



**Mutenje v Republic (Criminal Appeal E015 of 2024)
[2025] KEHC 10551 (KLR) (Crim) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10551 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E015 OF 2024
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

BERNARD MUTENJE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment of Hon. Lucy Mutai (CM) delivered on 29th July, 2024 on Isiolo CM's court in sexual offences case No. E006 of 2024.)

JUDGMENT

1. The Appellant herein was charged with defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 (The Act). The particulars of the charge were that on the 9th day of June 2024 at [Particulars Withheld] area in Isiolo sub-county within Isiolo county intentionally caused his penis to penetrate the vagina of ML a child aged 15 years. He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Act. He was tried and convicted of the main charge and sentenced to a term of 20 years in prison.

Petition of Appeal

2. He was aggrieved by both the conviction and sentence and filed this Appeal. He has listed the following grounds:
 - a. That the learned trial Magistrate erred in both matters of law and fact by convicting the Appellant on charges that were not proved beyond reasonable doubt as stipulated by the law.
 - b. That the learned trial Magistrate erred in both matters of law and fact by disregarding the Appellant defence, without giving cogent reasons.



- c. That the learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant to 20 years jail term on a case full of hearsay, contradiction and personal vendetta.
 - d. That the learned trial Magistrate erred in law and fact by relying on distorted and coached evidence full of falsehood and grudges.
 - e. That the learned trial Magistrate erred in both points of law and fact by passing a jail term of 20 years upon the Appellant without considering the Appellant's sworn defense.
 - f. That the learned trial Magistrate erred in law and fact by convicting the Appellant on framed up charges brought purposely out of malice.
 - g. That the learned trial Magistrate erred in both facts and in law by convicting the Appellant on the evidence that did not meet the minimum threshold to uphold a conviction.
 - h. That the Honourable trial Magistrate erred in both matters on law and fact for failing to consider the alternative sentence of non-custodial and/or community-based sentence as enshrined in probation offence Act(sic).
3. Parties argued the Appeal by way of written submissions.

Appellant's Submissions

- 4. The Appellant has identified two issues for determination: a).Whether the prosecution proved its case beyond reasonable doubt and; b).whether the sentence was harsh and excessive.
- 5. On the first issue, the Appellant has submitted that the Complainant's testimony "was not detailed enough", and the medical evidence did not prove penetration as the medical examination showed that the breakage of her hymen was old; that the Appellant was not examined to show that he had penetrated the Complainant; that the epithelial cells found in the Complainant was never connected to him as he was not medically examined. It is further submitted that a broken hymen alone is no proof of penetration.
- 6. The Appellant further submits that the elder who allegedly found the complainant being defiled was not called as a witness; In this regard ,the Appellant has relied on the decision in the case of P.K.W VS. Republic (2012) eKLR. It is further submitted that the Complainant could not be trusted to speak the truth as it is apparent that her testimony of an "old man who stumbled on the two of them" were mere allegations.
- 7. It is the Appellant's submission that none of the witnesses saw him defiling the Complainant and the evidence in this case is therefore purely circumstantial. It is further submitted that the testimony of the Complainant and that of her sister (PW2) were not corroborated and therefore was an unsafe to base the conviction on their testimonies.
- 8. On the sentence, it is submitted that the trial court did not give reasons for imposing the maximum sentence of 20 years.

Respondent's Submissions

- 9. It is the Respondent's submission that the prosecution proved all the ingredients of defilement.
- 10. On the age of the Complainant it is submitted that the Complainant's birth certificate was submitted in evidence and showed that she was born on 28/8/2008, and hence was 15 years old at the time of the



incident. On penetration the Respondent submits that the testimony of the Complainant and clinical officer sufficed, in proving penetration.

11. On the identity of the perpetrator, it is submitted that the Complainant and Appellant knew each other well; that the complainant's testimony in this regard was corroborated by the Appellant's own admission that he knew the Complainant, and that their families were friends.
12. The Respondent submits that sentence is at the discretion of the trial court and an Appellate court should not interfere with it unless the trial Magistrate acted on wrong principles or overlooked some material considerations, which in this case, had not happened.

Analysis and Determination

13. An Appeal to the High Court from the Magistrate's Court is by way of a retrial. Consequently, the duty of this Court is to review the evidence, evaluate it and arrive at its own determination. However, the trial court had the benefit of hearing and seeing the witness first-hand and due allowance must be made for this fact. (see *Gitobu Imanyara & 2 others vs AG (2016) e KLR*)
14. I have considered the trial court's record, the grounds of Appeal and parties' submissions. I have only identified 2 issues for determination, that is :
 - a). Whether the prosecution proved its case beyond reasonable doubt and
 - b). Whether the sentence was excessive.

Whether the prosecution proved its case beyond reasonable doubt

15. To procure a conviction for the offence of defilement offence the prosecution must prove the presence of 3 elements. The first is the age of the child. This is mandatory because the age of the child will determine the period of sentence an accused would be required to serve in the event of conviction. The perpetrator must also be positively identified. The last element is penetration.

The Age of the Complainant

16. The Age of the Complainant was placed at 15 years. Her birth certificate was produced (PExb 1), which confirmed the complainant's age. There was also no contestation on this issue. The age of the Complainant was therefore duly proved.

The Identity of the Perpetrator

17. Though the incident took place at night (about 8 p.m) both the Complainant and Appellant testified that they knew each other well. The Appellant also testified to have met the Complainant and given her a ride on his Motor bike. Further identification was not an issue during trial. It has also not been raised as one of the grounds in this Appeal. I am satisfied that the Appellant was positively identified.

Penetration

18. Section 2 of the Act defines penetration as the "partial or complete insertion of the genital organs of a person into the genital organs of another person."
19. The Appellant has argued that the only evidence available was that of the Complainant but the said evidence was not corroborated. The complainant in this case was 15 years old at the time of the incident. Did her testimony require corroboration at that age?



20. The need for corroboration is in respect of the evidence of a child of tender years. Section 124 of the [Evidence Act](#) provides as follows:-“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act where the evidence of a child of tender years is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.” Section 19 of the [Oaths and statutory declarations Act](#) on the other hand gives direction on how to handle testimonies of children of a tender age.
21. The imperative question is, was the complainant a child of tender years so as to fall under the provisions of section 19 of the [Oaths and statutory declarations Act](#)? Courts have given varied definitions on who is “ a child of tender years”but the prevailing position is what was arrived at by the court of Appeal in Patrick Kathurima vs. Republic (2015) eKLR as cited by the same court in the case of Karimi vs. Republic [2016] KECA 812 (KLR where it was held, “.....the age of 14 years remains a reasonable indicative age for purposes of Section 19 of Cap 15.....” .
22. The Complainant herein was 15 years of age at the time. she was therefore outside the bracket of a child of “tender years”. Her evidence therefore was outside the purview of Section 124 of the [Evidence Act](#) and consequently, needed no corroboration.
23. The Complainant told the court that she was on her way home from her step-father’s house when the Appellant came along with a motorbike and offered her a lift. He told her that her sister had called him and requested him to offer the Complainant a lift. The Complainant took the offer. On the way, the Appellant disembarked and peed. The complainant stated that , she sensed danger and she tried to run away. The Appellant grabbed her. He pulled up her dress and removed her biker. He removed his trouser and defiled her. He knocked her down and pushed his penis in her vagina. Someone came along and the accused picked up his motorbike and ran away.
24. The Complainant’s testimony remained firm under cross- examination. The Appellant has argued that it was not detailed enough to paint the picture of what exactly transpired. However, the Complainant was 15 years old. She was at an age where she understood the nature of sexual act. The use of such words as “he pushed his penis in my vagina”, “he defiled me” therefore sufficed.
25. On the medical evidence, whereas I agree with the Appellant’s contention that, a broken hymen is not necessarily proof of penetration, the Clinical Officer (PW3) told the court that he observed the presence of epithelial cells in the Complainant’s vagina which was indicative of sexual penetration. Thus though corroboration was not mandatory, the medical evidence corroborated the complainant’s testimony.
26. Further, it is trite law that rape (in this case defilement) can be proved by the sole testimony of the Complainant. In the case of Kassim Ali vs. Republic [2006] KECA 156 (KLR),The Court of Appeal held: “The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence.”
27. Am satisfied that the prosecution’s case was proved and the Appellant’s conviction was safe.

Sentence

28. Contrary to the Appellant’s assertion, the sentence of 20 years is the minimum prescribed under Section 8(3) of the Act, not the maximum. Thus, the sentence was lawful and mandatory. There was therefore no error on the part of the trial court and this court has no reason to interfere with it.
29. In conclusion, the entire appeal fails. It is hereby dismissed.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY 2025



S. CHIRCHIR.

JUDGE.

In the presence of :

Roba Katelo – court Assistant

Ms. Ochola for the Appellant.

Mr. Ngetich for the Respondent

