respondent submits that the trial court used its discretion and urges this court not to interfere citing the Court of Appeal decision in Benard Kimani Gacheru –vs- Republic (2002)eKLR.
21. This court has set out in summary the appellant's case as well as the respondent's opposition. This court as a first appellate court is mandated to re-evaluate the evidence tendered during trial and draw its own conclusion giving room to the fact that unlike the trial court, I did not have the benefit of observing the demeanour of the witnesses first hand as they testified.
22. The appellant as observed above was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of *Sexual Offences Act*. Under that charge, there are 3 essential ingredients which the prosecution must establish and prove beyond reasonable doubt. The elements are;
 - i. Age
 - ii. Penetration and
 - iii. Positive identification of the perpetrator

(i) Age

23. The prosecution's case on this element relied on the evidence of PW3 who stated that he was a community Oral Health Officer. The officer testified that she was testifying on behalf of one Augustine Khaemba who was also a medic at the facility but the witness did not state where the medical officer who authored the age assessment report was. This court finds that the prosecution failed to lay proper basis pursuant to the provisions of Section 33 of the *Evidence Act*. The witness was required to state where the author was and whether the witness was unable to be procured without unnecessary expenses and delays. Besides this, the qualification of the said officer should also have been laid out to confirm that he was an expert within the meaning of Section 48 of the *Evidence Act*.
24. In the absence of compliance with Sections 33 and 48 of the *Evidence Act*, the Assessment Report (PExhibit 4) was rendered hearsay evidence by operation of law and was inadmissible.
25. This court however finds that the other medical reports to wit treatment chit (PExhibit 1) and P3 Form (PExhibit 2) were properly tendered and the same clearly shows that the minor was aged 14 years at the time. This court therefore finds despite disregarding PExhibit 4 for being inadmissible in evidence, the other cited medical exhibits established and proved the element of age beyond reasonable doubt.



(ii) Penetration

26. The evidence of Alex Wafula Sikuli (PW4), a Clinical Officer was vivid in respect to the element of penetration. The medical officer stated that he examined the minor and made the following observations;
- a. That on the right side of the thigh there was smelly mucus.
 - b. That he observed inflamed labia and laceration of vaginal wall with blood contents.
 - c. That hymen was freshly torn and there was whitish discharge and mucus coming out of vaginal wall.
 - d. That when he sent the liquid for laboratory examination there was pus cells and spermatozoa.
27. The above observations were consistent with the evidence tendered showed that the victim was taken to the medical facility a few hours after the ordeal. It is quite clear that the medical officer's findings were consistent with his conclusion that the minor had been defiled. Penetration in other words was positive and that fact was consistent with the evidence tendered by the complainant (PW1) and PW2. This court finds that contrary to the assertions by the appellant that there were discrepancies or contradictions in the prosecution's case, the evidence tendered by prosecution witnesses was consistent and reliable.

(iii) Identification

28. The appellant was a worker employed to guard a farm which was next to the home of the complainant. Both children PW1 and PW2 knew him well. He pretended that he was taking action against the complainant for cutting grass in the farm he was guarding without permission but it is quite apparent that he had other bad intentions because he instead took the minor to a nearby bush and defiled her. He has not challenged the element of identification. His only issue is that he was framed. He however does not say why a child could frame him yet he had no issue or differences with the minors or their parents. This court finds that the incident occurred in broad daylight and the appellant was positively identified.
29. I am not persuaded by the appellant's assertion that his defence was not considered. His defence consisted of mere denials. The prosecution's case was simply overwhelming.
30. I am not also persuaded that there are crucial witnesses not availed. The prosecution availed sufficient witnesses to prove their case. The prosecution are not under any obligation to call specific number of witnesses or specific witness unless the defence can establish that failure to call a certain witness was in bad faith out to obscure the truth. That is not the case here.
31. On Sentence, it is true that Section 8(3) of the *Sexual Offences Act* prescribes a minimum sentence of 20 years because the victim was under 15 years of age. The trial court considered mitigating circumstances which included the manner the offence was committed and exercised her discretion by imposing 30 years jail term. The trial court noted that the appellant committed the offence "under heart wrenching circumstances, tying the child with a rope and covering her mouth with a polythene bag." The evidence of PW2 in respect to the conditions under which the victim was found lends credence to why the trial court exercised her discretion and imposed the sentence it did. I find no basis to interfere.

In short this appeal fails. The conviction and sentence are upheld.

DELIVERED, DATED AND SIGNED AT KITALE THIS 15TH DAY OF MAY, 2025.



HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of;

Mr Mugun for the Respondent

Philip Omori Mutari – Appellant present

Duke/Chemosop- court assistants

