



REPUBLIC OF KENYA



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**Mutungu v Republic (Criminal Appeal E057 of 2023)
[2025] KEHC 10458 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E057 OF 2023
AK NDUNG'U, J
JULY 17, 2025**

BETWEEN

PATRICK MWIRIGI MUTUNGU APPELLANT

AND

REPUBLIC RESPONDENT

*(From original Conviction and Sentence in Nanyuki CM
Sexual Offences Case No E004 of 2023– L. Nyaga, RM)*

JUDGMENT

1. The Appellant, Patrick Mwirigi Mutungu, And convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on 05/12/2022 at Maritati location in Buuri west subcounty within Meru County intentionally caused his penis to penetrate the vagina of K.G a child aged 15 years. On 09/08/2023 he was sentenced to twenty (20) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition filed on 15/08/2023. He subsequently filed amended memorandum grounds of appeal accompanying his submissions. 3. 3. The conviction and the sentence are being challenged on the following grounds as seen in the petition;
 - i. The learned magistrate erred by failing to note that the evidence tendered by the prosecution was not enough to secure a conviction.
 - ii. The learned magistrate failed to note that the prosecution relied on circumstantial evidence.
 - iii. The learned magistrate erred by failing to note that the prosecution's case was full of contradictions, inconsistencies and was not corroborative.
 - iv. The learned magistrate failed to note that the external genitalia was normal.



- v. The learned magistrate failed to note that the hymen was old broken.
 - vi. The learned magistrate failed to note that the prosecution's case was not watertight.
 - vii. That he is a pauper and a breadwinner of his young family.
3. The grounds of appeal raised in the Amended grounds of appeal are as follows;
- i. The learned magistrate erred convicting him without appreciating that the medical evidence failed to support penetration.
 - ii. The learned magistrate erred convicting him while relying on single witness evidence which was inconsistent, untruthful and unsupported by circumstantial evidence.
 - iii. That the learned magistrate convicted him while ignoring his defence and without weighing it vis a vis the weak prosecution's case.
 - iv. That the learned magistrate erred by applying wrong principle during sentence by meting out a mandatory minimum sentence which ignored his mitigation therefore rendering the entire trial unfair by not adhering to Article 19, 24, 27 and 28 of *the Constitution* and section 333(2) of the *Criminal Procedure Code*.
4. The appeal was canvassed by way of written submissions. In his written submissions, the Appellant argued that the PRC and the P3 forms were filled on 13/12/2022 whereas the complainant was examined on 06/12/2022 making one wonder what examination was done that did not require immediate records. That it cannot be said that PW4 was able to base her opinion of PW1 being penetrated on the material time. No treatment notes and laboratory results were produced hence the medical evidence was not cogent and was doubtful. PW4 could not tell when PW1 lost her virginity as well as PW1 did not mention when she lost her virginity, she did no lead evidence as to whether she was hurt, whether she observed any blood or semen. That the medical evidence did not link him to the offence as nothing was in the medical evidence to show that PW1 had been defiled.
5. He submitted that it beats logic why he would uncover the complainant and reveal himself to the complainant in broad daylight defeating the essence of covering her in the first place.
6. He questions why the complainant omitted the struggle she must have put out and the medical evidence did not reveal any scratches and bruises. He wonders why the assailant did not ejaculate yet he had all the time.
7. Further he wondered why the victim did not report to the labourers working in the neighbourhood and why did it took two weeks to be arrested even though he was known and a neighbour. That the circumstances surrounding the case were fishy in that the statements were recorded on 19/12/2023 whereas the matter was reported on 05/12/2023 and he was arrested on 17/12/2023 yet there were no statements recorded yet. That the area manager mentioned by PW1 and PW2 and the assistance chief were not availed who would have been independent witnesses and failure to avail them means their evidence may have been adverse to the prosecution's case.
8. He submitted that Section 124 of the *Evidence Act* obligates the court before relying on the sole evidence of the complainant, to first believe the victim and record reasons for such believe. That Section 199 of the *Criminal Procedure Code* obligates the court to record the demeanour of a witness and it cannot be said that the trial court recorded PW1's demeanour after testifying and after cross examination. Further, the evidential gaps in the prosecution's case and lack of circumstantial evidence proves that PW1's oral evidence was doubtful. That he raised a defence of unpaid debt which the



- trial court dismissed on account that the same was not put across to PW2 and PW3 raising a question whether if he would have raised it, the court's verdict would have been different.
9. The Appellant adds that trial courts are obligated to weigh the defence against the prosecution's case and should not rely on the weakness of the defence case. That the prosecution's case left many gaping holes and it behoved upon the trial court to take note of the discrepancies and realise that penetration was not supported by oral, medical and circumstantial evidence and the matter was pegged on unpaid debt.
 10. Regarding sentence, he argued that manifestly harsh and excessive sentences meted out despite mitigations are contrary to *the Constitution* and that a lesser punitive sentence could have served the same deterrent and restitutive ends of justice and that mandatory minimum sentences have been frowned upon by superior courts. He urged the court to exercise its revisionary powers and afford him a lesser sentence.
 11. The Respondent's counsel on the other hand argued that the Appellant did not seek leave to amend or add the grounds of appeal and should have filed a formal application for such leave which would have accorded the Respondent an opportunity to respond to the new grounds of appeal. She urged the court to disregard the amended grounds in line with Section 350(2) of the *Criminal Procedure Code*.
 12. On proof of the charges, it is urged that age was proved by complainant's birth certificate. That penetration was sufficiently proved as PW1 gave a detailed testimony on the chain of events preceding the act and on how the Appellant tied her eyes and mouth, proceeded to tear her trousers and had sex with her.
 13. That PW2 corroborated her evidence that she had indeed sent the complainant to fetch leaves and firewood to light the fire. Penetration was further corroborated by the medical evidence adduced. As to identification, she submitted that PW1 testified that after the assailant was done, he untied her mouth and eyes and she turned and saw that it was the Appellant. That it was daylight and it leaves no doubt that she was able to see her assailant whom she even identified at the dock.
 14. Further, pursuant to Section 124 of the *Evidence Act*, corroboration is not necessary. The evidence of the complainant was sufficient as the court did not find reason to doubt her and medical evidence was produced to bolster her claim. The Appellant did not challenge the authenticity of the medical evidence and therefore, it is trite that the trial court found the evidence of PW1 as corroborated by the medical evidence to be cogent and sufficient to sustain a conviction.
 15. Counsel adds that though the P3 and PRC forms were filed 8 days later after examination, this does not dispute the evidence of age, penetration and identification adduced. That failure to produce treatment cards, laboratory results and report form does not discredit solidarity of the evidence especially where the P3 and the PRC forms were adduced and confirmed that there was defilement. That absence of sperms does not rule out penetration and that from the medical evidence produced, there was presence of pus cells which proves that an act of sexual intercourse had occurred. Further PW4, concluded that from examination, defilement had occurred.
 16. Regarding the Appellant's defence, it is submitted that the defence was marred with mere denials without any substantive explanation of the events that preceded the material day that could cast doubt in the prosecution's case.
 17. Further, that the issue of debt owed to him by PW2 did not come up when he was cross examining PW2 and he failed to give any conflicting version of events that would cast doubt on the prosecution's case neither did he call any witness to corroborate his case.



18. On the sentence, counsel submitted that sentence is at the discretion of the trial court and this court can only interfere where there is evidence that the discretion was exercised injudiciously, the sentence was manifestly harsh, the court considered extrinsic factors to sentence or omitted to consider material factors. That none of these factors have been urged. That the sentence meted was commensurate with the charges as it is the sentence prescribed in the law and going by the circumstances of the case, it was merited and not excessive.
19. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
20. First, a recap of the evidence as recorded at trial.
21. The evidence before the trial court was as follows. PW1 the complainant testified that she was sent by her grandmother at 6:00am to collect leaves to light the fire. As she was collecting leaves, someone held her tightly from behind and when she was about to scream, her mouth and eyes were tied. He tore her trouser and had sex with her and after having sex, he untied her mouth and face and when she turned, she saw it was the Appellant. That it was in the bush and there was a ditch so no one could see them. That she felt bad after the ordeal and screamed but no one was passing by. She went back home and started crying and she informed her grandmother and the area chief was informed who advised them to go to police station. She was taken to hospital. She identified the Appellant.
22. On cross examination she testified that she did not inform any neighbour as the only neighbour who was there was a man who was Appellant's neighbour and so she could not tell him. That there were people in the neighbourhood who were laborers but she could not tell them. That the incident happened at 6:00am in the morning but she informed her grandmother at 6:00pm in the evening and that is why her statement read 6:00pm.
23. PW2, was the complainant's grandmother. She testified that she went to work and had directed the complainant to collect firewood so that she could cook Githeri. She got home at around 6:30pm and she found the complainant crying and she asked her why she was crying and she informed her that the Appellant found her collecting firewood, held her and tied her face with a scarf and did bad manners to her and had sex with her. That the Appellant threatened to cut her if she disclosed the incident. Her husband found them talking and she informed him that the complainant was defiled and he advised that they call the area manager whom they called. The manager informed the sub chief who advised them to report to the police. They reported and the complainant was referred to hospital where she was treated and tests were conducted. She identified the Appellant.
24. On cross examination, she testified that she took the complainant to hospital on the same day at night and she was treated.
25. PW3, the complainant's grandfather corroborated the evidence of PW2. He testified that the complainant was treated and was given medication and they were told to return after she had finished the medicine so that the P3 form could be filled. After she finished her medication, they were given a P3 form and PC Sophia accompanied them to hospital and the P3 form was filled. He identified the same in court. That when he got home on the material day, he was informed that the Appellant had defiled the complainant. He identified the Appellant.
26. On cross examination, he testified that he informed two neighbours but they were not witnesses. That the Appellant did not escape after the incident and the police advised him to remain silent until the complainant was fully treated and then he would be arrested. That the complainant identified him as the defiler and that the complainant knows him well.



27. PW4, a clinician testified that upon examination, the genitalia was normal, no bruises or laceration and the hymen was old broken. She had clear smelly discharge and on high vaginal swab, pus cells were seen. Urine microscopy was negative, HIV negative and pregnancy negative. The conclusion was that the girl had been defiled. That she filled the P3 form on 13/12/2022 and she produced the P3 and the PRC forms as Pexhibit1 and 2 respectively.
28. On cross examination, she testified that the complainant was examined within 72 hours and could not tell when the virginity was broken.
29. PW5 the investigating officer testified that a defilement case was reported and she escorted the complainant to hospital after visiting the scene. On 13/12/2022, she went back to the hospital and the P3 form was filled. After investigations, she arrested the Appellant and charged him. she produced the complainant's birth certificate as Pexhibit1.
30. On cross examination, she testified that the complainant and her grandparents identified him as the perpetrator. That she visited the scene inside the PJ farm and there was a big trench and the homestead were far and there was no one near the area. There were no people at the scene and she did not see anyone spraying the flowers.
31. In his sworn defence, the Appellant testified that PW2 was his colleague at PJ company and she had signed a loan form for him as a guarantor. He got the loan and PW2 asked him to lend her Kshs.10,000/- which he did in company of another man who was sacked. He later started asking for a refund but one John started threatening him that he would teach him a lesson. That when it reached January when PW2 was supposed to repay him, he was arrested while at work for reasons that he was not told even after enquiring. He was then presented in court.
32. On cross examination, he testified that on the material day, he was at work and he was assigned to weed flowers. That they used to leave work at 6:00pm and go to the field for socializing. That he did not see the complainant on the material day. At 6:00pm, he was at Maritati centre. That the charges were trumped due to the loan and that CM who was present when he gave out the money was not his witness. That he told the police that at 4:00pm, he bought food for his family. That he told the police that he left Maritati at 7:00pm and they had supper by 8:00pm. That was the totality of the evidence before the trial court.
33. I have had occasion to read and consider the evidence as adduced at the trial court. In doing so, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the applicable law, the submissions made and the case law cited.

34. Section 8(1) of the *Sexual Offences Act* No. 3 2006.

35. Sets out the ingredients that must be proved for a charge of defilement to stand. The Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator.
36. This court's obligation in this voyage then, it to establish whether the prosecution proved the 3 ingredients to the required degree.
37. Proof of age is important in a sexual offense. In *Kaingu Kasomo vs. Republic*, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated 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.”

38. In the present appeal, the complainant’s age is not disputed. PW5 the investigating officer produced the complainant’s birth certificate as Pexhibit1. According to the birth certificate, the date of birth is 26/07/2007 and the offence is said to have been committed on 05/12/2022 hence, the complainant was 15 years at the time, thus a minor.
39. In regard to penetration, the complainant testified that as she was collecting the leaves to light up the fire, someone held her tightly from behind and her eyes and mouth were covered. The man tore her trouser and had sex with her. He untied her after having sex with her. That she felt bad when the Appellant had sex with her.
40. The complainant’s evidence on penetration is not corroborated by the medical evidence, neither by the accounts of PW2 and PW3 which are mere hearsay evidence.
41. The complainant’s evidence on what transpired between her and the assailant was not specific as to the act of penetration and her evidence that the assailant had sex with her does not necessarily prove that penetration took place in the absence of further evidence and details as to what actually happened. The complainant’s explanation as to what transpired between her and the Appellant was vague.
42. In arriving at this conclusion, am guided by the decision in Julius Kioko Kivuva v Republic [2015] eKLR where the court held as follows;

“The complainant (PW1) testified as follows in this regard:

“The accused removed my pant and my skirt. I also had a black biker which he also removed. He did not use a condom. We had sex twice that night. We slept upto 9.00 a.m the following day”

PW1’s testimony in this regard was not specific as to the act of penetration; and her evidence of having sex does not necessarily prove that penetration took place, in the absence of further evidence and details as to what actually happened in the act of having that sex. Evidence of sensory details, such as what a victim heard, saw, felt, and even smelled, is highly relevant evidence to prove the element of penetration, as a victim’s testimony is the best way to establish this element in most cases. The specificity of this category of evidence, even though it may be traumatic, strengthens the credibility of any witness’s testimony, and is particularly powerful when the ability to prove a charge rests with the victim’s testimony and credibility as it does in this appeal.”

43. Kemei J in P M M v Republic [2017] eKLR weighed in on the matter when he stated;

“As noted in the case of Julius Kioko Kivuva =Vs= Republic (Machakos HCCRA No. 60 of 2014) that evidence of sensory details such as what a victim heard, saw, felt and even smelled is relevant to prove the element of penetration. I share the same findings of the learned justice Nyamweya in the above stated case. It was necessary for the Complainant to provide the vivid details of the sequence of how the rape ordeal took place. Even though the doctor noticed the presence of whitish discharge and semen as well as a rugged vagina it was only the Complainant to present sufficient details as to whether penetration did occur. Hence



I find the evidence clearly established the alternative charge of committing an indecent act with an adult contrary to section 11A of the *Sexual Offences Act...*”

44. The legal position is illuminated further in the case of *Furaha Ngumbau Kagenge Versus Republic*, Criminal Appeal No. 141 Of 2016, Mombasa (Cr); where the court observed that;

“.....it is not always the case that sex is synonymous with penetration, hence the definition of penetration that is set by Section 2 of the *Sexual Offences Act*, which is required to be proved beyond reasonable doubt.....”

45. Despite this exposition of the law, prosecutors and trial court’s have often fell short when it comes to prove of penetration and it is high time that investigators and prosecutors alike give the necessary attention to this crucial ingredient in the prove of sexual offences in furtherance of justice.

46. As it were the prosecution failed to prove penetration and the appeal would succeed without necessarily delving into the question of identification of the perpetrator.

47. With the result that the appeal is allowed the conviction quashed and sentence set aside. The Appellant shall be set at liberty unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF JULY 2025.

A.K. NDUNG’U

JUDGE

