



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Republic (Criminal Appeal E025 of 2025)
[2025] KEHC 8197 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E025 OF 2025
LN MUTENDE, J
JUNE 12, 2025**

BETWEEN

MOSES MBURU MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Moses Mburu Mwangi, the Appellant, was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 10th day of September, 2019, at [Particulars Withheld] Area in Laikipia County he intentionally and unlawfully caused his genital organ namely Penis to penetrate the genital organ namely vagina of R.W. a girl aged 17 years.
2. In the alternative he faced the charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 10th day of September, 2019, he intentionally and unlawfully caused his genital organ namely penis to come into contact of genital organ namely vagina of R.W. a girl aged 17 years.
3. He was taken through full trial, found guilty, convicted for the offence of defilement and sentenced to serve 15 years imprisonment.
4. Aggrieved, he appeals against the conviction and sentence on grounds that evidence as to the perpetrator of the alleged offence was contradictory; that the hymen was found broken but old, hence the court failed to consider that many factors can break hymen which should have called into perspective DNA test to ascertain the real perpetrator, and, that the sentence meted did not consider all necessary components for the act of defilement.
5. Briefly, this is a case where PW1 R.W, the Complainant, then a student in form 2 at [Particulars Withheld] Secondary School was going to school on 10th September, 2019, at about 5.48 am. As she ran



- to catch up with her friends including V she heard a loud bhang and she dropped her books and started walking back to where she came from. She encountered the assailant that she referred to as Moses who ordered her to stop and he thrust a knife but she jumped hence it did not injure her. He held her neck and pulled her towards the bush asking whether she knew him and she answered in the negative.
6. That he told her to remove her clothes and lie on the ground and she complied and he took the 20/- that was in her pocket and raped her. That he had sex with her and on being done he dressed up and told her to wait for the road to be clear prior to going. She dressed up, went to school and was punished by the teacher on duty for being late.
 7. Later on, she told PW3 Madam BWM that she had been raped by a man who had a knife and gun. PW3 reported to the school principal who called her mother, PW2 RWK, who was informed that her daughter had been raped. The matter was reported to the police and the Complainant was seen at Ng'arua Health Centre by PW5 Harrison Macharia, a Clinical Officer, on 10th September, 2019 at 11.00am following allegations of having been defiled. On examination she had injuries on her private parts, the labia minora had bruises and lacerations, the hymen was missing with fresh blood in the genitalia.
 8. PW6 No. 22xxxx Corporal Laban Nderitu of Ng'arua Police Station received the report that the Complainant was chased by a man who was armed with a knife and gun and that she knew the assailant. They went to arrest the Appellant who was identified by the Complainant as a neighbour hence the charges.
 9. Upon being placed on his defence, the Appellant denied knowing the Complainant. He testified that on 11th September, 2019 while at [Particulars Withheld] Trading Centre he was called by Cpl Laban Nderitu who said he wished to talk to him. He followed him to [Particulars Withheld] AP Post and on arrival he told him to remove his shoes and was placed in cells.
 10. At about 6.00pm he heard a car pull over. He was asked to go to the office and was introduced to the principal of [Particulars Withheld] Secondary School, Madam B and the Complainant's parents. He was asked whether he knew R.W but he denied. The Complainant's father had some shoes (Timberland) size 8, trouser and jacket which were placed on the table. He was asked to try them on. He did but they could not fit. He was released between 7.30pm – 8.00pm. The following day the investigating officer called him at about 3.00pm. He went to his office and was told that R's parents went to the District Officer and the case had to be taken to court and he was placed in cells. That at 7.00pm the OCS Kinamba went to the post, he was asked to try on the shoes which could not fit. Similarly, the jacket and trouser were small. Thereafter he was arraigned.
 11. Following directions taken, parties were to canvass the appeal through written submissions but only the Appellant filed written submissions that have been taken into consideration.
 12. This being a first appellate court, it is duty bound to reassess the entire evidence presented before the trial court, re-evaluate it so as to draw its own independent conclusions bearing in mind that it neither saw nor heard witnesses who testified so as to observe their demeanor. This duty was set out in *Okeno v Republic* [1972] EA 32 where the Court stated as follows;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it



decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post* [1958]EA 424." This was also set out in the case of *Kiilu & Another v Republic* [2005] KLR 174."

13. Ingredients of defilement are provided for in Section 8(1) of the *Sexual Offences Act* which stipulates thus;

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

14. The prosecution was obligated to prove elements of the offence thus;

- i. The victim's age
- ii. The act of penetration
- iii. Positive identification of the perpetrator

15. In *Kaingu Elias Kasomo v Republic* the Court of Appeal held 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."

16. In *Francis Omuroni v Uganda*, Criminal Appeal No. 2 of 2000 the Court of Appeal 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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."

17. To prove the age of the victim the prosecution adduced in evidence a birth certificate (number withheld) issued to R.W on 13th August, 2018 indicating she was born on 18th June, 2002. At the time of the act she was 17 years old hence a child.

18. As to the second element, penetration is defined by Section 2 of the *Sexual Offences Act* as;

"Penetration" means the partial insertion of the genital organs of a person into the genital organs of another person.

19. The Complainant explained that the assailant had sex with her. This may connote having penetrative sexual intercourse. Although the Complainant did not expound what happened, she was taken to hospital a few hours later. Medical evidence adduced confirms the fact of injuries and lacerations having been present on her labia minora. These protective structures could only have been bruised following some irritation. Further, the hymen was broken and there was blood in the vagina. This was proof of penetration.

20. On the third element of identification of the perpetrator of the act, the Complainant was the only witness to the act. She stated that she was attacked by an individual who seized her neck and thrust the knife at her which she however dodged by the sudden quick movement and it fell down. On cross examination she introduced the angle of the person having been in possession of a gun that he used to



threaten her. The person allegedly slapped her and told her not to look at him. However, she alluded to having seen his face.

21. In addition, she testified on cross – examination that some clothes were recovered at the scene and taken to the police station. That the Appellant wore them but they did not fit.
22. PW5 Corporal Laban stated that the victim knew the culprit whom she identified as a neighbour. On cross – examination he said that when she reported the incident she did not give the name of the person. The officer who moved to visit the scene claimed that no recovery was made at the scene of the incident, but, while at the police station the Appellant was told to try on some clothes which were not his. That even the shoes he was given to wear could not fit. He testified that the clothes were recovered at a different scene. The evidence of the investigation officer and that of PW1 corroborates what the Appellant stated regarding being made to wear clothes and shoes that could not fit.
23. Some other contradiction that was apparent was the allegation that the victim claimed that she knew her assailant as a neighbour while the PRC report and P3 form reads that;

“ The above mentioned person alleges to have been defiled by a person not well known to her.”
24. In *Alfred Twehangane v Uganda Criminal Appeal No. 139 of 2001 [2002] UGCA 6* it was held that;

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”
25. Contradictions in evidence affect various contexts significantly as it undermines witness reliability. This conflicting evidence required an assessment by the trial court so that this court could tell how it reached the conclusion to convict the Appellant.
26. The proviso to Section 124 of the *Evidence Act* provides thus;

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.
27. The victim’s evidence if reasonable and based on such evidence alone a court can convict as long as it believes the victim to be telling the truth and reasons for such belief must be recorded. The judgment of the trial court is silent on whether the court believed the victim as having been truthful. Failure to state reasons why the court arrived at the decision to convict the Appellant was fatal to the prosecution’s case.
28. In the result, I find the appeal being meritorious and is allowed. The conviction is quashed and the sentence imposed set aside. The Appellant shall be released forthwith unless otherwise lawfully held.
29. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JUNE, 2025.

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L.N. MUTENDE



JUDGE

