



**Muthale v Republic (Criminal Appeal E047 of 2024)  
[2025] KEHC 12967 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 12967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E047 OF 2024  
WM KAGENDO., J  
JUNE 27, 2025**

**BETWEEN**

**AMOS KARANI MUTHALE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against conviction and sentence in Mombasa Chief Magistrates Courts S.ONo. E009 of 2022 delivered on 22/8/2024 by Hon. Rita Orora (SRM.))*

**JUDGMENT**

1. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that the appellant on the 16th day of January, 2022 at Miritini area in Jomvu Sub-county within Mombasa county, intentionally and unlawfully caused his penis to penetrate the vagina of F.M a girl aged 9 years.
3. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 6 of 2006, which particulars of the offence are that on the 16th day of January, 2022 at Miritini area in Jomvu Sub-county within Mombasa county, intentionally and unlawfully caused his penis to rub the vagina of F.M a child aged 9 years with his penis.
4. The appellant was after full trial found guilty of the main count and no finding was made on the alternative count and was thereby sentenced to thirty-five (35) years imprisonment.
5. The appellant being aggrieved by the conviction and sentence meted against him, he preferred the present appeal. He based his appeal on amended grounds as listed in his written submissions as follows: that the learned trial magistrate erred in matters of both law and fact by not appreciating that the conviction was based in discrepancies and variances creating doubt in the entire case. Further, that the



learned magistrate failed to appreciate that the ingredient of penetration was not proved and similarly failed to consider his defence of alibi. (Sic)

6. The appeal was further canvassed by way of written submissions, where only the appellant complied.

### **Written submissions**

7. The appellant contends that the evidence was not cogent to convict him. First, there existed contradictions in the witness testimonies. For instance, PW1 testified that the complainant was wearing a skirt and tights and had semen, yet the PRC Form, the examining doctor notes ‘no spermatozoa seen’.
8. Similarly, PW2 testified that the appellant “...took me to a Kibanda. We ate there were no chairs” yet she further stated that ‘the kibanda was for selling miraa’.
9. Further, glaring inconsistencies arose of the date of the incidence where PW1 testified that on 26/1/2022 I had gone for training ...I came back on 4.00pm here brother told me PW2 had ran away. I went an reported to the village elder. I told my sister the next morning what had happened . When I was leaving the house. I saw a crowd of people. The child was telling the crowd that she slept at the accused’s house. The child was wearing a skirt, tights and had semen”
10. PW1’s narrative was corroborated by the minor; PW2, who testified that indeed ‘my mum went to work and told me to wash my clothes. I did not wash. I went to look for my father. I met the appellant he told me he will show me where to sleep.”
11. The appellant thus contends that, contrary to PW1 and PW2’s testimonies, PW3 and PW4, both testified that the minor was taken to hospital on 16/1/2022 after the alleged ordeal/incidence, creating doubt as to the day the alleged offence was perpetrated, if at all it was.
12. Further, on proof of penetration, discrepancies were noted where in the PRC Form noted that the offence occurred ‘hours’ before the medical exam, thus raising why the purported ‘spermatozoa or blood from the victim was absent’.
13. Lastly, the appellant argued that his alibi defence was not considered, despite availing an invoice diary as an exhibit establishing his location as at the time of the evidence.
14. The respondent summarily submitted that the triune elements were established in evidence, thus safeguarding a conviction.
15. Further, that the appellant’s defence was a blanket denial of the offence, simply stating that he was in a club having a drink, only to find him in custody.

### **Determination**

16. This being a first appeal, the court has a duty to re-evaluate and re-consider the evidence on record and come to its own conclusion. The court should also appreciate the fact that unlike the trial court it did not have the advantage of seeing and hearing the witnesses. See the case of David Njuguna Wairimu (2010) eKLR where it was held that:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered



the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”.

17. Having considered the salience of the appellant’s grounds of appeal, the sole issue for determination is: Whether the prosecution established its case against the appellant beyond reasonable doubt?

1. Section 8(1) of the [Sexual Offences Act](#) provides as follows:

“ 8. 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.

.....

(5) It is a defence to a charge under this section if –

- a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- b. the accused reasonably believed that the child was over the age of eighteen years.

18. The offence of defilement is rooted on three main ingredients being the age of the victim (must be a minor), penetration and the proper identification of the perpetrator. These ingredients are provided for under section 8(1) of the [Sexual Offences Act](#) No. 3 of 2006 and must each be proven for a conviction to issue. (See *George Opondo Olunga vs. Republic* [2016] eKLR.)

19. The appellant primarily anchored his appeal on what he termed as a myriad of inconsistencies and discrepancies in the prosecution witnesses’ testimonies as highlighted in the summary of his submissions hereinabove.

20. From the onset, I cede guidance to the decision in *Philip Nzaka Watu v. Republic* [2016] eKLR where the court of appeal stated as follows:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.



21. Further, in *Dickson Elia Nsamba Shapwata & Another V. The Republic*, CR. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”
22. Closer home, the Court of Appeal in *Joseph Maina Mwangi versus Republic Criminal Appeal No.73 of 1993* held inter alia that:

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”
23. I have the variances and inconsistencies in the prosecution witnesses as argued by the appellant. In as much as most are inconsequential and neither go to the root of the case nor prejudice the appellant’s defence, I am of the opinion one such discrepancy risks rendering the prosecution’s case anchored on quicksand.
24. In my view, the variance in the dates of the purported offence cannot be gainsaid. PW1 in detail narrated that despite leaving PW2 at home on the morning of 26/1/2022, having instructed her to do her laundry, on her return in the evening she was informed by her son that she had ran away. At which point she reported to the village elder. The following morning, now 27/1/2022, she informed her sister of the situation, and on her way to work she met a crowd of people and PW2 was telling the crowd that she slept at the accused’s house. Later that day she took her to hospital.
25. PW2 after being properly subjected to voir dire examination, and the learned Magistrate concluding that she could give a sworn testimony, corroborated that she indeed left home despite her mother directing her to do her laundry, and met up with the appellant who showed her where she would sleep and she spent the whole night with him. Notably, she did not state the actual dates, understandably so, but she corroborated her mother’s statement of the occurrences on the morning of the material date.
26. PW3, a Clinical Officer by the name Joshua Nandwa, testified that PW2 escorted by the mother came to hospital on 16/1/2022, where PW2 told him that she had ran away from home on 15/1/2022 at around 2.00pm scared that her mother would beat her.
27. PW4, No. 104959; PC Elizabeth testified that she received a report on 16/1/2022 by the complainant and the child, after which initiated the arrest of the appellant.
28. Further discrepancies arise where the P3 Report, states that PW2 alleged to have been defiled by a ‘person well known to her’ yet in her testimony she testified to not knowing the appellant prior to the offence.
29. Nonetheless, I must address my dissatisfaction of how casually the prosecution conducted this case. For what is worth, PW2 constantly made mention of a ‘lady’ who met her with appellant and apparently sought to aid her get home. In my view, she was crucial witness who would have otherwise provided a link on the nexus between the appellant and the accused.



30. For what is worth, the risk attached to the casual prosecution of criminal cases is that a would be convict, who is probably guilty of the alleged offence, receives an undeserved lifeline to roam around freely in otherwise civil society.
31. In the present appeal, it is my view that, the discrepancies are material, and goes to the root of the case, and can only be ruled in favour of the appellant.
32. Weighing the above as against the residue evidence before me, this court is unable to find an inference of guilt against the appellant cogently and firmly established by the said evidence. Simply, put the circumstances herein do not form a chain so complete to conclude that the crime was committed by the appellant. It is my opinion that the prosecution evidence fell below the required threshold. This court is unable to find beyond reasonable doubt that the appellant defiled the complainant.
33. From the above, it is the finding of this court that the appeal must succeed. The conviction of the appellant of the offence of defilement is hereby quashed, and his sentence set aside. The Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 27TH DAY OF JUNE 2025.**

**W.K. MICHENI JUDGE**

In the presence of;

The appellant in person

For the Respondent.....Mr Sirima

Court Assistant.....Ms Bebors.

Signed by: HON. LADY JUSTICE WENDY MICHENI

