Mwaura v Republic (Criminal Appeal E033 of 2024)
[2025] KEHC 5639 (KLR) (Crim) (7 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5639 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E033 OF 2024

KW KIARIE, J

MAY 7, 2025

BETWEEN

GEORGE THUKU MWAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E011 of 2024 of Senior Principal Magistrate's Court at Ol Kalou by Hon. L.A. Mwera–Resident Magistrate)

JUDGMENT

1. George Thuku Mwaura, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between 11th and the 10th day of February 2024, at Nyandarua West sub county within Nyandarua County, intentionally caused his penis to penetrate the vagina of O.W.E., a child aged six years.

3. The appellant was sentenced to serve 30 years' imprisonment. He has appealed against both conviction and sentence. He was represented by Waichungo Martin & Company Advocates. He raised the following grounds of appeal:

    a. The learned magistrate erred in law and fact by failing to find that the victim's evidence was untrustworthy and did not establish the offence of defilement.

    b. The learned magistrate erred in law and fact in convicting the appellant on contradictory and inconsistent evidence from the key prosecution witnesses.

c. The learned magistrate erred in law and fact in finding that the prosecution had proved the charge of defilement beyond a reasonable doubt.

d. The learned trial magistrate erred in law and failed to consider the appellant's defence.

e. The learned trial magistrate erred in law and fact by failing to give the appellant a chance to call his witnesses.

f. That the learned trial magistrate erred in law and in fact by passing a harsh sentence under the circumstances.

4. The state did not file grounds of opposition or submissions.

5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.

6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
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> a. That there was penetration of the complainant's genitalia;
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> b. That the accused was the perpetrator, and;
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> c. The victim must be below eighteen years old.
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> This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR when Joel Ngugi J. said:
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> > Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.
>
> These are the ingredients that the prosecution must prove against an accused person.

7. The copy of the birth certificate produced as an exhibit indicates that C.R.A. was born on November 21, 2017. As of February 1, 2024, she was 6 years and three months old. The victim's age was proven to meet the required standards.

8. The complainant was taken to Nyahururu Referral Hospital. Dr. Ernest Mureithi Gakere (PW4) examined her and completed a P3 form dated February 13, 2024. The complainant had bruises on her face and a broken hymen.

9. In her evidence, O.W.E. (PW2) testified that her mother used to visit her uncle's place. She would lock her inside the house and leave her alone. The appellant would gain access to the house and defile her. This is what she testified to:

> I used to live with my mother, E, at Nyandarua. She used to go to my uncle's place. She would leave me inside the home alone. She would lock the door while I was left at home.

> George would get into the house and did bad manners to me. He would use his thing for peeing or his hand and put it in my private part. If he sees anyone, he would run away. He also used to remove our mattress outside so that he could put it in his house, but he would not do so eventually. He would use his hands to put into my private part. He did so on three occasions. He came there for three days. The 3 day [sic] he came and would do bad manners to me. The private part is where I pee. I felt pain. I screamed, and one person came to my aid and told George that you will kill the child. [sic]. George ran away. It was during the day. On the other two occasions, it all happened during the day. The said George is in court today. (The child points at the accused person, George Thuku). I told my mother about the incident. She told the accused to stop doing so. Then she would even beat me.

10. The prosecution did not call two crucial witnesses: the child's mother and the person whom it was claimed to have gone to her rescue. Given that the child was of tender years and the appellant raised a defence, it was important to call these two witnesses. The prosecution did not explain why the two were not called.

11. George Thuku Mwaura, the appellant, contended that he disagreed with the complainant's mother over a drying line. She falsely implicated him after warning him of dire consequences. This was acknowledged by P.N.N.(PW1), the child's grandmother. This called for meticulous weighing of the evidence.

12. testified that the complainant was in school. Although she said she did not know why she (complainant) delayed attending school in February, this should have raised a red flag. The more reason the child's mother ought to have been called as a witness. She contradicted the complainant. Her evidence was that the complainant was locked in the house when her mother went to work. However, the complainant said her mother locked her in the house when she went to her uncle's place. There was no attempt to reconcile the two witnesses' evidence. The Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller and Potter JJA) held:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

13. The complainant contended that the appellant defiled her on three occasions. In her narration, she mentioned the issue of pain as if it were an afterthought. In the case of Ben Maina Mwangi v Republic [2006] eKLR Lesiit, J. (as she then was) observed:

> Bearing in mind she was a child of tender years being only 4 years at the time, for the offence to be proved there should have been evidence adduced to show that the Appellant used some force on her or something tending to show an assault or infliction of pain. At least some evidence needed to be adduced from which it could be construed that defilement took place. Considering the Complainant's age as compared to the Appellant, if any attempt was made to penetrate the Complainant's private parts it would be expected that the Complainant must have felt pain, if not excruciating pain. There is no way the Complainant would forget the experience or that detail in her evidence.

14. The fact that the doctor saw some bruises and a broken hymen (PW4) cannot rule out the child's genital manipulation. A child of this age to have sexual intercourse with an adult male would have left very clear footprints.

15. It was essential to call the child's mother and the individual who reportedly rescued the child on one occasion as witnesses. Their evidence could have assisted the court in reaching an informed conclusion. The Court of Appeal in the case of Bukenya vs Uganda [1972] EA 549 (Lutta Ag. Vice President) held:

> The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.
>
> Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

16. In the instant case, I am persuaded to infer that had they called the two witnesses, their evidence would have been unfavourable to the prosecution's case.

17. A broken hymen alone cannot be used as proof of penetration. This was also the view of the Court of Appeal in the case of P. K.W vs Republic [2012] eKLR. The court observed as follows:

> 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse.
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> 16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of The Queen vs Manuel Vincent Quintanila [1999] AB QB 769.

18. Without any other material evidence, it was unsafe to conclude that the complainant was defiled due to the broken hymen.

19. The upshot of the analysis of the evidence on record is that the conviction was unsafe. The same is quashed, and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 7TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE